INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE
(REQUEST FOR ADVISORY OPINION)

Book of Exhibits

(submitted by Republic of Vanuatu)

21 March 2024

LIST OF EXHIBITS

Exhibit No.	Document	Page in Exhibits Bundle
Expert Reports		
A	Expert Report of Anna Naupa and Dr Chris Ballard on Climate Change and Cultural Loss in Vanuatu (dated 2 February 2024).	**6**
A.1	Annexure A: Curriculum Vitae of Anna Naupa.	**39**
A.2	Annexure B: Curriculum Vitae of Dr. Chris Ballard.	**42**
B	Expert Report of Professor Corinne Le Quéré on Attribution of global warming by country (dated 8 December 2023).	**47**
B.1	Annex B to Expert Report of Professor Corinne Le Quéré on Attribution of global warming by country: Country contributions to global warming (excel spreadsheet)	**N/A**
C	Expert Report of Professor Martin Scheinin on International Human Rights Law Obligations of States in Respect of Climate Change (dated 31 December 2023).	**67**
D	Expert Opinion of Professor Naomi Oreskes on Historical Knowledge and Awareness, in Government Circles, of the Effects of Fossil Fuel Combustion as the Cause of Climate Change (dated 29 January 2024).	**91**
E	Expert Report for the Government of Vanuatu prepared by the Pacific Community (SPC) (dated 12 March 2024).	**112**
Statements		
F	Statement of Alpi Nangia, dated 12 January 2024.	**131**
G	Statement of Werry Narua, dated 12 January 2024.	**136**
H	Statement of Mangau Iokai, dated 12 January 2024.	**146**
I	Statement of Nine Women (Linet Iawain, Yalitea Iakaho, Sera Nawahta, Nelly Pilia, Naus Iaho, Nancy Iacitan, Sera Naburam, Yoba Merarangi, Jenny Toata), dated 12 January 2024.	**157**
J	Statement of Jenny Toata, dated 12 January 2024.	**162**
K	Statement of Johnny Loh, dated 12 January 2024.	**165**
L	Statement of Jimmy Namile, dated 12 January 2024.	**170**
M	Statement of Naus Iaho, dated 12 January 2024.	**173**
N	Statement of Sera Nawahta, dated 12 January 2024.	**175**
O	Impact Statement of Robson Tigona, Lecturer in Environmental Sciences at Vanuatu National University, 14 March 2024.	**176**
P	Impact Statement of Rothina Ilo Noka, Director for the Department of Women's Affairs, the Republic of Vanuatu, 15 March 2024.	**183**
Q	Impact Statement of Peter Korisa Kamil, Head of the National Disaster Recovery Coordination Unit within the Department of Strategic, Policy, Planning and Aid Coordination (DSPPAC), the Republic of Vanuatu, 14 March 2024.	**191**
R	Impact Statement of Antoine Ravo, Director of the Department of Agriculture in the Republic of Vanuatu, 15 March 2024.	**198**

Exhibit No.	Document	Page in Exhibits Bundle
S	Impact Statement of John Kaltau, Acting Director General of the Department of Education, Republic of Vanuatu, 14 March 2024.	**204**
T	Impact Statement of Abraham Nasak, Director of the Vanuatu National Disaster Management Office, Republic of Vanuatu, 15 March 2024.	**209**
U	Impact Statement of Dr. Vincent Lebot, root tuber crop breeder and researcher with the French Agricultural Research Centre for International Development (CIRAD), the Republic of Vanuatu, 14 March 2024.	**218**
Other Exhibits		
V	Commonwealth Scientific and Industrial Research Organisation (CSIRO) & Secretariat of the Pacific Regional Environment Programme (SPREP), 'Climate change impacts on root crop production in Vanuatu: Infobyte prepared for the Vanuatu Meteorology and Geo-hazards Department as part of the Van-KIRAP project' (2023).	**227**
W	Commonwealth Scientific and Industrial Research Organisation (CSIRO) & Secretariat of the Pacific Regional Environment Programme (SPREP), 'Extreme heat impacts on electricity demand in Efate: Infobyte prepared for the Vanuatu Meteorology and Geo-hazards Department as part of the Van-KIRAP project' (2023).	**233**
X	Commonwealth Scientific and Industrial Research Organisation (CSIRO), Secretariat of the Pacific Regional Environment Programme (SPREP) & Vanuatu Meteorology and Geo-hazards Department (VMGD), *Historical, current and future marine heatwave climatology for Vanuatu: A report to the Van-KIRAP project* (2023).	**238**
Y	Dan Tong, Qiang Zhang, Yixuan Zheng, Ken Caldeira, Christine Shearer, Chaopeng Hong, Yue Qin & Steven J. Davis, 'Committed emissions from existing energy infrastructure jeopardize 1.5 °C climate target' (2019) 572 Nature 373.	**251**
Z	John Campbell, "Climate-Induced Community Relocation in the Pacific: The Meaning and Importance of Land" in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Oxford: Hart Publishing, 2010).	**268**
ZA	Frederick T Short, Robert Coles, Miguel D Fortes, Steven Victor, Maxwell Salik, Irwan Isnain, Jay Andrew & Aganto Seno, 'Monitoring in the Western Pacific region shows evidence of seagrass decline in line with global trends' (2014) 83(2) Marine Pollution Bulletin 408-416.	**292**
ZB	Yi Zhang, Isaac Held & Stephan Fueglistaler, 'Projections of Tropical Heat Stress Constrained by Atmospheric Dynamics (2021) 14 Nature Geoscience.	**301**
ZC	Karen E McNamara, Rachel Clissold, Ross Westoby, Stephanie Stephens, George Koran, Willy Missack and Christopher Y Bartlett, "Using a human rights lens to understand and address loss and damage" (2022) 13 *Nature Climate Change* 1334.	**307**
ZD	Minutes of the 14th Meeting of the Council, 24 June 1921, League of Nations Official Journal 697.	**318**
ZE	Aoife Nolan, "Children's Rights" in Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran, *International Human Rights Law* (Oxford University Press, 4th ed, 2023) (EXTRACT).	**349**
ZF	Christina Voigt and Felipe Ferreira, ''Dynamic Differentiation': The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement' (2016) 5(2) Transnational Environmental Law 285.	**357**

Exhibit No.	Document	Page in Exhibits Bundle
ZG	Daniel Bodanksy, Jutta Brunnée, and Lavanya Rajamani, *International Climate Change Law* (OUP, 2017) (EXTRACT)	**376**
ZH	Dinah Shelton, "Human Rights, Remedies" in *Max Planck Encyclopaedia of Public International Law* (Last updated July 2006).	**381**
ZI	Lavanya Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics' (2016) *65* International and Comparative Law Quarterly 493.	**391**
ZJ	Louis B. Sohn, "The Human Rights Law of the Charter" (1977) 12 Texas International Law Journal 129, 133.	**414**
ZK	Malcolm Shaw, 'The Establishment of the Legal Right to Self-Determination' in Malcolm Shaw (ed), *Title to Territory in Africa* (OUP 1986).	**427**
ZL	Manfred Nowak, *Introduction to the International Human Rights Regime* (Martinus Nijhoff, 2003) (EXTRACT).	**460**
ZM	Marcelo G Kohen, "Self-Determination" in Jorge E Viñuales (ed), *The UN Friendly Relations Declaration at 50 An Assessment of the Fundamental Principles of International Law* (Cambridge University Press, 2020).	**466**
ZN	Michael O'Boyle and Michelle Lafferty, 'General Principles and Constitutions as Sources of Human Rights Law', in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press, 2013).	**499**
ZO	Myres S. McDougal, Harold D. Lasswell, Lung-chu Chen, *Human Rights and World Public Order* (Oxford University Press, 2nd ed, 2019) (EXTRACT).	**520**
ZP	Myres S. McDougal, Harold D. Lasswell, Lung-chu Chen, *Human Rights and World Public Order* (Oxford University Press, 2nd ed, 2019) (EXTRACT).	**523**
ZQ	Nigel S. Rodley, "Human Rights and Humanitarian Intervention: The Case Law of the World Court" (1989) 38 International and Comparative Law Quarterly 321.	**535**
ZR	Ralph Bodle and Sebastian Oberthür, 'The Legal Form of the Paris Agreement and Nature of its Obligations', in Daniel Klein et al (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (OUP, 2017).	**548**
ZS	Raphael Lemkin, 'Genocide' (1946) 15/2 *American Scholar* 227-230.	**562**
ZT	Robert McCorquodale, "Group Rights" in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 3rd ed, 2018) (EXTRACT).	**567**
ZU	Rupert Emerson, *From Empire to Nation* (1960) (EXTRACT)	**572**
ZV	Sangeeta Shah and Sandesh Sivakumaran, 'The Use of International Human Rights Law in the Universal Periodic Review' (2021) 21 Human Rights Law Review 264.	**575**
ZW	Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, 3rd ed, 2013).	**613**
ZX	Theodor Meron, 'Extraterritoriality of Human Rights Treaties' (1995) 89 Americal Journal of International Law 78.	**627**

Exhibit No.	Document	Page in Exhibits Bundle
ZY	William A Schabas, *The Customary International Law of Human* Rights (OUP, 2021) (EXTRACT).	**632**
ZZ	Edith Brown Weiss, 'Intergenerational equality' in *Max Planck Encyclopaedia of Public International Law*.	**654**
ZZA	Jorge E. Viñuales, 'Due Diligence in International Environmental Law: A Fine-grained Cartography', in Heike Krieger, Anne Peters, Leonhard Kreuzer (eds.), *Due Diligence in the International Legal Order* (Oxford University Press, 2020).	**676**
ZZB	Lavanya Rajamani, 'Due Diligence in International Climate Change Law', in Heike Krieger, Anne Peters, Leonhard Kreuzer (eds.), *Due Diligence in the International Legal Order* (Oxford University Press, 2020).	**694**
ZZC	John H Knox, "Human Rights" in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2nd ed, 2021).	**712**
ZZD	Olivier de Schutter, *International Human Rights Law, Cases, Materials, Commentary* (Cambridge University Press, 3rd ed, 2019) (EXTRACT).	**725**
ZZE	John P. Humphrey, "The Universal Declaration of Human Rights: Its History, Impact and Juridical Character", in *Human Rights: Thirty Years after the Universal Declaration* (B.G. Ramcharan ed., 3d ed., 1979).	**728**

Climate Change and Cultural Loss in Vanuatu

Expert Report by Anna Naupa and Dr Chris Ballard

KEY MESSAGES

- Culture underpins Vanuatu's social cohesion, stability, and resilience, along with its cultural and natural heritage, which cannot be treated separately from each other.
- Climate change and related harm to the environment has already had a direct impact on Vanuatu's cultures, culture bearers, cultural sites and resources, resulting in cultural loss and damage across Vanuatu's many islands. This loss and damage has occurred through both rapid-onset climate change events (cyclones, extreme rainfall events and flooding, drought) and slow-onset events (temperature rise, loss of biodiversity, ecosystem degradation, ocean acidification, sea level rise, and salinization).
- Cultural loss and damage include loss of tangible and intangible cultural heritage, bio-resources, and traditional knowledge (including traditional ecological knowledge), as well as reduced local resilience.
- These losses and damages can be further experienced in ways that overlap and compound each other, through: a) injury and disease; b) displacement; c) degradation and loss of access to cultural sites; d) loss of cultural materials, or access to them, essential for cultural expression, such as pandanus (*natangura*) thatch for mat weaving and house construction; e) a range of economic impacts including livelihoods that undermine cultural practices and cultural reproduction.
- Displacement from ancestral lands and ecosystems induced by climate events has already led to grave cultural losses and is a form of loss in itself. These losses are intergenerational, as they involve cultural transmission and survival.
- Increase in the intensity, scale and severity of climate-related events has exposed limits to cultural adaptation. Recovery intervals between extreme weather events are getting shorter, increasingly overwhelming people's capacity to draw on and implement cultural adaptation.
- The transmission of culture in Vanuatu is being affected by the cascading effects of climate change on all aspects of life in Vanuatu. Compounding climate impacts are pushing the limits of cultural resilience in the longer term, leading to further severe erosion and loss of tangible and intangible heritage across Vanuatu, and undermining local capacity for cultural adaptation to climate change.
- Intensifying climate change-induced strains on Vanuatu's cultures, languages and traditional ways of life undermine the aspirations for resilient development set out in the Vanuatu Government's National Sustainable Development Plan 2016-2030.

I. SUBJECT MATTER AND OUTLINE OF THE REPORT

1. This Expert Report, written at the request of the Republic of Vanuatu, provides a framework for understanding the relationship between culture and the environment in Vanuatu, and for assessing how climate change has impacted this relationship. The report identifies Vanuatu's existing cultural losses attributed to climate change by focusing on both direct and observable impacts, and more complex, indirect forms of impact on culture.

2. Culture underpins Vanuatu's social cohesion, stability, and resilience. Cultural principles, values and systems feature centrally in the Preamble to the Constitution of the Republic of Vanuatu, which states the importance of "Cherishing our ethnic, linguistic and cultural diversity." The Vanuatu National Sustainable Development Plan 2016-2030 embeds culture in national development aspirations and recognises that vibrant cultural identities make possible a peaceful, just, and inclusive society.

3. Vanuatu's cultural and natural heritage are indivisible. Over thousands of years, Indigenous cultural values, knowledge systems, economy and practices have adapted to and been organised in relation to natural marine and terrestrial resources, providing sustainable livelihoods for the population. Across generations, extensive and intricate systems have been developed throughout the archipelago to sustainably manage resources across the varied island environments, mediated through Indigenous social systems. The management of natural hazards, such as cyclones and floods, has also developed over long periods, and is woven into cultural knowledge and practices, however this is now under significant duress due to increasingly severe weather and climate events.

4. Climate change has already substantially undermined the link between culture and the environment and cultural transmission for several Vanuatu communities. Vanuatu is exposed to an exceptional degree to all the natural hazards associated with climate change, including stronger tropical cyclones, coastal flooding, prolonged drought, ocean acidification and sea-level rise. High vulnerability of communities and their exposure to increasingly more intense, more frequent and more prolonged extreme weather events in Vanuatu has already destroyed livelihoods, homes, access to food and safe water. Sustained access to 'place' underpins most cultural practices, and changes to local environments have already, profoundly, impacted social cohesion, and sustainable management practices.

5. In Vanuatu, climate change both introduces novel impacts and acts as a force multiplier for existing hazards and risks to culture. Key changes in Vanuatu's climate that have already impacted directly on culture in Vanuatu include:
   a) Heightened rapid onset extreme weather events, such as cyclones, heavier rainfall events, flooding, drought, storm surges, etc which cause immediate impact to the shelter, food and water security of communities and their cultures, and to their tangible cultural heritage such as cultural sites, monuments and architecture.

b) Slow onset, multi-decadal climate changes such as ocean warming and increases in average air temperature, saltwater intrusion, sea-level rise, and extended drought, which have already resulted in:
    - Increased degradation or loss of marine environments, habitats, and resources, including reef destruction and coral bleaching, seagrass and mangrove loss, and loss of access to or changes in marine resources.
    - Increased degradation or loss of terrestrial environments, habitats, and resources, including invasive species, and loss of access to or changes in terrestrial subsistence resources.
    - Changes to or loss of freshwater resources leading to longer term water insecurity.

6. Culture is currently under assault from both direct and indirect impacts of climate change:
    a) The bearers of culture, the resources and locales for cultural practice, the cultural practices themselves, and the ongoing transmission of culture are all directly impacted.
    b) Climate change effects that impact on the health, livelihoods, and habitats of culture bearers generate indirect impacts on the transmission and viability of culture.
    c) Climate change impacts also undermine the capacity of cultural bearers to draw on culture and traditional knowledge for adaptation and resilience over the longer term.

7. This report addresses the following key questions regarding the impact of climate change on culture and cultural systems in Vanuatu:
    a) How can we characterise the unique diversity of Vanuatu's cultural profile?
    b) How are Vanuatu's many cultures integrated with their local environments?
    c) How does climate change introduce novel effects on culture or act as a force multiplier to existing threats to culture?
    d) How does culture assist in reducing the negative impacts of climate change?
    e) How is the transmission of culture and its capacity for adaptation currently being affected by climate change?

8. This report uses the following definitions of key terms, most of which are adapted from the Pacific Regional Culture Strategy 2022-2023 (SPC 2022):
    - **Culture** refers to the ways of life of particular groups of people, including the values and belief systems, worldviews, philosophies, and knowledge systems that are expressed through their languages.
    - **Cultural heritage** is comprised of both intangible and tangible forms of cultural heritage, which are passed on over time, across generations. In the Vanuatu context, cultural and natural heritage are indivisible.
        - **Intangible cultural heritage** refers to traditions or living expressions of culture, language and oral traditions, performing arts, social practices, rituals, festive events, knowledge and practices concerning nature and the universe and heritage arts and crafts.

    - **Tangible cultural heritage** includes movable cultural heritage (heritage arts/crafts, paintings, sculptures/carvings, coins, manuscripts, etc.); immovable cultural heritage (ancestral cultural landscapes, archaeological sites, etc.); and marine cultural heritage (including oceans, rivers, lakes, etc., as well as shipwrecks, underwater ruins, and cities).
- **Place** refers to the emotional, symbolic, and spiritual connection to the environment.
- **Traditional knowledge** consists of the knowledge, know-how, skills, and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity. This can be considered as a subset of the community's intangible cultural heritage. In a Vanuatu context, traditional knowledge encompasses traditional ecological knowledge (TEK), indigenous knowledge (IK) and local knowledge (LK) and Indigenous Local Knowledge (ILK).
- **Traditional ecological knowledge** refers to the body of knowledge, beliefs, values, traditions, practices, institutions, and worldviews that are developed, sustained, and held by Indigenous and local communities in close relationship with their natural environment. TEK comprises all knowledge and practices and Indigenous understandings of custodianship within a broad and holistic cultural ecology of land, sky and sea (see Traditional knowledge).
- **Transmission of culture** is the transfer of the knowledge and skills essential for the enactment or embodiment of cultural heritage.
- **Vulnerability** is the degree to which a system is susceptible to, and unable to cope with, the adverse effects of climate change, including climate variability and extremes. Vulnerability is always multi-dimensional and incorporates non-economic dimensions (Lavell et al. 2012; https://www.un.org/ohrlls/mvi).
- **Resilience** is the ability of a system, such as a community, and its component parts to anticipate, absorb, accommodate, or recover from the effects of a potentially hazardous event in a timely and efficient manner (Lavell et al. 2012).
- **Kastom** is a term in Vanuatu's lingua franca, Bislama, to mean all forms of cultural heritage, practice, and traditional knowledge.
- **Climate change adaptation is** 'the process of adjustment to actual or expected climate and its effects in order to moderate harm or take advantage of beneficial opportunities' (IPCC 2023: 5-6).

9. This report proceeds as follows:
    - Section II summarises the expertise and qualifications of the co-authors, and the methodology employed in producing this report.
    - Section III elaborates on the context of Vanuatu's culture and environment, as documented historically and understood in the present.
    - Section IV addresses climate change impacts and cultural loss in Vanuatu, outlining (A) cultural loss due to direct impacts of climate change, and (B) indirect or complex impacts of climate change impacts on cultural systems.
    - Section V reviews the critical processes of transmission of culture and traditional knowledge, and discusses how this transmission is impacted by climate change.

II. EXPERTISE & METHODOLOGY

10. Anna Naupa is a ni-Vanuatu researcher and academic. Originally trained as an anthropologist-geographer, Anna has worked in Vanuatu cultural research, programming, and policy since 2001. Roles included documenting traditional resource management systems (2001–2004); co-producing Vanuatu's inaugural history curriculum (2004-2005); cataloguing national photographic archives (2005) and working with her island community of Erromango to document, preserve and promote linguistic and cultural heritage (2008– present). She has served as a Gender and Culture Expert on national taskforces and for a UN Expert Group on Women's Land Rights (2007–2013). For the past decade, her professional career has taken her into international relations, where she has worked in senior policy advisory and executive roles, advising 18 Pacific Island Forum member states on Pacific diplomacy priorities, including climate diplomacy and security. Anna served as a Regional Expert to the Pacific 2050 Strategy development process (2021) and represented her island community at COP27's Moana Pavilion, speaking about the impacts of climate change on traditional ecological knowledge and practice. She is a doctoral candidate in the School of Culture, History and Language at the Australian National University, currently undertaking ethnographic fieldwork in Vanuatu. Anna Naupa's CV is at Annexure A.

11. Chris Ballard is Senior Fellow in the School of Culture, History and Language at the Australian National University in Canberra, Australia. He has worked for 40 years with Indigenous communities, mostly in eastern Indonesia and the Pacific (Papua New Guinea since 1984, West Papua since 1987, and Vanuatu since 2001) on a range of issues, including agricultural systems, land rights and human rights, oral traditions and cultural heritage, and disasters and epidemics. He was lead researcher for Vanuatu's first UNESCO World Heritage site, Chief Roi Mata's Domain (inscribed in 2008), and continues to work closely with the local community custodians managing the site. His current research project addresses the local, regional, and global impacts of the massive eruption of the central Vanuatu island of Kuwae in the 15th century, with a particular focus on local oral traditions. Since 2016, he has been working with UNESCO's Living Heritage Unit on the relationship between intangible cultural heritage (ICH) and emergencies (including conflict and disaster), and most recently on ICH and climate change. Chris Ballard's CV is at Annexure B.

12. The short timeframe for this report has precluded original field research or interviews, and the report thus relies on our individual research and experience, as well as a comprehensive survey of the literature on climate change and culture in Vanuatu. It draws on Anna Naupa's own cultural heritage, traditional knowledge, as well as discussions with the Director of the Vanuatu Cultural Centre, Richard Shing. The Vanuatu Cultural Centre is mandated to provide the necessary services for the preservation, protection and development/promotion of important aspects of Vanuatu's rich and diverse cultural heritage. It is tasked to collect, store and disseminate information (tangible and intangible) about Vanuatu's cultural heritage.

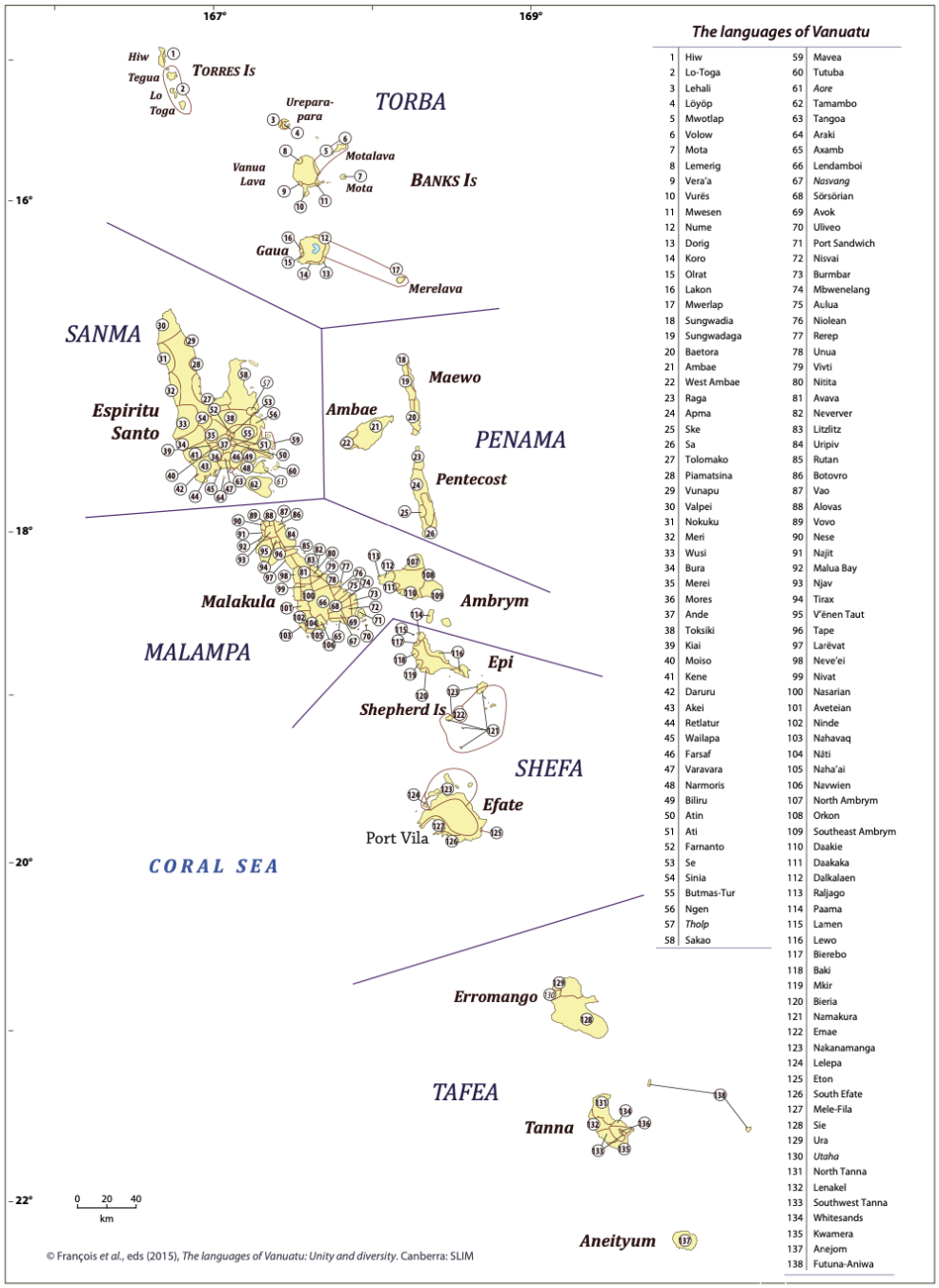
13. Information contained in this report has secured the appropriate cultural permissions for written publication.

14. Statements or testimonies about the impacts of climate change reflect local understandings of climate change as well as an intimate knowledge of local environments and indicators of change. This report reproduces these statements without qualification or formal assessment of their correspondence with global scientific understandings of climate change.

III. CULTURE AND ENVIRONMENT IN VANUATU

15. If language is a proxy for culture, then Vanuatu is per capita the most culturally diverse country in the world, with an estimated 138 languages for a total population of just 330,000 (François, Franjieh, Lacrampe & Schnell 2015; DataReportal 2023 – see Fig.1). This cultural and linguistic variation reflects in situ adaptation and diversification over more than 3,000 years of continuous occupation of the archipelago and its considerable ecological diversity, further influenced by cultural, linguistic, and genetic contact with neighbouring regions. Cultural difference in Vanuatu is not passively developed and enacted, but actively promoted and enhanced to create and sustain highly localised identities.

Figure 1 — A reference map of Vanuatu's 138 vernacular languages



16. No single Indigenous language or culture is dominant in Vanuatu. Instead, national-level communication is achieved through three national languages: Bislama, the creole lingua franca, along with English and French. Numerically, all of Vanuatu's 138 Indigenous languages can thus be considered minority languages. The 2019-2020 NSDP Baseline Survey on wellbeing in Vanuatu reports that 80% of the population aged 3 years or more speak an Indigenous language as their first language, and of those aged 12 and above, 70% of Vanuatu's population speak Indigenous languages every day (VNSO 2021: 15).

17. Vanuatu's rich cultural heritage is also expressed through an extensive body of traditional ecological knowledge, developed over thousands of years. This knowledge is organised into discrete bodies or systems, is place-specific (Mondragon 2018; Rarai et al., 2022: 2244), and includes traditional indicators drawn from close observation of environmental change – in plants, animals, astronomy and meteorology (e.g. wind direction and strength, cloud patterns) — to forecast and manage weather and climate (VMGD 2023: 7). Traditional knowledge pervades all aspects of life and cultural practice more generally, and is transmitted verbally, visually and sensorily. There is a broad-based faith in the power of customary or *kastom* knowledge to assist in managing climate change impacts (Davies 2015: 62).

18. Vanuatu society reflects an exceptional integration of culture and the environment through:
    - Trans-species relationships and co-adaptation of people, environment, and hazards.
    - Cultural resource security.
    - Psychosocial and fertility dynamics between people and their environment.
    - Managing vulnerabilities and exposure to hazard risk.

    Each of these aspects of the culture-environment relationship is discussed below, drawing on selected examples from across the country.

Trans-species relationships and co-adaptation of people, environment and hazards

19. The symbolic and psychological importance of 'place' in Vanuatu's diverse cultures manifests in people-nature relationships, co-adaptations with the environment and a sense of identity. Across Vanuatu's islands, cultural groups are socially organised around the relationship between people and their local environments, forming customary governance systems. Governance is intimately bound up with local environments and changing socio-economic conditions; it is both a strength of Vanuatu society and a vulnerability when governance breaks down. These social systems are intricately linked to local marine and terrestrial environments, assigning roles and responsibilities to clans and kinship groups which collaborate to maintain harmonious relations within the community and with the environment. Table 1 provides selected examples of the rich cultural diversity across Vanuatu's islands.

Table 1. Examples of people-environment relations

Northern Vanuatu
Vanua Lava, in Vanuatu's northern province of Torba, has different names for 96 varieties of the nutritious tuber, taro (*Colocasia esculenta).* The name of a specific taro generally corresponds to specific individuals in the social group, colloquially referred to as 'taro-men' of Vanua Lava (Caillon & Degeorges 2007: 2924). Taro-men are viewed as the guardians of traditional culture; their traditional knowledge and sustainable management of the wide variety of taro cultivars demonstrates the indivisibility of the natural and the cultural, and sustains the *suqe* social system that was a major component of traditional governance and inter-island relations (Campbell 1990: 406; Caillon & Degeorges 2007: 2924). Taro plants represent a historical map of Vanua Lava

society, mediating the past and the present by establishing a link with ancestral spirits who have conferred knowledge, plant material and taro plantations to the present-day cultivators (Caillon & Degeorges 2007: 2926). Through the *suqe* customary governance system that maintains social order between the Torres and Banks islands, taro from Vanua Lava would be exchanged for yams in neighbouring Mota Lava and Mota islands, for example during periods of disaster (Campbell 1990: 407). Any changes in a local ecosystem impact social relations management under the customary governance system.

Central Vanuatu

Social and environmental responsibilities are also interwoven in the *naflak* or *namatrao* kinship system of Efate in central Vanuatu, which organises clan identities in accordance with matrilineal totems. These divide into coastal totems for matrilines with origins along the coast (usually marine species such as the *nawita*/octopus, *pakoa*/shark, etc) or in the interior (with totems such as *nawi*/yam, *naniu*/coconut etc). *Naflak* identities are inherited through the maternal line, and those who share an identity are referred to as a *nakainanga*, tracing descent from a common female ancestor (Fingleton, Naupa and Ballard 2007: 28). This shared identity confers certain responsibilities on the clan, which plays a key role in the traditional resource management of its totemic species. The *naflak* species connections are evident in social ceremonies such as weddings and funerals, and embody a social safety net of shared support for provision of food, labour, land and psycho-social support in times of need. Marriages under the *naflak* system can also be an important strategy for land access, facilitating inter-clan relations (Naupa 2004).

Southern Vanuatu

On co-author Naupa's ancestral island of Erromango in southern Vanuatu, knowledge of place is intimately linked to a clan's standing in the social order of the island. A kinship group's *namarawan* or origin source binds them to place, typically categorised as sea or stone; those who came from the sea and have marine totems, and those who came from the land, marked by stone. The fourth largest island in Vanuatu, Erromango is estimated to have had a population of more than 10,000 at the point of European contact (Spriggs 2007). Kastom roads, which mediate inter-clan relations across the sea- and landscape, are organised to connect the sea and land clans across the island under a common customary governance system, called the *simanlou*. In addition to their sea or stone totem, each clan has unique links with *menuc* (birds), *nei* (trees), food crops, *nakave* (kava) and *nu* (water), as well as the spiritual realm in relation to each clan's ancestral land. These totemic relationships confer custodianship obligations to the clan, as well as specific identities and symbols for use in traditional peace-making ceremonies like the *nevsem*. Historical movements of particular species or individuals across the island via kastom roads are recorded through traditional songs and marked through the naming of the land and seascapes. The sacred bond between human and species is honoured through specific rituals. For example, at Potnarvin in northeastern Erromango, a traditional story recounts a time when the guardian of the whale, a man named Rungu, failed to complete the customary protocol of honour, violating the sacred bond and resulting in a local tsunami (Naritantop 2022: 25). The transgression of the spiritual bond with nature and place is often recounted as a cautionary tale to

underscore the importance of maintaining a healthy relationship to the environment and place.

20. Across Vanuatu, many cultural groups are associated with a range of different totems, including specific types of fish, octopus, giant clams, turtles, sharks and moray eels, as well as various terrestrial resources such as varieties of yam and taro (Hickey 2006: 17). Totemic systems have different names across the islands, such as the *naflak* or *namatrao* system on Efate, the *tupunis* on Tanna, or the *suqe* in the Banks Islands. The practice of not consuming one's ancestral totems out of respect and reverence for them also serves as a management strategy by reducing harvesting pressure on those resources. In some areas, highly controlled, ritualized harvests of totemic species are undertaken for exchange to other areas. The range of traditional resource management systems across the archipelago embodies the profound co-adaptation of people with their local environment, ensuring the sustainability of the sacred relationship between people and nature.

Figure 2. The late Chief Murmur of Mangaliliu, reconsecrating the World Heritage site of Chief Roi Mata's Domain in the aftermath of Cyclone Pam, 2015. (Photo: Chris Ballard)



21. Cyclones are the most regular and familiar form of natural hazard in Vanuatu, often affecting the entire archipelago and occurring several times each year. To an important degree, culture in Vanuatu has developed in the context and with the knowledge of cyclones. The locations of settlements and gardens reflect centuries of observation on cyclone patterns, and the subsistence systems have been developed around the seasonal recurrence of cyclones. On many islands, moderate cyclones are even welcomed as a source of mineral nutrients for garden soils. The impact of climate change on cyclone intensity, frequency and seasonality is already a cause for considerable concern, as it calls into question not just the traditional knowledge relating to cyclone management, but also the entire cultural edifice that is woven through with a familiarity with cyclones as a natural and partly predictable occurrence. Community leaders express their concern over the new form of cyclones, as well as their de-contextualisation from local culture when defined as new and unfamiliar disasters that seemingly require external assistance: as Richard Matanik of Lelepa Island says, “When did cyclones become disasters?”

Cultural resource security

22. If traditional resource management is the cultural bedrock of human-environment relations, then traditional knowledge that enhances human security is the next layer of cultural practice upon which food, water and shelter security are assured. Bio-resources are primarily accessed for food production, traditional architecture, kastom medicine and canoe-making, as well as for ceremonial purposes. Sustainable management of local ecosystems, underpinned by harvest, preparation and production techniques developed across generations, further embed people within their local ecosystems.

23. Table 2 elaborates on the range of cultural use of bio-resources in Vanuatu.

Table 2. Selected examples of cultural use of bio-resources in Vanuatu

Traditional food and water security techniques
Traditional knowledge relating to food security, such as famine foods, food preservation techniques, crop selection and diversity, traditional pest control, kastom magic and harvesting *tabus* (managed seasonal bans on harvest), as well as the practice of planting extra gardens for additional food security, is widespread (Rarai et al. 2022; Granderson 2017, 2018). These traditional risk management strategies ensure food security through times of resource variability and climatic hazards, and also include producing and preserving food surpluses, accessing specific famine foods, planting disaster-resilient crops and communal pooling of resources (e.g., Campbell 1990; Nakashima et al. 2012). The production of food surpluses is not only for own-use storage but also for traditional, reciprocal inter-island exchange in times of food scarcity. For example, in the Banks Islands, the *suqe* customary governance system binds people politically, economically, and socially throughout the island group and is regularly leveraged during disasters to obtain additional relief supplies from other islands as needed (Campbell 1990: 407-9). Across the Vanuatu archipelago, a wide

variety of techniques for storing and preserving food are practised, such as specialised storage of yams and fermentation of breadfruit (e.g. in the Banks Islands, Campbell 1990: 409). Similarly, water management techniques through *tabus*, the importance of the young green coconut (for drinking) and knowledge of water sources are employed to ensure a community's water security.

Traditional architecture

The traditional *nakamal* or meeting house (*nakamal* is the common Bislama term, with different terms found in local languages) is significant across Vanuatu cultures as a central site for chiefs, *kastom* governance and ceremonies. In recent decades the *nakamal* has become more multi-purpose for communities, and often also serves as a cyclone shelter and place of refuge (Christie 2017: 7). The centrality of the *nakamal* to community life is enduring. Construction of the *nakamal* uses local materials; trees for posts and beams, bamboo for walls, thatching from the sago palm (*natangura*), wild cane or coconut leaves, and fibrous vine-ropes to bind the parts together. Tree varieties are wide-ranging across the islands, with *namariu* (Acacia spirorbis*),* whitewood *(*Endospermum medullosum) and *natora (*Intsia bijuga) being commonly favoured hardwoods in traditional construction (Wheatley 1992: 282). Across the islands, specific *kastom* protocols are observed in the construction of the *nakamal*, which in turn reinforces social codes and maintains traditional knowledge, including through song (Christie 2017: 9). As the first President of the Malvatumauri National Council of Chiefs, the late Chief Willie Bongmatur, has described, "A chief without a *nakamal* is nothing" (Christie 2017: xi). A common feature of the dual cyclone shelter function of the *nakamal*, is the roofs reaching from the ground to the central roof ridge, creating a dome-like structure able to withstand high winds. Traditional *nakamal* served as evacuation centres during severe tropical cyclone Pam in 2015 (DSPPAC 2016: 51). However, the availability of local plant materials for *nakamal* construction, as well as other residential construction, is regularly stressed by the increased intensity of cyclones each year. Severe tropical cyclones have destroyed several historic *nakamal*, including every historic *nakamal* on the island of Tongoa, and the Malvatumauri Nakamal for the National Council of Chiefs, all of which sustained significant damage during the Category 5 Cyclone Pam in 2015 (DSPPAC 2015: 51)

Canoe building

Traditional outrigger canoes are an essential mode of transport in coastal villages as well as used in inshore fisheries. *Tamanu* (Calophyllum inophyllum*)* is a common coastal tree species widely used in canoe-building, as are the canoe tree *(*Gyrocarpus americanus*)*, blue wood (Hernandia moerenhoutiana) and blue water (Pterocarpus indicus) (Wheatley 1992: 277). Canoe styles vary across islands and cultural groups, and are made according to strictly prescribed protocols based on area-specific cosmologies or beliefs (Hickey 2006: 13). As the intensity of tropical cyclones increases in the Vanuatu region, cyclone storm surges are causing much more severe damage to Vanuatu's coastlines. This has led to the loss of older and larger coastal trees across Vanuatu, drastically reducing the number of individual trees available for traditional canoe construction. The loss of coastal trees is also leading to increased coastal erosion from subsequent cyclones and sea level rise.

Traditional medicines

Vanuatu's biocultural diversity promotes a wide range of traditional medicinal plant knowledge and use across the archipelago, with traditional medicine being particularly valued in more remote islands (Bradacs et al. 2011). A 2011 study of ethnopharmacology in the islands of Loh, Ambrym and Aneityum documented over 133 medicinal plant species, with the highest diversity of plants found for the most common diseases of the skin, gastrointestinal, respiratory, and urogenital systems (Bradacs et al. 2011: 438). A diverse range of trees, shrubs and herbs are used in differing ways across the country depending on local conditions. Common species used across the islands are the coconut (Cocos nucifera*),* whose bark is used for backache and wound treatment, and the pawpaw (Carica papaya) whose flower is chewed to treat ciguatera fish poisoning.

Place-based health

24. Connections to ancestral lands and places of belonging are essential elements of Vanuatu peoples' connection to the land, terrestrial and marine environments (MacDonnell 2021: 286). For example, research into the affected population's post-disaster mental health following the aftermath of Category 5 Tropical Cyclone Pam in 2015 has observed that:

> Closely bound communities and extended families were generally described as important support mechanisms that facilitated post-disaster restoration to damaged infrastructure and agriculture. One participant described how strong community networks ensured the well-being of children, the elderly and other vulnerable sub-groups (Dawes et al. 2019: 6).

25. Social and extended family networks are important coping mechanisms following a severe disaster, and together with traditional healers and *kastom* medicine are vital for psychosocial health following disasters (Dawes et al. 2019: 7). However, even tightknit social and extended family networks are coming under considerable strain due to the increased frequency of severe climate change-induced disasters with shorter recovery intervals. Between 2010 and 2020, the proportion of people receiving support in a community dropped from 84% to 71% (VNSO 2020: 160). Labour migration, domestically to urban centres as well as internationally, are common coping strategies to support families in need due to cyclones and other climate impacts, however this in turn dilutes the availability of local manpower for support during cyclones and other hazard events (e.g. in rapid garden harvests, securing shelter, clean-up etc., DSPPAC 2020), and is further undermining resilience in the longer term.

Managing cultural vulnerabilities and exposure to hazard risk

26. Traditional knowledge used to predict weather, seasons and extreme events draws on close observation of animal and plant behaviour as indicators of environmental change. Observation of atmospheric conditions and meteorological factors such as

wind direction and strength, and cloud structure also inform traditional forecasting of extreme weather events. For example, traditional knowledge holders from Espiritu Santo, Epi, Pentecost and Malekula islands observe that when the Pacific Emerald Dove (Chalcophaps longirostris) nests closer to the ground, it signals the coming of a strong cyclone in the next few months (VMGD 2023: 13). On Malekula, an increase in sea foam signals warming sea temperatures preceding cyclone season. On Erromango, a change in wind direction to the north (*nomporavu manwo*) and north-west (*nomporavu orog*) signals that a storm or cyclone is imminent (Naupa 2022: 60). On Tanna, the dry season is observed to commence when the mackerel feed close to shore. As a study of communities in northern Vanuatu has observed, "Local knowledge... enables assessment of climatic conditions and changes at a level of granularity far beyond the one achievable with the available weather data for the region" (Nef et al 2021: 13).

27. Traditional weather indicators are used by communities to adequately prepare for the season that is signalled, and to manage potential food, water and shelter insecurity. Combined with *kastom* protocols for the sustainable management of resources (see paragraphs 19-20), this traditional knowledge assists communities to manage exposure to hazard risk and supports localized short-term resilience in the immediate aftermath of tropical cyclones in Vanuatu. Climate change is already disrupting traditional knowledge of weather and climate indicators (see para. 37).

IV. CLIMATE CHANGE AND CULTURAL LOSS

28. Climate change has already generated cultural losses in Vanuatu. Key dimensions of climate-related cultural loss and damage have been experienced in the areas of agriculture, water supply, biodiversity, fisheries and tourism (as a site for promoting cultural reproduction) and include:
    - Loss of culturally significant reef and pelagic species
    - Losses to culturally significant crops from climatic events and invasive pests
    - Impacts of climatic hazard events on material cultural heritage, including traditional houses and other structures, and spaces for cultural performance and practice, as well as loss of the natural resources (such as timber, roofing, ropes and weaving materials) required to repair or replace these structures
    - Cascading impacts of climate change on community livelihoods, leading to out-migration of youth, and thus loss of the human resources required for cultural practice and performance, as well as interruption to the transmission of culture.

29. Cultural loss and damage occur through both rapid onset events (cyclones, extreme rainfall events and flooding, drought) and longer term or slow onset events (increasing temperatures; loss of biodiversity; land and forest degradation; ocean acidification; sea level rise; and salinization) associated with climate change (UNFCCC n.d.; McNamara et al. 2023). This distinction is significant: rapid onset events are harder to adapt to and draw heavily on local resilience, presenting the most direct and immediate threat to tangible cultural heritage; while slow onset events incur

compounding threats that erode and undermine intangible cultural heritage and traditional knowledge.

30. This Section outlines the impacts of climate change on culture in Vanuatu to date. It is organised in two parts, according to the nature of the impact: Part A outlines the direct, largely tangible impacts of climate change on culture; Part B outlines the indirect impacts brought about by climate change's cascading and compounded impacts on culture.

A. Climate change-induced cultural loss in Vanuatu today.

31. Climate change-induced cultural losses have been identified in a recent Pacific Island-wide study as the second most-feared form of loss from climate change, after loss of land (Clissold et al 2023). Climate change has already caused considerable direct impacts to tangible cultural heritage, including in Vanuatu, through damage to cultural sites, graveyards, and "natural" sacred sites (UNFCCC 2013). "Traditional landmarks that have been culturally significant for generations have been affected, lost or displaced by severe weather events and cause disputes over land ownership and property boundaries" (participant 72 in McNamara et al. 2023).

32. In addition to these direct losses to the material or tangible elements of culture, climate change also imposes profound damage and loss on the immaterial or intangible aspects of culture. This damage to intangible aspects of culture can occur through the loss of elders and practitioners and their knowledge, damage to the locations for the performance of culture (such as dance, ceremony, or worship), or loss of the material resources required for cultural practice (such as pandanus fronds required for weaving, or the materials and artefacts necessary for dance).

33. Climate-induced landslides have been responsible for devastating cultural loss. For example, between early 2022 and January 2023, the villages of western Santo Island experienced a combination of extreme rainfall events from a rare multi-year La Niña event and a series of earthquakes of over M4.6, which destabilised the mountainside eventually causing the entire village and gardens of Molpoi community to be submerged on two occasions by devastating landslides (Bartlett 2023: 71). The immediate destruction of homes and livelihoods extended to the 600+ hectare Molpoi Conservation Area, managed under customary governance and home to endangered and endemic bird species such as the Santo Mountain Starling (Aplonis santovestris) and the Santa Cruz Ground Dove (Pampusana sanctaecrucis); as well as other previously undescribed flora and fauna which hold considerable spiritual and cultural value for the Molpoi villagers (Bartlett 2023: 72). The climate-fuelled landslides also destroyed ancestral burial sites and the sacred Su stones, the latter being critical to the transmission of chiefly titles and customary land rights but now lost forever (Bartlett 2023: 72). Working with the community in the aftermath of the extreme events, Chris Bartlett (2023: 73) notes:

> Earthquakes can and do cause landslides on their own, but in the case of the people of Molpoi, the climate influenced triple dip La Niña, extreme localised

rainfall, and a lack of early warning or technical support have combined. These events have led to the permanent displacement of an Indigenous community and incalculable non-economic loss and damage to its people.

Figure 3. The 2022-23 climate-fuelled landslides at Molpoi, western Santo submerged homes, gardens, burial and spiritual sites up to 3km inland to the coast. (Digital Earth Pacific, SPC 2024)



34. Loss from regular coastal flooding is already causing the degradation of coastal cultural sites in many of Vanuatu's islands. For example, archaeological surveys of rock art in Vanuatu in the 1990s determined that most rock art sites were found within 1km of the coastline, often located in limestone caves and shelters, cliffs and outcrops, boulders (usually of volcanic origin), and beach rock platforms, and are thus particularly vulnerable (Bedford et al. 1998). This climate-fuelled action exacerbates co-existing geomorphological forces on the island-scape, combining to compound threats to cultural sites. Coastal rock art provides some of the earliest records of human habitation and local cosmologies:
    - On the western coast of Maewo island, the rock art sites of Huti and Siligi contain coastal boulders with motifs associated with the local grade-taking ceremony, the Gwatu. Jeffrey Uli Boe, a National Museum fieldworker from the island, says the motifs were produced at the birth of the Creation Being, Tagaro - credited for creating the islands of Maewo, Ambae and Pentecost - and have been used across generations to signal male and female leadership ranks (Bedford et al. 1998: 188). Regular coastal inundation from cyclones, such as Cyclone Harold in 2020, is causing two types of erosion: along the

coastline where these sites are found, and; erosion of traditional governance due to the disruption to traditional ceremonies (DSPPAC 2020: 49).

- On the island of Erromango, known for extensive rock art sites containing both engraved and painted motifs, the rock art documents historical events over centuries. For example, the first use of kava at Potnarvin village in eastern Erromango is marked by coastal boulders which hold the story of the early kava and food trade between coast and inland communities, and etchings in old lava flows document the number of ceremonies held over years (Wilson 1999). Coastal erosion from regular storm surge is causing these sites to disintegrate, fragmenting cultural heritage and collective memory.

35. Degradation of the marine and terrestrial ecosystems within which Vanuatu's cultural systems are embedded has had immediate consequences on cultural life. Depletion of marine resources (due to declining reef health from bleaching, ocean acidification, increasing ocean temperatures or cyclone damage, for example) and decreasing productivity of gardens (due to heat or changed rain patterns, for example) has direct impacts on subsistence gardening and fishing (Nef et al. 2021). The same impacts cause loss of forest resources for *kastom* practices (e.g. ceremonial foods, *kastom* medicine, *nakamal* construction, weaving). The impacts of climate change-induced extreme weather events on cultural resources, and the effects on the area and quality of their habitats, have been significant. For example, Cyclone Uma in 1987 was assessed to have reduced tropical rainforest cover by 30% (Baldwin et al. 1992: 305). Cyclone Harold in 2020 destroyed the natural environment in parts of northern Vanuatu, directly affecting 37% of households' access to traditional sources of food, medicine, and shelter (DSPACC 2020: 16). Twin cyclones Judy and Kevin in 2023 devastated agricultural and forest stands, affecting the food and agricultural sources for 84% of households (DSPACC 2023: 31).

36. Climate change is affecting the resources and traditional knowledge used in cultural practice, through direct destruction of local environments. Testimonies to this include:
    - Traditional planting of yam, which is unable to adapt to rapid climate change: "The cultural ways of planting are not adaptive to these fast changes caused by the climate which is now leading to a loss of cultural practices and knowledge" (participant 59, quoted in McNamara et al. 2023).
    - "Most of our weaving materials have been damaged… and we no longer practice our cultural practices" (participant 57, quoted in McNamara et al. 2023).
    - "Medicinal plants are becoming more difficult to find due to plants [being] destroyed by cyclones" (participant 71, quoted in McNamara et al. 2023).

37. Climate change is challenging planning that is based on reliable prediction of the transition between seasons using traditional climate knowledge (Granderson 2018; Nef et al. 2021: 10), and producing an increase in out-of-season cyclones and rainfall, for example; heavier rainfall events and extended droughts also combine to produce water insecurity (BOM 2014, SPC 2016). These abrupt changes from sun to rain have also had a major impact on traditional farming practices. In the Banks Islands (Nef et al. 2021:9), an island group where the taro crop is central to its social system. Trees

fruiting out of season or not in season are increasingly observed by communities, and subverting traditional planting calendars (Granderson 2017: 556):

- At Siviri village on Efate Island, one informant says, “Dry times do not emerge at the expected time of the year and “rain comes now, at any time, unexpected”’, “*Ol taem i difren, i nomo olsem befoa*”, “Everything is crazy! You cannot predict anything now.” (Pascht 2019: 240)
- Elsewhere in Vanuatu, people report that ‘Planting seasons have changed and now they don’t know when to plant various crops so find it really hard to grow sufficient crops” (Davies 2015: 56)
- “Before climate change it was easier to teach children about how to predict weather… however it has become harder to do so with unpredictable weather patterns meaning that cultural/traditional practices and knowledge sometimes lose their value because people can no longer rely on such knowledge” (participant 73, quoted in McNamara et al. 2023).

38. Environmental degradation following climatic events has been documented, creating conditions conducive to the proliferation of new invasive weeds and pests (Wilson and Nojima 2018). A particularly damaging example of a pest species novel to Vanuatu has been the Coconut Rhinoceros Beetle (Text Box 1). In December 2023, the Vanuatu Government confirmed a new threat to the agricultural sector, the Fall Armyworm (Spodoptera frugiperda), believed to have been introduced via cyclone relief supplies from New Zealand and Australia earlier in the year.

Text Box 1. New climate-change induced pests are destroying Efate's coconut culture.

Following twin severe cyclones Judy and Kevin in March 2023, the volume of fallen trees and deadwood created conditions that propelled an exponential growth in the population of the destructive Coconut Rhinoceros Beetle (Oryctes rhinoceros, CRB) on Efate Island (SPC 2023: 13). The extent of damage to coconut palms on the island is severe (see figure below, SPC 2023: 14).

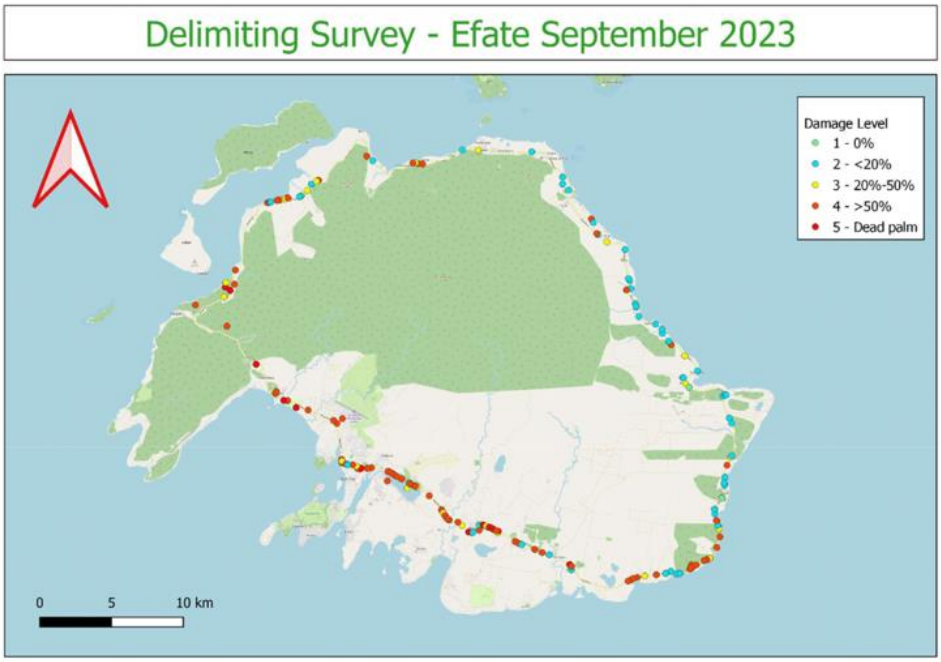


Figure 12. Updated delimiting survey map of Efate showing the extent and severity of damage.

As a vital cultural crop across all aspects of village life, for food production, domestic shelter, baskets, fans, brooms, and ceremonial purposes, this has a significant and direct impact on the ability to maintain cultural practice. For example, the traditional symbolic act of gifting a germinating coconut (*navara*) in cultural ceremonies on Efate must now look elsewhere to source healthy plants. Similarly, there is subsequential increased dependency on imported store-bought items for household items such as baskets, brooms and fans, placing new financial pressures on the household level due to the devastation of their local coconut tree stands. The coconut also has a significant role in custom stories on the island. For the Efate *naflak naniu* (coconut) matriline, it also has implications on their ability to fulfill their custodianship role within the codified social system, with potential cultural identity implications (ref. paras 23-24).

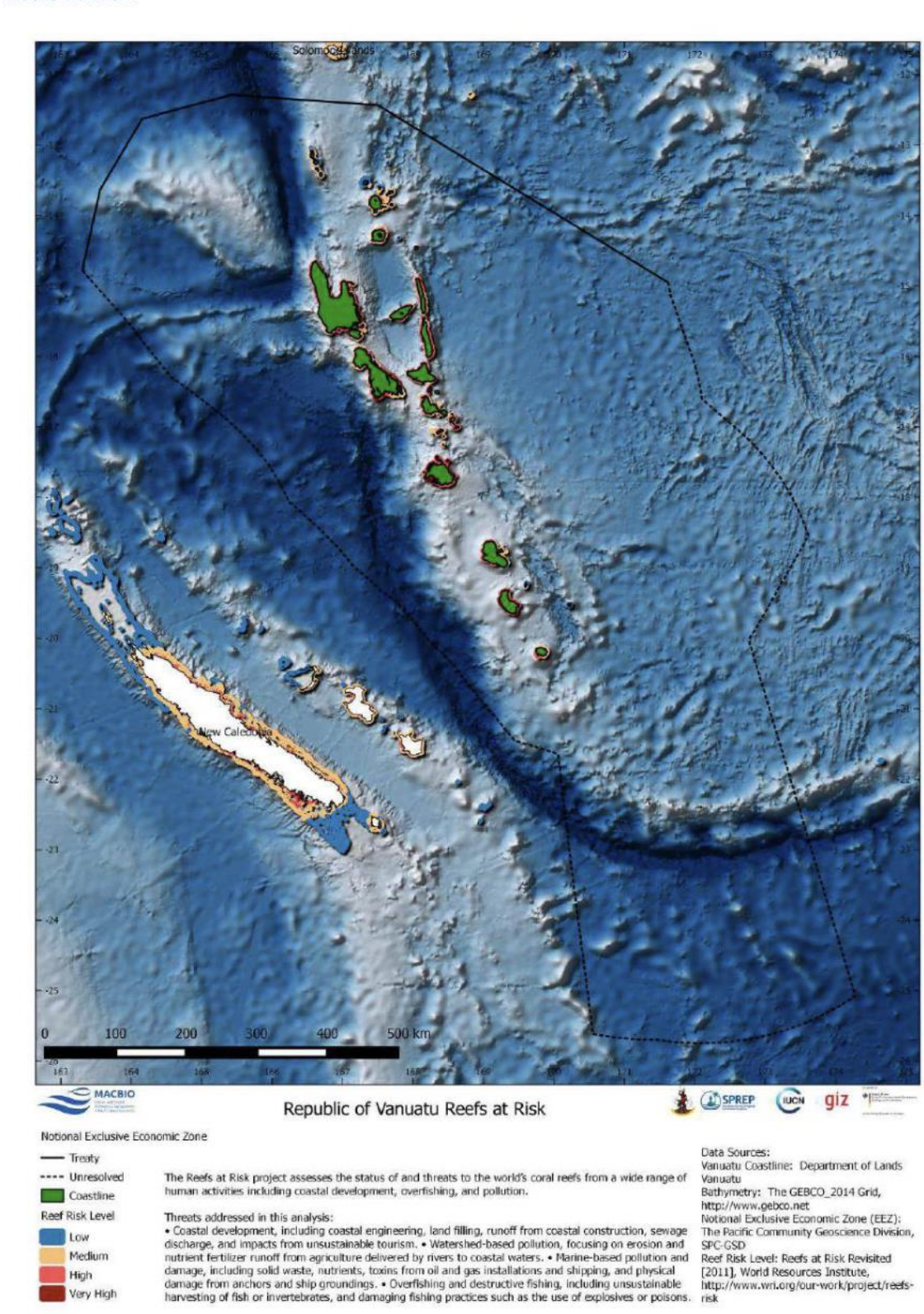
Referred to as 'the tree of life' in Vanuatu, the ubiquity of the coconut in cultural life, origin stories, cosmology and in oral histories is now threatened. With decreasing palm-based food available to CRB on Efate, the beetles have begun feeding on other important plant species such as the sago palm (*natangura*) and pandanus, both vital cultural resources used in weaving for local construction and domestic purposes.

Figure 3. Examples of post-cyclone impacts on culture.
*Note: these documented examples are occurring more broadly across Vanuatu's cultural landscape.



39. Climate change-induced ocean warming and damage to coasts, reefs and mangrove forests caused by cyclones and extreme rainfall events affects the health of Vanuatu's marine ecosystems and greatly harms food security, traditional marine knowledge and resource management practices. In addition, these impacts have strongly gendered implications because, throughout Vanuatu, women are the primary reef gatherers, gathering shellfish and crustaceans according to the season. Changes to the seasons and declining stocks of important food species have flow-on implications for their livelihoods and social positions in relation to their role providing household sustenance (Hickey 2006: 12). Declining reef health places pressure on customary *tabus* (restrictions) to manage seasonal harvesting (see para. 19), sometimes reducing fishing bans or removing species-specific restrictions to maintain pace with household food requirements. Impacts on marine ecosystem health also have implications for traditional economies, for example affecting community fish harvests that contribute to annual cycles of ceremonial feasts or ritualized exchanges with inland villages in return for resources such as yam or fruits from island interiors (Hickey 2006: 14). Moreover, these impacts all affect traditional ecological knowledge and traditional resource management, which are important local community forms of governance with socio-political dimensions and implications for how they interact with state legislation, such as in relation to customary land tenure.

Figure 4. Traditional livelihoods depend significantly on reef resources, now under threat from climate impacts. (VNBSAP 2018: 189)



B. Climate change as a force multiplier, and cascading impacts on culture.

40. Climate change acts as a force multiplier, adding to and exacerbating existing hazards and issues which have already led to cultural losses, and triggering or contributing to cascading impacts. Although these impacts are often less easy to identify and less tangible, and thus do not lend themselves to quantification or assessment for financial loss, they are already causing significant damage and loss to culture, cultural resilience and transmission in Vanuatu.

41. Slow-onset climate events such as ocean acidification, sea level rise and rising sea surface temperatures are forcing changes to marine species, including the loss of culturally significant species, coral bleaching and damage to coral reefs. With more than 75% of Vanuatu's settlements residing on the coast and highly dependent on marine sources of protein, the long-term implications for food security are considerable (Davies 2015: 51). For example, residents of the coastal village of Marou on the high volcanic island of Emau have noted sea level changes since the 1990s, resulting, already, in the loss of settlement areas (Ruehr 2022: 1623-164). On Pele Island, 11 of 23 groundwater wells have been contaminated by salinization over the past 25 years (Perumal 2018: 57). Although inundation at a local level is strongly subject to localised tectonic uplift and subsidence, as demonstrated for Tegua in the Torres Islands (Ballu et al. 2011), cyclones, intense rainfall and storm surges act to compound these effects.

42. Climate change is also contributing to the extreme weather conditions produced by El Niño and La Niña cycles, which have become more variable in the Pacific since about 1960 (Cai et al. 2023). An El Niño phase of the El Niño Southern Oscillation (ENSO) index typically produces drier than normal conditions in Vanuatu, including drought, while a La Niña phase produces wetter than normal conditions, including extreme rainfall events. These extreme weather events have a significant compounding impact on marine and agrobiodiversity over time, an impact that has already been observed in relation to several significant species that underpin sociocultural systems, whose changing habitats signal further social impacts (see Table 3 and Text Box 2). Climate-induced changes in hydrology are also affecting water catchments (DEPC 2018: 17), and in turn undermining the habitability of ancestral lands, triggering displacement, either temporarily or permanently. For example, most of the people from the in-land Lounapkamei village on Tanna Island migrated to Port Vila in 2017 due to the lack of access to potable water (Sanga, n.d.). Relocation away from ancestral lands impacts the exercise of a cultural group's customary land rights and access to land for livelihood, as well as impacts on cultural identities, which are closely tied to place and environment (see paragraphs 45-47 below on the impacts of displacement).

Table 3. Climate change impacts on selected species significant to traditional governance systems and ceremonies

Scientific Name	English (Bislama) Name	IUCN Red List Category / Species health	Climate impact on habitats	Cultural Use (Area)
	Habitat: Marine			
Chelonia mydas	Turtle – green, hawksbill	Endangered	Degradation of nesting beach and feeding habitats, coastal erosion and changing thermal profiles	Clan totem – various islands across Vanuatu
Octopus cyanea	Octopus – common (Nawita)	Least Concern (Unknown)	Ocean acidification and ocean warming affect their coral reef habitats	Clan totem – var. islands across Vanuatu
Thunnus obesus	Bigeye Tuna	Vulnerable	Sea surface temperatures and dissolved oxygen levels and other ocean variables are driving tuna species eastwards across the Pacific (SPC 2018: 2)	Food source
Carcharhinus melanopterus / Triaenodon obesus	Various sharks – black and white tip reef sharks	Vulnerable	Global climate change has already resulted in large-scale coral bleaching events with increasing frequency	Clan totem, important in local mythologies

			causing worldwide reef degradation since 1997.	
	Habitat: Terrestrial			
Cycas seemannii	Namele	Vulnerable	Storm damage	Central to traditional resource management and societal peace-making
Pandanus halleorum	Screw palm (Pandanus)	Vulnerable *Endemic to Vanuatu	Cyclone and flooding damage to habitats	Variety of cultural uses for weaving (mats, baskets, thatch, grass skirts, ceremonies)
Pteropus anetianus	Vanuatu flying fox - endemic	Vulnerable	Cyclone and flooding damage to habitats	Traditional mythology and protein source

This list is not exhaustive and is intended to illustrate the range of culturally significant species under threat from climate change, which have flow-on effects on sociocultural systems. Sources: Vanuatu NBSAP 2018-2030; IUCN Red List.

43. The loss of culturally significant terrestrial habitats and the species they host impacts on the capacity of cultural groups to fulfill customary protocols and obligations that depend on the availability of specific species. For example, a traditional symbol of peace throughout Vanuatu is the *namele* leaf (Cycas seemannii), which is listed on the IUCN Red List as a vulnerable species (see https://www.iucnredlist.org/species/42064/67759797). The 2022 species assessment documents a continuing decline in area, extent, and quality of the habitat. Typically found between 0-600m elevation, habitat decline of the *namele* in the aftermath of the more frequent and more intense cyclones associated with climate change is impacting its availability for use in cultural ceremonies and management of customary *tabus* or seasonal bans on resource harvests, where the *namele* is also a symbol of kastom authority.

44. Traditional ceremonies are central to the transmission of culture and depend on local resources for use in gift exchange. Across both urban and rural populations, ceremonial participation rates are high: 93% of households in Vanuatu participate in at least one traditional ceremony a year, 45% participate in 3 or more traditional funerary rites, and 27% participate in 3 or more marriage ceremonies (VNSO 2021: 20). Traditional coming-of-age ceremonies, grade-taking and peace and reconciliation ceremonies are also prevalent across Vanuatu (with concentration in some provinces, e.g. Malampa and Tafea for the former, Penama for the latter, according to VNSO

2021: 20). The traditional items of wealth in these ceremonies, drawn locally from natural or domesticated resources (e.g. kava, tusker pigs, *namele* cycads, yams, pandanus mats, see table 3 and Text Box 2) play a very significant role in the mediation of social relations of reciprocity. Impacts on the production of key traditional wealth items (such as tusker pigs) in turn impact on key cultural ceremonies that embody and promote social cohesion and peace.

Text Box 2. Climate impacts on kava culture

The traditional narcotic drink kava (Piper methysticum*)* is central to most cultural rituals and ceremonies across Vanuatu's islands. With over 82 kava cultivars in Vanuatu, the island archipelago is understood to be the centre of the origins of kava as a domesticate (Lebot and Levesque 1989). Within traditional local economies, kava plays a key role, alongside pigs, yams, taro and pandanus mats, in ceremonial exchange between and within communities, with 88% of households reporting use of traditional wealth items for ceremonies (VNSO 2021: 74). Kava features in mythologies and social roles may be assigned according to kava varieties found in a locale. For example, on Tanna Island certain families have the right to consume specially grown and decorated kava – named the *tupuga* – at circumcision festivals (Lindstrom 2009: 299). Kava has also been a key item of traditional trade and has had increasing commercial value in recent decades, providing a main source of income for 24% of farming households (VNSO 2021: 11). Traditionally grown beneath tree canopies, any water stress – such as during drought and El Nino seasons – harms cultivation, with diseases and pests also affecting kava production (Davis and Brown 1999: 18, 25). Kava is highly sensitive to the minerals in sea water; "sea water can be blown several kilometres inland during cyclones and strong winds, and cause extensive damage to kava crops" (Davis and Brown 1999: 30). During the un-seasonally early Cyclone Lola in October 2023, kava farmers on Pentecost Island reported large-scale damage to their crops, with a 5-year recovery period (Radio New Zealand 30/11/23).

45. Displacement from ancestral lands and ecosystems induced by slow-onset climate events is perhaps one of the greatest challenges for cultural survival. Climate change, combined with increasing urbanization and development pressures, is compounding the impacts of natural hazards and disasters in Vanuatu (IPCC 2014) and driving evacuation pressures for people facing floods, cyclones, and other hazards.

46. Customary custodianship of land is enshrined in Vanuatu's Constitution and comprises an estimated 97% of all land area (Farran et al. 2011). As Vanuatu's first Minister for Lands, Sethy Regenvanu, states, "Land to ni-Vanuatu is what a mother is to a baby." Land access and usufruct rights are essential for life in Vanuatu society. Governed by diverse customary land tenure systems, sustainably managed access to land-based resources underpins traditional social support systems and inter-community relations. Physical displacement from place, whether long-term or temporary, has direct implications for transmission of culture. Displacement management in Vanuatu necessarily draws on customary systems to facilitate mobility, due to the predominance of customary land tenure and the frequent needs for custom land access for relocated communities. Maintenance of social cohesion and structures in any displacement process is a key consideration and, if not done well, can disrupt

cultural knowledge holders and fragment linguistic communities, weakening cultural production and cultural transmission.

47. Where group cohesion is not able to be maintained in displacement contexts, or movement is to areas which are not on one's own customary territory, the threats to cultural production and transmission are heightened. A particular example is that of language: studies of historical mobility in Vanuatu, often in the rural-urban context, highlight linguistic erosion due to dominance of the lingua franca, Bislama, and the dispersion of linguistic communities (Tonkinson 1968). Similarly, traditional knowledge and practice of cultural performances can be diminished, particularly if the relocation site has different biodiversity or does not provide adequate space for cultural production and performance of rituals. Consideration by displaced communities of their potential to integrate into the customary land tenure system of the host community is also a key factor in determining whether to proceed with displacement through custom networks or to alienated government land (McDonnell 2021; Fitzpatrick 2022).

48. Climate change-related increases in cyclone intensity, stronger El Niño events (Esswein and Zernack 2020) have knock-on effects: "loss and damage to Ni-Vanuatu's human rights are having cascading impingements on many other interconnected human rights and can transcend across generations (for example, interconnected human rights to custom, Indigenous knowledge, family, agency and identity)" (McNamara et al 2023).

49. It is worth noting an emerging problematic use of the term 'resilience' which can deny attention to a broader set of cultural vulnerabilities brought about through climate change impacts. For example, reports on the resilience of communities in the immediate aftermath of cyclones typically focus on traditional knowledge of disaster/famine foods and shelter. However, full recovery of the community in the longer term must necessarily work within customary institutions that are central for addressing any community relocation and cultural transmission matters. In addition to varying degrees of cultural resilience across a timescale, resilience needs to also be considered in the context of the multiple dimensions of vulnerability that local communities face. Despite the importance of culture for climate change adaptation and resilience in Vanuatu, there remains a need to address the structural challenges contributing these dynamics across multiple scales of action, from the global to local (Ensor 2015).

V. TRANSMISSION OF CULTURE

50. Where there has been cultural loss due to climate change, the transmission and thus the sustainability of culture is directly impacted. This fundamental unravelling of culture, exacerbated by climate change, is a process that is already under way, but one which plays out over longer time frames. It is loss, in the present, of future capacity. As discussed in Section IV.A above:

- Cultural practices are often unable to adapt to fast rates of change, "leading to a loss of cultural practices and knowledge" (para 35).
- Craft resources (such as pandanus for weaving) have been depleted, with consequences for production and knowledge reproduction: "we no longer practice our cultural practices" (para 35).
- Before climate change impacted the seasons and predictability of the weather, it was "easier to teach children about how to predict weather…however it has become harder to do so with unpredictable weather patterns meaning that cultural/traditional practices and knowledge sometimes lose their value because people can no longer rely on such knowledge" (para 36).
- Landslides with multiple causes on western Santo, including climate change-induced heavier rainfall, destroyed sacred Su stones which are critical to inheritance of chiefly titles and customary land rights, but which have now been lost forever (para 32).

51. While cultural systems and traditional knowledge are optimizing their adaptive capacity to respond to the novel and cascading threats of climate change and ensure localized resilience in the short term, this act of emergency response and resilience is already a form of cultural loss and harm: re-orienting societal resources to a heightened climate risk diminishes the ability to implement, communicate and transmit cultural knowledge necessary for adaptive strategies. Moreover, adaptation can also be seen, in the cultural context, as a form of loss or damage (depending upon the adaptation required).

52. Shared cultural values and identities contribute to social cohesion and wellbeing, and community-based support systems are a critical safety net in times of crisis, and recognised as such by society and the government. This is underscored by the Vanuatu Government's strong commitment to place culture at the centre of the National Sustainable Development Plan 2016-2030:

> Community, family and kinship ties serve as the primary social safety net, especially for the young, the elderly, people with disabilities and other vulnerable people… The indivisible connections between culture and the social, environmental and economic pillars of the NSDP are reflected in our aspirations, and how we will deliver our national vision. (Government of Vanuatu 2019: 8)

53. Intensifying, climate change-induced strains on Vanuatu's cultures, languages and traditional ways of life undermine the resilient development aspirations of the Vanuatu Government's National Sustainable Development Plan 2016-2030. The Vanuatu Government produced the plan partly in response to the challenge of safeguarding culture and cultural transmission, however these efforts are under increasing pressure, given losses that have occurred and are presently occurring and a worsening climate change outlook, including impacts that are already unfolding (such as reef decline and sea level rise). The scale and urgency of the task is significant given the immense pressure placed on cultural systems by accelerating climate change.

54. The frequency of climate-induced severe weather events, and the subsequently frequent 'states of emergency' render the Vanuatu Government and households in constant crisis mode, focused on basic access to food, water and shelter. The increasing demands on the limited national resources available to respond to frequent climate-induced extreme weather events place even more pressure on community-based systems to facilitate local disaster response efforts. This in turn imposes a reliance on customary groups to drive community resilience and adaptation to the impacts of climate change, drawing on traditional knowledge and practice.

55. Transmission of traditional knowledge and traditional ecological knowledge is currently impacted by climate change with both immediate and longer-term effects. For example, indicator species used as the basis of traditional knowledge of seasons, weather and climate, are in some cases no longer reliable, as they have shifted habitats, range, or breeding behaviours, or have suffered population declines in response to climate change. A large body of knowledge built up over thousands of years is slowly being lost. The Vanuatu Government has undertaken commendable efforts over the past three decades to document traditional ecological knowledge (VKS 2001) and traditional knowledge of indicator species used in forecasting weather and climate (SPREP 2023). These efforts notwithstanding, the rapid transformations to Vanuatu's island environments and biodiversity due to climate change means that this traditional knowledge remains vulnerable to loss. Moreover, documenting this knowledge does not guarantee that it will continue to be practiced in place.

56. Reflecting Vanuatu's archipelagic geography, lack of level of Western-style development, and financially strained state institutions, local communities across Vanuatu's 83 islands remain the primary agents of cultural survival, transmission and adaptation (Cox et al. 2007; Thompson n.d.). With 78% of Vanuatu's population residing in rural areas (VNSO 2020: v), cultural support systems bridge gaps in government services where there are financial and logistical constraints; the link between people and their environments is critical for the ongoing survival of these communities. Strong indigenous systems of support within communities, clans and extended families underpin cultural forms of social protection, and are themselves grounded in traditional knowledge systems, kinship, ties, customary reciprocity and gift-exchange, and a keen sense of 'belonging' through identifying with land and language (Jolly et al. 2014: 5). The effectiveness of these culturally based social 'safety nets' depends on community agency and continued access to traditional lands and environmental resources. It also depends upon a healthy environment.

57. Climate-related disasters, displacement and mobility intensify socio-cultural pressures (Naupa 2023). Robust cultural systems have lessened community vulnerabilities for generations, dependent as they are on secure and sustainable access to environmental resources and social cohesion. The changes to these systems, directly to environmental resources, and indirectly through disaster-induced social displacement and erosion of codified systems, undermine cultural survival and resilience. Climate change has directly impacted environment-based resilience, and is undermining socially-based cultural resilience.

References

Baldwin, P.J, Mathias, A.J, Wood, D.J, Bellamy, J.A and J.K. Vanclay. 1989. *Vanuatu National Forestry Inventory.* Port Vila, Vanuatu: Department of Forestry. https://vanuatu-data.sprep.org/dataset/vanuatu-national-forest-inventory (accessed 1 Dec 2023)

Ballu, V., Bouin, M. N., Siméoni, P., Crawford, W. C., Calmant, S., Boré, J. M., et al. 2011. Comparing the role of absolute sea-level rise and vertical tectonic motions in coastal flooding, Torres Islands (Vanuatu). *PNAS* 108(32), 13019-13022.

Bartlett, Christopher. 2023. Ode to the Behanaj River: how a climate-fuelled landslide and subsequent ecosystem loss forced an Indigenous tribe in Vanuatu to relocate. In *Living in the shadow of loss and damage: uncovering non-economic impacts.* London, UK: International Institute for Environment and Development. Pp.69-77. https://www.iied.org/sites/default/files/pdfs/2023-11/21891iied.pdf

Bedford, Stuart, Spriggs, Matthew, Wilson, Meredith and Regenvanu, Ralph. 1998. The Australian National University – National Museum of Vanuatu Archaeology Project: A Preliminary Report on the Establishment of the Cultural Sequences and Rock Art Research. *Asian Perspectives,* 27 (2): 165 – 193.

Bradacs, G., Heilmann, J., and Weckerle, C.S. 2011. Medicinal plant use in Vanuatu: A comparative ethnobotanical study of three islands. *Journal of Ethnopharmacology,* 137(2011): 434-448.

Cai, Wenju, et al. 2023. 'Anthropogenic impacts on twentieth-century ENSO variability changes.' *Nature Reviews Earth & Environment*, 1-12.

Caillon, Sophie, and Patrick Degeorges. 2007. Biodiversity: negotiating the border between nature and culture. *Biodiversity and Conservation* 16: 2919-2931.

Campbell, J.R. 1990. Disasters and Development in Historical Context: Tropical Cyclone Response in the Banks Islands, Northern Vanuatu. *International Journal of Mass Emergencies and Disasters*, *8*(3), 401–424.

Christie, W. 2017. *Safeguarding Indigenous architecture in Vanuatu*. UNESCO, Paris. http://www.unesco.org/open-access/terms-use-ccbysa-en

Clissold, R., Furlong, E., McNamara, K. E., Westoby, R., & Latai-Niusulu, A. 2023. How Pacifika Arts Reveal Interconnected Losses for People and Place in a Changing Climate. *Land*, *12*(4), 925.

Cox, M., Rawlings, G., Soni, N., Naupa, A., Alatoa, H., Vatu, C., and Kenni, L. 2007. *The Unfinished State: Drivers of Change in Vanuatu.* Port Vila, Vanuatu: AusAID.

CSIRO and SPREP. 2021. 'NextGen' Projections for the Western Tropical Pacific Current and Future Climate for Vanuatu. Final report to the Australia-Pacific Climate Partnership for the Next Generation Climate Projections for the Western Tropical Pacific project. Commonwealth Scientific and Industrial Research Organisation (CSIRO) and Secretariat of the Pacific Regional Environment Programme (SPREP), CSIRO Technical Report, Melbourne, Australia. https://doi.org/10.25919/hexz-1r10

DataReportal 2023. Digital 2023: Vanuatu. DataReportal, 14 February 2023. https://datareportal.com/reports/digital-2023-vanuatu#:~:text=Vanuatu%27s%20population%20in%202023,of%20the%20population%20is%20male

Davies, K. 2015. Kastom, climate change and intergenerational democracy: Experiences from Vanuatu. In Leal Filho W (ed) *Climate Change Management.* Cham: Springer International Publishing, pp. 49-66.

Dawes, N., Franklin, R.C., McIver, L. and Obed, J., 2019. General and post-disaster mental health servicing in Vanuatu: A qualitative analysis. *International Journal of Disaster Risk Reduction*, *40*, p.101256. https://doi.org/10.1016/j.ijdrr.2019.101256

Department of Environmental Protection and Conservation. 2018. *Vanuatu National Biodiversity Strategy and Action Plan 2018 – 2030.* Port Vila, Vanuatu.

Department of Strategic Policy, Planning and Aid Coordination. 2020. *Vanuatu Tropical Cyclone Harold and COVID-19 Post Disaster Needs Assessment Volume A*, October 2020. Port Vila, Vanuatu: Government of Vanuatu. https://recovery.preventionweb.net/publication/vanuatu-tropical-cyclone-harold-and-covid-19-post-disaster-needs-assessment

Department of Strategic Policy, Planning and Aid Coordination. 2023. *Post-Disaster Needs Assessment: Vanuatu Tropical Cyclones Judy and Kevin*. 22 June 2023. Port Vila, Vanuatu: Government of Vanuatu. https://repository.unescap.org/rest/bitstreams/ae92ab7b-6425-451b-b4d1-c6a076a3ebbd/retrieved

Ensor, J.E. 2015. Adaptation and Resilience in Vanuatu. Research Report, Oxfam Australia. Victoria. https://eprints.whiterose.ac.uk/124323/1/2015_90_Vanuatu_Research_Report_FA.pdf

Ensor, J.E., 2016. Resilience realities: Resilience and development practice in Vanuatu. Research Report. Oxfam Australia. https://eprints.whiterose.ac.uk/124325/1/Resilience_Report_Web_2_.pdf

Farran, Sue, M. Stefanova, A. Naupa and K. Vurobaravu. 2011. National Land Leasing Profile. Jastis blong Evriwan Program, World Bank.

Fingleton, J., Naupa, A. and C. Ballard. 2008. One Common Basket: Village Land Trusts in Vanuatu. In *Making Land Work Volume 2.* Canberra, Australia: AusAID. http://aid.dfat.gov.au/Publications/Documents/MLW_VolumeTwo_CaseStudy_2.pdf

François, Alexandre, Michael Franjieh, Sébastien Lacrampe & Stefan Schnell. 2015. The exceptional linguistic density of Vanuatu. In Alexandre François, Sébastien Lacrampe, Michael Franjieh & Stefan Schnell (eds), *The Languages of Vanuatu: Unity and Diversity*, 1–21. Canberra: Asia–Pacific Linguistics.

Government of Vanuatu. 2016. *National Sustainable Development Plan 2016 – 2030.* Port Vila, Vanuatu. https://doi.gov.vu/images/docs/national-strategy-plans/Vanuatu%20National%20Sustainable%20Development%20Plan%20(2016-2030).pdf

Granderson, Ainka A. 2017. The role of traditional knowledge in building adaptive capacity for climate change: Perspectives from Vanuatu. *Weather, Climate, and Society*, *9*(3), 545–561. https://doi.org/10.1175/WCAS-D-16-0094.1

Granderson, Ainka A. 2018. Value conflicts and the politics of risk: Challenges in assessing climate change impacts and risk priorities in rural Vanuatu. *Climate and Development*, *10*(6), 481–494. https://doi.org/10.1080/17565529.2017.1318743

Hickey, Francis. 2006. Traditional resource management in Vanuatu: Acknowledging, supporting and strengthening indigenous management systems. *SPC Traditional Resource Management and Knowledge Information Bulletin #20 – December 2006.*

IPCC 2014. Small Islands – Chapter 29. In *Climate Change 2014: Impacts, Adaptation and Vulnerability, Part B: Regional Aspects, Working Group II Contribution to the Fifth*

Assessment Report of the IPCC, available at: https://www.ipcc.ch/pdf/assessment-report/ar5/wg2/WGIIAR5-Chap29_FINAL.pdf

IPCC 2023. Synthesis Report 2. In *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*. https://report.ipcc.ch/ar6syr/pdf/IPCC_AR6_SYR_SPM.pdf

Jolly, Margaret, Helen Lee, Katherine Lepani, Michelle Rooney and Anna Naupa. 2015. Falling through the net? Gender and Social Protection in the Pacific. *UN Women Discussion Paper* no. 6. https://www.academia.edu/14860383/Jolly_M._et._al._Falling_through_the_net_Gender_and_Social_Protection_in_the_Pacific

Lavell, A., M. Oppenheimer, C. Diop, J. Hess, R. Lempert, J. Li, R. Muir-Wood, and S. Myeong, 2012: Climate change: new dimensions in disaster risk, exposure, vulnerability, and resilience. In: Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation [Field, C.B., V. Barros, T.F. Stocker, D. Qin, D.J. Dokken, K.L. Ebi, M.D. Mastrandrea, K.J. Mach, G.-K. Plattner, S.K. Allen, M. Tignor, and P.M. Midgley (eds.)]. A Special Report of Working Groups I and II of the Intergovernmental Panel on Climate Change (IPCC). Cambridge University Press, Cambridge, UK, and New York, NY, USA, pp. 25-64. https://www.ipcc.ch/site/assets/uploads/2018/03/SREX-Chap1_FINAL-1.pdf

McDonnell, Siobhan. 2021. The importance of attention to customary tenure solutions: slow onset risks and the limits of Vanuatu's climate change and resettlement policy. *Current Opinion on Environmental Sustainability,* 50: 281 – 288. https://doi.org/10/1016/j.cosust2021.06.008

McNamara, K. E., Clissold, R., Westoby, R., Stephens, S., Koran, G., Missack, W., & Bartlett, C. Y. 2023. Using a human rights lens to understand and address loss and damage. *Nature Climate Change*, pp. 1-6.

Mondragón, Carlos 201). Forest, Reef and Sea-Level Rise in North Vanuatu: Seasonal Environmental Practices and Climate Fluctuations in Island Melanesia. In Nakashima, D., & Krupnik, I. (eds) *Indigenous Knowledge for Climate Change Assessment and Adaptation* (pp. 23–40). Cambridge: Cambridge University Press. https://doi.org/10.1017/9781316481066.003

Naritantop, Sempet. 2022. The Story of the Whale. In Anna Naupa (ed.) *Netai en Namou Toc: Stories of Mother Ocean, Erromango Culture and the Sea.* Port Vila, Vanuatu: Erromango Cultural Association, pp. 24-25.

Naupa, Anna. 2004. Negotiating Land Tenure: Cultural Rootedness in Mele village, Vanuatu. MA Thesis. Honolulu, Hawai'i: University of Hawai'i, Manoa.

Naupa, Anna. 2023. Cultural security in the Pacific: why it matters. *The Interpreter*. https://www.lowyinstitute.org/the-interpreter/cultural-security-pacific-why-it-matters-regional-security

Nef, Danny Philipp, Daniel Neneth, Patteson Dini, Carmenza Robledo Abad, and Pius Kruetli. 2021. How local communities attribute livelihood vulnerabilities to climate change and other causes: a case study in North Vanuatu. *Climatic Change* 168: 17.

Pascht, Arno (2019). Klaemet jenj worlds. Approaching climate change and knowledge creation in Vanuatu. *Journal de la Societe des Océanistes* 149 : 235–244. https://doi.org/10.4000/jso.11257

Perumal, Nikita (2018). “The place where I live is where I belong”: Community perspectives on climate change and climate-related migration in the Pacific Island nation of Vanuatu. *Island Studies Journal* 13(1), 45–64. https://doi.org/10.24043/isj.50

Radio New Zealand. 2023. Kava farmers in Vanuatu want govt assistance. 30/11/2023 https://www.rnz.co.nz/international/pacific-news/503583/kava-farmers-in-vanuatu-want-govt-assistance

Rarai, Allan, Meg Parsons, Melissa Nursey-Bray, and Roa Crease. 2022. Situating climate change adaptation within plural worlds: The role of Indigenous and local knowledge in Pentecost Island, Vanuatu. *Environment and Planning E: Nature and Space* 5(4): 2240-2282.

Ruehr, Sophie 2022. Beyond the vulnerability/resilience dichotomy: Perceptions of and responses to the climate crisis on Emau, Vanuatu. *Island Studies Journal* 17(1), 151-176.

Sanga, Alice. n.d. Linking Climate Change and Human Mobility in Vanuatu. Presentation. Port Vila, Vanuatu: National Disaster Management Office.

Secretariat of the Pacific Community (SPC). 2010. *Valuing culture in Oceania: methodology and indicators for valuing culture, including traditional knowledge, in Oceania.* Noumea, New Caledonia: Secretariat of the Pacific Community.

Secretariat of the Pacific Community (SPC). 2016. *Climate Change Impacts in North Efate, Vanuatu*. Noumea, New Caledonia: Secretariat of the Pacific Community.

Secretariat of the Pacific Community (SPC). 2018. Impact of climate change on tropical tuna species and tuna fisheries in Pacific Island waters and high seas areas. Information paper for SAN 6003922(CI-4). https://www.fao.org/fileadmin/user_upload/common_oceans/docs/Climate%20change%20modelling%20information%20paper%20231218.pdf

Secretariat of the Pacific Community (SPC). 2022. *Pacific Regional Culture Strategy 2022-2032.* Noumea, New Caledonia: Secretariat of the Pacific Community.

Secretariat of the Pacific Community (SPC). 2023. Activity Progress Report: Pacific Awareness and Response to CRB Project. Suva, Fiji: Secretariat of the Pacific Community.

Secretariat of the Pacific Regional Environment Programme (SPREP). 2023. *Vanuatu Traditional Knowledge National Indicator Booklet.* Port Vila, Vanuatu: Vanuatu Klaemet Infomesen blong Redi, Adapt mo Protekt (VanKIRAP) Project.

Spriggs, M. 2007. Population in a vegetable kingdom: Aneityum Island (Vanuatu) at European contact in 1830. In Kirch, P.V., & Rallu, J.L. (eds) *The Growth and Collapse of Pacific Island societies: archaeological and demographic perspectives* (pp. 278-305). Honolulu: University of Hawai‘i Press.

Thompson, Ambong. n.d. Vanuatu Cultural Centre Report. https://www.true-echoes.com/community-voices/vanuatu-cultural-centre/

Tonkinson, Robert. 1968. *Maat Village, Efate: a relocated community in the New Hebrides*. Eugene, OR: Department of Anthropology, University of Oregon.

UNFCCC 2013. *Non-Economic Losses in the context of the work programme on loss and damage*.

UNFCCC n.d. Slow Onset Events. https://unfccc.int/wim-excom/areas-of-work/slow onset-events

VanKIRAP. n.d. TORBA Province, Vanuatu Traditional Knowledge Seasonal Calendar, https://nab.vu/sites/default/files/documents/SPREP%20-%20Provincial%20Calendars%20A3%20v03%20TORBA.pdf

Vanuatu Kaljoral Senta. 2001. *Documentation of Traditional Resource Management Systems. P*ort Vila, Vanuatu. Compiled by Anna Naupa.

Vanuatu National Statistics Office. 2021. *Well-Being in Vanuatu, 2019-2020 NSDP Baseline Survey.* Port Vila, Vanuatu. https://www.stanapstrong.com/wp-content/uploads/2023/10/Wellbeing_Report_2019-2020.pdf (accessed 25 Nov 2023)

Vanuatu National Statistics Office. 2020. *National Population and Housing Census 2020, Basic Tables Report, Volume 1.* Port Vila, Vanuatu: Ministry of Finance and Economic Management.

Vanuatu Prime Minister's Office. 2015. *Post-Disaster Needs Assessment: Tropical Cyclone Pam, March 2015*. Port Vila, Vanuatu: Government of Vanuatu. https://www.gfdrr.org/sites/default/files/publication/pda-2015-vanuatu.pdf (accessed 25 Nov 2023)

Wheatley, J.I. 1992. *A Guide to the Common Trees of Vanuatu, With Lists of their Traditional Uses and ni-Vanuatu Names.* Department of Forestry: Port Vila, Vanuatu.

Wilson, Meredith. 1999. Bringing the Art Inside: A Preliminary Analysis of Black Linear Rock-art from Limestone Caves in Erromango, Vanuatu. *Oceania* 70(1), pp.87-97.

Wilson, Meredith L., and Yoko Nojima. 2018. An ICH-disasters dialogue on Gaua island, Vanuatu. In M.O. and Y.N.W. Iwamoto (Ed.), *Preliminary Research on ICH Safeguarding and Disaster Risk Management in the Asia-Pacific Region. Project Report for the FY 2016-2017* (pp. 97–114). International Research Centre for Intangible Cultural Heritage in the Asia-Pacific Region (IRCI).

ANNEXURE A – ANNA NAUPA CV

Attached.

ANNEXURE B – CHRIS BALLARD CV

Attached.

SIGNATURES



Anna Naupa, 2 February 2024



Chris Ballard, 2 February 2024

Anna Naupa

Curriculum vitae

P.O. Box 3290, Port Vila, Vanuatu
Mobile: +678 772-3343
Email: anaupa@yahoo.com

Education & Awards

2022-26 PhD Candidate, School of Culture, History and Language, Australian National University

2014 Master in Public Administration, Harvard Kennedy School, USA
Fellow, Edward S. Mason Program in Public Policy and Management
Lucius N. Littauer Award for Academic Excellence
2004 MA, Geography University of Hawai'i, Manoa
2001 BA (Honors), Geography and Anthropology
University of Hawai'i, Hilo, USA
East-West Center Alumnus
Accredited Partnership Broker & Associate
Vanuatu Independence Medal (2021) for services to Arts and Culture

Country Experience

Pacific & Rim - Vanuatu, Papua New Guinea, Solomon Islands, Fiji, New Caledonia, Nauru, Niue, Palau, Federated States of Micronesia, Samoa, Tonga – and Australia, New Zealand, Japan, Republic of Korea, Laos, Indonesia, USA. (*Desk-based:* Cambodia, Canada, People's Republic of China, Cuba, the EU, France, Germany, India, Italy, Malaysia, Myanmar, Norway, Philippines, Spain, Thailand, Turkey and the UK.)

Citizenship & Languages

Ni-Vanuatu: Bislama, English, French (basic), Sie (basic)

Relevant skills

Strategic leadership, institutional governance, multi-party negotiations, policy analysis and development, international relations, national development, partnership brokering, financial and program management, design, implementation and review, communications and public diplomacy, organisational skills, networking, advanced writing.

Referees

- Available on request.

Selected Professional Research Experience

February 2022 – August 2023
Associate Director - Outreach, Pacific Fusion Centre
Provide analytic oversight of regional security assessments. Other responsibilities include establishing the Centre's reputation for excellence and collaboration, including a legal personality for the Centre, building effective working partnerships across the Pacific security community, aligned to the PIF Boe Declaration.

October 2021 – present (project-based, concurrent with other roles)
Director, Island Minds Ltd
Management oversight and principal consultant for a Vanuatu-based research, analysis and strategic communications management consultancy. Clients have included Blue Ocean Law / Vanuatu Government, CARE Vanuatu, the Pacific Community (SPC), IOM, the European Climate Foundation, Espresso Magazine, the National University of Vanuatu and VBTC for the Press Klab blong Vanuatu expert dialogue series. Assignments span cultural and geopolitical research and analytics, including expert cultural input to Vanuatu's submission to the International Court of Justice on climate change.

October 2021 – February 2022
CSO and Community Services Adviser, Vanuatu-Australia Policing and Justice Program (part-time)
Provided advisory services in support of improving access to justice and social protection for the most vulnerable populations. Facilitated COVID preparedness and planning for the Ministry of Justice and Community Services, including its agencies. Guided policy and programming to support a strengthened chain of justice from communities and customary governance systems into the state system, incorporating GEDSI principles.

2020 – 2022
Regional Expert for Pacific 2050 Strategy Development (Independent, voluntary capacity)
Providing strategic expert input into the Pacific 2050 Strategy Drivers of Change analysis, and future-thinking/foresight contributions on politics and geostrategic issues, culture, employment and economics. Nominated by Vanuatu Government.

2019 – present
Creator & Coordinator, Vanuatu Children's Literature Initiative (Volunteer) www.taftumas.com
Created, co-edited, guided and coordinated research and writing of over 75 community volunteers in the bilingual publication of *Taf Tumas: Different journeys, one people*, an illustrated non-fiction children's book celebrating 40

inspirational ni-Vanuatu men and women to mark Vanuatu's 40th Independence anniversary. Trilingual audio stories aired on radio in Vanuatu, in New Zealand and on social media. The book forms part of the Vanuatu Government's disaster-ready Home School Care Package learning content.

2019 –2023
Advisory Member (Pacific), Developmental Leadership Program (Independent, voluntary capacity)
Providing advisory input into DLP's research priorities and publications for the Pacific, including international learning. Funded by DFAT and managed through the University of Manchester, there are 5 advisory members in total covering Asia, and the Pacific, representing academic, DFAT and development sectors.

December 2018 – October 2021
Country Director, Australia-Pacific Training Coalition (Vanuatu & Nauru)
Provided strategic direction for the transition of APTC from an Australian technical college to a coalition-builder with partner institutions, industry, and the Governments of Vanuatu and Nauru to achieve sustainable country driven TVET reform.

October 2017 – December 2018
Economic Affairs Officer, UN-ESCAP Pacific Sub-Regional Office (Fiji)
Led sustainable development policy research and analysis in support of the Pacific's implementation of the SDGs through the Pacific Roadmap for Sustainable Development, with a focus on the peace-development nexus, Pacific innovations in working with customary institutions and regional financing. Research lead for the 2018 biennial *Pacific Perspectives* report.

July 2014 – October 2017
Regional and International Issues Adviser, Pacific Islands Forum Secretariat (Fiji)
Led geopolitical and policy analysis of respective foreign policy positions towards the Pacific and advised Members in the advancement of agreed Forum positions during partnership talks, such as on climate change and ocean governance. Led and advised the 2015-17 analysis of governance and financing arrangements through CROP agencies, which facilitated greater evidence-based conversations across Pacific SIDS about how to optimise the alignment of pooled finance for the regional agenda.

Feb – Sept 2014
Country Case Author, Gender and Social Protection Policies in the Pacific, Australian National University/UNWOMEN
Conducted expert gender assessment of Vanuatu's social policies, examining both state-centric and informal social protection mechanisms.Collaborated with a team of Australian and Pacific Islander academics to develop several country case studies as part of a Pacific background paper on the topic. This paper was input into UNWOMEN's 2014 *Progress of the World's Women* report. See: https://www.academia.edu/14860383/Jolly_M._et._al._Falling_through_the_net_Gender_and_Social_Protection_in_the_Pacific

Mar 2014
Adviser (New York), Government of Vanuatu Department of Women's Affairs
Provided policy research and advised the Vanuatu Government delegation to the 58th United Nations Commission on the Status of Women (CSW) meeting on the emerging issue of women's access to productive resources. Represented the Vanuatu Government at relevant meetings.

May 2006 – July 2013
AusAID Senior Program Manager – Land, Governance and Gender (Vanuatu)
Designed and managed AusAID's land, democratic governance, civil society and gender programs in Vanuatu, providing strategic direction to implementing partners such as the World Bank (Justice for the Poor Program) and oversight of joint AusAID-NZAID funding for Vanuatu's land reform initiatives. Efficient, effective and transparent management of A$51 million in development assistance over seven years. Managed and co-authored the *Drivers of Change* political-economy analysis of Vanuatu in 2007, which shaped the expansion of AusAID's support to civil society to the country.

2008 – present
Erromango Community/ Erromango Cultural Association Adviser (Volunteer) www.erromango.org
The Erromango Cultural Association is a community organization working to document, protect and promote the languages and *kastom* of my home island of Erromango in order to strengthen traditional governance structures. I advise the organization on fundraising/grant proposals, program management and cultural research. To date we have produced 13 books for children/adults in the vernacular, as well as conducted numerous cultural revival community workshops relating to traditional artforms, governance and land rights.

2004 – 2005
Project Officer, National History Curriculum Project, Vanuatu Cultural Centre
Co-authored, lead researcher and project managed the development of Vanuatu's first-ever national history curriculum, in three volumes plus a teachers' guide. Worked closely with an expert reference group, Ministry of Education, partners and managed all publication logistics.

2001 (contract)
Research Officer, Traditional Resource Management Project, Vanuatu Cultural Centre
Lead researcher into traditional resource management systems across Vanuatu. Conducted interviews with male and female VKS fieldworkers from across the country, report write-up was used to inform cultural approaches through the Vanuatu Environment Unit.

Selected blog posts & publications (full list available upon request)

- *(pending publication).* Naupa, Anna. 2024. "The Melanesian Way in the 21st Century: culture, politics and festivals." *Journal of Pacific History Special Issue on Melanesia.* Honolulu: University of Hawai'i Press.
- *(pending publication).* Naupa, Anna. 2024. "The steering paddle of our canoe: culture in Vanuatu's diplomatic practice." In *Oceanic Diplomacy,* Eds. Greg Fry, George Carter and Gordon Nanau. ANU Press, Canberra.
- Naupa, Anna. August 2023. « Cultural security in the Pacific: why it matters." Lowy Institute, The Interpreter. https://www.lowyinstitute.org/the-interpreter/cultural-security-pacific-why-it-matters-regional-security
- Naupa, Anna. 2022. "Can oceanic diplomacy solve the Pacific's maritime disputes?" Australia Pacific Security College, Canberra. https://pacificsecurity.net/can-oceanic-diplomacy-solve-the-pacifics-maritime-disputes/
- Naupa, Anna. 2022. "Sealed with kava and betel nut: Lessons in Oceanic Diplomacy from the Mota Lava Treaty." InBrief Series. ANU Department of Pacific Affairs, Canberra.
- Naupa, Anna. 2021. "Our language, our land and future – Lessons learned from the Erromangan Cultural Association's promotion of the vernacular in contemporary Vanuatu." In *Papers from the inaugural National University of Vanuatu Symposium on Education, Culture and Identity, 5-7 April 2021,* Port Vila, Vanuatu.
- Naupa, Anna, Sovick, Mere, Olul-Hassen Rebecca, and Ann Howarth. 2021. 'From little things, big things grow: the power of story-telling as part of Vanuatu's independence story.' In *Papers from the inaugural National University of Vanuatu Symposium on Education, Culture and Identity, 5-7 April 2021,* Port Vila, Vanuatu.
- Naupa, Anna. September 2021. "Safeguarding Pacific Island seas starts with indigenous knowledge." Lowy Institute, The Interpreter. https://www.lowyinstitute.org/the-interpreter/safeguarding-pacific-island-seas-starts-indigenous-knowledge
- Naupa Anna, and Derek Brien. May 2018. "Fostering peaceful sustainable development in the Pacific under the 2030 Agenda." UNESCAP Working Paper Series Macroeconomic Policy and Financing for Development Division. https://www.academia.edu/39807785/Working_Paper_Series_Macroeconomic_Policy_and_Financing_for_Development_Division_FOSTERING_PEACEFUL_SUSTAINABLE_DEVELOPMENT_IN_THE_PACIFIC_UNDER_THE_2030_AGENDA
- Jolly, Margaret, Lee, Helen Lepani, Katherine, Rooney, Michelle and Anna Naupa. September 2015. *Falling through the net? Gender and Social Protection in the Pacific.* UN Women Discussion Paper no. 6.
- https://www.academia.edu/14860383/Jolly_M._et._al._Falling_through_the_net_Gender_and_Social_Protection_in_the_Pacific
- Naupa, Anna and Simo, Joel. 2008. 'Hu I kakae long basket? Matrilineal Land Tenure in Vanuatu, Case studies of Raga and Mele Village.' *Land and Women: The Matrilineal Factor.* Suva, Fiji: Pacific Islands Forum Secretariat.

Curriculum Vitae **Christopher Hugh Lewis BALLARD**

Work Address	School of Culture, History and Language, College of Asia and the Pacific, The Australian National University, Canberra, ACT 2601, Australia
E-mail	chris.ballard@anu.edu.au
Web pages	https://researchers.anu.edu.au/researchers/ballard-chl https://anu-au.academia.edu/ChrisBallard https://www.researchgate.net/profile/Chris_Ballard3

Research Interests

Indigenous historicity and temporality; disaster, emergency and climate change; cultural heritage and World Heritage; resource ownership and land rights; narrative and memory; violence and colonial encounters; racism and history of "racial science"; social and agricultural transformations; theory and practice in the disciplines of history, anthropology, archaeology and geography; Taiwan, eastern Indonesia, Papua New Guinea, Vanuatu, Solomon Islands, New Caledonia, French Polynesia, Melanesia, Pacific.

Qualifications

1995	Ph.D., Research School of Pacific and Asian Studies, Australian National University. • Thesis title: 'The Death of a Great Land: ritual, history and subsistence revolution in the Southern Highlands of Papua New Guinea.' Available on-line at http://hdl.handle.net/1885/7510
1985	BA (Hons) in Prehistory, Australian National University

Employment

2016-18	Professor, University of French Polynesia, Pape'ete, French Polynesia (1/8/16-31/7/18)
2016	Associate Dean for HDR (Higher Degree by Research) Students, College of Asia and the Pacific, ANU (1/3/2016 – 1/8/2016)
2013-15	Director (Research) and Deputy Director, School of Culture, History and Language, College of Asia and the Pacific, ANU
2010+	Senior Fellow / Associate Professor, School of Culture, History and Language, College of Asia and the Pacific, Australian National University.
2001-2010	Fellow, Division of Pacific and Asian History, Research School of Pacific and Asian Studies, Australian National University.
1995-2000	Research Fellow, Resource Management in Asia Pacific Project, Research School of Pacific and Asian Studies, Australian National University.

Select International Committees

2023-	Member of the Advisory Body and Representative of the Advisory Body on the Board, International Research Centre for Intangible Cultural Heritage in the Asia-Pacific Region (IRCI), Japan.
2023	Member, Panel of Experts of the Collaborative Research Action (CRA) for the European Commission's Joint Project Initiative on Climate and Cultural Heritage.
2018-	Facilitator, Global Intangible Heritage Facilitator Network, UNESCO https://ich.unesco.org/en/facilitator
2018-	Member, Conseil scientifique (Scientific Council), Maison des Sciences de l'Homme – Pacifique (MSH-P) http://www.msh-reseau.fr/msh/maison-des-sciences-de-lhomme-du-pacifique-polynesie-francaise
2013-2019	Member, Conseil scientifique (Scientific Council), Labex CORAIL http://www.labex-corail.fr/

Student Supervision

As of May 2023, I have been Chair for 22 PhD candidates and Co-supervisor for 32 other PhD candidates; supervisor for 8 Masters / MPhil Students; and Convenor for the Honours in Asia and the Pacific program from 2019 to the present.

Select Funded Research Projects and Consultancies

2022-24	Capacity building for safeguarding intangible cultural heritage in emergencies in Small Island Developing States in the Pacific and the Caribbean, UNESCO, Apia, Samoa
2022-23	Concept Note on Climate Change and Intangible Cultural Heritage, Living Heritage Entity, UNESCO, Paris
2021	Facilitator, UNESCO Training Workshop on Intangible Cultural Heritage in Emergencies, Philippines
2020-24	International Assistance for a Geotechnical Study and Risk Assessment of Fels Cave, Chief Roi Mata's Domain, Vanuatu. World Heritage Centre, UNESCO, Paris.
2020	*Deep Histories of Oceania*. Australian-French Association for Research and Innovation (AFRAN) Initiative Grant.
2020-22	Chief Investigator, ARC Discovery Grant, *Kuwae 1452 AD: multi-disciplinary perspectives on a Pacific super-eruption.* DP200102320 (with CI Stuart Bedford).
2020	Training Materials on ICH and Disasters. Report for UNESCO, Paris.
2019	Operational Principles and Modalities for Safeguarding Intangible Cultural Heritage in Emergencies. Report for UNESCO, Paris.
2017	Natural Disasters and Intangible Cultural Heritage in the Pacific: a review. Report for UNESCO, Paris.
2015	Emergency Assessment of the Impacts of Cyclone Pam on the Chief Roi Mata's Domain World Heritage Site, Vanuatu. Report for UNESCO, Paris.
2011-15	Chief Investigator, ARC Discovery Grant, *The Original Field Anthropologist: Nikolai Miklouho-Maclay in Oceania, 1871-1883.* DP110104578 (with CI Jude Philp).
2010-11	Chief Investigator, *The Chiefly Oral Traditions of Central Vanuatu*. Firebird Foundation.

2010-12 Strengthening World Heritage and Protected Area Governance in Vanuatu, AusAID Pacific Public Sector Linkage Program (PPSLP) Grant (with Meredith Wilson and Stepwise Heritage and Tourism Pty Ltd)

2006-09 Chief Investigator, ARC Discovery Grant, *European Naturalists and the Constitution of Human Difference in Oceania: crosscultural encounters and the science of race, 1768-1888.* DP0665356 (with CI Bronwen Douglas).

2005-06 UNESCO World Heritage Preparation Assistance Grant, Chief Roi Mata's Domain, Vanuatu.

Field Experience (ca. 91 months in Indonesia, Papua New Guinea, Vanuatu and the Pacific)

Select Publications: Monographs, Edited Books and Journal Special Issues (n = 16)

1. 2023. Material Encounters. Eds. Bronwen Douglas and Chris Ballard. London & New York: Routledge.
2. 2020. Confronting the Naturalness of Disaster in the Pacific. Special Issue of Anthropological Forum 30(1/2) [Chris Ballard, Maëlle Calandra and Siobhan McDonnell (eds)]
3. 2008. Foreign Bodies: Oceania and the science of race, 1750-1940. Edited by Bronwen Douglas and Chris Ballard. Canberra: ANU E Press.
4. 2005. The Sweet Potato in Oceania: a reappraisal. Edited by Chris Ballard, Paula Brown, R. Michael Bourke and Tracy Harwood. Ethnology Monograph 19 and Oceania Monograph 56. Sydney and Pittsburgh: University of Pittsburgh and University of Sydney.
5. 2001. Agricultural Transformation and Intensification. Special Issue of Asia-Pacific Viewpoint, August/December 2001, 42(2/3). Guest Editors: Bryant Allen and Chris Ballard with Elanna Lowes.

Select Publications: Articles in Refereed Journals (n = 56)

1. 2023. Evidence at Source for the Mid-Fifteenth Century Eruption of Kuwae, Vanuatu. Journal of Applied Volcanology 12: 12. [Chris Ballard, Stuart Bedford, Shane J. Cronin and Sönke Stern] https://doi.org/10.1186/s13617-023-00138-1 / https://rdcu.be/dtyaE
2. 2023. Stones in motion: monuments and chiefly title histories in Central Vanuatu. Archaeology in Oceania 58(1): 20-32. https://doi.org/10.1002/arco.5283
3. 2023. Agarabi pottery production in the Eastern Highlands of Papua New Guinea. Journal of Anthropological Archaeology 69: 101479 https://doi.org/10.1016/j.jaa.2022.101479 [Kristine Hardy, Chris Ballard, Mathieu Leclerc]
4. 2023. Frontier archaeology: excavating Huli colonisation of the Lower Tagali Valley, Papua New Guinea. Cambridge Archaeological Journal 33(3): 391-411. https://doi.org/10.1017/S095977432200035X [Jeremy Ash, Tim Denham, Chris Ballard, John Muke, Joe Crouch]
5. 2022. A night on the island: Jean Guiart and Roi Mata on Lelepa. Journal de la Société des Océanistes 154(2022-1): 93-104. https://doi.org/10.4000/jso.13718
6. 2021. Cyclone Aila and post-disaster housing assistance in Bangladesh. Sustainability 13, 8604. https://doi.org/10.3390/su13158604 [Sebak Saha and Chris Ballard]
7. 2021. Human impacts and Anthropocene environmental change at Lake Kutubu, a

Ramsar wetland in Papua New Guinea. PNAS 118(40): https://doi.org/10.1073/pnas.2022216118 [Kelsie Long, Larissa Schneider, Simon Connor, Niamh Shulmeister, Janet Finn, Georgia Roberts, Atun Zawadiszki, T. Gabriel Enge, John P. Smol, Chris Ballard, Simon G. Haberle]

8. 2020. Confronting the naturalness of disaster in the Pacific. In Chris Ballard, Maëlle Calandra and Siobhan McDonnell (eds) Confronting the Naturalness of Disaster in the Pacific. Special Issue of Anthropological Forum 30(1/2): 1-14. https://doi.org/10.1080/00664677.2020.1729698 [Chris Ballard, Siobhan McDonnell and Maëlle Calandra]
9. 2020 Disaster as opportunity? Cyclone Pam and the transmission of cultural heritage. In Chris Ballard, Maëlle Calandra and Siobhan McDonnell (eds) Confronting the Naturalness of Disaster in the Pacific. Special Issue of Anthropological Forum 30(1/2): 90-107. https://doi.org/10.1080/00664677.2019.1647825 [Chris Ballard, Meredith Wilson, Yoko Nojima, Richard Matanik and Richard Shing]
10. 2020 The lizard in the volcano: narratives of the Kuwae eruption. In Eveline Dürr, Philipp Schorch and Sina Emde (eds) Experiencing Pacific Environments: Pasts, Presents, Futures. Special Issue of The Contemporary Pacific 32(1): 98-123. https://doi.org/ 10.1353/cp.2020.0005

Select Publications: Book Chapters (n = 50)

1. 2024. Monumental underlands: Indigenous archaeology in Melanesia. In Oscar Moro Abadía, Kellie Pollard, Ora Marek-Martinez, Craig Cipolla, Sara L. Gonzalez (eds) The End of Epistemology in Archaeology? Indigenous Knowledges, Ontologies and the Crisis of Traditional Philosophies of Knowledge in Archaeology. [Chris Urwin and Chris Ballard]
2. 2023. Community management of cultural tourism at a World Heritage site: intersections of the 'local' and 'global' at Chief Roi Mata's Domain, Vanuatu. In Marcus L. Stephenson (ed.) Routledge Handbook of Tourism and Small Island States in the Pacific. London: Routledge, pp. 205-218. [Adam M. Trau and Chris Ballard]
3. 2023. The meaning of ditches: an ethnography of field systems and other networks in a New Guinea landscape. In Ian J. McNiven and Bruno David (eds) The Oxford Handbook of the Archaeology of Indigenous Australia and New Guinea. Oxford: Oxford University Press, pp. 449-472.
4. 2022. Transmission's end? Cataclysm and chronology in Indigenous oral tradition. In Ann McGrath and Lynette Russell (eds) The Routledge Companion to Global Indigenous History. London: Routledge, pp. 571-602.
5. 2019. The perfect island. In Shameem Black, Matt Tomlinson and Jack Fenner (eds) Perfection. paradigm_shift 06. Canberra: College of Asia and the Pacific, pp. 12-17. [Chris Ballard and Nicola van Dijk]
6. 2018. Pacific futurities. In Warwick Anderson, Miranda Johnson and Barbara Brookes (eds) Pacific Futures: Past and Present. Honolulu: University of Hawai'i Press, pp. 280-293.

Select Publications: Media, Reports and Other Publications

1. 2023. Climate emergency: roles and risks for intangible cultural heritage. ICH Courier, 56, September 2023, pp. 14-17.

2. 2022. Cultural Heritage and Climate Change: New challenges and perspectives for research. White Paper, JPI Cultural Heritage and JPI Climate. https://www.heritageresearch-hub.eu/white-paper-cultural-heritage-and-climate-change-new-challenges-and-perspectives-for-research/ [Contributing author]
3. 2022. ICOMOS & ICSM CHC White Paper II: Impacts, vulnerability, and understanding risks of climate change for culture and heritage. [Simpson, N.P., Orr, S.A., Sabour, S., Clarke, J., Ishizawa, M., Feener, M., Ballard, C., Mascarenhas, P.V., Pinho, P., Bosson, J.B., Morrison, T., Zvobogo, L.] Charenton-le-Pont & Paris, France: ICOMOS & ICSM CHC. ISBN: 978-2-918086-72-7, https://openarchive.icomos.org/id/eprint/2718/
4. 2021. "Natural" Disasters and Intangible Cultural Heritage. ICH Courier, 48, September 2021. https://ichcourier.unesco-ichcap.org/natural-disasters-and-intangible-cultural-heritage/
5. 2017. Safeguarding and Mobilising Intangible Cultural Heritage in the Context of Natural Hazards. A Desk Study for the Intangible Heritage Section, UNESCO, Paris. https://ich.unesco.org/doc/src/38266-EN.pdf [Meredith Wilson and Chris Ballard]
6. 2015 Community responses to climate change in Vanuatu. World Heritage October 2015, 77: 14-21. [Chris Ballard, Meredith Wilson, Richard Matanik, Brigitte Laboukly]
7. 2015 Port Vila: disaster capital of the world. Canberra Times, 21 March 2015. Available at: http://www.canberratimes.com.au/comment/port-vila-disaster-capital-of-the-world-20150320-1m3p32.htm
8. 2015 Planning ahead to reduce feast and famine after natural disasters. The Conversation 19 June 2015. [Mike Bourke and Chris Ballard] http://theconversation.com/planning-ahead-to-reduce-feast-and-famine-after-natural-disasters-42184
9. 2013 Guide to Chief Roi Mata's Domain World Heritage Site, Vanuatu. Chief Roi Mata's Domain Publication Series 1. Port Vila: Vanuatu World Heritage Advisory Group and Lelema World Heritage Committee. [Meredith Wilson and Chris Ballard]

Unpublished Consultant Reports (n = 78)

Attribution of observed global warming to countries

Independent expert report

By Corinne Le Quéré CBE FRS*
Royal Society Research Professor of Climate Change Science, University of East Anglia (UEA), UK.
8 December 2023

I have been asked by counsel for the Republic of Vanuatu to provide an independent expert opinion on the attribution of observed global warming to countries. I am a Royal Society Research Professor of Climate Change Science at the University of East Anglia. I conduct research on the interactions between climate change and the carbon cycle. My research has contributed to understanding how climate change and variability affects the land and ocean carbon sinks, and to understanding the drivers of CO_2 emissions. I was an author of the 3rd, 4th and 5th assessment reports of the Intergovernmental Panel on Climate Change (IPCC), which was awarded the Nobel Peace Prize in 2007. I Chair France's High Council on Climate and I am a member of the UK Climate Change Committee. These are independent expert councils that provide evidence-based advice to inform governments response to climate change. Previously, I directed the Tyndall Centre for Climate Change Research during 2011-2018. I initiated the annual publication of the 'Global Carbon Budget' as part of the Global Carbon Project and directed the update for 13 years. I received multiple awards for my research, most recently the Dr A.H. Heineken Prize for Environmental Sciences 2020. I am a Clarivate Highly Cited Researcher since 2018. I was elected fellow of the Royal Society in 2016. I hold a B.Sc. in physics from University of Montréal (1990), an M.S. in Atmospheric and Oceanic Sciences from McGill University (1992), and a Ph.D. in oceanography at University Pierre et Marie Curie (now part of Sorbonne University, 1999). Further information on my profile is available at: https://research-portal.uea.ac.uk/en/persons/corinne-le-quere

* Acknowledgements: This independent report is largely based on the peer-reviewed publication "National contributions to climate change due to historical emissions of carbon dioxide, methane, and nitrous oxide since 1850" published in *Scientific Data*, and on comprehensive evidence as published by the 6th Assessment report of the Intergovernmental Panel on Climate Change (IPCC). Data have been updated to 2022 where possible. I have been assisted in writing this report by Dr. Matthew W. Jones from the University of East Anglia, and by the Global Carbon Budget team for the updates of the CO_2 emissions data and relevant analysis. I thank J. Gütschow and the PRIMAP-hist team for providing 2022 updates of methane and N_2O emissions.

Summary

1. **It is now well established that climate change is overwhelmingly caused by the emissions of greenhouse gases (GHG) from human activities.** The main drivers of GHG emissions have been the use of fossil fuels, primarily for energy, and to a lesser extent the use of land, primarily from deforestation but also from agriculture. Future GHG emissions from human activities, regardless of their origin, will cause continued rise in global warming and associated climate change, with further impacts and risks.

2. **The level of global warming scales with cumulative emissions of carbon dioxide (CO_2) and with current emissions of methane.** Hence CO_2 emissions need to decrease to "Net Zero" to stabilise the Earth's climate, alongside rapid decreases in methane and other GHG. According to the 6th Assessment report of the Intergovernmental Panel on Climate Change (IPCC), GHG reductions of -43% in 2030 compared to their 2019 levels are needed to limit climate change to 1.5°C above pre-industrial levels, and -21% to limit climate change to well below 2°C above pre-industrial levels in the same time horizon, with Net Zero CO_2 achieved around 2050 and 2070, respectively.

3. **Despite the urgent need to decrease global GHG emissions, emissions have continued to rise in the past decade.** CO_2 emissions, the dominant source of GHG emissions, have continued to rise in the past decade (2013-2022) by 0.2% per year on average. Methane emissions are rising steeply, by 0.9% per year on average over the past decade, but with large uncertainties. All gases combined, global GHG emissions have continued to rise over the past decade, by 0.6% per year on average. These trends are not aligned with limiting global warming well below 2°C or to 1.5°C above pre-industrial levels, which require rapid decreases in emissions of CO_2 and methane in the short term.

4. **Actions to tackle climate change can be effective, but so far, they have not been deep or widespread enough to reverse global GHG emissions.** Global GHG emissions have grown more slowly in the past decade compared to the decade before, although they are still rising. Notably, 26 countries have succeeded in significantly decreasing their CO_2 emissions from using fossil fuels in the past decade while growing their economies. These trends have been attributed to climate and energy policies that support reduced energy use and the substitution of fossil fuel by renewable energy sources. Despite this progress, the actions in place are insufficient and global GHG emissions continue to rise. As a result of continued GHG emissions, global warming has steadily grown each decade.

5. **Cumulative CO_2 emissions and annual methane emissions have clear origin in historical use of fossil fuels and land by countries.** The largest contributors to global cumulative emissions of CO_2 during 1851-2022 were the USA (20.5%), the EU27 (11.7%), China (11.7%), Russia (7.0%); and Brazil (4.6%). The largest contributors to annual methane emissions averaged over the past decade (2013-2022) were China (16.6%), India (8.7%), the USA (6.7%), Brazil (5.8%), and the EU27 (5.4%).

6. **Global warming can be attributed to countries based on their historical emissions of different GHG.** The top 10 contributors to global warming from their historical emissions of GHG during 1851-2022 are the USA (responsible for 17.0% of global warming due to GHG emissions; 0.28°C), China (12.5%; 0.21°C), the EU27 (10.3%; 0.17°C, including Germany 2.9% and France 1.3%), Russia (6.3%; 0.11°C), Brazil (4.9%; 0.081°C), India (4.7%; 0.078°C), Indonesia (3.7%; 0.061°C), the United Kingdom (2.4%; 0.040°C), Canada (2.1%; 0.035°C), and Japan (2.1%; 0.035°C). The 42 industrialised countries of the UNFCCC Annex I list in aggregate account for 45% (0.74°C) of global warming due to GHG emissions during 1851-2022, while the 47 Least Developed Countries (LDCs) in aggregate contributed 6% (0.10°C). The top seven emitters are also the largest contributors to global warming from emissions of GHG during the shorter 1990-2022, with China the largest contributor in that recent period.

7. **For most countries, GHG emissions from fossil fuels are the source of most of their contributions to global warming.** Globally, the use of fossil fuels was responsible for 65% of global warming caused by GHG emissions from human activities during 1851-2022, and 80% for the shorter 1990-2022 period. The use of land was responsible for the remainder, with 35% and 20% contributions to global warming caused by GHG from human activities during 1851-2022 and 1990-2022, respectively. Notable exceptions are Brazil and Indonesia in the top emitters mentioned above, for whom their GHG emissions from land use contribute more to global warming than their emissions from fossil fuel use.

8. **GHG emissions are based on self-reported data by each State with sufficient confidence level to establish the country's contributions to climate change.** Reporting of GHG emissions, and the underpinning energy and land use data, is overseen by the UN, which also verifies the respect of reporting procedures, and increasingly the country's plans and actions. GHG emissions are also produced by several established international institutions. Emissions of CO_2 from the use of fossil fuels, the largest contributor to global warming in most countries, benefit from the most reliable data. GHG emissions from the use of land involve biological processes that have larger uncertainties,

but reporting methodologies are updated regularly with the latest data and understanding. Updates of GHG emissions take place regularly and are closely monitored by the scientific community.

The scientific basis for climate change

1. **It is now well established that climate change is overwhelmingly caused by the emissions of greenhouse gases (GHG) from human activities.** The science of the Earth's climate system is well understood. The greenhouse effect traps heat and warms the Earth's climate, a phenomenon known as global warming. Emissions of GHG from human activities increase the content of heat-trapping gases in the atmosphere, heating the climate system. Warming is observed consistently around the planet, on land and in the oceans, with widespread snow and ice melting, and coherent changes in rainfall patterns, vegetation, and ocean properties. The observed rate of global warming since 1970 has exceeded warming from natural climate variability for at least the past two thousand years where detailed observations exist. The contributions of natural causes to recent warming have been assessed thoroughly by many (30 in the latest IPCC) independent climate centres from around the globe. Natural causes, including the contributions from variations in the sun and from the effects of volcanic eruptions, have contributed practically nothing to the observed warming of the planet since the period 1850-1900 (commonly used to refer to the "pre-industrial" period). Evidence that the warming is caused overwhelmingly by the rise in GHG levels in the atmosphere from human activities has consistently strengthened in all six assessment reports published by the IPCC since 1990.

2. **The increase of GHG in the atmosphere is primarily caused by fossil fuel uses, and by deforestation and other uses of land.** Fossil fuel use is the main source of emissions of carbon dioxide (CO_2), which accounts for 70% of total GHG emissions from human activities today.[1] Activities that use fossil fuels include producing electricity and heat for power, industry and buildings, and transportation. CO_2 emissions are also produced by some industries through chemical processes (for example producing cement). Land use, and in particular deforestation, is another important source of CO_2 emissions. Fossil fuel and land use both contribute significantly to methane emissions (CH_4), which accounts for 18% of total GHG emissions from human activities today. Methane emissions in the land sector are predominantly from livestock rearing, and from landfills and waste. Emissions of nitrous oxide (N_2O) account for 6% of total GHG emissions and are primarily from nitrogen additions for fertilisation in agriculture. Emissions of F-gases account for 6% of total GHG emissions and are primarily due to products used in refrigeration.

3. **Five sectors are responsible for global GHG emissions: energy supply, industry, land use (including agriculture and forestry), transport, and buildings.** Their relative importance depends on whether one considers where emissions are produced or where

they are used (Table 1). Levers for reducing emissions can tackle both the production and the end uses. For example, replacing coal or gas power stations by renewable energy generation is a lever that tackles production, while improving energy efficiency in industry and buildings is a lever that tackles end uses.

Table 1: Sectors responsible for global GHG emissions.

Sector	Percent of global GHG emissions	
	By production	By use
Energy supply	34	12
Industry	24	34
Agriculture, forestry and other land use	22	22
Transport	15	16
Buildings	6	15

Source: IPCC WGIII Summary for policymakers (2022) based on 2019 values

4. **The level of global warming scales primarily with the cumulative emissions of CO_2 over the past, present, and future.** Much of the emitted CO_2 remains in the atmosphere for a long time (a century for 30-50% of the CO_2 emissions, and longer than one thousand years for 15-40% of the CO_2 emissions)[2]. Thus, a large fraction of global warming from CO_2 emissions is irreversible on multi-century time scales unless CO_2 is actively removed from the atmosphere. Because of the long lifetime of CO_2, the level of global warming today is proportional to the cumulative emissions of CO_2 from past and present emissions, regardless of when or where they were emitted. Likewise, additional global warming this century and beyond will depend on the total amount of CO_2 emissions that will be emitted to the atmosphere by human activities between now and 2100 and beyond, regardless of when it will be emitted. Stopping further CO_2 emissions will stop further global warming, and therefore limit risks associated with climate change, but it will not reverse global warming to date. N_2O and F-gases have a long lifetime like CO_2 and therefore warming from these gases is also persistent over centuries and beyond, although their contribution to global warming is much smaller than that of CO_2.

5. **The level of global warming is also influenced by annual methane emissions.** In contrast to CO_2 emissions, methane emissions remain in the atmosphere only around 12 years. This means that if methane emissions were to decrease, the associated global warming would decrease within a few years. Hence the level of global warming caused by methane emissions is related to annual emissions of this gas, rather than to the cumulative emissions as in the case of CO_2. Global warming from methane emissions is thus reversible if methane emissions cease. This property makes the reduction of methane emissions an attractive lever to reduce the level of global warming, although

reductions in methane emissions do not lead by themselves to the stabilisation of world temperatures, which are dependent on cumulative emissions of CO_2 and other long-lived GHG.

6. **Global CO_2 emissions need to reach "Net Zero" to limit further global warming, alongside decreases in total GHG emissions.** Stabilising the climate requires that emissions from CO_2 become Net Zero. This means that CO_2 emissions need to decrease as much as possible, and any residual emissions that cannot be entirely stopped need to be compensated by actively removing CO_2 from the atmosphere (called carbon dioxide "removals"; CDRs). Removals can be done by carefully managing land, for example to achieve more reforestation or afforestation (planting new forests) than deforestation. Additional warming can also be limited by reducing the level of annual methane emissions. Emissions of N_2O and F-gases, which have a long lifetime, also need to be brought down to zero or compensated by removals.

7. **Achieving Net Zero CO_2 cannot rely mainly or even substantially on the deployment of removals based on technology, because of unproven scalability, energy penalties, and costs.** In addition to land-based removals, removals can also, in small quantities, be achieved with technologies based on Carbon Capture and Storage (CCS), but the scalability of technology-based removals is unproven. There are mainly two types of removals using CCS: Bio-Energy with CCS (BECCS) and Direct Air capture with CCS (DACCS). BECCS competes with other uses of land, in particular food production, and therefore its expansion can only be limited. DACCS is particularly energy-intensive and practically inexistent today, and therefore cannot be a substantial solution by mid-century. The use of CCS by itself can help reduce the emissions from some economic sectors (industry and energy in particular), but CCS requires additional energy and does not capture all of the CO_2 emitted, and therefore it cannot, by itself, bring emissions down to zero. The potential for technology-based removals is further limited by the risks of failures or leakages, by the high costs associated with the development and use of these technologies, and by the lack of a monitoring framework and suitable governance. Therefore, achieving Net Zero cannot rely mainly or even substantially on the deployment of such technologies.

8. **Rapid, deep, and widespread cuts in global GHG emissions are needed to limit global warming to well below 2°C above pre-industrial levels and as close as possible to 1.5°C, the aim of the Paris Agreement.** According to the IPCC's 6th Assessment report, limiting climate change to 1.5°C above pre-industrial levels would require a reduction of total GHG by -43% in 2030 compared to their 2019 levels, while

limiting climate change well below 2°C requires a reduction of -21% in the same time horizon (Table 2). Emissions scenarios that limit global warming "well below 2°C" have a peak global warming of 1.7°C (median value across scenarios) and a 67% probability of limiting global warming to 2°C. The emissions would need to continue to decrease afterwards, until CO_2 emissions reach Net Zero around 2050 (for 1.5°C) and around 2070 (for well below 2°C). Net Zero total GHG would also need to be achieved around 2085 if global warming is to be kept to 1.5°C above pre-industrial levels. Note that additional removals, beyond those needed to limit further global warming, could work to reduce the level of warming slightly this century. Estimates of plausible reduced warming after an overshoot (i.e. temporary exceedance of a specified global warming level, followed by a decline to or below that level) are typically in the order of 0.1-0.2°C. They are highly uncertain, likely costly, and could incur additional risks.

9. **Considering implemented climate policies only (not including implementation of Nationally-Determined Contributions (NDCs) under the Paris Agreement that are not yet in law) warming levels of around 3°C could be reached at the end of this century according to the extensive analysis of the IPCC 6th Assessment report[3].** Considering also current NDCs for 2030, including conditional contributions, would still lead to global warming exceeding the "well below 2°C" trajectory (Figure 1). The UNEP Emissions Gap Report of 2023[4] shows that even if NDCs were fully implemented, associated policies would lead to warming of 2.5°C to 2.9°C. The UNEP Production Gap Report of 2023[5] further shows that the assumption of full implementation is highly questionable, given the inconsistency between NDCs and government plans and projection pathways, which would lead to global production levels of 460%, 29% and 82% higher for coal, oil and gas, respectively, than production levels consistent with limiting warming to 1.5°C above pre-industrial levels. Thus, there is a need to strengthen both existing policies and actions, and existing commitments in the short and long term in order to limit the worse impacts of climate change.

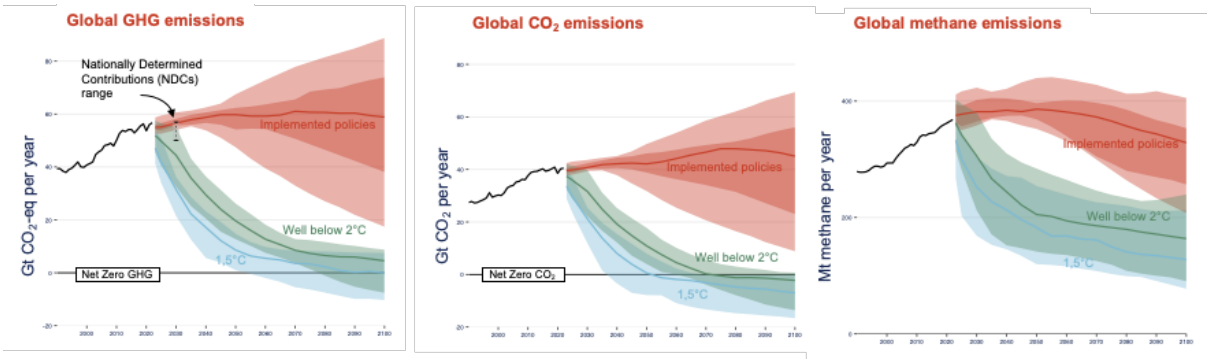
Table 2: Timelines for change in CO_2 and GHG emissions corresponding to current policies and needed for limiting global warming to well below 2°C and as close as possible to 1.5°C.

	Change in global GHG emissions in 2030 (from 2019)	**Year of Net Zero**	
		CO_2	**GHG**
Implemented policies	no change projected		
2°C	–21%	2070	not essential
1.5°C	–43%	2050	2085

Source: IPCC Synthesis Report Summary for policymakers (2023)

10. **Despite the urgent need to decrease global emissions of GHG, they have continued to rise in the past decade, albeit more slowly than in the previous decade.** CO_2 emissions from fossil fuel use, the largest source of GHG emissions, have continued to rise in the past decade (2013-2022) by 0.5% per year on average. This growth is slower than the 2.5% per year growth observed in the decade before this (2003-2012), with the slowdown explained by climate and energy policies worldwide. CO_2 emissions from the use of land show a small but uncertain decline in the past two decades, with a slight decrease in emissions from deforestation and stable or slightly increasing removals from reforestation and afforestation (new forests). Growth in total CO_2 emissions from fossil and land use combined has substantially slowed in the past decade, but CO_2 emissions are still increasing by 0.2% per year on average (see Figure 1). Methane emissions are growing steeply, by 0.9% per year on average over the past decade, but with large uncertainties. With all three gases combined, global GHG emissions have continued to grow over the past decade, by 0.6% per year on average. These trends are not aligned with limiting warming well below 2°C or to 1.5°C above pre-industrial levels, which require emissions of CO_2 and methane to decrease rapidly.

Figure 1: Emissions trajectories consistent with limiting warming to well below 2°C and as close as possible to 1.5°C, compared to trajectories with implemented policies.



Source: Scenarios from the IPCC Synthesis Report Summary for policymakers (2023)[3]; data for 1990 to 2022 are from Jones et al. (2023) based on the Global Carbon Budget 2023[6] and PRIMAP-hist[7].

Global warming from global GHG emissions

11. **Global warming from human activities reached 1.15°C in the past decade (2013-2022) and can be attributed to historical emissions of specific GHGs.** Emissions from CO_2, methane and N_2O generated global warming of 1.16°C, 0.42°C, and 0.08°C above pre-industrial levels, respectively, for a total warming contribution from GHG during 1851-2022 of 1.66°C. The warming from GHG was partly offset by cooling of 0.5°C mainly from pollution by aerosols.[8] Thus, for the contribution to global warming from GHG gases, CO_2,

methane and N_2O accounted for 70%, 25% and 5%, respectively, whereas the contribution from F-gases remained negligible. Emissions from fossil fuel and land uses were responsible for 65% and 35% of global warming caused by human activities during 1851-2022, respectively. For the shorter 1990-2022 and 2013-2022 periods, GHG emissions from fossil fuel use accounted for a larger (and growing) proportion of the additional global warming induced by human activities, with 80% and 83%, respectively.

12. **Global warming caused by human activities has steadily grown each decade in spite of growing knowledge on the impacts and risks of climate change.** GHG emissions from human activities caused 0.1°C of global warming in the 1950s, rising to 0.24°C in the 2010s (Figure 2). Each decade has been substantially warmer than the previous one since 1960 as a result of human-induced global warming from GHG emissions. Individual years can be slightly warmer or cooler from the superposed natural variations that modulate annual temperatures.

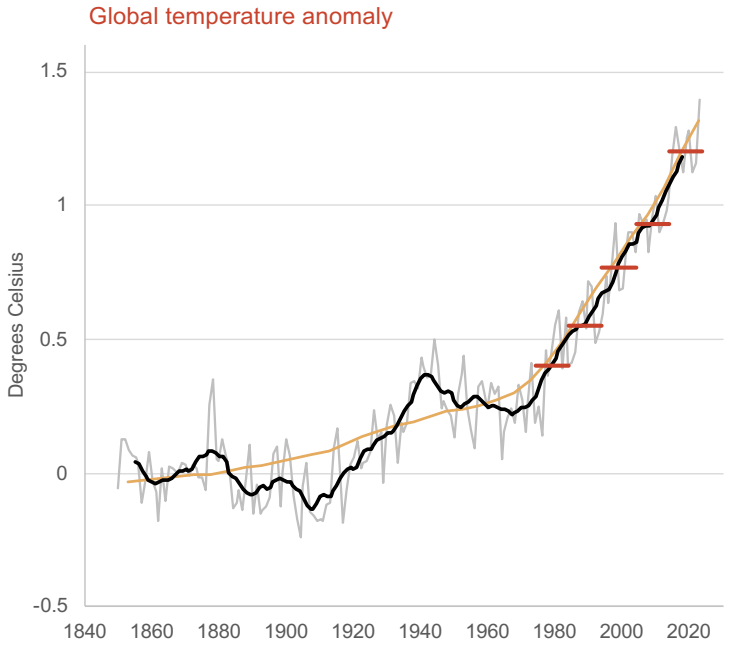


Figure 2: Observed global temperature change from the pre-industrial period (1850-1900), with the contribution of global warming due to human activities (in yellow).

Source: HadCRUT5 for the observations (grey for annual, black for 10-year running average, red for decadal averages); Forster et al (2023) for the human contribution (yellow; average of three estimates)

Reporting of country and regional GHG emissions

13. **GHG emissions are based on self-report by each State with sufficient confidence level to establish the country's contributions to climate change.** Reporting of GHG emissions, and the underpinning energy and land use data, has taken place for decades. For energy-related emissions, reporting is generally a function of reported energy use, multiplied by emissions per unit of energy use at the level of the fuel type and activity. As

for energy, process emissions (e.g. from cement production) are also a function of reported production multiplied by an emissions factor. For land-related emissions, reporting is generally a function of the activity level (e.g. for agriculture and forest management) or of the changes in land-uses (e.g. for deforestation), and can be integrated in time to consider lags associated with decay or regrowth of vegetation and wood products. Emissions from energy-related uses are typically more reliable than emissions from land-related uses because the latter involve biological processes that are more difficult to monitor. Emissions related to products and services produced in another country, so-called “consumption-emissions”, can also be estimated based on economic databases that follow the input and output within countries. Consumption-based methodologies have higher uncertainties than the standard “territorial-based” emissions, but they provide an approximate estimate of the country’s reliance on others. International bunker fuels from international aviation and shipping are not included in countries emissions according to the UNFCCC methodologies, although there are country-based estimates (for example from the International Energy Agency). Bunker fuels represent 3% of global emissions.

14. **The UNFCCC oversees and verifies the application of reporting procedures of GHG emissions by countries, and increasingly their plans and actions.** Until 2023, only reporting for States listed in Annex I of the UNFCCC was required, with verification done at a technical level by the UNFCCC. Annex I countries are industrialised countries and economies in transition (including countries from the Former Soviet Union). Annex I countries submit a GHG inventory every year, and an evaluation of progress every two years. UNFCCC teams visit countries to verify their reporting and governance practices. From 2024, the UNFCCC reporting process will be reinforced to apply to all countries, and to verify that actions are taken place to meet the set objectives. The UNFCCC also details methodological updates based on IPCC reports, including for the relative effects of different GHGs on global warming. The UNFCCC processes are reinforced in countries where independent climate councils exist. Because of the processes and the scrutiny in place, GHG emissions reported by countries are generally the most reliable source of data on GHG emissions and their evolution through time.

15. **GHG emissions by countries are also reported by international institutions, with regular updates.** Several international institutions have developed the capacity to keep track of global, regional, and national emissions inventory. The International Energy Agency reports CO_2 emissions from fossil energy use by all top emitters. Research organisations have developed the capacity to report emissions by country (beyond those

that report to the UNFCCC), building on methodologies developed by the IPCC and country reports for energy and land uses. These include the Global Carbon Budget[6], the Global Methane Budget[9], and the Global N_2O Budget[10] by the Global Carbon Project, the Indicators of Global Climate Change[1] published for the first time in 2023, and PRIMAP-hist[7]. The report here uses the latest available emissions and their contribution to warming estimated consistently with the latest IPCC findings as described in Jones et al (2023)[8], and updated to include emissions data for year 2022[6,7]. CO_2 emissions from the uses of land are based on IPCC methodologies and differ from the country reports to UNFCCC[11] (see methods).

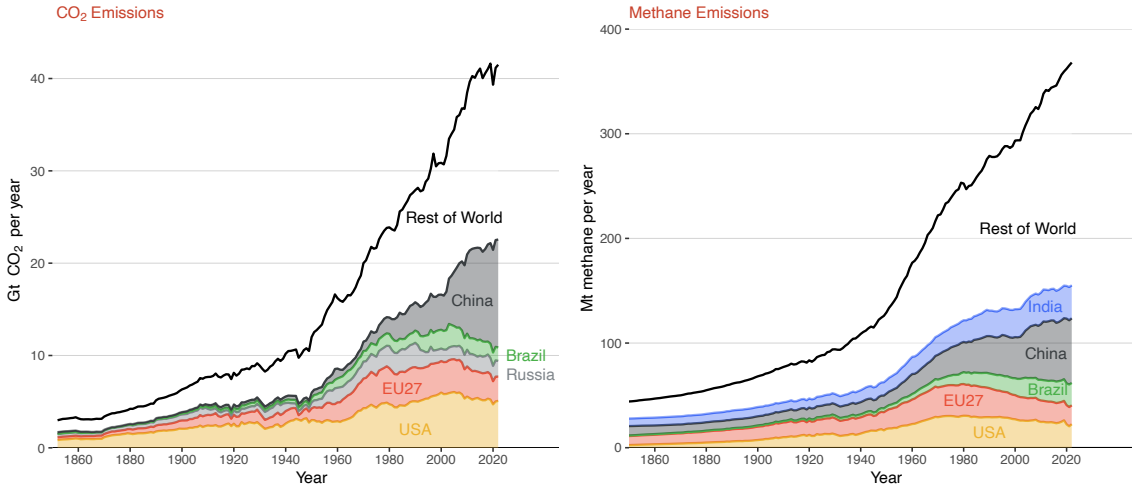
16. **Independent monitoring of countries' GHG emissions with earth observations provides complementary information.** Earth observations of GHG levels or associated indicators, either from surface data (e.g. Mauna Loa station) or from satellite data (e.g. the OCO-2 sensor), provide additional information that help attribute regionally the growth in global GHG levels. Earth observations provide complementary information that indicate more precisely where emissions come from, for example around cities or large industries. Earth observations measure the concentration of GHG in the atmosphere, which result from the combination of emissions from human activities and natural processes. The emissions from human activities can then be inferred, but the uncertainties are higher than emissions estimated using energy and land use data reported by States.

Country and regional GHG emissions and trends

17. **Cumulative CO_2 emissions, the main cause of human-induced climate change, has clear origin in historical use of fossil fuels and land by countries.** The largest contributors to cumulative emissions of CO_2 during 1851-2022 were the USA (20.5%), whose emissions peaked around 2005; the EU27 (11.7%), with emissions decreasing since the early 1980s; China (11.7%), with most of its emissions occurring since 2000; Russia (7.0%); and Brazil (4.6%) (see Figure 3). All 42 industrial countries of the Annex I in aggregate account for 52% of cumulative CO_2 emissions, while all 47 Least Developed Countries (LDCs) in aggregate contributed 4.5%. As a result of the long-term trends in emissions by countries, the patterns have shifted in recent decades. The largest contributors to cumulative emissions of CO_2 during 1990-2022 were China (19.4%), the USA (15.5%), the EU27 (9.3%), Brazil (5.1%), and Russia (4.8%). Globally, land use contributed 31% and fossil fuel use 69% to cumulative CO_2 emissions during 1851-2022. Land use emissions were the dominant source of global CO_2 emissions globally until the 1950s.

18. **Annual methane emissions, the second largest cause of human-induced climate change after cumulative emissions of CO_2, is from current use of fossil fuels and land by countries.** The largest contributors to annual methane emissions averaged over the past decade (2013-2022) were China (16.6%), India (8.7%), the USA (6.7%), Brazil (5.8%), and the EU27 (5.4%). All 42 industrial countries of the Annex I in aggregate account for 22.4% of annual methane emissions, while all 47 Least Developed Countries (LDCs) in aggregate contributed 10.6%.

Figure 3: Annual emissions for CO_2 and methane for the top five emitters for the period 1851-2022.



19. **Annual CO_2 emissions from fossil fuel use have peaked and decreased in 26 countries over the past decade (2013-2022), while their economies grew.** These are: Belgium, Brazil, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong SAR, Israel, Italy, Jamaica, Japan, Luxembourg, the Netherlands, Norway, Portugal, Romania, Slovenia, South Africa, Sweden, Switzerland, the United Kingdom, the USA, and Zimbabwe, as well as the EU27 in aggregate.[6] The decreasing trends in fossil fuel CO_2 emissions have been attributed to climate and energy policies in many of those countries, associated with decreases in energy use and with renewable energy progressively replacing fossil energy.[3] The annual rate of decrease in fossil fuel CO_2 emissions has consistently reached 3-4% per year in the United Kingdom, Denmark, and Finland. In contrast, most countries where emissions did not decrease saw renewable energy use increasing alongside fossil energy use, not replacing it. [12]

20. **Annual CO_2 emissions from fossil fuel use continue to rise or decrease only slowly in many industrialised countries of UNFCCC Annex I**. These include Australia,

Slovakia, Austria, New Zealand and Canada, whose fossil fuel CO_2 emissions decrease in the past decade but not significantly, and Poland, Russia and Hungary, whose emissions continue to rise. Fossil fuel CO_2 emissions also grow strongly in many emerging economies, including in Southeast Asia, including Indonesia, the Philippines, and Viet Nam, the most populous countries.

21. **Growth in annual CO_2 emissions from fossil fuel use has slowed in many emerging economies, but emissions continue to grow.** This includes China, whose emissions grew by 1.8% per year during the past decade compared to 7.9% per year during the decade before this. Likewise for India, emissions grew 3.3% per year in the past decade compared to 6.7% per year during the decade before this.

22. **Annual CO_2 emissions from land use remain high, pushed up by deforestation.** The biggest emitters of CO_2 from land use are Brazil, Indonesia, and the Democratic Republic of the Congo, which together account for 56% of land use CO_2 emissions of the past decade. The trends in country's CO_2 emissions from deforestation are difficult to quantify on an annual basis because of lags in decay and regrowth associated with biological processes. Several countries see a small net sink of CO_2 from land use. This means that their management actions in the land sector lead to more absorption of CO_2 than emissions, which generally occurs in regions where there has been historical abandonment of agriculture followed by reforestation and afforestation. Some of these trends have flattened in the past decade. Those sinks are fragile as they depend on the health of the ecosystems, which are affected by climate change.

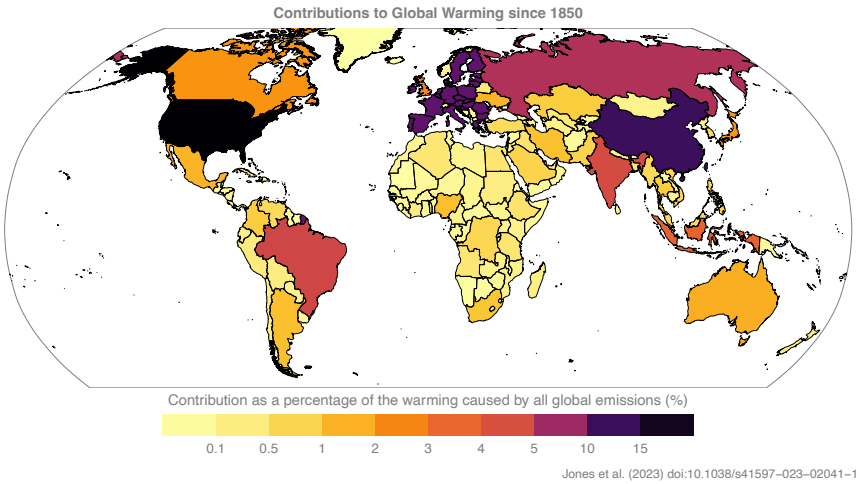
23. **The growth patterns in annual methane emissions tend to follow the growth patterns observed for annual CO_2 emissions in the past decade mentioned above.**

Country and regional contributions to global warming

24. **The warming that occurred so far can be attributed to countries based on their historical emissions of GHG.** Using the emissions of different GHG by country that are available annually since 1850, it is possible to estimate the contribution of each country to observed global warming by considering the different lifetime of specific GHG (CO_2, methane and N_2O), and accounting for the influence of each of these GHG on global temperatures (Figure 4; see Methods). The warming attribution to countries can be done separately for different periods (for example 1851-2022 or 1990-2022) by considering only the country's emissions during these periods. The warming attribution can also be done

for the total warming, for the warming due to fossil fuel and land use emissions separately, and for the warming due to different GHG.

Figure 4: Contributions to global warming caused by GHG emissions from human activities during 1851-2022 per country or region (for the EU27).



25. **The top 10 contributors to global warming from historical emissions of GHG during 1851-2022 are the USA (responsible for 17.0% of the global warming in 2022 due to their historical GHG emissions; 0.28°C), China (12.5%; 0.21°C), the EU27 (10.3%; 0.17°C, including Germany 2.9%, France 1.3%, Poland 1.0% and Italy 0.9%), Russia (6.3%; 0.11°C), Brazil (4.9%; 0.081°C), India (4.7%; 0.078°C), Indonesia (3.7%; 0.061°C), the United Kingdom (2.4%; 0.040°C), Canada (2.1%; 0.035°C), and Japan (2.1%; 0.035°C).** The GHG emissions from these contributors, together with those from Australia (1.5%; 0.025°C), Mexico (1.4%; 0.023°C), Ukraine (1.4%; 0.022°C), Nigeria (1.2%; 0.019°C), Argentina (1.2%; 0.019°C), and Iran (1.1%; 0.019°C), amount to three quarters of the global warming due to GHG emissions during 1851-2022 (Table 3). Of those countries, most of their contributions to global warming originate from fossil fuel sources, except for Brazil, Indonesia, Australia, and Argentina where emissions from land uses, including agriculture and forestry, account for more than half of the attributed global warming. Emissions from bunkers (international shipping and aviation) are also important and are entirely from fossil fuels. All 42 industrial countries of the Annex I in aggregate account for 45% (0.74°C) of global warming due to historical GHG emissions (1.66°C), while all 47 Least Developed Countries (LDCs) in aggregate contributed 6% (0.10°C). Although the exact country contributions may vary a little based on the data sources, especially for emissions related to land use, the dominant patterns are robust.

26. **The same countries figure among the largest contributors to global warming from emissions of GHG during the shorter 1990-2022, with China the largest contributor in that period (see Annex A).** The dominance of emissions from fossil fuels has further strengthened over the recent time period, while CO_2 sinks on managed land by a few countries make a small contribution to reducing the rate of global warming (see Annex A).

Table 3. Largest contributors to global warming from GHG emissions during 1851-2022, with the fraction due to emissions from fossil fuels and from land use.

Rank	Country	Warming contribution (°C)	Percent of global warming	Cumulative percent	Fossil fraction	Land fraction
1	USA	0.282	17.0%	17.0%		
2	China	0.208	12.5%	29.5%		
3	EU27	0.170	10.3%	39.8%		
4	Russia	0.105	6.3%	46.1%		
5	Brazil	0.082	4.9%	51.0%		
6	India	0.078	4.7%	55.7%		
7	Indonesia	0.061	3.7%	59.4%		
	Germany	0.047	2.9%			
8	United Kingdom	0.040	2.4%	61.8%		
9	Canada	0.035	2.1%	63.9%		
10	Japan	0.035	2.1%	66.0%		
11	Australia	0.025	1.5%	67.5%		
12	Mexico	0.023	1.4%	68.9%		
13	Ukraine	0.023	1.4%	70.2%		
	France	0.022	1.3%			
	Bunkers	0.020	1.2%	71.4%		
14	Nigeria	0.019	1.2%	72.6%		
15	Argentina	0.019	1.2%	73.7%		
16	Iran	0.019	1.1%	74.9%		
	Poland	0.017	1.0%			
17	South Africa	0.017	1.0%	75.9%		
18	Kazakhstan	0.014	0.87%	76.8%		
19	Thailand	0.014	0.87%	77.6%		
	Italy	0.014	0.87%			
20	Colombia	0.014	0.87%	78.5%		

Principles and limits to country attribution

27. **The attribution of GHG emissions and associated global warming can be done within set principles and limits.** Available emissions data provide a strong and coherent basis for assessing country's contributions to global warming using known correspondence between emissions and observed warming. Attribution estimates can be done from 1851 or from any year chosen as start year. Emissions reported by the countries themselves are generally the most reliable source of information and will be increasingly scrutinised by the UNFCCC. Improvements in methodology for emissions accounting takes place continuously, and attention is particularly needed to improve the estimates of emissions from land uses which use different conventions from those of the IPCC[11].

28. **The attribution of global warming at the country level should be made on the basis of their GHG emissions, as is done here**, excluding the cooling effect of aerosols and other pollutants which currently masks part of the warming due to GHG. Aerosols and other pollutants should be reduced to improve air and water quality, and to respect national and international laws on pollution, irrespective of climate objectives. Coordinated policies and actions would avoid pernicious incentives and ensure maximum synergies between climate and air quality policies. Methodologies to estimate country contributions to global warming based on GHG emissions are updated regularly to incorporate the latest data and understanding.

Methods and Data

The method used here is described in Jones et al. (2023)[5] and is consistent with the latest finding of the IPCC. The warming from CO_2 emissions is calculated as a product of the transient response to cumulative emissions (TCRE) of CO_2 assessed by the IPCC at 1.65 °C per 1000 Pg C emitted, with a likely range 1.0–2.3 °C per 1000 Pg C. The warming from N_2O is calculated as for CO_2 but after converting N_2O emissions into equivalent-CO_2 emissions using a global warming potential (GWP) over a time horizon of 100 years reported in the IPCC AR6. The warming from methane is calculated based on the conversion of methane emissions to equivalent- CO_2 emissions using GWP* which takes into account the short lifetime of methane compared to CO_2, and then converting to warming using the TCRE. The contribution of F-gases to warming is neglected in this analysis.

Data sources: CO_2 emissions are from the Global Carbon Budget 2023[6]. Fossil CO_2 emissions are based on country reports to the UNFCCC when they exist, or derived largely from UN energy databases when not, extended to 2022 based on energy growth reported by the Energy Institute. Historical data prior to 1990 and UNFCCC reporting are predominantly derived from the Carbon Dioxide Information Analysis Center (CDIAC). Land CO_2 emissions are based on three bookkeeping method that keep track of reported land-use change and activities, mainly with data from the FAO extrapolated to 2022. These will differ from emissions reported by countries because of differences in scope and in data sources[11]. Methane and N_2O emissions are from the PRIMAP-hist database, which prioritises data reported by countries to the UNFCCC with a preliminary assessment for year 2022.

References

1. Forster, P. M. *et al.* Indicators of Global Climate Change 2022: annual update of large-scale indicators of the state of the climate system and human influence. *Earth Syst. Sci. Data* **15**, 2295–2327 (2023). https://doi.org/10.5194/essd-15-2295-2023
2. Ciais, P. *et al.* Chapter 6: Carbon and Other Biogeochemical Cycles. in *Climate Change 2013 The Physical Science Basis* (eds. Stocker, T., Qin, D. & Platner, G.-K.) (Cambridge University Press, 2013).
3. Calvin, K. *et al. IPCC, 2023: Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC,*

Geneva, Switzerland. https://www.ipcc.ch/report/ar6/syr/ (2023) doi:10.59327/IPCC/AR6-9789291691647.

4. United Nations Environment Programme. *Emissions Gap Report 2023: Broken Record – Temperatures hit new highs, yet world fails to cut emissions (again)*. (United Nations Environment Programme, 2023). doi:10.59117/20.500.11822/43922.
5. Stockholm Environment Institute, Climate Analytics, E3G, International Institute for Sustainable Development, & UN Environment Programme. *The Production Gap: Phasing down or phasing up? Top fossil fuel producers plan even more extraction despite climate promises*. https://www.sei.org/publications/production-gap-report-2023/ (2023) doi:10.51414/sei2023.050.
6. Friedlingstein, P. *et al.* Global Carbon Budget 2023. *Earth Syst. Sci. Data* **15**, 5301–5369 (2023). https://doi.org/10.5194/essd-15-5301-2023
7. Gütschow, J. & Pflüger, M. The PRIMAP-hist national historical emissions time series (1750-2021) v2.4.2. (2023) doi:10.5281/ZENODO.7727475.
8. Jones, M. W. *et al.* National contributions to climate change due to historical emissions of carbon dioxide, methane, and nitrous oxide since 1850. *Sci. Data* **10**, 155 (2023). https://doi.org/10.1038/s41597-023-02041-1
9. Saunois, M. *et al.* The Global Methane Budget 2000–2017. *Earth Syst. Sci. Data* **12**, 1561–1623 (2020). https://doi.org/10.5194/essd-12-1561-2020
10. Tian, H. *et al.* A comprehensive quantification of global nitrous oxide sources and sinks. *Nature* **586**, 248–256 (2020). https://doi.org/10.1038/s41586-020-2780-0
11. Gidden, M. J. *et al.* Aligning climate scenarios to emissions inventories shifts global benchmarks. *Nature* **624**, 102–108 (2023). https://doi.org/10.1038/s41586-023-06724-y
12. Le Quéré, C. *et al.* Drivers of declining CO2 emissions in 18 developed economies. *Nat. Clim. Change* **9**, 213–217 (2019). https://rdcu.be/bor0g

Annex A: Largest contributors to global warming from GHG emissions during 1990-2022, with the fraction due to emissions from fossil fuels and from land use

Rank	Country	Warming contribution (℃)	Percent of global warming	Cumulative percent	Fossil fraction	Land fraction
1	China	0.140	20.5%	20.5%		
2	USA	0.080	11.7%	32.2%		
3	EU27	0.043	6.3%	38.5%		
4	Brazil	0.040	5.8%	44.3%		
5	India	0.039	5.7%	50.0%		
6	Indonesia	0.030	4.4%	54.3%		
7	Russia	0.026	3.8%	58.1%		
8	Japan	0.017	2.4%	60.6%		
	Bunkers	0.013	1.9%	62.5%		
9	Canada	0.012	1.8%	64.3%		
10	Iran	0.012	1.7%	66.0%		
11	Mexico	0.012	1.7%	67.7%		
12	Saudi Arabia	0.009	1.4%	69.1%		
	Germany	0.009	1.4%			
13	South Africa	0.008	1.2%	70.3%		
14	Australia	0.008	1.2%	71.4%		
15	South Korea	0.008	1.2%	72.6%		
16	Pakistan	0.008	1.1%	73.7%		
17	Nigeria	0.007	1.1%	74.8%		
18	Democratic Repub	0.007	1.0%	75.8%		
19	Türkiye	0.006	0.9%	76.7%		
20	Malaysia	0.006	0.91%	77.6%		

Annex B: Country contributions to global warming (excel spreadsheet)

INTERNATIONAL HUMAN RIGHTS LAW OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

Expert Report by Professor Martin Scheinin, December 2023

I. THE SUBJECT MATTER AND OUTLINE OF THIS EXPERT REPORT

1. On 29 March 2023 the General Assembly, by resolution A/RES/77/276, requested from the International Court of Justice an Advisory Opinion on 'the obligations of States in respect of climate change'. The General Assembly put to this esteemed Court the following questions:

> *(a)* What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations;
>
> *(b)* What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:
>
> > (i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?
> >
> > (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?

2. This Expert Report, written pursuant to a request by the Republic of Vanuatu, will address both questions (a) and (b). Its starting point will be the notion of 'obligations of States under international law' as it appears in question (a), which is a *de lege lata* question that also concerns pertinent international *human rights law* obligations. Therefore, the framework of international human rights treaties, including the two Covenants of 1966,[1] is central for the analysis that follows below. That said, question (b) is formulated using the past tense ('have caused') and its scope depends on historical facts concerning anthropogenic emissions and resulting harms to the climate system and other parts of the environment that may precede the entry into force of the two Covenants in 1976 or of other human rights treaties. The discussion of both questions (a) and (b) therefore needs to be open to the possibility that States may have breached their international human rights obligations *before* 1976 which would require assessing, under question (a) the content of such obligations as

[1] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3; International *Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

stemming from customary international law, the United Nations Charter,[2] and as codified into the Universal Declaration of Human Rights in 1948.[3] While this report will not engage in a detailed comparison of the substantive content of States' human rights obligations before and after their ratification of the Covenants of 1966, it notes the general overlap and consistency between the catalogues of human rights in the Covenants and in the Universal Declaration and adopts the view that the latter should be understood as a reflection of how the scope of international human rights, as enshrined in customary international law and as referred to in the Charter was understood in 1948.

3. This Expert Report will give attention to the issue of '*particular vulnerability*' mentioned in General Assembly's question (b)(i), the references in both question (a) and question (b)(ii) to '*present and future generations*', and the reference in question (b)(iii) also to '*peoples*'. This report will explore how international human rights law can help in operationalizing, within the framework of legally binding norms of international law, the ideas of particular vulnerability, rights of future generations, and rights of States, peoples and individuals.

4. This Expert Report will proceed as follows: After a brief recapitulation of the qualifications and credentials of the author (section II), a presentation will follow in section III of the general contours of States' obligations under international human rights law in respect of the harmful impacts of anthropogenetic emissions that cause the ongoing global phenomenon, generally known as climate change. Section IV is devoted to a discussion on the 2022 Final Views by the Human Rights Committee in the case of *Daniel Billy et al. (Torres Strait Islanders) v. Australia*, whereafter main section V of this Expert Report will follow, addressing pertinent dimensions of the questions posed by the General Assembly to the Court, through a structured analysis of five distinct but interdependent issues of international human rights law. Finally, the author will present his conclusions (section VI) and a declaration of integrity and impartiality (section VII).

II. QUALIFICATIONS AND CREDENTIALS OF THE EXPERT

5. I have a PhD in law (Helsinki 1991) and have since then worked as a full-time academic scholar, mainly in the field of international human rights law. I have served as full-time professor at the University of Helsinki, Finland (1993-1998), at Åbo Akademi University in Turku, Finland (1998-2008), at the European University Institute in Florence, Italy (2008-2020), and currently at the University of Oxford as British Academy Global Professor (2020-2024).

---

[2] *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

[3] *Universal Declaration of Human Rights*, General Assembly Resolution 217 A(III) of 10 December 1948.

6. A second main strand of my professional career has been related to the practice of international human rights law and, in particular, under human rights treaties with global reach, adopted by the United Nations General Assembly. In 1997-2004 I served as a member of the Human Rights Committee, the treaty body established under the International Covenant on Civil and Political Rights. Parallel to membership of that Committee, I was the Chairperson of the International Law Association's Committee on Human Rights Law and Practice. In 2005-2011 I was the first holder of the mandate of the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, which mandate included review of national counter-terrorism laws and their application, as to their compatibility with international human rights law.

7. During my career, I have served as expert witness in four cases before the Inter-American Court of Human Rights and in one investor-state arbitration case, as co-counsel in a small number of individual cases before the European Court of Human Rights and -- before being in 1996 elected as member of the Human Rights Committee and again from 2015 when ten years had passed since the end of my term on the Committee -- as counsel in individual communications before the Human Rights Committee and other UN human rights treaty bodies. In the case of *Daniel Billy et al. (Torres Strait Islanders) v. Australia*, to be discussed below, I authored an *amicus curiae* brief at the request by the petitioners. In the case of *Ukraine v. Russia* concerning the CSFT and the CERD, currently pending before this esteemed Court, I wrote at the request of Ukraine an Expert Report concerning the relationship between national security and CERD obligations.

III. SUBSTANTIVE HUMAN RIGHTS OBLIGATIONS OF STATES IN RESPECT OF ANTHROPOGENETIC CLIMATE CHANGE

8. As stated in paragraph 2 above, the normative framework provided by the two Covenants of 1966, as complemented by other global and regional human rights treaties, forms a natural basis for addressing, as a question of *de lege lata,* General Assembly's question (a) that pertains to the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations. As of 31 July 2023, the International Covenant on Economic, Social and Cultural Rights has been ratified by 171 States and the International Covenant on Civil and Political Rights by 173 States. This near universal ratification pattern is complemented by a wide range of universal and regional human rights treaties, to the effect that all States in the world have through their voluntary treaty ratifications accepted the catalogue of international human rights as legally binding State obligations. Most significantly, 196 States have ratified the Convention on the Rights

of the Child[4] that in substantive scope covers the whole catalogue of human rights and in personal scope a large share of the world's population of today and in the near future when the harmful effects of climate change upon the enjoyment of human rights are still expected to intensify. It is justified to conclude that all States in the world by 2023 have through their voluntary treaty ratifications accepted as international treaty obligations the whole catalogue of human rights enshrined in the Universal Declaration of Human Rights and in customary international law.[5]

9. What follows from the general overlap between current treaty law, the Universal Declaration of Human Rights and customary norms of international human rights law[6] is that irrespective of the treaty ratification patterns of States or the period of time under assessment – at least since 1945-1948 – the *substantive* human rights obligations of different States to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases are by and large the same. The catalogue of human rights in the Universal Declaration provides a sound basis for identifying the substantive human rights obligations of all States, affirmed as a matter of law through the adoption of the UN Charter in June 1945 and then receiving their authentic interpretation in the Universal Declaration in 1948. As will be explained soon below, differences between States as to their human rights obligations are by and large *jurisdictional* in nature, relating to the competence of various human rights treaty bodies or courts to examine reports or complaints concerning alleged breaches of substantive obligations. Importantly, they do not affect the ability or duty of the International Court of Justice, holistically and reflecting the principles of the indivisibility and interdependence of all human rights, to address the substantive human rights obligations of all States in the current Advisory Opinion proceedings.

10. Special consideration must, however, be given to the right of all peoples to self-determination, a right that has its basis in a *principle* of international law recognized *inter alia* in the UN Charter and was reaffirmed as a *human right* in the Covenants of 1966. The emergence and progressive evolution of the law of self-determination have

---

[4] United Nations, Treaty Series, vol. 1577, p. 3.

[5] The only qualification that is needed in respect of the conclusion made in the last sentence of the paragraph relates to the United States of America that has ratified neither the Covenant on Economic Social and Cultural Rights nor the Convention on the Rights of the Child. As a consequence, its acceptance as treaty obligations of some of economic and social rights is based on other treaties it has ratified, such as certain Conventions of the International Labour Organization and the International Convention on the Elimination of All Forms of Racial Discrimination (United Nations, Treaty Series, vol. 660, p. 195).

[6] For the methodology for and outcome from determining customary norms of international human rights law, see, William A. Schabas, *The Customary International Law of Human Rights*, Oxford University Press 2021. For methodology, see Chapter 3. As to substantive scope, Schabas writes in Chapter 2.F: 'There is today considerable authority for the view that much if not all of the [Universal Declaration of Human Rights] constitutes a codification of customary international law.'

been examined by this esteemed Court in its *Advisory Opinion on the Separation of the Chagos Archipelago*,[7] where the Court characterised the adoption in 1960 of the General Assembly resolution 1514 (XV)[8] as a 'defining moment' that had clarified the content and scope of the customary law right of self-determination,[9] respect for which is an obligation *erga omnes*.[10] The United Nations is based on the sovereign equality of States which form the basis for rights and obligations in inter-State relations.[11]Article 1(2) of the UN Charter establishes as one of the purposes of the United Nations to 'develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'. As a matter of positive treaty law, the Covenants of 1966 further clarified the status of peoples as the beneficiaries of the right of self-determination, consisting of a range of dimensions reflected in paragraphs 1 to 3 of common Article 1 of the Covenants. Peoples are entitled to invoke that right in respect of the State where they live, or in respect of other States or the international community as a whole. Importantly, the Charter then provides a solid legal basis for a State acting as custodian of the right to self-determination and other human rights of its population or any segment of its population that qualifies as a people for purposes of the two Covenants.

11. Many, if not all substantive human rights are affected by climate change. Arbitrary deprivations of life, many forms of cruel, inhuman or degrading treatment, denial of many economic, social and cultural rights including the rights to health, food and work, many new and old forms of discrimination, destruction of people's homes and possessions, and many other adverse impacts will result from ongoing and forecasted changes in the global climate system. Many of such adverse effects are imputable to action or inaction by States, often also constituting a breach of their obligations under international law.

12. However, only a subset of all these adverse human rights impacts of climate change could be adjudicated under human rights treaty law. Ratification patterns by individual States and the scope of the jurisdiction of the respective treaty body or regional human rights court to receive individual or inter-State complaints, as well as a whole range of admissibility requirements under such procedures, including the

---

[7] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965,* Advisory Opinion, I.C.J. Reports 2019, p. 95.

[8] *Declaration on the Granting of Independence to Colonial Countries and Peoples*, 14 December 1960, A/RES/1514(XV)

[9] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965,* Advisory Opinion, I.C.J. Reports 2019, paras. 150, 152, see also 154

[10] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965,* Advisory Opinion, I.C.J. Reports 2019, para. 180.

[11] See UN Charter, Art 2(1), (2).

victim requirement[12] and the requirement of exhausting domestic remedies,[13] further narrow down the subset of adjudicated cases. Furthermore, actual victims of the potential human rights violations that could in principle be adjudicated in respect of a specific State, may be unable or unwilling or lack the resources needed for taking their case to international human rights bodies, usually requiring first the exhaustion of domestic remedies.

13. A graphic illustration of the consequences of jurisdictional and related challenges to adjudicating climate change even where a case might be strong as to substantive human rights obligations, relates to the most sacrosanct of all human rights, the right to life. As will be discussed in the following section, individual cases related to climate change and the right to life have by now reached three of the United Nations human rights treaty bodies but in none of these cases has a violation of that right been established. This does not, however, mean that multiple States would not have acted in breach of their international obligations to respect and ensure the right to life of their inhabitants and other members of humankind in respect of GHG emissions and the effects of climate change, thereby violating their obligations under international human rights treaties or customary norms of international human rights law. To illustrate the wide range of well documented situations where climate change has resulted in loss of human lives some examples are listed below. The fact that these, or other, situations have not been adjudicated before human rights bodies does not mean that there would not have been a breach of positive or negative human rights obligations under the right to life, attributable to one or more States.

- For as early as for summer 2003, it has been shown that anthropogenic climate change increased the risk of heat-related mortality in Central *Paris* by~70% and by~20% in *London*, which then experienced lower extreme heat when respectively, 64 deaths were attributable to anthropogenic climate change in London, and 506 in Paris.[14]
- In June–July 2016, extreme rainfalls in the Yangtze–Huai region of *China*, attributed to preceding 2015/16 El Niño conditions with strong anthropogenic factors, resulted in 833 reported deaths.[15]

---

[12] See e.g., *Optional Protocol to the International Covenant on Civil and Political Rights* (GA res. 2200A (XXI), adopted 16 December 1966) UNTS, vol. 999, p. 171 (OP-ICCPR), art 1; *Optional Protocol to the Convention on the Rights of the Child on a communications procedure* (GA res. 66/138, adopted 19 December 2011), UNTS, vol. 2983, p. 135, A/RES/66/138 (OP-CRC), art 5(1).

[13] See e.g., OP-ICCPR, art 5(2)(b); OP-CRC, art 7(e).

[14] Daniel Mitchell et al., Attributing Human Mortality During Extreme Heat Waves to Anthropogenic Climate Change 11 ENVTL. RES. LETTERS 1, 1 (2016), https://iopscience.iop.org/article/10.1088/1748-9326/11/7/074006/pdf.

[15] Qiaohong Sun & Chiyuan Mao, Extreme Rainfall (R20mm, Rx5day) In Yangtze– Huai, China, In June–July 2016: The Role Of Enso And Anthropogenic Climate Change, Bulletin of the American Meteorological Society (January 2018), http://www.ametsoc.net/eee/2016/ch20.pdf and https://www.climatesignals.org/events/china-floods-june-july-2016.

- In August 2017, Hurricane Harvey caused unprecedented rainfalls in parts of the *United States* and over 80 reported deaths.[16]
- In September 2017, *Puerto Rico* was hit by Hurricane Maria, resulting in estimated 5 740 excess deaths.[17]
- A July 2018 heatwave in *Japan* that 'would never have happened without human-induced climate change' caused 1032 deaths.[18]
- In June-August 2022, heavy rains and resulting flooding affected over 33 million people in *Pakistan*, destroyed 1.7 million homes, and nearly 1500 people lost their lives, when the maximum rainfalls over the provinces Sindh and Balochistan were about 75% more intense than they would have been had the climate not warmed by 1.2 C.[19]
- In January and February 2022, the storms Ana and Batsirai caused at least 250 documented deaths across *Madagascar, Mozambique, and Malawi,* with greenhouse gas and aerosol emissions shown in part responsible.[20]
- At a more general level, the World Meteorological Organization has reported that between 1970 and 2019 weather, climate and water hazards accounted for more than two million deaths,[21] and that between 2005 and 2015 only, there were 700 000 deaths.[22]

IV. THE CASE OF *DANIEL BILLY ET AL. (TORRES STRAIT ISLANDERS) V. AUSTRALIA* AND ITS SIGNIFICANCE FOR THE ADVISORY OPINION

14. So far, only a narrow subset of internationally wrongful acts that amount to breaches of the *substantive* human rights obligations of States have been adjudicated

---

[16] Geert Jan van Oldenborgh, Attribution of extreme rainfall from Hurricane Harvey, August 2017, Environmental Research Letters 12 124009 (2017), https://iopscience.iop.org/article/10.1088/1748-9326/aa9ef2.

[17] WMO Atlas Of Mortality And Economic Losses From Weather, Climate And Water Extremes (1970–2019), World Meteorological Organization WMO-No. 1267 (2021), https://library.wmo.int/doc_num.php?explnum_id=10989, p. 75.

[18] Yukiko Imada et al., The July 2018 High Temperature Event in Japan Could Not Have Happened without Human-Induced Global Warming, SOLA Volume 15A 8-12 (2019), https://www.jstage.jst.go.jp/article/sola/15A/0/15A_15A-002/_pdf/-char/en.

[19] Friederike E. L. Otto, et. al, Climate Change Likely Increased Extreme Monsoon Rainfall, Flooding Highly Vulnerable Communities in Pakistan, World Weather Attribution (Sept. 15, 2022), https://www.worldweatherattribution.org/climate-change-likely-increased-extreme-monsoon-rainfall-flooding-highly-vulnerable-communities-in-pakistan/

[20] Friederike E. L. Otto et al., Climate change increased rainfall associated with tropical cyclones hitting highly vulnerable communities in Madagascar, Mozambique & Malawi, World Weather Attribution (2022), https://www.worldweatherattribution.org/wp-content/uploads/WWA-MMM-TS-scientific-report.pdf.

[21] WMO Atlas Of Mortality And Economic Losses From Weather, Climate And Water Extremes (1970–2019), World Meteorological Organization WMO-No. 1267 (2021), p. 16.

[22] Idem, p. 71.

as actual human rights violations that pass the various *jurisdictional* preconditions for international human rights adjudication and have materialized as human rights violations in respect of identifiable individuals who meet the 'victim' requirement under respective human rights treaties. Before the landmark case of the *Torres Strait Islanders* decided in July 2022 by the Human Rights Committee,[23] it had in 2021 been established by the Committee on the Rights of the Child that now living children may meet *the victim requirement* in respect of a number of States they call into account under international human rights law, even if their petitions were declared inadmissible for other reasons.[24] Importantly, the Committee also adopted the position of the Inter-American Court of Human Rights in its 2017 advisory opinion on the environment and human rights where the Court recognized the extraterritorial reach of states' human rights obligations in the context of *transboundary harm*,[25] and applied it in the context of climate change. While the *Torres Strait Islanders* case engaged only the territorial state, Australia, the *Sacchi* cases retain their relevance concerning the potential scope of extraterritorial human rights obligations in respect of harmful effects of climate change.[26] Furthermore, the Committee applied the principle of *common but differentiated responsibilities* by stating that the 'collective nature of the causation of climate change does not absolve the State party of its individual responsibility that may derive from the harm that the emissions originating within its territory may cause to children, whatever their location'.[27]

15. In 2019, the Human Rights Committee had declared admissible a petition, *Ioane Teitiota v. New Zealand*,[28] alleging a violation of ICCPR Article 6 (i.e., the right to life) if a person was returned to a Kiribati, as he faced '*a real risk of impairment* to his right to life'[29] under ICCPR Article 6 due to the impact of climate change and associated sea level rise on the habitability of Kiribati and on the security situation on the islands. On the merits, however, the Committee concluded that this real risk of impairment had not (yet) amounted to a violation of Article 6 by New Zealand:

---

[23] *Daniel Billy et al. v. Australia* (Communication No. 3624/2019) CCPR/C/135/D/3624/2019.

[24] *Chiara Sacchi et. al. v. Argentina, Brazil, France, Germany and Turkey* (Communication Nos. 104-108/2019), CRC/C/88/D/104/2019, CRC/C/88/D/105/2019, CRC/C/88/D/106/2019, CRC/C/88/D/107/2019, CRC/C/88/D/107/2019. The Committee's establishment of the petitioners meeting the victim requirement was formulated as follows: '… the Committee concludes that the authors have sufficiently justified, for the purposes of establishing jurisdiction, that the impairment of their Convention rights as a result of the State party's acts or omissions regarding the carbon emissions originating within its territory was reasonably foreseeable. It also concludes that the authors have established prima facie that they have personally experienced real and significant harm in order to justify their victim status. Consequently, the Committee finds that it is not precluded by article 5 (1) of the Optional Protocol from considering the authors' communication.' (para 10.14 of *Chiara Sacchi et al v. Argentina*).

[25] Inter-American Court of Human Rights, Advisory Opinion OC-23/17 on the environment and human rights. See, in particular, paras. 95-104.

[26] Paras. 10.5 and 10.7 of *Chiara Sacchi et al v. Argentina.*

[27] Para. 10.10.

[28] (Communication No. 2728/2016) CCPR/C/127/D/2728/2016.

[29] Para. 8.6 (emphasis added)

> 9.12 In the present case, the Committee accepts the author's claim that sea level rise is likely to render Kiribati uninhabitable. However, it notes that the time frame of 10 to 15 years, as suggested by the author, could allow for intervening acts by Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population. The Committee notes that the State party's authorities thoroughly examined that issue and found that Kiribati was taking adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms. Based on the information made available to it, the Committee is not in a position to conclude that the domestic authorities' assessment that the measures taken by Kiribati would suffice to protect the author's right to life under article 6 of the Covenant was clearly arbitrary or erroneous in that regard, or amounted to a denial of justice.

16. It needs to be noted that the time frame of 10 to 15 years 'as suggested by the author' had been presented in a submission of December 2016. Hence, the Committee's reference to 10 years only extends to the end of 2026 which at the time of writing this Expert Report is *less than three and a half years ahead*. Equally importantly, the question whether returning the petitioner to Kiribati could already at the time of the Committee's assessment in 2019 qualify as a form of inhuman treatment in violation of ICCPR Article 7 was *not* adjudicated in *Teitiota.* This observation begs the question whether a violation of Article 7 may be triggered earlier in time than a violation of Article 6: returning someone to a known and inevitably approaching threat to their life may be an inhuman act earlier than it constitutes an actual violation of the right to life. Following the approach of the Human Rights Committee in the case of the *Torres Strait Islanders* case, my answer to that question is affirmative.

17. The remaining part of this section will focus on several highly significant features of the case of *Daniel Billy et al v. Australia* (the *Torres Strait Islanders* case), decided on the merits by the Human Rights Committee in July 2022. The first one of such features relates exactly to the issue of whether the adverse impacts of climate change upon different human rights may materialize as adjudicable (justiciable within a specific jurisdiction) human rights violations at different points of time. For the first time, the Human Rights Committee established violations of the ICCPR because of the actions or omissions by a State in respect of the harmful impact of climate change. While the right to life claim was, similarly to *Teitiota*, declared admissible but concluded on the merits as a non-violation with reference to a similar 10-15 years' timeframe in which the State party could take action,[30] the Committee held that certain

[30] See, para. 8.7 of the Views in the *Torres Strait Islanders* case (footnote 23) where the reasons for a non-violation of Article 6 were expressed as follows:'… The Committee takes note of the other adaptation and mitigation measures mentioned by the State party. The Committee considers that the time frame

adverse effects upon other human rights had already materialized as human rights violations. The ICCPR provisions established as violated were Articles 17 (right to privacy, home and family life) and 27 (right to enjoy a minority culture). The Committee's differentiation of how States' actions or omissions in respect of climate change causing human rights harm may materialize as human rights violations at different points of time is of immense significance.

18. The second feature of immense significance of the *Torres Straits Islanders* case is the unprecedented and clear identification of indigenous peoples, as individuals and communities, as victims of adverse impacts of climate change, amounting to actual human rights violations by the respondent State – which in this particular case was both a major emitter of GHGs and the territorial State. Building upon its long line of case law related to the right of members of an indigenous people to enjoy their 'own culture' in community with other members of the group, including the practice of their traditional or otherwise typical nature-based forms of economic livelihood, the Committee held (footnotes omitted):

> 8.13 … The Committee also recalls that, in the case of Indigenous Peoples, the enjoyment of culture may relate to a way of life which is closely associated with territory and the use of its resources, including such traditional activities as fishing or hunting. Thus, the protection of this right is directed towards ensuring the survival and continued development of cultural identity. The Committee further recalls that article 27 of the Covenant, interpreted in the light of the United Nations Declaration on the Rights of Indigenous Peoples, enshrines the inalienable right of Indigenous Peoples to enjoy the territories and natural resources that they have traditionally used for their subsistence and cultural identity. Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion.
>
> 8.14 The Committee notes the authors' assertion that their ability to maintain their culture has already been impaired by the reduced viability of their islands and the surrounding seas, owing to climate change impacts. The

---

of 10 to 15 years, as suggested by the authors, could allow for intervening acts by the State party involving taking affirmative measures to protect and, where necessary, relocate the alleged victims. The Committee also considers that the information provided by the State party indicates that it is taking adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms on the islands. Based on the information made available to it, the Committee is not in a position to conclude that the adaptation measures taken by the State party would be insufficient and therefore represent a direct threat to the authors' right to life with dignity.' Notably, also here the timeline of 10-15 years refers to the petitioners' submission which for instance of the islands of Boigu and Masig was 10 years from September 2020 (see, paras. 5.1 and 5.3).

> Committee notes the authors' claim that those impacts have eroded their traditional lands and natural resources that they use for traditional fishing and farming and for cultural ceremonies that can be performed only on the islands. The Committee further notes their claim that the health of their land and the surrounding seas is closely linked to their cultural integrity. The Committee notes that the State party has not refuted the authors' arguments that they could not practice their culture on mainland Australia, where they would not have land that would allow them to maintain their traditional way of life. The Committee considers that the climate impacts mentioned by the authors represent a threat that could have reasonably been foreseen by the State party, as the authors' community members began raising the issue in the 1990s. While noting the completed and ongoing seawall construction on the islands where the authors live, the Committee considers that the delay in initiating these projects indicates an inadequate response by the State party to the threat faced by the authors….

19. But the Human Rights Committee did not stop here by establishing a violation of ICCPR Article 27 on account of simply relying on its earlier case law on Article 27 and indigenous peoples. Instead, as a third important feature of the case, the Committee took the necessary and logical step of identifying as an aspect of 'the right to enjoy one's own culture', the right *to transmit* a culture inherited from earlier generations to new generations, including both those already living and those yet to be born. The closing part of paragraph 8.14 reads (emphasis added):

> … the Committee considers that the information made available to it indicates that the State party's failure to adopt timely adequate adaptation measures to protect *the authors' collective ability to maintain their traditional way of life and to transmit to their children and future generations their culture and traditions and use of land and sea resources* discloses a violation of the State party's positive obligation to protect the authors' right to enjoy their minority culture. Accordingly, the Committee considers that the facts before it *amount to a violation of the authors' rights under article 27 of the Covenant.*

20. The relevance of the *Torres Strait Islanders* case is not limited to the important specific case of indigenous peoples whose traditional lands and resources, as well as enjoyment and transmission to future generations of their distinct culture, are threatened by rising sea levels or other unprecedented changes caused by anthropogenetic climate change. A fourth immensely significant feature of the case is in the Committee's finding concerning violations of the universally applicable provision of ICCPR Article 17, namely that the petitioners' right to privacy, home, or family life had been disrupted and violated through the adverse impacts of climate change. These were not violations of minority rights, but of rights belonging to any member of society. . These violations had already materialized in respect of the Torres

Strait Islander petitioners, in addition to the violation of their Article 27 right to enjoy their own culture. The Committee held as follows (footnote omitted):

> 8.12 … The Committee also notes the authors' specific descriptions of the ways in which their lives have been adversely affected by flooding and inundation of their villages and ancestral burial lands; destruction or withering of their traditional gardens through salinification caused by flooding or seawater ingress; and decline of nutritionally and culturally important marine species and associated coral bleaching and ocean acidification. The Committee further notes the authors' allegations that they experience anxiety and distress owing to erosion that is encroaching on some homes in their communities and that the upkeep and visiting of ancestral graveyards is associated with the very heart of their culture, which requires experiencing feelings of communion with deceased relatives. The Committee notes the authors' statement that their most important cultural ceremonies are meaningful only if performed on native community lands. The Committee considers that when climate change impacts, including environmental degradation on traditional [indigenous] lands in communities where subsistence is highly dependent on available natural resources and where alternative means of subsistence and humanitarian aid are unavailable, have direct repercussions on the right to one's home, and the adverse consequences of those impacts are serious because of their intensity or duration and the physical or mental harm that they cause, the degradation of the environment may then adversely affect the well-being of individuals and constitute foreseeable and serious violations of private and family life and the home. The Committee concludes that the information made available to it indicates that, by failing to discharge its positive obligation to implement adequate adaptation measures to protect the authors' home, private life and family, the State party violated the authors' rights under article 17 of the Covenant.

21. As the case was brought by indigenous Torres Strait Islanders, it is natural that also the factual basis of the Article 17 violation was closely linked to their distinctive indigenous identity. Irrespective of that, the Committee's finding is of more general significance as it opens the possibility that also non-indigenous groups, communities, families or persons may present their own factual and legal arguments concerning their particular vulnerability, in order to substantiate a claim that their Article 17 rights have been violated. Similarly to the Article 27 finding, this aspect of the case demonstrates that climate change related violations of ICCPR Article 17 may materialize much earlier in time than some other human rights violations, such as violations of the right to life.

22. A fifth and final immensely important feature of the Human Rights Committee's Views in the Torres Strait Islanders case relates to the Committee's

pronouncement on the authors' *right to an effective remedy* under Article 2, paragraph 3, of the ICCPR. Here, the way the Committee addressed the legal obligations of the respondent state under the ICCPR is instructive of how international human rights law addresses the *consequences* of states' breaches of their international obligations in the context of climate change. In particular, the Committee held that Australia was required to make 'full reparation' and, inter alia, to 'provide adequate compensation to the authors for the harm that they have suffered, engage in meaningful consultations with the authors' communities in order to conduct needs assessments; continue its implementation of measures necessary to secure the communities' continued safe existence on their respective islands; and monitor and review the effectiveness of the measures implemented and resolve any deficiencies as soon as practicable.' Australia was also under an obligation to 'take steps to prevent similar violations from occurring in the future'[31].

23. Another Human Rights Committee case where a double violation of Articles 17 and 27 was established in respect of members of an indigenous community, is *Benito Oliveira Pereira et al. v. Paraguay* (Communication No. 2552/2015).[32] While the case was not about the adverse human rights impacts of climate change, it nevertheless addressed the State party's obligations in respect of the destruction of the natural environment and livelihoods of the indigenous group, in this case through large-scale fumigation with toxic agrochemicals. The Committee's two findings of violation were formulated as follows:

> 8.4 In the present case, the Committee notes that the State party did not adequately monitor the illegal activities at the source of the contamination, which have been widely documented (para. 2.7), observed by the State party itself (paras. 2.13–2.23) and even acknowledged by both of the accused farm owners (para. 2.21). By inadequately monitoring the activities, the State party failed to prevent the contamination. This failure in its duty to provide protection made it possible for the large-scale, illegal fumigation, including with banned agrochemicals, to continue for many years, not only causing health problems among community members – including children, as the fumigation was carried out mere metres from the school during school hours – but also contaminating the community's waterways, destroying its subsistence crops, killing its livestock and triggering the mass extinction of fish and bees, all basic components of the members' private life, family life and home. The Committee notes that the State party has not provided an alternative explanation to contradict the alleged causal link between the fumigation with agrochemicals and the aforementioned harm. When contamination has direct repercussions on the right to one's privacy, family

[31] Para. 11.
[32] CCPR/C/132/D/2552/2015

life and home, and its consequences are serious, then the degradation of the environment adversely affects the well-being of individuals and constitutes a violation of privacy, family life and the home. Consequently, in the light of the information that it has before it, the Committee concludes that the events at issue in the present case disclose a violation of article 17 of the Covenant.

8.8 In the present case, the Committee notes that the authors and other members of the community exercise the right to enjoy their culture through a way of life that is closely linked with their territory and the use of the natural resources found therein. The Committee also notes that the large-scale fumigation with toxic agrochemicals presents a threat which the State party could reasonably have foreseen. Not only were the competent State authorities notified of the activities and their impact on the community members, but the prosecutor's office found that the acts fully met the definition of the offence (para. 2.23) and the accused themselves acknowledged their liability (para. 2.21). Yet, the State party did not put a stop to the activities, thus allowing the continued contamination of the rivers in which the authors fish, draw their water, bathe and wash their clothing, the further death of their livestock, a source of food, and the ongoing destruction of their crops and the resources in the forest where they forage and hunt. The Committee further notes that the State party has not provided an alternative explanation of what happened or demonstrated having taken any steps whatsoever to protect the right of the authors and other community members to their cultural life. The Committee accordingly finds that the facts before it disclose a violation of article 27 of the Covenant with regard to the Campo Agua'ẽ indigenous community.

V. WHAT ARE THE OBLIGATIONS OF STATES UNDER INTERNATIONAL HUMAN RIGHTS LAW TO ENSURE THE PROTECTION OF THE CLIMATE SYSTEM?

24. Building upon the *Torres Strait Islanders* case and other case law by the UN human rights treaty bodies, this main section of this Expert Report will now move to a discussion of five distinct but interrelated issues of direct relevance for addressing the questions (a) and (b) put to this esteemed Court by the General Assembly. Here, an effort is made to identify some of the most pertinent *substantive* norms of international human rights law that entail obligations of States 'to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases' or that govern 'the legal *consequences* under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment', in respect of *peoples and individuals of the present and future generations* affected by the adverse

effects of climate change, including those *injured* or *specially affected by* or *particularly vulnerable to* the adverse effects of climate change. The following discussion seeks to address some of the most pertinent substantive rights in order to assist the esteemed Court in addressing the questions put to it by the General Assembly, in respect of diverse beneficiaries of human rights obligations of States.

Issue 1: The specific case of indigenous peoples and the human rights obligations of States

25. Anthropogenetic emissions of greenhouse gases have caused rapidly escalating changes in the climate system that entail adverse effects upon human rights protected by international law. Many indigenous peoples are, due to the geographical location of their traditional lands and the total dependency of their distinct economies, livelihoods, communities, cultures, and ways of life upon the natural resources and conditions of specific geographic areas, especially vulnerable to such adverse effects. As the *Torres Strait Islanders* case by the Human Rights Committee demonstrates, these adverse effects may materialize as adjudicable human rights violations by identifiable States much earlier than other negative consequences of climate change in respect of members of the dominant population would in the same countries. This is primarily because of the distinct right, enshrined in Article 27 of the ICCPR, of members of ethnic or other minorities, including indigenous peoples, to enjoy their own culture in community of other members of their group, as well as the jurisdictional availability of the right of complaint under the Optional Protocol to the ICCPR to a large proportion of indigenous peoples in the world.[33] As was established in the *Torres Strait Islanders* case, a violation of ICCPR Article 27 occurs when the elders in an indigenous group are because of climate change unable to transmit its distinct culture, based on local natural resources and traditional or otherwise typical forms of livelihood, to new generations.

26. This important conclusion by the Human Rights Committee in the *Torres Strait Islanders* case is not an isolated finding. As the author of this Expert Report demonstrated in an *amicus curiae* brief in that case,[34] that position is based on multiple legal sources and interpretive practice, including General Comment No. 23[35] and case

[33] The ICCPR-OP has been ratified by 116 States which by far exceeds the number of States that have accepted any other international procedure of complaint under human rights treaties.

[34] Amicus Curiae Brief by Professor Martin Scheinin in the Case of 'Daniel Billy et al. (Torres Strait Islanders) v. Australia' by the UN Human Rights Committee, subsequently published as Bonavero Report No. 2/2022 (November 2022).

[35] See, opening phrase of paragraph 6.2 of General Comment No. 23 which affirms protection for 'the ability of the minority group to *maintain* its culture...' (emphasis added) and final paragraph 9 of the same General Comment is clear in that the protection of article 27 rights 'imposes specific obligations on States parties ... directed to *ensur[ing] the survival and continued development* of the cultural, religious and social identity of the minorities concerned' (emphasis added), a formulation that clearly recognizes the intergenerational dimension of the right, even if not employing notions such as 'to transmit' or 'future generations'.

law[36] by the Human Rights Committee itself, the best known and widely accepted *José Martínez Cobo definition* of the notion of indigenous peoples,[37] and ILO Convention No. 169 on Tribal and Indigenous Peoples.[38] These elements of the intergenerational dimension of indigenous people's rights are also reflected in the United Nations Declaration on the Rights of Indigenous Peoples,[39] academic literature,[40] as well as case law under regional human rights treaties.[41]

---

[36] See, *Ángela Poma Poma v. Peru* (Communication No. 1457/2006) CCPR/C/95/D/1457/2006*:* '7.3 In previous cases, the Committee has recognized that the rights protected by article 27 include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong. In the present case, it is undisputed that the author is a member of an ethnic minority and that *raising llamas is an essential element of the culture of the Aymara community, since it is a form of subsistence and an ancestral tradition handed down from parent to child*...' (emphasis added). For other support for the intergenerational dimension of indigenous peoples' rights in case law, see *Chief Bernard Ominayak and the Lubicon Lake Band v Canada* (Communication No. 167/1984) CCPR/C/38/D/167/1984; *Sandra Lovelace v Canada* (Communication No 24/1997) CCPR/C/13/D/24/1977; and *Ioane Teitiota v New Zealand* (Communication No 2728/2016) CCPR/C/127/D/2728/2016; see further at paragraphs 16-19 in the *amicus curiae* brief mentioned above in footnote 34.

[37] UN document E/CN.4/Sub.2/1986/7/Add.4: 'Indigenous communities, peoples and nations are those which, having a *historical continuity* with pre-invasion and pre-colonial societies that developed on their territories, consider themselves *distinct* from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and *transmit to future generations* their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.' (paragraph 379; emphasis added)

[38] The intergenerational nature of indigenous peoples' rights and the and importance of cultural transmission to new generations is reflected, *inter alia*, in article 1 (1)(b) ('who are regarded as indigenous on account of their descent... and who ... retain...') and in article 29 ('imparting of general knowledge and skills that will help children belonging to the peoples concerned to participate fully...').

[39] Most importantly, see UNDRIP Article 25 that reads: 'Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to *future generations* in this regard.' (emphasis added) See, also, Articles 11 (1) and 13 (1).

[40] See, James S. Anaya, Indigenous Peoples in International Law (2nd edition, Oxford University Press 2004) pp. pp. 66-67 and 131-141; William Schabas, p. 892 in the 3rd revised edition of *Manfred Nowak's CCPR Commentary* (N.P.Engel 2019); and Martin Scheinin at p. 162 in Francesco Francioni and Martin Scheinin, eds., Cultural Human Rights, Martinus Nijhoff 2008.

[41] See, Inter-American Court of Human Rights, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay* (Judgment of 29 March 2006) paragraph 222; *Case of the Yakye Axa Indigenous Community v. Paraguay* (Judgment of 17 June 2005) paragraph 124, 131 and 203; and *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Judgment of 31 August 2001) paragraph 149. Also, see African Court of Human and Peoples' Rights, the case of the *Ogiek Community (Commission v. Kenya)* (Case No. 6/2012, Judgment of 26 May 2017) paragraphs 103, 106, 155, 165 and 179.

Issue 2: The wider case of similarly situated or otherwise particularly vulnerable groups

27. The fact that indigenous peoples often become victims of adjudicable human rights violations related to climate change earlier in time than other individuals or groups, does not mean that the adverse effects of climate change would not have already materialized as human rights violations in respect of anyone else. Indigenous peoples often are in situations of specific vulnerability in respect of changes in the climate system but there may be other groups that share those same vulnerabilities. There is plenty of authority in support of an understanding that on account of the concrete factual circumstances, international law protections typically afforded to indigenous peoples also apply in respect of many other vulnerable groups that do not identify themselves as indigenous peoples or lack one or some of the characteristics on account of which groups may by a State or an international actor be recognized as indigenous peoples, such as the criterion of having arrived on a geographical area earlier in time than another culture.

28. For instance, ILO Convention 169 applies equally to 'tribal' and 'indigenous' groups and assures to them equal rights, even if in its Article 1 only indigenous peoples are characterized through the criterion of being first.[42] More generally, the vulnerability of indigenous peoples to the natural resources of a particular geographical area, as being the foundation of their distinct culture and way of life and its transmission to new generations, may apply also to, for instance, tribal peoples, ethnic minorities, peasants, fisherpersons, mountain communities, lowland farmers, or city dwellers or even the whole population of an island State or other low-lying country. Reference is made to the established understanding of the notion of indigenous peoples in Africa,[43] to the 2018 United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas,[44] and various policy directives of international financial institutions.[45] All these sources point to the conclusion that States have identical or analogous human rights obligations in respect of many similarly situated groups in addition to indigenous peoples. What matters for those obligations is not the criterion of 'being first' but the *situation of particular vulnerability* to climate change of a people or community with a distinct way of life based on the natural resources of a particular geographical area. Importantly in the context of the current Advisory Opinion proceedings, this conclusion would be applicable to low-

[42] See ILO Convention No. 169, Art 1: 'who are regarded as Indigenous *on account of their descent from the populations which inhabited the country … at the time of* conquest or colonization or the establishment of present state boundaries…'

[43] See, Report of the African Commission's Working Group on Indigenous Populations/Communities (2003). Adopted by the African Commission on Human and Peoples' Rights at its 28th Ordinary Session.

[44] A/RES/73/165

[45] See, for instance, World Bank Operational Policy 4.10 on Indigenous Peoples (2005), paragraph 4, and Performance Standard No. 7 (2012) by the International Finance Corporation, paragraph 5.

lying Pacific Island nations, where the whole population, jointly constituting the people of an independent State or another type or territory, could claim victim status in respect of adverse effects of climate change, and where the Pacific Island State may act as custodian of the human rights of its inhabitants, in adjudication in respect of other States responsible for GHG emissions, climate change and adverse human rights consequences.

29. As the *Torres Strait Islanders* case by the Human Rights Committee demonstrates, the legal basis for the State obligations discussed in the previous paragraph can be found, inter alia, in ICCPR Article 17 on the protection of privacy, family and home, supplementing and expanding the protection afforded by ICCPR Article 27 to minority cultures.[46] Expanding the main rationale of the case of the *Torres Strait Islanders* to tribal peoples, pastoralists, subsistence farmers, fisherpersons or even city dwellers or the whole population of a low-lying State or area should be seen as primarily being a *factual* question concerning the distinctiveness and vulnerability of the way of life of a particular group and the threat climate change constitutes to that way of life and its transmission to new generations, including future ones. As a consequence, communities and peoples in for instance low-lying Pacific Island countries, as well as the States of such countries, acting as custodians of the rights and cultures of their population as a whole, are entitled to invoke the rationale of the *Torres Strait Islanders* case in the substantiation of claims concerning legal obligations of States that, by their acts and omissions, have caused significant harm to the climate system. For instance, they may turn to inter-State adjudication and seek to establish the international *wrongfulness* of the actions or omissions of other States, as pertinent for question (a) by the General Assembly, or to present pursuant to question (b) claims concerning the *consequences* of such wrongfulness, including in respect of cessation, non-repetition and various forms of reparation (restitution, compensation and satisfaction).[47]

.

Issue 3: The relevance of the right of all peoples to self-determination

30. Since the *Quebec Secession* case by the Supreme Court of Canada (1998),[48] the Human Rights Committee and other human rights bodies have acknowledged that common Article 1 of the twin Covenants of 1966 on the right of all peoples to self-determination also applies to indigenous peoples. Those interpretive developments paved the way for the adoption in 2007 of the Declaration of the Rights of Indigenous

[46] The application of ICCPR Article 17 in the *Torres Strait Islanders* case is supported by earlier case law, in particular the cases of *Hopu and Bessert v. France* (CCPR/C/60/D/549/1993/Rev.1) and *Benito Oliveira Pereira et al. v. Paraguay* (footnote 32, above).

[47] Reference is made to Articles 30-31 and 34-37 of the Articles on Responsibility of States for Internationally Wrongful Acts, Annex to General Assembly resolution 56/83 of 12 December 2001 (A/RES/56/83).

[48] [1998] 2 SCR 217.

Peoples that confirms the same position. A consequence of these developments is that even if many communities, groups and individuals are entitled to invoke the rationale of the *Torres Strait Islanders* case to substantiate their claims concerning legal obligations of States in respect of climate change, such claims may relate to the right of all peoples to self-determination only in respect of beneficiaries that constitute 'peoples' under international law. Such beneficiaries will include whole populations of independent States as 'peoples', as well as distinct groups within a State that identify themselves as and meet the characteristics of being 'peoples'.

31. As enshrined in common Article 1 of the twin Covenants, the right of all peoples to self-determination includes several dimensions or attributes, including internal and external political dimensions (paragraph 1),[49] a resource dimension (paragraph 2),[50] and a solidarity dimension (paragraph 3).[51]

32. States are entitled to invoke, in relation to other States and the international community as a whole, the right of all peoples to self-determination, acting as custodians of the human rights of the members of their population as a whole, as well as in order specifically to claim and protect the rights of a distinct 'people' within the country. Indigenous or other distinct groups qualifying as peoples under international law are themselves entitled to invoke the right of self-determination in respect of the State that exercises sovereignty over the area where the group lives, be it a multi-ethnic local territorial State or the State of a distant country that retains sovereignty over an overseas territory or a colony. The right of self-determination of peoples is relevant in the context of climate change even if, or precisely because, it is a right of peoples and not of individuals, or any community of individuals.

Issue 4: The question concerning which substantive human rights are most pertinent

33. It is important to note that the question which kinds of human rights violations related to climate change have been successfully and *first in time* been adjudicated at international level is not indicative of the true scope and magnitude of States' breaches of international human rights obligations in respect of anthropogenic climate change. All human rights are interdependent and indivisible, and as was demonstrated in

---

[49] '… By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'

[50] 'All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.'

[51] 'The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.'

paragraph 13 above, climate change has by 2023 caused a great number of deaths, many of which most likely entail substantive breaches of the right to life. The right of indigenous peoples to enjoy and transmit their culture is one human right where violations can in some cases already have been established through international adjudication. Furthermore, many 'similarly situated' groups have become subject to the same or analogous forms of human rights violations as indigenous peoples, due to the particular vulnerability of their way of life to the effects of climate change. But these discussions do not justify a conclusion that the most sacrosanct of all human rights, the right to life, would not be pertinent or would not have been violated. Quite to the contrary, as scientific reports, media, social movements and people themselves all point to, ongoing climate change constitutes a real threat to human life and has probably already resulted in two million deaths. International adjudication before human rights treaty bodies or regional human rights courts, or in the form of contentious cases before the International Court of Justice, may follow but by 2023 there should be no reason to doubt that at least a proportion of those two million deaths entail violations by States of their positive or negative human rights obligations under the right to life.

34. Already adjudicated human rights cases themselves point to the relevance of the right to life in the context of climate change. In the *Sacchi, Teitiota and Torres Strait Islanders* cases no violation of the right was yet established as having materialized and proven.[52] Irrespective of that, it was affirmed through these cases that climate change constitutes an ongoing and increasingly severe threat to human life, or life with dignity. States not only have an obligation to refrain from arbitrary deprivations of life, but also an obligation to protect human rights in respect of evolving threats and through active positive measures to maintain and ensure the conditions for human life and life with dignity. Specific positive and negative human rights obligations under the right to life may relate to the elderly, to the young, to people in low-lying areas, to city dwellers, or to people living in poverty.

[52] In *Teitiota*, the Human Rights Committee concluded with a non-violation of Article 6, noting that 'in his comments submitted in 2016, the author asserted that Kiribati would become uninhabitable within 10 to 15 years' (para. 9.10; see also para. 7.1 where the date of the author's submission is given as 29 December 2016) and then itself assessing that 'the time frame of 10 to 15 years, as suggested by the author, could allow for intervening acts by Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population' (para. 9.12). In 2023, soon 7 years of those 10-15 years have passed, and that the actual trajectory presented in 2016 entailed that Article 6 would or might be violated in 3 to 8 years from the submission of this Expert Report.

Issue 5: Operationalizing the rights of 'future generations': from aspirational moral rights to treaty-based legal rights

35. The General Assembly's request for an Advisory Opinion includes, in its question (b)(ii) a reference to the rights of 'peoples and individuals of the present and future generations'. Some commentators may seek to misinterpret the request by claiming that rights of future generations should be constrained to being aspirational and moral in their nature, rather than immediate and legal rights. The *Torres Strait Islanders* case has provided a sound basis for dismissing those views. Under the legally binding treaty provision of ICCPR Article 27, the respondent State was found to have violated the rights of the petitioners '*to transmit to their children and future generations their culture and traditions and use of land and sea resources'*. This finding related to the specific case of the right of members of minorities to enjoy their own culture and the inclusion of transmission of a distinct culture to new and even future generations as an attribute of this right, in the specific context of indigenous peoples. That said, the rationale of this interpretation is sound and can be expanded to other contexts, such as other groups than indigenous ones, or even other treaty provisions than ICCPR Article 27. Even without such an expansion that may prove justified in future cases, the *Torres Strait Islanders case* has provided this esteemed Court with a well-founded foundation for operationalizing the protection of future generations in respect of climate change as a legal obligation of States under international law.

VI. CONCLUSIONS

36. By the end of 2023, very few cases concerning adverse human rights impacts of climate change have been adjudicated before international human rights treaty bodies or regional human rights courts. Importantly, in the *Torres Strait Islanders* case the Human Rights Committee nevertheless established violations of ICCPR Articles 17 and 27, and also the *Sacchi* and *Teitiota* cases demonstrated that human rights claims may be adjudicable. More importantly, this Expert Report has demonstrated that the scope of breaches of States' positive or negative human rights obligations in respect of anthropogenic climate change is much wider than the relatively narrow subset of claims that by now have been adjudicated - narrow because of different ratification patterns of States, various admissibility requirements or other jurisdictional constraints. On the basis of the assessment that the substantive human rights obligations by States are by and large the same and cover, — through States' voluntary ratification of human rights treaties or on account of customary norms of international law — the whole catalogue of human rights enshrined in the 1948 Universal Declaration of Human Rights, it is very likely that many States have violated or are currently in breach of their legal obligations under international human rights law on account of their contribution to GHG emissions or failure to respond to climate change.

37. The international wrongfulness of such conduct, either by actions or omissions, that have occurred in the past, continue as of today, or will occur in the future, may be established through individual complaint procedures under human rights treaties, or through inter-State adjudication before the same human rights *fora*, but also by the International Court of Justice. Consequently, the scope of obligations of States, under international law, to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations, as addressed in question (a) posed by the General Assembly, includes the full catalogue of human rights and both negative and positive State obligations.

38. The right of indigenous peoples, individually and collectively, to enjoy their own culture that is based on coexistence with the specific conditions and natural resources of areas they traditionally occupy, and to transmit that culture from generation to generation, including to future generations, was presented as an issue where it already has been established that adverse impacts of climate change have resulted in human rights violations by a State that is in breach of its positive or negative obligations under international human rights law. ICCPR Article 27 has a prime place as a provision of human rights treaty law that is being violated. This was established by the Human Rights Committee in the *Torres Strait Islanders* case.

39. There are numerous peoples, groups, or communities that are situated similarly to indigenous peoples as to the adverse effects of climate change, due to their particular vulnerabilities. They may be, for instance, tribal peoples, ethnic minorities, peasants, fisherpersons, mountain communities, lowland farmers, city dwellers or the whole population of an island State or other low-lying country. Their way of life, or living culture, and its transmission to new generations, may also be disrupted and made impossible because of the effects of climate change. The finding by the Human Rights Committee in the *Torres Strait Islanders* case, that also Article 17 of the ICCPR had been violated, has wide ramifications in expanding the rationale first established in respect of indigenous communities to apply also in respect of many other groups, communities or peoples.

40. A prime example of how the human rights obligations of States are wider than where human rights violations have already been established, relates to obligations of States under the right to life, enshrined in ICCPR Article 6. In the *Sacchi, Teitiota and Torres Strait Islanders* cases no violation of this right was established as having already materialized. Irrespective of that, climate change has reportedly caused already two million deaths and constitutes an ongoing and increasingly severe threat to human life, or life with dignity. States not only have an obligation to refrain from arbitrary deprivations of life, but also an obligation to protect human rights in respect of evolving threats and through active positive measures to maintain and ensure the

conditions for human life and life with dignity. Irrespective of whether violations of State obligations in respect of the right to life have already resulted in internationally adjudicable claims concerning the deprivation of life, States do have obligations under the right to life to prevent loss of human life, since 1945-1948, right now, and also in the future. Those obligations may in specific forms relate to the elderly, to the young, to people in low-lying areas, to city dwellers, or to people living in poverty.

41. The right of all peoples to self-determination is enshrined in common Article 1 of the ICESCR and ICCPR and is relevant as a legal obligation of States, applicable in the context of climate change. This right includes distinct political, resource and solidarity dimensions. It is applicable both to the benefit of the whole population of a country as a 'people' and to the benefit of distinct groups within a State that under international law qualify as 'peoples'. A State is entitled to invoke, in respect of other States or the international community, the right of self-determination as custodian of the rights of its whole population or the rights of a distinct people within a multi-ethnic country. Also, a people within a State are entitled to invoke the right of self-determination in respect of the territorial State, or another State.

42. Having concluded above that the *substantive* scope of the full catalogue of human rights and both negative and positive State obligations in respect of them, gives rise to State obligations under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations (question a posed by the General Assembly), it is pertinent to close this Expert Report in respect of question (b). Breaches of those substantive obligations constitute internationally wrongful acts that give rise to claims by individuals, communities of individuals, including indigenous and other peoples, as well as by States acting as custodians of the human rights of their inhabitants. Under general international law such wrongfulness in the past, at present, or in the future gives rise to State responsibility and involves legal *consequences*, including cessation, non-repetition and various forms of reparation (restitution, compensation and satisfaction). The Human Rights Committee's application in the *Torres Strait Islanders* case of ICCPR Article 2, paragraph 3, a provision on a State party's legal obligation to provide an effective remedy for human rights violations demonstrates that the question of legal consequences for human rights violations in the context of climate change can be operationalized, so as to entail full reparation and adequate compensation for the harm suffered, and measures including, but not limited to, meaningful consultations, needs assessments, securing people's safe existence, monitoring and reviewing of measures undertaken, as well as preventing similar violations from occurring in the future.[53]

[53] *Torres Strait Islanders* case (footnote 23), para. 11.

VII. DECLARATION BY THE EXPERT

I confirm that all the matters in respect to which I expressed my opinion are within my competence and professional knowledge. I understand that I have an obligation to assist the International Court of Justice with resolving the matters covered by this Expert Report. I have fulfilled my obligation and will continue to do so in future. I confirm that the conclusions in this Expert Report are unbiased, objective and impartial; they were not led by the influence of the proceedings, nor of any participant thereto.

Signed in London on 31 December 2023,



Martin Scheinin
British Academy Global Professor (Bonavero Institute of Human Rights, University of Oxford); Part-time Professor (European University Institute, Florence)

Historical Knowledge and Awareness, in Government Circles, of the Effects of Fossil Fuel Combustion as the Cause of Climate Change

Expert Opinion

Professor Naomi Oreskes
Harvard University

Table of Contents

I. Introduction 1

II. Summary 1

III. The State of Science on the Relationship Between Carbon Dioxide and the Global Climate System Since 1960 2

IV. State Access to Relevant Scientific Knowledge 6

V. Awareness in Major International Conferences and Intergovernmental Organizations 13

VI. Conclusion 16

I. Introduction

1. I have been asked by counsel for the Republic of Vanuatu to provide an expert opinion on the historical knowledge and awareness, in governmental circles, of the effects of fossil fuel combustion as a cause of climate change, particularly in the United States as the largest cumulative emitter of carbon dioxide (CO_2).

2. I provide this expert opinion on the basis of my expertise and research on this specific issue. I am a historian of science who has researched the history of the earth sciences, the role of science in society, anthropogenic climate change, and the role of disinformation in blocking climate action for several decades. I am the Henry Charles Lea Professor of the History of Science at the Department of the History of Science of Harvard University and an Affiliated Professor of Earth and Planetary Sciences at the Department of Earth and Planetary Sciences of Harvard University. I hold a BSc (First Class Honours) from the Royal School of Mines, Imperial College, a PhD from Stanford University (Graduate Special Program: Geological Research and History of Science) and honorary doctorates from Clark University, ETH Zurich, the University of British Columbia, Roskilde University, Colgate University, and the Free University of Brussels. I am the author or co-author of 9 books and over 150 articles, essays, and opinion pieces on these areas of research. I am also the author or co-author of several expert reports on economic geology and the history of science, and I have provided testimonial evidence before the United States Congress and the Belgian Parliament. More information about my qualifications is available at: https://histsci.fas.harvard.edu/people/naomi-oreskes

3. This expert opinion relies on the historical evidence that I have gathered in my decades-long research. Each conclusion is substantiated by reference to a range of sources, encompassing scientific literature, corporate and institutional archives, official governmental communications, and contemporaneous media reports.

II. Summary

4. This expert report demonstrates that, **at least from the 1960s, the United States and other States with high cumulative emissions of greenhouse gases (GHGs),**

including France and the UK, were aware that (i) the release of greenhouse gases into the Earth's atmosphere had the potential to alter the climate system, and (ii) that such interference, if unmitigated, could have catastrophic effects for humans and the environment.

5. There are three main grounds on which I reach this conclusion. First, from the early 1900s, scientists understood that the heightened levels of atmospheric carbon dioxide resulting from the combustion of fossil fuels could significantly alter the Earth's climate system. By the 1960s, this scientific understanding was confirmed by leading scientists on the basis of advances in spectroscopy and CO_2 measurements (Section III). Second, such knowledge was both in public domain and specifically in the power of certain governments, which funded the relevant research and employed many of the scientists who led the decisive studies (Section IV). Third, this knowledge and implications were widely discussed in the context of major domestic conferences, international conferences, and intergovernmental organizations (Section V).

III. The State of Science on the Relationship Between Carbon Dioxide and the Global Climate System Since 1960

6. An overview of scientific academic production shows that by the end of the 1960s leading scientists in Europe and the United States had been working on the foundations of the relationship between CO_2 and the global climate system for more than a century. Crucially, in the 1950s and 1960s, leading scientists concluded (a) that CO_2 in the atmosphere was increasing due to fossil fuel combustion, and (b) that if this increase continued, the increased atmospheric CO_2 would affect the global climate system in potentially catastrophic ways,

7. Since the mid-nineteenth century scientists have known that CO_2 is a 'greenhouse gas', which means that it is highly transparent to visible light but relatively opaque to infrared radiation.[1] In 1859, Irish physicist John Tyndall established the physical basis of what would later be termed the 'greenhouse effect'. The 'greenhouse effect' is the phenomenon by which sunlight reaching the Earth penetrates the atmosphere and warms the planet, and some of that warmth is trapped by greenhouse gases when it is re-

[1] See, generally, James Fleming, *Historical Perspectives on Climate Change* (Oxford University Press 1998); Spencer Weart, *The Discovery of Global Warming* (2 edn, Harvard University Press, 2008).

radiated back to space. In particular, Tyndall measured the infrared absorption and emission characteristics of different gases and vapors and discovered that CO_2 and water vapor absorbed and radiated heat.[2]

8. In the late 19th century scientists building on Tyndall's research provided further insight into how changing atmospheric CO_2 concentrations could alter the global climate system. US geologist TC Chamberlin proposed that fluctuations in CO_2 levels from natural causes could explain the ice ages.[3] Around the same time, Svante Arrhenius, a Swedish chemist and Nobel Laurate, suggested that the burning of fossil fuels, such as coal, could also contribute to changing atmospheric CO_2 concentrations, leading to a net warming effect of the atmosphere.[4] As Chamberlin and Arrhenius were distinguished scientists, their ideas reached a global scientific audience.

9. Ever since Arrhenius' groundbreaking findings were published in the late 1890s and early 1900s, scientists worldwide continued to investigate the potential impact of the heightened levels of atmospheric CO_2 resulting from the combustion of fossil fuels. These scientists repeatedly noted that heightened CO_2 could significantly interfere with the Earth's climate system. Over the years, research on these topics included the works of US Naval Research Laboratory physicist Edward O. Hulburt, British geologist Robert Lionel Sherlock, and British engineer Guy Stewart Callendar.[5]

---

2 John Tyndall, 'The Bakerian Lecture —On the Absorption and Radiation of Heat by Gases and Vapours, and on the Physical Connexion of Radiation, Absorption, and Conduction' (1861) 151 Philosophical Transactions of the Royal Society of London 1.

3 TC Chamberlin, 'A Group of Hypotheses Bearing on Climatic Changes' (1897) 5 Journal of Geology 653; TC Chamberlin, 'The Influence of Great Epochs of Limestone Formation upon the Constitution of the Atmosphere' (1898) 6 Journal of Geology 609; TC Chamberlin, 'An Attempt to Frame a Working Hypothesis of the Cause of Glacial Periods on an Atmospheric Basis' (1899) 7 Journal of Geology 751.

4 Svante Arrhenius, 'On the Influence of Carbonic Acid in the Air upon the Temperature of the Ground' (1897) 9 Publications of the Astronomical Society of the Pacific 14; Svante Arrhenius, 'Ueber die Wärmeabsorption durch Kohlensäure' (1901) 309 Annalen der Physik 690; Svante Arrhenius, 'Ueber die Wärmeabsorption durch Kohlensäure und ihren Einfluss auf die Temperatur der Erdoberfläche' (1901) 22(1) Kongl. Vetenskaps-Akademiens Förhandlingar 25; Svante Arrhenius, *Lehrbuch der komischen Physik*. *Teil 2: Physik der Atmosphäre* (Hirzel 1903).

5 See e.g. EO Hulburt, 'The Temperature of the Lower Atmosphere of the Earth' (1931) 38 Physical Review 1876; Robert Lionel Sherlock, *Man as a Geological Agent: An Account of His Action on Inanimate Nature* (H F & G Witherby 1922); GS Callendar, 'The Artificial Production of Carbon Dioxide and Its Influence on Temperature' (1938) 64 Quarterly Journal of the Royal Meteorological Society 223; GS Callendar, 'Variations of the Amount of Carbon Dioxide in Different Air Currents' (1940) 66 Quarterly Journal of the Royal Meteorological Society 395;

10. By the 1960s, scientists had concluded that: (a) atmospheric CO_2 was increasing, and (b) more atmospheric CO_2 would likely have a significant impact on the climate.

11. The establishment of proposition (a) began in the 1930s and 1940s, when Guy Stewart Callendar published a series of papers presenting measurements of atmospheric CO_2, indicating that a measurable increase was already underway.[6] His work was interrupted by World War II, but it was sufficiently well known that when scientists returned to the question in the 1950s and 1960s, the effect of increased atmospheric CO_2 was often referred to as "the Callendar Effect."[7]

12. In the 1950s, oceanographer Roger Revelle, chemist Hans Suess, and geochemist Charles David Keeling undertook further work establishing that atmospheric concentrations of CO_2 were increasing and would likely alter the climate. In 1957, Revelle and Suess were responding to the scientific objection that increased atmospheric CO_2 would not necessarily alter the climate, if the oceans absorbed some or most of the excess CO_2 Revelle and Suess showed that the oceans would not absorb all the excess CO_2 emitted by the use of fossil fuels and that the concentration of the gas in the atmosphere would therefore almost certainly continue to rise.[8] In 1958, Charles David Keeling began the systematic measurement of atmospheric CO_2, under the auspices of the International Geophysical year. By 1965, he had compiled sufficient data to demonstrate that atmospheric concentrations of CO_2 were indeed rising, a conclusion that was cited in a 1965 report by the U.S President's Science Advisory Committee.[9] According to his findings, atmospheric CO_2 had increased by an amount

---

6 See e.g. Edward Olson Hulburt, 'The Temperature of the Lower Atmosphere of the Earth' (1931) 38 Physical Review 1876; Robert Lionel Sherlock, *Man as a Geological Agent: An Account of His Action on Inanimate Nature* (H F & G Witherby 1922); Guy Stewart Callendar, 'The Artificial Production of Carbon Dioxide and Its Influence on Temperature' (1938) 64 Quarterly Journal of the Royal Meteorological Society 223; Guy Stewart Callendar, 'Variations of the Amount of Carbon Dioxide in Different Air Currents' (1940) 66 Quarterly Journal of the Royal Meteorological Society 395.

7 See James Robert Fleming, The Callendar Effect: The Life and Work of Guy Stewart Callendar (1898-1694) (American Meteorological Society, 2009)

8 Roger Revelle and Hans E. Suess, 'Carbon Dioxide Exchange between Atmosphere and Ocean and the Question of an Increase of Atmospheric CO2 During the Past Decades' (1957) 9 Tellus 18.

9 Jack Pales and Charles Keeling, 'The Concentration of Atmospheric Carbon Dioxide in Hawaii' (1965) 70 Journal of Geophysical Research 6053; Craig Brown and Charles Keeling, 'The Concentration of Atmospheric Carbon Dioxide in Antarctica' (1965) 70 Journal of Geophysical Research 6077; Charles

of 30 parts per million (ppm) since 1850 – about a 10% increase – with the rate of increase rising in tandem with fossil fuel use.[10]

13. Proposition (b) was demonstrated by Canadian physicist Gilbert Plass in the mid-1950s, who worked in academia and in 1955 moved into the private sector, conducting research at the Ford Motor Company. Plass was responding to the objection that small increases in CO_2 might not alter the global climate because the heat absorption by CO_2 overlapped with that of water vapor, which was far more abundant. Plass showed that the overlap between CO_2 and water vapor was much less than previously believed, and therefore concluded that doubling CO_2 would warm the planet by as much as 3.6°C, a magnitude sufficient to explain past ice ages.[11] However, he also noted that the present warming trend caused by human activity clearly differed from oscillatory past planetary changes.[12] Thus he concluded that if atmospheric CO_2 built up in the atmosphere, it would almost certainly warm the planet; the oceans would slow global warming, but they would not stop it—effectively proving Arrhenius's theory.[13] Plass disseminated his

---

Keeling, 'Is Carbon Dioxide from Fossil Fuel Changing Man's Environment?' (1970) 114 Proceedings of the American Philosophical Society 10. Need to add ref to PSAC report.

10 Charles Keeling, 'Is Carbon Dioxide from Fossil Fuel Changing Man's Environment?' (1970) 114 Proceedings of the American Philosophical Society 10.

11 Gilbert Plass, 'A Method for the Determination of Atmospheric Transmission Functions from Laboratory Absorption Measurements' (1952) 42 Journal of the Optical Society of America 677; Gilbert Plass, 'Parallel-Beam and Diffuse Radiation in the Atmosphere' (1952) 9 Journal of Meteorology 429; Gilbert Plass and Danial Fivel, 'Influence of Doppler Effect and Damping on Line-Absorption Coefficient and Atmospheric Radiation Transfer.' (1953) 117 Astrophysical Journal 225; Gilbert Plass, 'Regions of Validity of Various Absorption-Coefficient Approximations' (1954) 11 Journal of Meteorology 163; Gilbert Plass and Danial Fivel, 'The Influence of Variable Mixing Ratio and Temperature on the Radiation Flux' (1955) 81 Quarterly Journal of the Royal Meteorological Society 48; Gilbert Plass, 'The Influence of the 9.6 Micron Ozone Band on the Atmospheric Infra-red Cooling Rate' (1956) 82 Quarterly Journal of the Royal Meteorological Society 30.

12 Gilbert Plass, 'The Carbon Dioxide Theory of Climatic Change' (1956) 8 Tellus 140.

13 Gilbert Plass, 'Carbon Dioxide and the Climate' (1956) 44 American Scientist 302.

work in both specialist and popular scientific journals, and his discoveries were reported by global-reaching media such as *The New York Times* as early as 1953.[14]

14. Throughout the 1950s and the 1960s, the insights from scientists such as Chamberlin and Arrhenius on the problem of carbon dioxide emissions and their impact on the global climate system were confirmed and expanded by scientists such as Plass, Revelle, Suess and Keeling. As a result, by the 1960s, leading scientists had concluded that CO_2 pollution, caused by fossil fuel use combustion, was a problem which, if left unaddressed, would alter the global climate system with major adverse and even potentially catastrophic consequences for humans and the environment.

IV. State Access to Relevant Scientific Knowledge

15. The scientific concern regarding the impending risk of climate change due to increased atmospheric CO_2 from burning fossil fuels was far from insular, resonating well beyond the boundaries of specialized scientific communities. The concern was widely understood by State officials and industry scientists from at least the late 1950s and 1960s.

16. States were not just passive recipients of scientific knowledge; they actively funded the research and employed many of the scientists who led these studies. Shortly after the Second World War, the US government funded projects to study techniques of weather modification.

17. A significant part of this work was financially supported by industry. The reports of a research group at the General Electric Corporation, led by Nobel Laureate Irving Langmuir, Vincent Schaefer, and Bernard Vonnegut[15] contained discussions of a concept their authors termed 'inadvertent weather modification' – what scientists today would call anthropogenic climate change.[16]

---

14 WK, 'How Industry May Change Climate' *New York Times* (24 May 1953), available at <https://www.nytimes.com/1953/05/24/archives/how-industry-may-change-climate.html>.

15 James Rodger Fleming, *Fixing the Sky: The Checkered History of Weather and Climate Control* (Columbia University Press 2010), 137-157, 165-187 (2010).

16 Vincent Schaefer, 'The Inadvertent Modification of the Atmosphere by Air Pollution' (1969) 50 Bulletin of the American Meteorological Society 199. For recent use of this terminology, see Philip B Duffy and others, 'Strengthened Scientific Support for the Endangerment Finding for Atmospheric Greenhouse

18. In the early 1960s, President John F. Kennedy authorized government funding for weather modification research through the National Science Foundation (NSF), an agency of the US federal government.[17] The discussions on deliberate weather modification reveals an explicit recognition that 'inadvertent weather modification' could be highly consequential. For example, the NSF's 1962 annual report (released in 1963) cited a 1962 seminar in which the US Weather Bureau meteorologist Harry Wexler had analyzed a variety of factors that could modify Earth's radiation balance, including changing the carbon dioxide content of the atmosphere.[18] The report indicated that this was a cause for concern insofar as Plass had '*suggested that man may already be inadvertently modifying the atmosphere at an alarming rate by burning ever-increasing amounts of fossilized fuel, thus releasing larger amounts of carbon dioxide than ever before in historical times*'.[19] Such warming, if continued, could cause the icepack to '*vanish from the frozen north and frozen tundra would thaw*'.[20]

19. In 1964 the NSF director announced the creation of a Special Commission on Weather Modification to review the state of knowledge and respond to a request from the federal government to analyze potential uses of weather modification and control. The Commission's 1965 report discussed weather and climate modification as already underway and not merely as a local effect: '*Weather and climate modification is becoming a reality ... [T]he inadvertent modification of the weather and climate by such influences as the products of urban development, surface modification for agriculture and silviculture, [and] compositional changes through the combustion of fossil fuels*

Gases' (2019) 363 Science eaat5982. ('One area of scientific progress since the [Endangerment Finding] is the attribution of extreme weather events . . . to human-caused climate change').

17 National Science Foundation Act of 1950, Public Law No. 85-510, 72 Stat. 353 (1958) <https://www.nsf.gov/about/history/legislation.pdf>. This amendment to the National Science Foundation Act of 1950 made NSF the official coordinating agency for weather modification research projects and required that the agency report annually. For a summary of federal laws governing US federal weather modification programs, see Rachel Hauser, 'Using Twentieth-Century U.S. Weather Modification Policy to Gain Insight into Global Climate Remediation Governance Issues' (2013) 5 Weather, Climate, and Society 180.

18 National Science Foundation, *Weather Modification: Fourth Annual Report* (1962), 19, citing Harry Wexler, Seminar on weather control, Department of Meteorology, UCLA (February 1962).

19 National Science Foundation, *Weather Modification: Fourth Annual Report* (1962), 19, citing Gilbert Plass, 'The Influence of Infrared Absorptive Molecules on the Climate' 95 Annals of the New York Academy of Science 61.

20 National Science Foundation, *Weather Modification: Fourth Annual Report* (1962), 20.

and other exhausts are becoming of sufficient consequence to affect the weather and climate of large areas and ultimately the entire planet'.[21]

20. Since at least the late 1950s, CO_2 had been discussed not just as a factor in meteorology, atmospheric physics, and climate science, but also in air pollution science and public health. This included government-sponsored conferences, where leading scientists recognized CO_2 as a pollutant. In March 1963, the Conservation Foundation of New York (which later merged with the World Wide Fund for Nature) held a conference to discuss 'the implications of rising carbon dioxide content in the atmosphere'. A group of seven experts brought together for the discussion included Keeling, Plass, Erik Eriksson of the International Meteorological Institute in Stockholm, biologists from Yale University and the Atlantic Marine Laboratory, and the aerial landscape photographer William Garnett. The report explicitly linked the burning of fossil fuels to global warming and issued dire warnings about consequences such as melting ice caps, flooding coasts, and the potential annihilation of life forms in equatorial regions. It read, in relevant part: '*The present liberation of such large amounts of fossil carbon in such a short time is unique in the history of the earth, and there is no guarantee that past buffering mechanisms are really adequate. It is not a cause for complacency that nature seems to have a lot of checks and that these checks seem thus far to be controlling any artificial imbalances. There may be processes presently going on which are due to man's activities and which will eventually be alarming*'.[22]

21. By 1968, in France, policymakers and scientists at a prominent international symposium on technological forecasts and economic planning organized by the Interministerial Delegation of Land Planning and Regional Attractiveness were similarly discussing whether they should '*systematically focus on these micro-pollutions that are today's urban pollutions, or, on the contrary*, […] *think about pollution of a global character, that is to say the increase in the rate of carbon dioxide in the entire atmosphere, which*

---

21 National Science Foundation, *Weather and Climate Modification: Report of the Special Commission on Weather Modification* (1965), 8, available at <https://www.nsf.gov/nsb/publications/1965/nsb1265.pdf>.

22 Conservation Foundation, *Implications of Rising Carbon Dioxide Content of the Atmosphere* (1963), 5, available at <https://babel.hathitrust.org/cgi/pt?id=mdp.39015004619030>.

could perhaps, in a decade or half a century, begin to pose problems of global climate change?'[23]

22. In the 1960s, the relation between CO_2 pollution and interference with the climate system became well known to political leaders worldwide. In 1965, under President Lyndon Johnson, the US President's Science Advisory Committee issued a now-famous report in which they predicted that '[b]*y the year 2000 there will be about 25% more CO_2 in our atmosphere than at present. This will modify the heat balance of the atmosphere to such an extent that marked changes in climate, not controllable through local or even national efforts, could occur*'.[24] Revelle and Keeling served on the Committee, which was then the most important channel by which scientific information and advice was transmitted to the White House.[25] The channel was clearly in operation, as suggested by a special message by President Johnson to the Congress on Conservation and Restoration of Natural Beauty, of 8 February 1965, where he noted that '*Air pollution is no longer confined to isolated places. This generation has altered the composition of the atmosphere on a global scale through radioactive materials and a steady increase in carbon dioxide from the burning of fossil fuels*'.[26]

23. By 1968, a US Congressional Committee observed that '*our power to disturb or alter the ponderous forces and rhythms of nature by man-induced manipulations has increased to the point where mistakes or unknown effects may be profound and*

---

23 Collège des techniques avancées et de l'aménagement du territoire (CTAAT), *Colloque international sur l'aménagement du territoire et les techniques avancées* (1968), 51, available at <https://www.terrestres.org/wp-content/uploads/2021/10/1968_1er-coll-int-sur-lamenagt-du-terr-et-les-tech-avancees_pages-cle-1.pdf>, cited in Christophe Bonneuil, Pierre-Louis Choquet and Benjamin Franta, "Early Warnings and Emerging Accountability: Total's Responses to Global Warming, 1971–2021" (2021) 71 Global Environmental Change 102386, 3.

24 Environmental Pollution Panel of the President's Science Advisory Committee, *Restoring the Quality of Our Environment: Report of the Environmental Pollution Panel* (The White House, 1965), 9, available at <https://books.google.it/books/about/Restoring_the_Quality_of_Our_Environment.html?id=mdXanDtshX8C&redir_esc=y>.

25 Zuoyue Wang, *In Sputnik's Shadow: The President's Science Advisory Committee and Cold War America* (Rutgers University Press 2009); American Institute of Physics, 'United States. President's Science Advisory Committee', American Institute of Physics (archived at The Internet Archive), available at <https://web.archive.org/web/20220815054423/https://history.aip.org/phn/21612015.html>.

26 Lyndon B. Johnson, Special Message to the Congress on Conservation and Restoration of Natural Beauty, 8 February 1965 (emphasis added), available at: <https://www.presidency.ucsb.edu/documents/special-message-the-congress-conservation-and-restoration-natural-beauty>

irreversible'.[27] A year later, in 1969, a British Lord, the 2nd Viscount St Davids, became one of first politicians to raise climate change in the UK's Houses of Parliament, when he asked: '*My Lords, can my noble friend say whether he and British Railways have taken account of the fact that what were abnormal temperatures last summer may not be abnormal if we continue to discharge carbon dioxide into the air by the burning of various fossil carbons, so increasing the greenhouse effect?*'.[28]

24. In 1968, the NSF issued its tenth annual report on the topic of weather modification, and in 1969 US President Richard Nixon and his staff drafted a two-page, impassioned message to Congress on the 'special interest' of this report in the aftermath of Hurricane Camille. Nixon's message was vivid: '*In recent months many American communities were ravaged by storms that were among the most violent and destructive in our history … Swept away by wind and water were families, homes, businesses, and dreams for the future*'. Writing two months after the hurricane, Nixon linked the storm wreckage to '*mounting concern with the quality of the environment generally*' and emphasized to Congress the importance of a research program in '*facing the issue of air pollution, including the possible effect on weather and climate*'.[29]

25. In November 1969, Nixon appointed a Task Force on Air Pollution to evaluate the effectiveness of existing air pollution control efforts. The task force included representatives of the United Steelworkers of America, the US Steel Corporation, Ford Motor Company, an array of prominent scientists, and Princeton statistician John Tukey. The resulting report, Cleaner Air for the Nation, was transmitted to the President in June 1970 and publicly released in August. In a section on 'Climatic Effects of

---

27 'Is Mankind Playing a Game of Environmental Russian Roulette?' Conservation Foundation Letter (23 February 1968) at 1, s. V.A.6, b. 598, f. 5, Edmund S. Muskie Archives and Special Collections Library, Bates College, quoting from *Subcommission on Science, Research and Development, Report to the H. Comm. on Science and Astronautics, 89th Cong., 2d Sess., Environmental Pollution: A Challenge to Science and Technology* (Comm. Print 1966), 3.

28 'Railways: Use of Continuous Welded Rail', House of Lords Debate, 5 November 1969, vol 305, cols 335-9335, available at <https://api.parliament.uk/historic-hansard/lords/1969/nov/05/railways-use-of-continuous-welded-rail>.

29 Richard Nixon, Letter of Transmittal to the Congress of the United States 2 (27 October 1969), f. Atmos. Sci. [Oversized Materials, 1969-70], b. 4, Edward E. David papers (WHCF:SMOF), RNPL. For the full report see, National Science Foundation, *Weather Modification: Tenth Annual Report for Fiscal Year Ended June 30, 1968* (1969), available at <https://hdl.handle.net/2027/uc1.31210025052638>.

Pollutants', the report concluded that: '*the greatest consequences of air pollution for man's continued life on earth are its effects on the earth's climate*'.[30]

26. As scientists grew increasingly concerned about the destructive potential of greenhouse gases, they communicated this concern to governmental bodies throughout the globe, as well as to industry leaders and the general public, increasing the scope of awareness. As early as 1959, physicist Edward Teller sounded an alarm to petroleum industry leaders, cautioning them about the looming consequences of CO_2 accumulation – namely, a discernible rise in global temperatures and sea levels before the end of the century.[31] In 1965, Frank Ikard, president of the American Petroleum Institute (API), discussed the President's Science Advisory Committee 1965 report at the organization's annual meeting, concluding that the '*substance of the report is that there is still time to save the world's peoples from the catastrophic consequence of pollution, but time is running out*'.[32]

27. As a result of extensive communication of scientific knowledge to the general public, global environmental matters rose to public prominence.[33] In this context, the scientific concern about impending climate change found an echo in activists and artists of the era, underlining an often-overlooked cultural uptake of climate issues during the 1950s and 1960s. This shows how much of the available scientific knowledge was generally known and disseminated at this time. For instance, in 1958 Frank Capra, a prominent US filmmaker, produced a film entitled *The Unchained Goddess* about weather, weather modification, and climate change for The Bell System Science Series. In the film, the protagonist, Dr. Research, explains that even a few degrees of temperature rise could melt the polar ice caps, creating a future sea level rise that was so great that an '*inland*

---

30 US President's Task Force on Air Pollution, *Cleaner Air for the Nation: The Report of the President's Task Force on Air Pollution* (1970), 34, available at <https://babel.hathitrust.org/cgi/pt?id=mdp.39015002760075&seq=1>.

31 Benjamin Franta, 'Early Oil Industry Knowledge of CO2 and Global Warming' (2018) 8 Nature Climate Change 1024. See also E Robinson and RC Robbins, 'Sources, Abundance, and Fate of Gaseous Atmospheric Pollutants. Final Report and Supplement' Stanford Research Institute Proj. No. PR-6755 105 (1968) (prepared for the American Petroleum Institute), available at <https://www.osti.gov/biblio/6852325>; Bonneuil, Choquet, and Franta (n 23).

32 FN Ikard, 'Meeting the Challenges of 1966' (1965) 45 Proceedings of American Petroleum Institute, 12-13, available at <https://archive.org/details/5348130-1965-API-Proceedings>.

33 See Yannick Mahrane, Marianna Fenzi, Céline Pessis, and Christophe Bonneuil, 'From Nature to Biosphere: The Political Invention of the Global Environment, 1945-1972' (2012) 113 Vingtième Siècle. Revue d'histoire.

sea would fill a good portion of the Mississippi Valley [and] tourists in glass bottom boats would be viewing the drowned towers of Miami through 150 feet of tropical water'. This could happen, he added, because of industrial CO_2: '*Even now, man may be unwittingly changing the world's climate through the waste products of his civilization. Due to our release through factories and automobiles every year of more than six billion tons of carbon dioxide, which helps air absorb heat from the sun, our atmosphere seems to be getting warmer*'.[34] The Bell Science Series has been described as '*among the best known and remembered educational films ever made'*, and *The Unchained Goddess* was broadcast on television and also shown in classrooms around the United States.[35]

28. In 1967, anthropologist Gregory Bateson discussed global climate change in his lecture at the Dialectics of Liberation Congress held in London between July 15 and 30 of 1967. Remembered as a 'now legendary' event in the 'expression of the politics of dissent', the Congress was attended by prominent intellectuals, activists, and artists from around the world, including William S. Burroughs, Thich Nhat Hahn, C.L.R James, Angela Davis, and Kwame Ture (née Stokely Carmichael).[36]

29. In March 1969, US Senator Henry Jackson received a letter from an angry constituent in Seattle. The constituent had watched a recent episode of the popular television show – the *Merv Griffin Show* – where the Beat poet Allen Ginsberg told an alarming story of planetary demise. Ginsberg claimed that '*the current rate of air pollution brought about by the proliferation of automobiles*' could cause '*the rapid build-up of heat on the earth*'. This would '*melt the polar ice caps, causing a flooding of the greater part of the globe*'. The constituent was sure that the eccentric poet was wrong, but he wanted the powerful Senator to do something to stop Ginsberg from spreading disinformation.

---

34 *Unchained Goddess* (Warner Brothers Pictures 1958), available at <https://www.youtube.com/watch?v=sqClSPWVnNE>. Discussion of weather modification begins around 47:30.

35 Geoff Alexander, *Academic Films for the Classroom: A History* (McFarland 2010), 66.

36 See James McKenzie, 'An Interview with Allen Ginsberg' in Michael Schumacher, *First Thought: Conversations with Allen Ginsberg 70-71* (University of Minnesota Press 2017); Gregory Bateson, 'Lecture at Dialectics of Liberation: Consciousness versus Nature' (17 July 1967) (transcript at Villon Films Archive, available at <https://villonfilms.ca/archive/vf_avtacrcbfp>); David Cooper (ed.), *The Dialectics of Liberation* (Verso 2015). The quote is from the book description at Verso: <https://www.versobooks.com/products/89-the-dialectics-of-liberation>.

'*After all, quite a few million people watch this show, people of widely varying degrees of intelligence, and the possibility of this sort of charge – even from an Allen Ginsberg – being accepted even in part, is dangerous*', he wrote. The constituent was particularly concerned that Ginsberg had attributed this information to a presidential science advisor. Jackson did not know whether Ginsberg's claims were true or false, so he forwarded the letter to Lee DuBridge, the former President of Caltech who had become science advisor to President Richard Nixon that year, asking for clarification. DuBridge replied with a long, detailed letter describing current knowledge of CO_2 and the greenhouse effect. He affirmed that Ginsberg was broadly correct. The '*greenhouse effect*' – caused by atmospheric CO_2 – was real, and it was also true that '[w]*e are indeed filling the atmosphere with a great many gases and in very large quantities from our automobiles, from industry, and from the burning of fossil fuels*'.

30. These examples, while by no means exhaustive, suffice to make the point: scientists working in the 1950s and 1960s on climate change were not isolated in ivory towers, their work unbeknownst to others. On the contrary, by the late 1960s concern about CO_2 and climate change had been communicated both to politicians at the highest levels and to school children and teachers, conservationists, and ordinary people though film, television, and articles in popular magazines such as *Fortune* and *Sports Illustrated*.[37]

31. Thus, throughout the 1960s, leaders and policymakers in States with high greenhouse gas emissions, including the United States, were well-versed in the potentially serious implications of climate change due to the increased levels of atmospheric carbon dioxide from fossil fuel use. Moreover, this vital knowledge had been extended beyond political and scientific circles to inform the general public.

V. Awareness in Major International Conferences and Intergovernmental Organizations

32. The international efforts in the 1960s and 1970s to address global environmental crises demonstrate a widespread global awareness of the carbon dioxide problem. The question of air pollution due to changes to climate introduced by human activity and the

[37] See, e.g., Edmund Faltermayer, 'A Fortune Proposition: We Can Afford Clean Air' *Fortune* (November 1965); Tom Alexander, 'Some Burning Questions about Combustion' *Fortune* (February 1970); Lord Ritchie-Calder, 'Mortgaging the Old Homestead' *Sports Illustrated* (2 February 1970).

need for an international plan of action were being discussed within the United Nations and other international organizations in the late 1960s. The preparations for the landmark 1972 UN Stockholm Conference on the Human Environment (UNCHE), which started in the late 1960s, provide strong evidence of this international awareness.

33. By the mid-1960s, numerous international organizations were discussing global environmental crises and CO_2 as air pollution, including the International Labour Organization (ILO), the World Health Organization (WHO), and the World Meteorological Organization (WMO).[38]

34. For example, in 1968, the Secretary-General of the United Nations described the work of the WMO in this area as follows. '*Application of meteorology to the protection of the atmosphere is mainly related to the problem of increasing air pollution*'. He expressly mentioned in this context that '*the increase of the carbon-dioxide in the earth's atmosphere which may change our climate*' was a '*large scale air pollution problem*', which explained the WMO's global approach to the matter.[39]

35. The groundwork for convening the UNCHE began in 1968. The Permanent Representative of Sweden in New York proposed that the United Nations Economic and Social Council address the topic of human environment by organizing a conference.[40] The explanatory memorandum accompanying this request specifically referred to the prior work of international organizations on the issue of air pollution.

36. Further key preparatory steps were taken during an intergovernmental meeting organized by the United Nations Educational, Scientific, and Cultural Organization (UNESCO) to address the subject of conservation and the environment. This meeting, known as the International Biosphere Conference, brought together approximately 320 experts from 63 different countries and 23 international organizations. These experts collectively adopted a report that unequivocally identified atmospheric carbon dioxide

---

38 'Activities of United Nations Organizations and programmes relevant to the human environment: Report of the Secretary-General' (11 July 1968) E/4553, available at <https://digitallibrary.un.org/record/729430>.

39 'Activities of United Nations Organizations and programmes relevant to the human environment: Report of the Secretary-General' (11 July 1968) E/4553, para 78, available at <https://digitallibrary.un.org/record/729430>.

40 Letter dated 20 May 1968 from the Permanent Representative of Sweden addressed to the Secretary-General of the United Nations, E/4466/Add.1, available at <https://digitallibrary.un.org/record/729874>.

as a major pollution concern resulting from the '*technological developments of man as shown by his achievements in industry, transport, communications and urbanization*'.[41] The report emphasized the need for international action as '*many of the changes produced by man affect the biosphere as a whole and … these problems cannot be solved on a regional, national or local basis but require attention on a global scale*'.[42] Moreover, the report urgently called for approval of a United Nations Conference on the Human Environment at the upcoming UN General Assembly session, wherein States could deliberate on the advisability of a Universal Declaration on the Protection and Enhancement of the Human Environment.[43]

37. On 3 December 1968, the United Nations General Assembly unanimously adopted the resolution to hold the UNCHE in 1972. The resolution was tabled by Sweden and co-sponsored by 51 other nations, including the United States.[44] The Resolution 2398 noted that modern scientific and technological developments '*involve*[d] *great dangers if not properly controlled*'.

38. The groundwork for the UNCHE was not only the province of State representatives; it was a collaborative effort involving various stakeholders. International non-governmental organizations, such as the International Council of Scientific Unions (ICSU), also began to address the topic, which heavily relied on the findings of the academic community. An example of this collaboration is the ICSU Scientific Committee on Problems of the Environment (SCOPE)'s reliance on the *Study of Critical Environmental Problems* conducted under the direction of the Massachusetts Institute of Technology. The report, which included participation of US federal departments and agencies, private foundations, and corporations, found that the human-induced increase

---

41 'Intergovernmental Conference of Experts on the Scientific Basis for Rational Use and Conservation of the Resources of the Biosphere (Paris, France, September 4-13, 1968), Recommendations' (1 October 1968), 2, available at <https://files.eric.ed.gov/fulltext/ED047952.pdf>.

42 'Intergovernmental Conference of Experts on the Scientific Basis for Rational Use and Conservation of the Resources of the Biosphere (Paris, France, September 4-13, 1968), Recommendations' (1 October 1968), 2, available at <https://files.eric.ed.gov/fulltext/ED047952.pdf>.

43 'Intergovernmental Conference of Experts on the Scientific Basis for Rational Use and Conservation of the Resources of the Biosphere (Paris, France, September 4-13, 1968), Recommendations' (1 October 1968), 24, available at <https://files.eric.ed.gov/fulltext/ED047952.pdf>.

44 UNGA 'Resolution 2398: The Problems of the Human Environment' UN GAOR 23rd Session A/RES/2398(XXIII) (3 December 1968), available at <https://digitallibrary.un.org/record/202554>. The draft resolution and its sponsoring states are available at <https://digitallibrary.un.org/record/657791>. See projects A/L.553 and Add.1-4.

in atmospheric CO_2 could lead to the '*long-term warming of the planet*'.[45] The report further added that '*the consequences for the human condition and human endeavor could be enormous. They could threaten man's agriculture and food supply, his warmth in winter and his cooling in summer, and could throw his entire transportation system out of gear*'; addressing the problem, therefore, could involve a '*radical curtailment of man's consumption of fossil fuels*'.[46]

VI. Conclusion

39. For the foregoing reasons, I reach the conclusion that at least from the 1960s, the United States and other States with high cumulative emissions of greenhouse gases, including France and the UK, were aware that (i) the release of greenhouse gases into the Earth's atmosphere had the potential to alter the climate system, and (ii) that such interference, if unmitigated, could have catastrophic effects for humans and the environment.

Professor Naomi Oreskes
29 January 2024

---

45 Study of Critical Environmental Problems and Massachusetts Institute of Technology (eds), *Man's Impact on the Global Environment: Assessment and Recommendations for Action; Report* (MIT Press 1970), 10-12, available at <https://archive.org/details/mansimpactonglob0000unse/page/12/mode/2up?q=warming>.

46 Study of Critical Environmental Problems and Massachusetts Institute of Technology (eds), *Man's Impact on the Global Environment: Assessment and Recommendations for Action; Report* (MIT Press 1970), 245, available at <https://archive.org/details/mansimpactonglob0000unse/page/12/mode/2up?q=warming>.

References

1965 API President 'Meeting the Challenges of 1966' (2018) <http://archive.org/details/5348130-1965-API-Proceedings>

Ångström K, 'Ueber die Bedeutung des Wasserdampfes und der Kohlensäure bei der Absorption der Erdatmosphäre' (1900) 308 Annalen der Physik 720 <https://onlinelibrary.wiley.com/doi/10.1002/andp.19003081208>

Arrhenius S, 'On the Influence of Carbonic Acid in the Air upon the Temperature of the Ground' (1897) 9 Publications of the Astronomical Society of the Pacific 14 <http://www.jstor.org/stable/40670917>

——, 'Ueber die Wärmeabsorption durch Kohlensäure' (1901) 309 Annalen der Physik 690 <https://onlinelibrary.wiley.com/doi/10.1002/andp.19013090404>

——, Lehrbuch Der Komischen Physik, vol 2 (Hirzel 1903) <https://archive.org/details/lehrbuchderkosmi00arrh/page/528/mode/2up>

Bonneuil C, Choquet P-L and Franta B, 'Early Warnings and Emerging Accountability: Total's Responses to Global Warming, 1971–2021' (2021) 71 Global Environmental Change 102386 <https://www.sciencedirect.com/science/article/pii/S0959378021001655>

Brown CW and Keeling CD, 'The Concentration of Atmospheric Carbon Dioxide in Antarctica' (1965) 70 Journal of Geophysical Research 6077 <http://doi.wiley.com/10.1029/JZ070i024p06077>

Callendar GS, 'The Artificial Production of Carbon Dioxide and Its Influence on Temperature' (1938) 64 Quarterly Journal of the Royal Meteorological Society 223 <https://onlinelibrary.wiley.com/doi/10.1002/qj.49706427503>

——, 'Variations of the Amount of Carbon Dioxide in Different Air Currents' (1940) 66 Quarterly Journal of the Royal Meteorological Society 395 <https://rmets.onlinelibrary.wiley.com/doi/10.1002/qj.49706628705>

Chamberlin TC, 'A Group of Hypotheses Bearing on Climatic Changes' (1897) 5 The Journal of Geology 653 <http://www.jstor.org/stable/30054630>

——, 'The Influence of Great Epochs of Limestone Formation upon the Constitution of the Atmosphere' (1898) 6 The Journal of Geology 609 <http://www.jstor.org/stable/30054731>

——, 'An Attempt to Frame a Working Hypothesis of the Cause of Glacial Periods on an Atmospheric Basis' (1899) 7 The Journal of Geology 751 <http://www.jstor.org/stable/30056816>

Collège des techniques avancées et de l'aménagement du territoire, Colloque international sur l'aménagement du territoire et les techniques avancées (Documentation française 1968)

Duffy PB and others, 'Strengthened Scientific Support for the Endangerment Finding for Atmospheric Greenhouse Gases' (2019) 363 Science eaat5982 <https://www.science.org/doi/10.1126/science.aat5982>

Fanning AL and Hickel J, 'Compensation for Atmospheric Appropriation' (2023) 6 Nature Sustainability 1077 <https://www.nature.com/articles/s41893-023-01130-8>

Fleming JR, Historical Perspectives on Climate Change (Oxford University Press 1998) <https://academic.oup.com/book/41694>

——, Fixing the Sky: The Checkered History of Weather and Climate Control (Columbia University Press 2010) <https://cup.columbia.edu/book/fixing-the-sky/9780231144124>

Franta B, 'Early Oil Industry Knowledge of CO2 and Global Warming' (2018) 8 Nature Climate Change 1024 <https://www.nature.com/articles/s41558-018-0349-9>

Hauser R, 'Using Twentieth-Century U.S. Weather Modification Policy to Gain Insight into Global Climate Remediation Governance Issues' (2013) 5 Weather, Climate, and Society 180 <https://journals.ametsoc.org/view/journals/wcas/5/2/wcas-d-11-00011_1.xml>

Hulburt EO, 'The Temperature of the Lower Atmosphere of the Earth' (1931) 38 Physical Review 1876 <https://doi.org/10.1103/PhysRev.38.1876>

K W, 'How Industry May Change Climate' The New York Times (24 May 1953) <https://www.nytimes.com/1953/05/24/archives/how-industry-may-change-climate.html>

Keeling CD, 'The Concentration and Isotopic Abundances of Carbon Dioxide in the Atmosphere' (1960) 12 Tellus 200 <http://tellusa.net/index.php/tellusa/article/view/9366>

——, 'Is Carbon Dioxide from Fossil Fuel Changing Man's Environment?' (1970) 114 Proceedings of the American Philosophical Society 10 <http://www.jstor.org/stable/985720>

——, 'Rewards and Penalties of Monitoring the Earth' (1998) 23 Annual Review of Energy and the Environment 25 <https://www.annualreviews.org/doi/10.1146/annurev.energy.23.1.25>

Mahrane Y and others, 'From Nature to Biosphere. The Political Invention of the Global Environment, 1945-1972' (2012) 113 Vingtième siècle. Revue d'histoire 127 <https://hal.inrae.fr/hal-04164522>

National Science Foundation, Weather Modification: Tenth Annual Report for Fiscal Year Ended June 30, 1968 (US Congress 1969) <https://hdl.handle.net/2027/uc1.31210025052638>

Pales JC and Keeling CD, 'The Concentration of Atmospheric Carbon Dioxide in Hawaii' (1965) 70 Journal of Geophysical Research 6053 <http://doi.wiley.com/10.1029/JZ070i024p06053>

Panel USPSACEP, Restoring the Quality of Our Environment: Report (White House 1965)

Plass G, 'Carbon Dioxide and the Climate' (1956) 44 American Scientist 302 <http://www.jstor.org/stable/27826805>

——, 'The Carbon Dioxide Theory of Climatic Change' (1956) 8 Tellus 140 <https://doi.org/10.1111/j.2153-3490.1956.tb01206.x>

Plass GN, 'A Method for the Determination of Atmospheric Transmission Functions from Laboratory Absorption Measurements' (1952) 42 Journal of the Optical Society of America 677 <https://opg.optica.org/abstract.cfm?URI=josa-42-9-677>

——, 'Parallel-Beam and Diffuse Radiation in the Atmosphere' (1952) 9 Journal of Meteorology 429 <http://journals.ametsoc.org/doi/10.1175/1520-0469(1952)009<0429:PBADRI>2.0.CO;2>

——, 'Regions of Validity of Various Absorption-Coefficient Approximations' (1954) 11 Journal of Meteorology 163 <http://journals.ametsoc.org/doi/10.1175/1520-0469(1954)011<0163:ROVOVA>2.0.CO;2>

——, 'The Influence of the 9.6 Micron Ozone Band on the Atmospheric Infra-red Cooling Rate' (1956) 82 Quarterly Journal of the Royal Meteorological Society 30 <https://rmets.onlinelibrary.wiley.com/doi/10.1002/qj.49708235104>

——, 'The Influence of Infrared Absorptive Molecules on the Climate' 95 Annals of the New York Academy of Science 61 <https://nyaspubs.onlinelibrary.wiley.com/doi/abs/10.1111/j.1749-6632.1961.tb50025.x>

Plass GN and Fivel DI, 'Influence of Doppler Effect and Damping on Line-Absorption Coefficient and Atmospheric Radiation Transfer.' (1953) 117 The Astrophysical Journal 225 <http://adsabs.harvard.edu/doi/10.1086/145680>

——, 'The Influence of Variable Mixing Ratio and Temperature on the Radiation Flux' (1955) 81 Quarterly Journal of the Royal Meteorological Society 48 <https://onlinelibrary.wiley.com/doi/10.1002/qj.49708134706>

Pollution USPTF on A and PROGRAMS USEPAOOA, Cleaner Air for the Nation: The Report of the President's Task Force on Air Pollution. [United States]. (United States Environmental Protection Agency Office Of Air Programs 1970)

Robinson E and Robbins RC, 'Sources, Abundance, and Fate of Gaseous Atmospheric Pollutants. Final Report and Supplement' <https://www.osti.gov/biblio/6852325>

Schaefer VJ, 'Inadvertent Modification of the Atmosphere by Air Pollution' (1969) 50 Bulletin of the American Meteorological Society 199 <https://journals.ametsoc.org/view/journals/bams/50/4/1520-0477-50_4_199.xml>

'Scientists, Engineers Honored with National Medals' (2002) 55 Physics Today 71 <https://pubs.aip.org/physicstoday/article/55/7/71/411937/Scientists-Engineers-Honored-with-National-Medals>

Sherlock RL, Man as a Geological Agent: An Account of His Action on Inanimate Nature (H F & G Witherby 1922)

Study of Critical Environmental Problems and Massachusetts Institute of Technology (eds), Man's Impact on the Global Environment: Assessment and Recommendations for Action; Report (MIT Press 1970)

Tyndall J, 'The Bakerian Lecture.—On the Absorption and Radiation of Heat by Gases and Vapours, and on the Physical Connexion of Radiation, Absorption, and Conduction' (1861) 151 Philosophical Transactions of the Royal Society of London 1 <https://royalsocietypublishing.org/doi/10.1098/rstl.1861.0001>

'United States. President's Science Advisory Committee' <https://web.archive.org/web/20220815054423/https://history.aip.org/phn/21612015.html>

Weart SR, The Discovery of Global Warming (Revised and expanded edition, Harvard University Press 2008) <https://www.hup.harvard.edu/catalog.php?isbn=9780674031890>

Weather and Climate Modification: Report of the Special Commission on Weather Modification (of the) National Science Foundation (National Science Foundation 1965)

Weather Modification. Fourth Annual Report for Fiscal Year Ended June 30, 1962 (Verlag nicht ermittelbar 1963) <http://www.nationallizenzen.de/angebote/nlproduct.2009-02-20.2266515664>

Zuoyue W, *In Sputnik's Shadow: The President's Science Advisory Committee and Cold War America* (Rutgers University Press 2009) <https://books.google.it/books/about/In_Sputnik_s_Shadow.html?id=ML7aAAAAMAAJ&redir_esc=y>

Pacific Community
Communauté du Pacifique

INTERNATIONAL COURT OF JUSTICE

Request for an Advisory Opinion on Obligations of States in respect of Climate Change

Expert Report for the Government of Vanuatu
prepared by the Pacific Community (SPC)

Authorised by the Director-General of the Pacific Community,
Dr Stuart Minchin

Compiled and authored by Johanna Gusman, M.Sc., J.D.

12 March 2024

Acknowledgements

We acknowledge the scientific and technical support from Pacific Community (SPC) staff, with climate change science expertise, in particular from the Climate Change and Environmental Sustainability Programme (CCES), Geoscience, Energy and Maritime Division (GEM), Fisheries, Aquaculture and Marine Ecosystems (FAME) Division and Land and Resources Division (LRD).

Disclaimer

This publication was produced by the Pacific Community (SPC). Its contents are the sole responsibility of SPC and do not necessarily reflect the views of the Government of Vanuatu. While efforts have been made to ensure the accuracy and reliability of the material contained in this report, SPC cannot guarantee that the information is free from errors and omissions, and does not accept any liability, contractual or otherwise, for the content of this report or any consequences arising from its use.

CONTENTS

I. INTRODUCTION AND EXPERTISE 1
II. METHODOLOGY 1
III. CLIMATE CHANGE–RELATED IMPACTS 2
Extreme weather events: Increased frequency and intensity of extreme weather events, including cyclones 2
Temperature Rise 4
Water security, including floods and drought 4
Agriculture 5
Food security 6
Sea-level rise 6
Coastal inundation 8
Ocean warming, acidification, and deoxygenation 10
Pelagic fisheries and tuna stock 12
Coastal fisheries 13
Coral reefs and biodiversity 14
IV. CONCLUSION 15

I. INTRODUCTION AND EXPERTISE

The Pacific Community (SPC) supports Pacific countries and territories with scientific and technical solutions to address the region's greatest challenge, climate change. SPC is one of the Pacific region's scientific and technical intergovernmental organisations working alongside its Pacific Island country and territory (PICT) members[1] to understand and develop effective solutions to the challenges they face. In this case, SPC's core technical abilities to provide the objective science behind observed impacts of the adverse effects of climate change will help provide further expertise for Vanuatu's state submission.

SPC's mandate and work programme addresses the many facets of climate change and its impacts on the region, including but not limited to marine ecosystems, fisheries,[2] coastal hazards, and human rights protections.[3] Additionally, SPC is the regional lead for the implementation of many climate–change mitigation and adaptation programmes, including those on sea-level rise as well as loss and damage, and it sustainably manages Pacific maritime zones, ecosystems, and resources from 'ridge to reef' for current and future generations.[4] Its expertise in global and regional analyses of the impacts of climate change on the marine environment led to its inclusion in the advisory opinion proceedings at the International Tribunal for the Law of the Sea in Case No. 31.[5]

Finally, SPC is a consultative and advisory body to participating governments in matters affecting the economic and social development of the territories within its scope of the Pacific Community and the welfare and advancement of their peoples.[6] SPC sustainably manages the social and environmental risks and impacts of all its activities in an inclusive manner, with a people-centred approach to maximise whole-of-society benefits. SPC is committed to openness and transparency, maintaining the highest ethical standards, and, as such, the statements contained in this report are factually correct and materially complete.

II. METHODOLOGY

Vanuatu requested this expert report to include the full scope of climate-related losses and damages experienced, including environmental, human health, socio-economic, and cultural impacts. From this

---

[1] SPC has 27 members, including 22 PICTs: American Samoa, Cook Islands, Federated States of Micronesia, Fiji, French Polynesia, Kiribati, Guam, Marshall Islands, Nauru, New Caledonia, Niue, Northern Marianna Islands, Palau, Papua New Guinea, Pitcairn Islands, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu, Vanuatu and Wallis and Futuna.

[2] Note that, under the United Nations Convention on the Law of the Sea (UNCLOS), fishing is singled out among the legitimate uses of the sea that are negatively affected by pollution (*'pollution of the marine environment means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities)*, UNCLOS, 10 December 1982, 1833 United Nations Treaties Series (U.N.T.S.) 397 (entered into force 1 November 1994) at Article 1(1)(4).

[3] Article IV, §§ 6-10, of the Canberra Agreement establishing the South Pacific Commission (U.N.T.S., vol. 97, p. 227).

[4] For the full range of SPC's implementation for mitigation and adaptation programming, *see* Pacific Community Strategic Plan 2022-2031 (available at: https://purl.org/spc/digilib/doc/uzzya).

[5] *See* Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for an Advisory Opinion submitted to the Tribunal, Intergovernmental Organizations invited to submit written statements pursuant to the Rules of the Tribunal.

[6] *Supra* note 3 at para. 6.

request, several of SPC's largest and most relevant divisions provided the necessary science to put together this report, compiled by an international lawyer with a scientific background to ensure proper competencies.[7]

The science captured in this expert report builds upon the best available science, including the Sixth Assessment Report of the United Nations Intergovernmental Panel on Climate Change (IPCC).[8] It covers climate impacts that have already been observed as well as those currently occurring, such as cyclones and other natural disasters, extreme weather events, marine environment degradation, and others.

It concludes that (i) Vanuatu has experienced significant harm as a result of anthropogenic climate change; and (ii) future losses and damages are bound to occur, with the extent of future harm depending on actions taken to avert, minimise, and address such losses and damages.

III. CLIMATE CHANGE–RELATED IMPACTS

Small island developing states, due to their geographical circumstances and level of development, are specially affected and particularly vulnerable to the adverse effects of climate change. For Vanuatu, these well-documented harms include but are not limited to extreme weather events; sea-level rise; coastal erosion; ocean warming, acidification, and deoxygenation; and adverse effects on pelagic and coastal fisheries; coral reefs and biodiversity; temperature rise; drought and water security; agriculture; and food security.[9] These impacts are described under the progression of time and corresponding increased temperature projections, and where possible, including climate impacts likely to occur at 2.8°C, the level of warming projected to occur if nationally determined contributions submitted under the Paris Agreement are fully implemented.

Extreme weather events: Increased frequency and intensity of extreme weather events, including cyclones

According to the World Risk Index 2021, Vanuatu has been classified as the country most exposed to the risks of natural disasters,[10] meaning that current climate change–related harm is likely to only worsen. Global evidence shows that the economic damage caused by cyclones is long-lasting and cumulative.[11] Countries never quite recover from the impact of one cyclone, let alone a series of them.

---

[7] SPC's relevant divisions include Geoscience, Energy and Maritime (GEM), Fisheries, Aquaculture and Marine Ecosystems (FAME), Land and Resources Division (LRD), and Human Rights and Social Development (HRSD). The Climate Change and Environmental Sustainability programme also agrees with the following report. The profiles of these divisional directors as well as the author's curriculum vitae for this expert compilation can be found packaged at the end of this report.

[8] United Nations Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2022: Impacts, Adaptation, and Vulnerability*. Contribution of Working Group II to the Sixth Assessment Report of the United Nations Intergovernmental Panel on Climate Change, Cambridge University Press, 2022 (also available at: https://report.ipcc.ch/ ar6/wg2/IPCC_AR6_WGII_FullReport.pdf).

[9] *See mainly*, McGree, Simon, Grant Smith, Elise Chandler, Nicholas Herold, Zulfikar Begg, Yuriy Kuleshov, Philip Malsale, and Mathilde Rittman, SPC. *Climate Change in the Pacific 2022: Historical and recent variability, extremes and change.* Chapter 16 'Vanuatu'. https://purl.org/spc/digilib/doc/7wifz; and Gillett, Robert and Mereselita Fong. 2023. Fisheries in the economies of Pacific Island countries and territories (Benefish Study 4). Noumea, New Caledonia: Pacific Community. 704 p. https://purl.org/spc/digilib/doc/ppizh. SPC also received data on *Coral Reefs* and on *Biodiversity* from experts at the Secretariat of the Pacific Regional Environment Programme (SPREP) in consultation with the Government of Vanuatu.

[10] *See* World Risk Index 2021 available at https://www.preventionweb.net/publication/world-risk-report-2021-focus-social-protection.

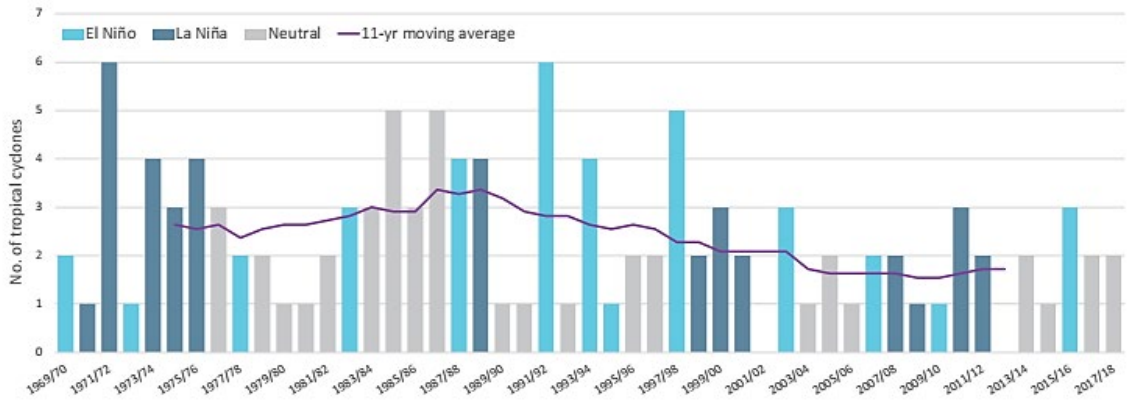
[11] United Nations Capital Development Fund (2020) at 5.

While current statistics for Vanuatu indicate an average annual loss of 20% GDP,[12] the impacts due to sea-level rise further reduce arable area, and hence agricultural and forestry production lags. GDP loss due to the frequency and intensity of cyclones occurring will certainly increase and adversely affect vulnerable aspects of nature and community into the future.

Tropical cyclones usually affect Vanuatu during the southern hemisphere tropical cyclone season, which is from November to April, but also occasionally occur outside the tropical cyclone season. The Southern Hemisphere Tropical Cyclone Archive indicates that between the 1969/70 and 2017/18 seasons, 117 tropical cyclones passed within the Vanuatu exclusive economic zone (EEZ) (see Figure 1).[13] This represents an average of 24 cyclones per decade. Tropical cyclones were most frequent in El Niño years (28 cyclones per decade), followed by La Niña years (26 per decade), and least frequent in neutral years (20 cyclones per decade).

Interannual variability in the number of tropical cyclones in the EEZ is large, ranging from zero in some seasons to six in 1971/72 and 1991/92, and five in 1984/85, 1986/87, and 1997/98. High interannual variability and the small number of tropical cyclones occurring in the EEZ make reliable identification of long-term trends in frequency and intensity difficult.[14] However, extensive data does exist for the loss and damages caused by previous extreme weather events that have had lasting impact on Vanuatu. For example, Cyclone Pam—a category 5 tropical cyclone struck Vanuatu killing 11 people, destroying and/or damaging over 17,000 buildings, and displacing 65,000 people—hit the island in 2015. The economic damages alone were estimated to be equivalent to 64% of Vanuatu's total gross domestic product (GDP).[15]

Figure 1. Number of tropical cyclones passing within Vanuatu EEZ per season.[16]



While the predictions for cyclones for the country are expected to decrease, there is likely to be an increase in the wind speed of between 2% and 11% and an increase in rainfall intensity of about 20%

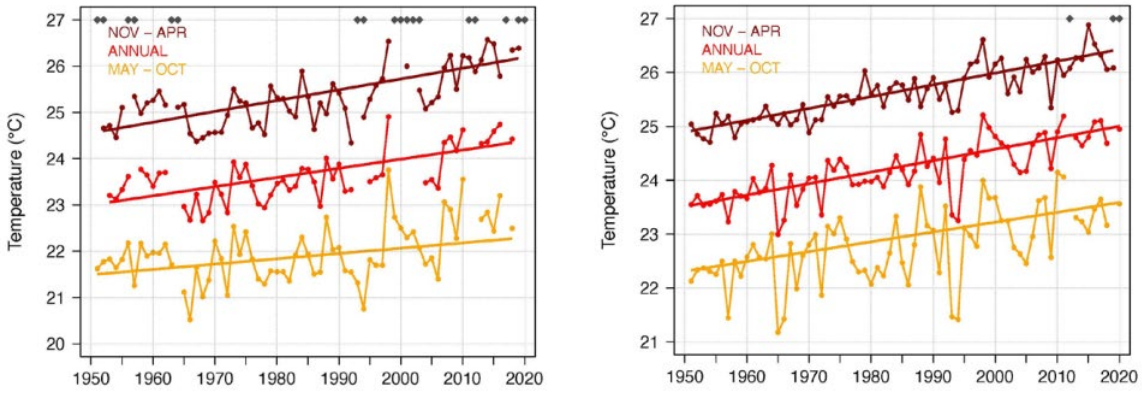
[12] United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), *Vanuatu twin cyclones underscore the Pacific's vulnerability to compounding climate disaster risks*, available at https://rb.gy/ay1pol (accessed 12 December 2023).
[13] McGree et al. *Climate Change in the Pacific 2022,* 205.
[14] Records of tropical cyclones exist from the late 1800s in some countries in the Southwest Pacific, but trends in tropical cyclones have only been presented from 1981/82. Satellite-based observations began in the Southwest Pacific in the early 1970s, but consistent coverage and reliable intensity estimates have only been available since the early 1980s. Confidence in tropical cyclone trends is moderate as the definition of a tropical cyclone has changed and satellite observation methods have continued to improve over the last 40 years.
[15] The World Bank Group, Climate Risk Country Profile: Vanuatu (2021), available at https://climateknowledgeportal.worldbank.org/sites/default/files/country-profiles/15825-WB_Vanuatu%20Country%20Profile-WEB.pdf
[16] Figure from McGree, S. et al. *Climate Change in the Pacific 2022*, 205.

within 100 km of the cyclone centre.[17] In the year 2023 alone, Vanuatu was impacted by three cyclones. The impact of the March cyclones to the economy of the country was estimated at 20% of its GDP.[18]

Temperature Rise

Average annual and seasonal temperatures are increasing in Vanuatu (see Figure 2). All temperature trends are statistically significant for the two sites SPC has measured, and November to April temperatures have increased faster than the May to October temperatures, with maximum temperatures increasing faster than minimum temperatures, especially outside Port Vila.[19] Seasonal temperature changes in Vanuatu are strongly connected to changes in the surrounding ocean temperature, so as one rises, it will influence the other.[20] SPC analysis determined that there is a clear shift towards warmer average monthly temperatures between the climatology periods of 1961–1990 and 1991–2020.

Figure 2. Average annual and seasonal temperature rise in Aneityum (left) and Port Vila (right).[21]



Water security, including floods and drought

Past droughts have caused significant impacts in Vanuatu affecting water security and agricultural production.[22] In the coming decades, droughts are projected to become longer and more intense, with a higher proportion of events in the extreme drought category, with little change in annual average rainfall projected.[23] At the same time, annual average temperature is projected to increase (see above), with more heatwaves and increased climate variability, through more extreme El Niños and La Niñas in the future, impacting water security.[24]

---

[17] Pacific-Australia Climate Change Science and Adaptation Planning Program (PACCSAP), *Current and future climate of Vanuatu* (2015), available at https://www.pacificclimatechangescience.org/wp-content/uploads/2013/06/15_PACCSAP-Vanuatu-11pp_WEB.pdf.

[18] UNESCAP, *Vanuatu twin cyclones.*

[19] McGree et al., *Climate Change in the Pacific 2022*, 208.

[20] *Ibid*.

[21] Figure from *Climate Change in the Pacific 2022*, 208. Diamonds indicate years with insufficient data for one or more variables.

[22] Iese, Viliamu, Anthony S. Kiem, Azarel Mariner, Philip Malsale, Tile Tofaeono, Dewi GC Kirono, Vanessa Round et al. "Historical and future drought impacts in the Pacific islands and atolls." *Climatic Change* 166, no. 1 (2021): 19.

[23] Kirono, D., et al., National and sub-national climate projections for Vanuatu. 2023. CSIRO: Melbourne, Australia (accessed restricted).

[24] CSIRO and SPREP (2023), *Climate change impacts on water security in Vanuatu.* Info byte prepared for the Vanuatu Meteorology and Geo-hazards Department as part of the Van-KIRAP project. CSIRO: Melbourne, Australia. Given that access to clean drinking water is a fundamental human right, water security is identified in

In Vanuatu, major droughts occurred in 1982–1983, 1997–1998, and 2015–2016, with their frequency and intensity differing over space and time.[25] The latest drought occurred in the aftermath of Cyclone Pam, which had already caused considerable damage to agricultural production. Throughout the drought, most water tanks were empty or severely depleted. Villagers in 20% of households walked more than 30 minutes to collect water for cooking and washing.[26]

With extreme droughts becoming potentially longer and more intense under some emissions scenarios, the impacts on water security may worsen. Such impacts will likely include limitations in the supply of domestic and industrial water, including urban, peri-urban, and rural areas with deleterious consequences for public health, commerce, and overall economic productivity.[27] As has already been seen (see below), the agriculture sector impacts are especially affected and include reduced productivity, loss or reduced output of crops and livestock, deleterious consequences for food security for local communities, and reduced exports affecting the economy more broadly. For example, research conducted in the western region of Ambae has revealed a concerning vulnerability in the boreholes situated near the shoreline. These crucial water sources, relied upon by local communities for potable water, are prone to salinization during extended dry spells that will be further impacted by more extreme El Niño events in the future.[28]

While data shows no significant predicted change in the trend of annual rainfall, extreme daily precipitation is predicted to increase. On average, across the country, daily extreme rainfall events are expected to produce an average of 6.5% more precipitation by 2050 under RCP4.5 projections. However, 95th percentile estimates indicate precipitation on any given event could be as high as 77.5% higher than baseline observations, indicating individual events over a season or year could cause dramatically higher precipitation events. This is also correlated to the predicted increase in tropical cyclone intensity and rainfall. Damage to water and sanitation infrastructure caused by extreme wind and flooding events can lead to overflows in pit latrines or makeshift structures, reducing access to safe facilities and increasing the health burden of exposed communities.

Agriculture

The agriculture and forestry sectors of Vanuatu are highly prone to the impacts of climate change, especially concerning extreme weather events like cyclones. An impact assessment carried out in 2020 after Tropical Cyclone Pam estimated that the economic loss to the agriculture sector was 8% of the country's GDP. The crop damage was around 69% of the total agricultural damage with forestry estimated at 16%. The populations most impacted were also those most vulnerable, including farming communities operating at the subsistence levels.[29]

Studies carried out by SPC in the northern province of Vanuatu documented several climate change-related harms to agriculture in these communities, including a relatively high exposure and sensitivity to climate change impacts and lower abilities to adapt to such changes. For example, some of the identified climate-related impacts on agriculture production involved changes in behaviour of plants and livestock, resulting in reduced productivity. Weather patterns also closely correlated with increased

---

the Vanuatu National Sustainable Development Plan (NSDP) as an important issue, particularly in a changing climate.

[25] *Ibid*.

[26] Vanuatu Government, Post-Disaster Needs Assessment Tropical Cyclone Pam, March 2015. 2015: Port Vila, Vanuatu, available at https://www.dfat.gov.au/sites/default/files/post-disaster-needs-assessment-cyclone-pam.pdf.

[27] CSIRO and SPREP (2023), 3.

[28] SPC Recovery Support for Tropical Cyclone Pam: Groundwater Investigation, West Ambae, Vanuatu (2017) (access restricted).

[29] UN Capital Development Fund (2020), Economic impacts of natural hazards on vulnerable populations in Vanuatu, available at https://www.uncdf.org/article/6318/climate-risk-insurance-literature-reviews.

incidence of pests and disease problems.[30] Other impact assessments projected the climate change as causing significant damage to the infrastructure and equipment needed for a productive agriculture sector.[31]

Food security

These climate change–related harms compound and contribute to increased food and nutrition insecurities, especially for rural communities. With more than 50% of the household's dietary energy consumption purchased, the increase in prices of food after natural disasters puts them at greater risk. It is estimated that 29% of children in Vanuatu are stunted, which is higher than the Pacific average of 20%, around 4% of children are wasted and 11% are underweight.[32] While the statistics for wasting and underweight children are below the average rate for the Pacific average, this is not to say that as communities become more impacted by climate change, the prevalence of these food insecurity issues will increase.

The compounding nature of the climate crises is also found in the fisheries industry. Nearly three-quarters (71%) of the population enjoy free access to marine resources including fish, shellfish, and more. Just under one-third (31%) of households in Vanuatu have members actively engaged in fishing and 29% of households consume free fish from home production at least once a week. Fish, shellfish, and their products contribute to only 4% of the average dietary energy consumption,[33] meaning that more than half of the dietary energy consumed is purchased, despite free access to marine resources.[34]

For Pacific Islands like Vanuatu, climate change–related impacts significantly affect ocean and coastal areas. While the ocean covers two-thirds of the planet, the Pacific Ocean is the largest, occupying the most surface area, carrying nearly one-third of the world's marine resources, and comprising 20% of the global exclusive economic zones (EEZ).[35] Ocean and coastal ecosystems host vast biodiversity and modulate global climate systems by regulating heat, water, and elements like carbon. Marine systems are also central to Pacific cultures, providing food, minerals, energy, and employment to its peoples, of which Vanuatu is no exception.

Sea-level rise

Sea level observations from satellite altimetry over the last 30 years show a positive trend (increase) across the western tropical Pacific, and in many countries, the rate of sea-level rise is higher than the global average over that same period.[36] Sea level in Vanuatu, measured by satellite altimeters since 1993,[37] has risen between 3.5 millimetres (mm) and 5 mm per year across the EEZ, with a confidence

[30] SPC, Climate change vulnerability assessments for communities in six Pacific Island countries: Fiji, Kiribati, Samoa, Solomon Islands, and Vanuatu (2016), available at https://ccprojects.gsd.spc.int/wp-content/uploads/2016/04/Web_whole_Climate_change_Vulnerability_Assessments.compressed.pdf.
[31] *Ibid*.
[32] UNICEF, *Situational Analysis of Children in Vanuatu* (2017) available at https://www.unicef.org/pacificislands/media/1281/file/Situation-Analysis-of-Children-Vanuatu.pdf.
[33] Vanuatu National Statistics Office (VNSO), Food and Agriculture Organization of the United Nations (FAO), and SPC, 2021. *The Vanuatu Food Security Profile* available at https://www.fao.org/3/cb3785en/cb3785en.pdf.
[34] *Ibid*.
[35] Seidel, Henrike and Padma N. Lal, *Economic value of the Pacific Ocean to the Pacific Island Countries and Territories*, IUCN, 2010 (available at: https://www.iucn.org/sites/default/files/import/downloads/economic_value_of_the_pacific_ocean_to_the_pacific_island_countries_and_territories_p.pdf).
[36] McGree et al., *Climate Change in the Pacific 2022*, 207.
[37] SPC has completed lidar imagery acquisition for selected islands in Vanuatu. Lidar data is high-resolution topography and bathymetry imagery that can be used for multiple applications such as ocean modelling, hydrographic mapping, infrastructure development, planning, etc. including capturing climate change–related impacts and corresponding damage over time.

interval of ±0.4 mm in the south and up to ±1.0 mm in the north. Most of the EEZ exhibits sea-level rise that is larger than the global average of 3.1 ± 0.4 mm per year.[38] For example, Nguna-Pele Islands already faces coastal inundation and erosion, water salination, and land degradation exacerbated by sea-level rise. These impacts are exacerbated by other adverse effects of climate change including disrupted precipitation patterns, soil nutrient loss, and hillside erosion. While Vanuatu has implemented adaptation plans to address these effects, most of the impacts appear to be irreversible, amounting to losses.[39]

Sea-level rise is expected to continue to rise in Vanuatu in all emission scenarios. By 2030, under a high emissions scenario, an average of 12 centimetre (cm) is projected (see Table 1).[40] The projection for the intermediate emissions scenario paints an even more harrowing picture for small island developing states like Vanuatu because the sea level would rise by approximately 67 cm by 2100 and even about 26 cm as early as 2050 (see Figure 3). As the ocean encroaches upon the land, it is not merely the physical landscape that faces changes; it is the essence of how people live and thrive. As coastal areas become increasingly uninhabitable, communities face the heart-wrenching prospect of abandoning ancestral homes. This upheaval not only severs ties to land and heritage but also disrupts social structures, community cohesion, and cultural identity, and makes people deeply vulnerable.

Table 1. Decadal increments for projections of sea-level rise in metres for Vanuatu relative to the 1995–2014 mean sea-level rise.[41]

Year	*Low* SSP1-2.6	*Intermediate* SSP2-4.5	*High* SSP3-7.0	*Very High* SSP5-8.5	*Very High – Low* SSP5-8.5 H+
1995–2014	0.00	0.00	0.00	0.00	0.00
2020	0.07 (0.04–0.10)	0.07 (0.03–0.11)	0.07 (0.03–0.10)	0.07 (0.04–0.10)	0.07 (0.04–0.11)
2030	0.12 (0.08–0.17)	0.12 (0.08–0.17)	0.12 (0.08–0.17)	0.13 (0.10–0.17)	0.13 (0.10–0.20)
2040	0.18 (0.12–0.24)	0.18 (0.13–0.25)	0.18 (0.13–0.25)	0.20 (0.15–0.27)	0.21 (0.15–0.33)
2050	0.24 (0.18–0.32)	0.26 (0.20–0.34)	0.27 (0.20–0.35)	0.29 (0.22–0.38)	0.30 (0.21–0.48)
2060	0.30 (0.22–0.40)	0.33 (0.25–0.43)	0.35 (0.27–0.45)	0.38 (0.30–0.49)	0.40 (0.29–0.68)
2070	0.37 (0.28–0.49)	0.41 (0.31–0.55)	0.45 (0.35–0.59)	0.49 (0.38–0.65)	0.52 (0.38–0.92)
2080	0.43 (0.32–0.59)	0.50 (0.38–0.68)	0.56 (0.43–0.74)	0.61 (0.47–0.82)	0.67 (0.47–1.21)
2090	0.49 (0.37–0.68)	0.59 (0.44–0.80)	0.67 (0.52–0.90)	0.76 (0.59–1.01)	0.85 (0.59–1.53)
2100	0.56 (0.40–0.79)	0.67 (0.47–0.94)	0.81 (0.61–1.10)	0.93 (0.71–1.25)	1.06 (0.71–1.89)
2110	0.65 (0.44–0.92)	0.76 (0.51–1.09)	0.92 (0.64–1.27)	1.04 (0.74–1.46)	1.26 (0.74–2.23)
2120	0.71 (0.48–1.02)	0.85 (0.57–1.22)	1.05 (0.73–1.46)	1.19 (0.84–1.67)	1.50 (0.84–2.55)
2130	0.77 (0.51–1.12)	0.93 (0.62–1.35)	1.17 (0.81–1.64)	1.33 (0.94–1.87)	1.75 (0.94–3.34)
2140	0.84 (0.55–1.21)	1.02 (0.68–1.48)	1.30 (0.90–1.82)	1.46 (1.03–2.07)	2.03 (1.03–4.41)
2150	0.89 (0.59–1.30)	1.11 (0.73–1.61)	1.42 (0.98–2.00)	1.59 (1.11–2.26)	2.34 (1.11–5.59)

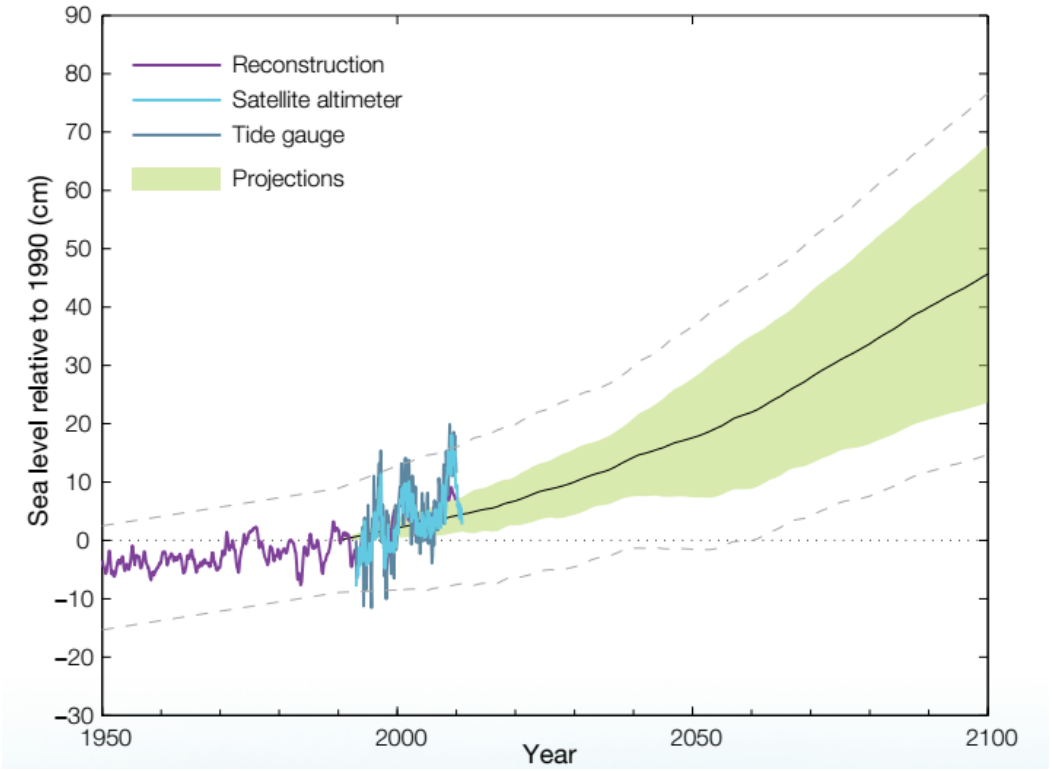
[38] von Schuckmann, Karina, Pierre-Yves Le Traon, Neville Smith, Ananda Pascual, Samuel Djavidnia, Jean-Pierre Gattuso, et al. 2021. Copernicus Marine Service Ocean State Report, issue 5. *Journal of Operational Oceanography*, 14, 1–185. doi: 10.108 0/1755876X.2021.1946240. This rise is partly linked to a pattern related to climate variability from year to year and decade to decade. Trend estimates at the Port Vila tide-gauge over a similar time span to the altimetry observations from January 1993 to July 2020.

[39] Nguna-Pele Islands is one of two pilot sites for implementing climate change adaptation measures under SPC's Coping with Climate Change in the Pacific Islands Region (CCCPIR) programme.

[40] International Climate Change Adaptation Initiative, Vanuatu Meteorology and Geo-hazard Department, Australian Bureau of Meteorology, and Commonwealth Scientific and Industrial Research Organisation (CSIRO) Pacific Climate Change Science Program, *Current and future climate of Vanuatu* (2011), available at https://www.pacificclimatechangescience.org/wp-content/uploads/2013/06/15_PCCSP_Vanuatu_8pp.pdf.

[41] Table from *PRIF (2021): Guidance for managing Sea Level Rise Infrastructure Risk in Pacific Island Countries*, published December 2021, available at https://www.theprif.org/sites/default/files/documents/PRIF_SLR-Report_Digital_0.pdf. Projections based on IPCC (2021) sourced from AR6 and interpolated to nearest decade and adjusted for the upper bound of the most *likely* vertical land movement defined by Fox-Kemper et al. (2021).

Figure 3. Observed and projected relative sea-level change near Vanuatu.[42]



Coastal inundation

Studies have documented significant harm caused by climate change across Vanuatu's islands and waters (see Image 1). For example, Teouma (South Efate) has suffered losses and damages due to rainfall variability, soil nutrient loss, high wind exposure, and excessive temperatures.[43] These climate change–exacerbated environmental impacts have forced many communities to abandon their ancestral lands and important traditional food sources and relocate to safer areas, often resulting in the loss of cultural heritage, cultural identity, cultural practices, social cohesion, and economic stability, causing insecurity. The displacement of these communities poses significant challenges in terms of safeguarding human rights, ensuring access to basic services, and maintaining community structures. There are also many implications for receiving communities and the ability of nations to effectively relocate communities where there are limited land resources and highly complex land tenure systems.[44]

[42] Graphic from *Current and future climate of Vanuatu* (2011), 7. The observed sea-level rise records are indicated in dark blue (relative tide-gauge observations) and light blue (the satellite records since 1993). Reconstructed estimates of sea level near Vanuatu since 1950 are shown in purple. The dashed lines are an estimate of 90% of the range of natural year-to-year variability in sea level.

[43] Teouma (South Efate) is the other pilot island under CCCPIR.

[44] *See e.g.,* Pacific Climate Change Migration and Human Security (PCCMHS) Programme*, Regional policy dialogue: Summary Report, 2022* (available at https://www.preventionweb.net/publication/pacific-climate-change-migration-and-human-security-pccmhs-programme-regional-policy).

Image 1. Projected inundation for extreme sea levels with an average recurrence of 10 years, 50 years, and 100 years for the Vanuatu coast.[45]



The inundation projections are calculated through extreme-value analysis from a 40-year SCHISM-WWMIII simulation[46] of the ocean around Vanuatu, which accounts for sea-level variations due to tides, waves, storm surge, and background variability combined with projected sea-level rise from the Next Generation Climate Projections for the Western Tropical Pacific. Data is available for the periods of 2020–2039, 2040–2059, 2060–2079, and 2080–2099, for emissions scenarios at representative concentration pathway (RCP) 2.6 (lower emissions) and RCP 8.5 (higher emissions) as well as for the baseline period representing near-current sea-level extremes. Noting that over 90% of Vanuatu's population lives within 5 kilometres of the coast, critical infrastructure is found in locations where there are varying degrees of exposure and vulnerability to such climate hazards.[47]

Damage has already been documented under current climate conditions (see Image 3). For the period of 1980–2020, regions of 10-, 50-, and 100-year coastal inundation (from light to dark blue) include roads that are inundated under current climate conditions.[48] With the sea-level rise observed over the western tropical Pacific of about 10–15 cm on average since 1993, the compounding issues have caused consequences for Vanuatu, particularly in low-lying coastal areas that are the most vulnerable to flooding and erosion. While vertical land motion due to earthquakes has offset some of the effects of

[45] Image from the Vanuatu Climate Futures Portal available at https://www.vanclimatefutures.gov.vu/dashboard/home.
[46] Recent technological advances have allowed for a high-resolution numerical model capable of analysing ocean dynamics to better understand how storms will impact local beaches on a Vanuatu-wide scale. The advanced, high-resolution (in the coastal zone ~100 m) 3D finite element hydrodynamic model (SCHISM) coupled with the state-of-the-art WWMIII wave model is capable of two-way information exchange between the hydrodynamic model and wave model to provide the most advanced simulations to date.
[47] CSIRO and SPREP (2023). Current and projected coastal inundation affecting roads in Vanuatu. Infobyte prepared for the Vanuatu Meteorology and Geo-hazards Department as part of the Van-KIRAP project. CSIRO: Melbourne, Australia.
[48] *Ibid*.

sea-level rise on relative sea level in some locations[49] (and can sometimes explain differences in long-term sea level trends between land-based tide gauges and satellite altimetry), at the national scale, Vanuatu remains vulnerable to the long-term effects of sea level rise.

Image 3. Coastal inundation of the road running between Kauwenu sport field and the coast (left) and a coastal road in Luganville, Santo (right).

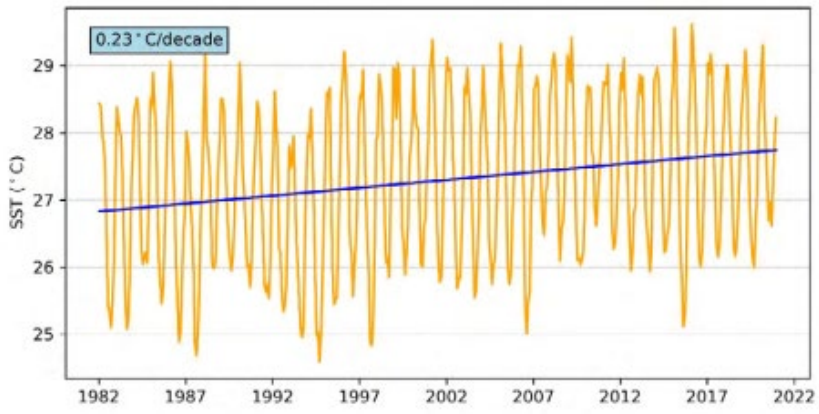


Ocean warming, acidification, and deoxygenation

Ocean warming, acidification, and deoxygenation will continue to increase this century at rates dependent on future emissions of carbon dioxide and greenhouse gases.[50] Since 1993, the rate of ocean warming (and thus heat uptake) has more than doubled and is attributed to anthropogenic forcing, or human-caused changes in concentrations of greenhouse gases despite climate variations that naturally occur. Anthropogenic change has been detected in surface temperature with very high significance levels, a conclusion strengthened by the detection of anthropogenic change in the upper ocean with a high significance level. In Vanuatu, surface-level ocean warming is in line with the conclusion against upper ocean warming being due to natural internal processes (see Figure 4). Observed change is very large relative to climate-model simulated internal variability.[51]

[49] Brown, N.J., A. Lal. B. Thomas, S. McClusky and J. Dawson, G. Hu and M. Jia. Vertical motion of Pacific Island tide gauges: Combined analysis from GNSS and levelling. Geoscience Australia, 2020. doi: 10.11636/Record.2020.003.
[50] Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2022*.
[51] Intergovernmental Panel on Climate Change (IPCC), *Combining Evidence of Anthropogenic Climate Change*.

Figure 4. Sea surface temperature from satellite observations averaged across the Vanuatu EEZ.[52]



In terms of sea surface temperature rise in Vanuatu, existing harm can best be captured in what is known as marine heat waves (MHWs), defined as 'discrete, prolonged anomalously warm water events which last for five or more days, with sea surface temperatures warmer than the 90th percentile relative to climatological values. Across Vanuatu historically there has been an increasing frequency of MHWs (1982–2021), mostly in the 'Moderate' to 'Strong' category.[53]

Broadly speaking, northern Vanuatu has experienced more frequent, longer duration and higher intensity MHWs than southern Vanuatu for the period 1982–2021.[54] Across all sites, historically the typical number of MHWs is around 25 days per year (20-year average centred on 1995). Under the low greenhouse gas emissions scenario (SSP126), this is projected to increase to about 80–150 days per year by 2050. Under the high emissions scenario (SSP585) this increases to about 170–310 days per year by 2050, with many days in the 'Strong' and 'Severe' MHW categories.[55]

There may also be broader biological, hydrological, physical, and chemical processes (e.g., fish spawning and recruitment, food web and critical habitat relationships, diurnal feeding and distributional patterns, nutrient cycling, etc.) sensitive to MHWs in winter.[56] Winter MHWs on top of long-term warming can also enable the establishment of invasive species in some instances where previously cool winters would have killed them off. The existing issues and projected changes to the key features of the tropical Pacific Ocean surrounding Vanuatu relative to the long-term averages are expected to result in increases to sea surface temperatures, sea level, and ocean acidification (see Table 2).[57]

---

[52] Image taken from *Climate Change in the Pacific 2022*, 206. Satellite observations are shown as the orange lines and the blue line shows the linear regression trend depicting the rise in temperature over time.
[53] CSIRO, SPREP and VMGD (2023). *Historical, current and future marine heatwave climatology for Vanuatu*. A report to the Van-KIRAP project. Commonwealth Scientific and Industrial Research Organisation (CSIRO), Secretariat of the Pacific Regional Environment Programme (SPREP) and Vanuatu Meteorology and Geo-hazards Department (VMGD), CSIRO Technical Report, Melbourne, Australia.
[54] *Ibid*., 3.
[55] *Ibid*.
[56] Shanks, Alan L., Leif K. Rasmuson, Jenna R. Valley, Marley A. Jarvis, Carly Salant, David A. Sutherland, Eleanor I. Lamont, MacKenna A.H. Hainey, and Richard B. Emlet, "Marine heat waves, climate change, and failed spawning by coastal invertebrates." *Limnology Oceanography*, 2020. 65(3): 627-636.
[57] Bell J.D., Johnson J.E., Ganachaud A.S., Gehrke P.C., Hobday A.J., Hoegh-Guldberg O., Le Borgne R., Lehodey P., Lough J.M., Pickering T., Pratchett, M.S. and Waycott M (2011), *Vulnerability of Tropical Pacific Fisheries and Aquaculture to Climate Change, Summary for Pacific Island Countries and Territories*. Secretariat of the Pacific Community, Noumea, New Caledonia.

Table 2. Current and projected changes in ocean features over time.[58]

Ocean feature	1980–1999 average	Projected change			
		B1 2035	A2 2035	B1 2100*	A2 2100
Sea surface temperature (°C)	27.1[a]	+0.6 to +0.8	+0.7 to +0.8	+1.2 to +1.6	+2.2 to +2.7
Sea level (cm)	+6 since 1960				
IPCC **		+8	+8	+18 to +38	+23 to +51
Empirical models ***		+20 to +30	+20 to +30	+70 to +110	+90 to +140
Ocean pH (units)	8.08	-0.1	-0.1	-0.2	-0.3
Currents	Increase in South Pacific gyre	SEC decreases at equator; EUC becomes shallower; SECC decreases and retracts westward			
Nutrient supply	Decreased slightly	Decrease due to increased stratification and shallower mixed layer			< -20%

* Approximates A2 in 2050; ** projections from the IPCC-AR4; *** projections from recent empirical models (Chapter 3, Section 3.3.8); a = average for EEZ derived from the HadISST dataset; SEC = South Equatorial Current; EUC = Equatorial Undercurrent; SECC = South Equatorial Counter Current.

Under all emissions scenarios, the acidity level of sea waters in the Vanuatu region will continue to increase over the 21st century, with the greatest change under the very high emissions scenario. The impact of increased acidification on the health of reef ecosystems is likely to be compounded by other stressors including coral bleaching, storm damage, and fishing pressure,[59] with many of those systems already showing large-scale bleaching.

About one quarter of the carbon dioxide emitted from human activities each year is absorbed by the oceans. As the extra carbon dioxide reacts with sea water it causes the ocean to become slightly more acidic. Due to closely linked changes in seawater chemistry, less oxygen remains available; a process known as ocean deoxygenation. This impacts the growth of corals and organisms that construct their skeletons from carbonate minerals. These species are critical to the balance of tropical reef ecosystems. Data show that since the 18th century, the level of ocean acidification has been slowly increasing in Vanuatu's waters.[60]

Pelagic fisheries and tuna stock

Pelagic fish inhabit the water column (meaning not near the bottom or the shore) of coasts, open oceans, and lakes.[61] Oceanic pelagic fish, such as tuna, are highly adept at long-distance migration, can travel with ocean currents, and inhabit the pelagic zone—the largest habitat on earth.[62] The Pacific Island Forum Fisheries Agency's (FFA) 'Tuna Report Card' for 2022 estimates Vanuatu's average annual tuna export during the period of 2018–2020 at USD 91 million. It also indicates that over that same period, an annual average of 560 people in Vanuatu had tuna-related employment encompassing the harvest, processing, and ancillary service sectors, observers, and government employees (artisanal/cultural

[58] Image taken from *Vulnerability of Tropical Pacific Fisheries and Aquaculture to Climate Change, Summary for Pacific Island Countries and Territories*, see note 57, at 265 (projections for AR6 forthcoming).
[59] Pacific-Australia Climate Change Science and Adaptation Planning Program (PACCSAP). *Current and future climate of Vanuatu*, 9, available at https://www.pacificclimatechangescience.org/wp-content/uploads/2013/06/15_PACCSAP-Vanuatu-11pp_WEB.pdf (updated versions forthcoming).
[60] *Ibid*. at 5.
[61] *See* the National Oceanic and Atmospheric Administration (NOAA) definition—What are pelagic fish? available at https://oceanservice.noaa.gov/facts/pelagic.html.
[62] *Ibid*.

sector not included).[63] All in all, pelagic fish constitute a major nutrient source for the people of Vanuatu, as collected from household surveys and village-level data on women's food consumption (see Table 3).

Table 3. Mean daily per capita consumption of aquatic foods in Vanuatu.[64]

Aquatic food group	National	Rural	Urban
Pelagic fish	14.4 (0.63)	18.0 (0.82)	4.4 (0.49)
Reef fish	7.2 (0.49)	7.6 (0.58)	6.1 (0.88)
Canned fish	14.1 (0.30)	13.3 (0.30)	16.3 (0.68)
Shellfish	1.6 (0.08)	2.0 (0.11)	0.44 (0.05)
Mixed fresh/frozen fish	1.4 (0.11)	1.7 (0.14)	0.58 (0.16)
Aquatic food (total)	38.8 (0.99)	42.6 (1.23)	27.9 (1.40)

Source: Farmery et al. (2020); Units: Edible portion in grams ± standard error

The scarcity of natural resources and limited private sector development in the Pacific makes the tuna industry vital to island economies. If emissions continue to rise throughout the twenty-first century (highest baseline emissions scenario), there will be a statistically significant redistribution of tuna by 2050.[65] As they shift east, the local decline in tuna fish means they will move from coastal states' EEZs to the high seas or international waters. This results in an average annual loss of revenue from fishing access fees that is upwards of USD 90 million.[66] For Vanuatu, this impact on communities is unsustainable.

Coastal fisheries

Coastal commercial fisheries production for Vanuatu is estimated to produce Vanuatu vatu (VT) 572.4 million.[67] With two-thirds of Vanuatu's population living along the coast, Vanuatu people depend on fish and other marine resources for food and income. In times of hardship—when natural disasters strike, or yields fail—Vanuatu turns to the sea for sustenance. With increasing pressures (e.g., population growth, natural disasters, and climate change), managing coastal fisheries is crucial now and for generations to come.[68]

Climate change impacts on marine ecosystems and their services put key cultural dimensions of lives and livelihoods at risk, including through shifts in the distribution or abundance of harvested species and diminished access to fishing or areas. This includes potentially rapid and irreversible loss of culture,

[63] Forum Fisheries Agency, Tuna Fishery Report Card (2022), Honiara, available at https://www.spc.int/DigitalLibrary/Doc/FAME/Brochures/FFA_2022_Tuna_Fishery_Report_Card.html.
[64] Table from Farmery Anna K., Jessica M. Scott, Tom D. Brewer, Hampus Eriksson, Dirk J. Steenbergen, Joelle. Albert, Jacob Raubani, Jillian Tutuo, Michael K. Sharp and Neil L. Andrew. 2020. "Aquatic Foods and Nutrition in the Pacific." *Nutrients*, 12, (2020) 3705. doi:10.3390/nu12123705.
[65] Bell et al., "Pathways to sustaining tuna-dependent Pacific Island economies during climate change", *Nature Sustainability*, 4, 2021, 900-910 ('could reduce total annual fishing access fees earned by the ten Pacific SIDS by an average of US$90 million (range = –US$40 million to−US$140 million) per year compared with the average annual revenue.') (available at: https://www.nature.com/ articles/s41893-021-00745-z).
[66] *Ibid*., 901. Additionally, recent review work across SPC's 22 member countries and territories has highlighted that the volume of fishery production between 2007 and 2021 increased by 20.3% (*Ibid.*), denoting further importance of fisheries as significant income generation in the Pacific.
[67] Gillett and Fong, *Benefish Study 4* (*see* note 9), 284.
[68] Vanuatu Fisheries Department (2019) *Vanuatu National Roadmap for Coastal Fisheries: 2019–2030. Noumea, New Caledonia: Pacific Community*, adapted from the Forward by Honourable Hosea NEVU (MP), Minister of Agriculture, Livestock, Forestry, Fisheries and Biosecurity.

traditional practices, and Indigenous knowledge as well as negative impacts on traditional diets and food security.[69]

Coral reefs and biodiversity

Significant losses of area and local extinctions of warm-water coral reefs have been observed across Vanuatu, especially as regards annual severe bleaching events when water temperature increases. This is compounded by severe cyclones that reduce the structural complexity of coral reef habitat. Structurally complex fast-growing branching corals tend to be more susceptible to bleaching and they die when temperature stress persists. Once dead, algae and other bioeroders colonise the skeleton, which then breaks up into rubble under typical wave forcing, especially during heavy seas caused by cyclones. Structurally complex coral colonies also have greater surface area and therefore are more susceptible to wave damage during cyclones.[70]

Data from the Millennium Coral Reef Mapping Project shows that Vanuatu's corals are damaged and at risk.[71] Many of the reef locations in Vanuatu have historically been refugia—defined as an area where coral species can survive during periods of adverse conditions where corals would die elsewhere—from thermal stress that causes coral bleaching. Reef locations that represent historical refugia are Tanna, Southern Efate, Ambrym, North Pentecost, and West Maewo Islands.[72] These historical refugia were less frequently exposed to severe thermal stress in the past 30 years and had relatively low rates of change in warm season temperatures and relatively high warm season variability – especially around Epi, West Pentecost, and West Maewo Islands. Climate model projections for Vanuatu suggest that some of these historical refugia are also temporary refugia from future severe thermal stress.[73] That is, they are projected to experience annual severe bleaching seven or more years later than the average for Vanuatu in 2040. This is especially true for the reefs of Tanna, Epi, and West Maewo Islands. Worldwide, almost all warm-water coral reefs are projected to suffer significant losses even if global warming is limited to 1.5 °C.[74]

Regarding biodiversity, Vanuatu has different reef types including fringing, platform and oceanic ribbon reefs, and atolls. The reefs contain significant biodiversity with records of 295 hard corals, 469 reef fishes, and 18 species of sea cucumbers. Seismic events and cyclones periodically cause significant

---

[69] *See* SPC written submission to International Tribunal for the Law of the Sea (ITLOS) at https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/2/C31-WS-2-5-SPC.pdf.

[70] Maynard J, Heron S, van Hooidonk R, and D Tracey (2018) *Past and projected future impacts of coral bleaching on the reefs of Vanuatu*. Report to the Secretariat of the Pacific Regional Environment Programme (SPREP), Apia, Samoa (19 pp) (reference provided by SPREP).

[71] Andréfouët, S., F. E. Muller-Karger, J. A. Robinson, C. J. Kranenburg, D. Torres-Pulliza, S. A. Spraggins, and B. Murch (2005). *Global assessment of modern coral reef extent and diversity for regional science and management applications: a view from space*. Y. Suzuki, T. Nakamori, M. Hidaka, H. Kayanne, B. E. Casareto, K. Nadaoka, H. Yamano, M. Tsuchiya, and K. Yamazato, Editors. Tenth International Coral Reef Symposium. Japanese Coral Reef Society, Okinawa, Japan. CDROM. Pages 1732-1745.

[72] *See* Note 70, *Past and projected future impacts of coral bleaching on the reefs of Vanuatu*, 3.

[73] *Ibid*.

[74] Hoegh-Guldberg, Ove, Daniela Jacob, Michael Taylor, Marco Bindi, Sally Brown, Ines Camilloni, Arona Diedhiou, Riyanti Djalante, Kristie L. Ebi, Francois Engelbrecht, Joel Guiot, Yasuaki Hijioka, Shagun Mehrotra, Antony Payne, Sonia I. Seneviratne, Adelle Thomas, Rachel Warren, and Guangsheng Zhou, 2018: *Impacts of 1.5ºC Global Warming on Natural and Human Systems*. In: Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty [Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T.Maycock, M.Tignor, and T. Waterfield (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, pp. 175-312. doi:10.1017/9781009157940.005.

damage to Vanuatu's coral reefs. This is due to Vanuatu's location on the western margins of the Pacific plate. Of Vanuatu's 16 volcanoes, nine are active, and earthquakes and eruptions occur regularly.

Figure 5: Timeline of major events causing significant harm in Vanuatu.[75]

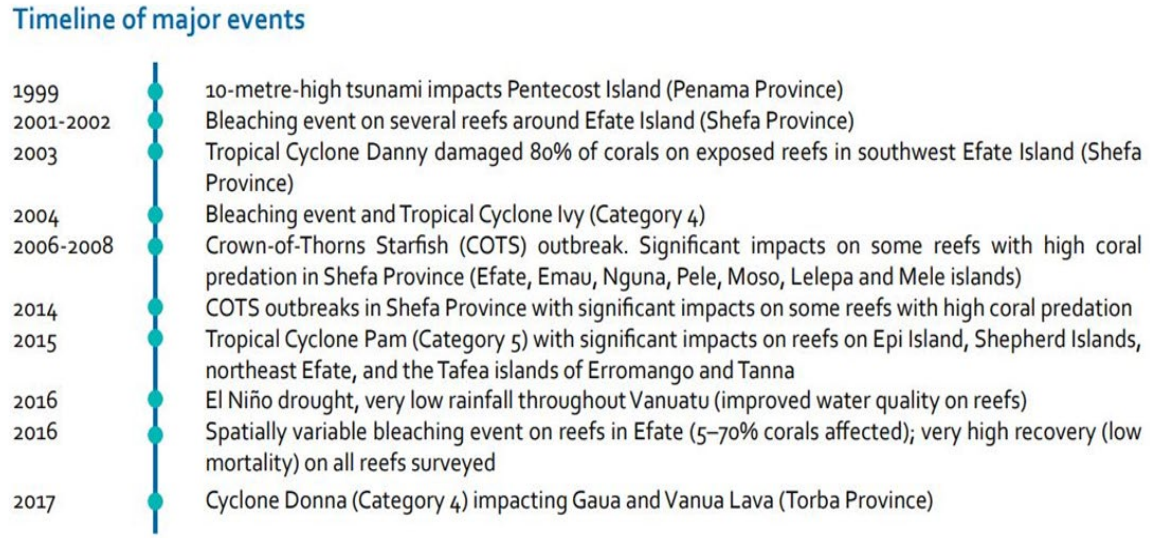


Figure 5 is a timeline of major events that outlines a selective list of local events (natural and anthropogenic) affecting coral reefs and local management as well as major conservation efforts that occurred in Vanuatu.

IV. CONCLUSION

Climate change is causing significant harm to Pacific Island countries, including Vanuatu. This harm materialises in the form of increasing ocean temperatures, sea level rise, ocean acidification, disrupted weather patterns, extreme weather events, prolonged drought, and other impacts.[76] Projections indicate that these impacts are bound to intensify, threatening to render some or all land territory of these countries uninhabitable. The extent to which this existential threat materialises will heavily depend on actions taken to curb anthropogenic greenhouse gas emissions—the vast majority of which is generated outside of its borders—as well as measures to adapt to climate change and respond to the loss and damage it causes.

[75] Moritz, Charlotte, Jason Vii, Warren Lee Long, Jerker Tamelander, Aurélie Thomassin, Serge Planes (eds.). (2018) Status and Trends of Coral Reefs of the Pacific. Global Coral Reef Monitoring Network, 212, available at https://gcrmn.net/wp-content/uploads/2022/06/Status-and-Trends-of-Coral-Reefs-of-the-Pacific-2018.pdf.
[76] *See also* note 69.

I, Alpi Nangia, from Yakel Village, Tanna, Vanuatu solemnly affirm and declare:

Background

1. My name is Alpi Nangia and I am a national of Vanuatu.

2. I do not know my birthdate, but I know I am 64 years old.

3. I live in Yakel Village in the island of Tanna, Vanuatu. I have lived in Yakel all of my life. I am a farmer.

4. I have been asked to provide a statement for the International Court of Justice about the changes to the weather that we have been observing and how these changes have affected my Kastom.

5. I speak my language *Nahvwaal* and I understand some English. However, I have given my statement through an interpreter John Kalwas, who can speak *Nahvwaal*. He read this statement to me in *Nahvwaal* and I agree with the content of this statement. This is my testimony.

6. My testimony is based on my direct knowledge and my knowledge based on kastom, which has been passed down to me from my parents, grandparents and my ancestors.

Yakel Village, the *Imalul* and our governance system

7. We live strong in our Kastom. We have kept our Kastom and we are known in Vanuatu as a Kastom village because we decided not to adopt any other religious belief, like others in Tanna. We believe and practice what our ancestors believed.

8. I look after the *Imalul*. In pidgin Bislama it is called the Nakamal. In my belief, the *Imalul* is there for us to do our cultural living and is our community space. It is the most important place in the whole village. It is a central area in Yakel village. It is surrounded by large Banyan trees and there is an open area, which is compacted soil.

9. The *Imalul* is the place where we perform Kastom ceremonies, such as the *Niel*, *Toka* and male circumcision ceremony. When we perform Kastom ceremonies, we also dance. The *Imalul* is a big space for many people in the community to come and perform these dances. We are living here for those things, those ceremonies and we want those things to keep on going and we do not want them to disappear.

10. The *Imalul* is also our place of governance. There are three important positions in the *Imalul*. The person who represents the *Imalul* is the *Iaramara*, he is a High Chief. The *Iaramara* is like a symbolic head of the *Imalul*, like the King of England. He has the power but he does not say anything in the *Imalul*. There is also the *Ieni* who is the spokesperson for the *Imalul*. He speaks on behalf of the *Iaramara*. He is like the Prime Minister. There are also *Tupunis* who work for the *Imalul*. The *Tupunis* commune with the spirits and look after the well-being of our community. They are all Chiefs and come from Chiefly lines from father to son.

Signed: Alpi Nangia Prepared on January 12, 2024 Witnessed: 1

Senior State Counsel
Office of the Attorney General

11. There are a lot of different *Tupunis*. We have *Tupunis* for Kava, Banana, Taro, Pigs, for the Fruits and Fishes down the river, they all have a *Tupunis*. There are *Tupunis* in other parts of Tanna too, like down the coast. People from the coast are *Tupunis* for shells and fishes.

12. Each *Tupunis* has sacred Stones which are the spirit of the thing they are responsible for. The *Tupunis* is also the Stone. The Tupunis, the Stone, and the spirit are all inseparable. If we want good Kava, for example, we tell the Tupunis for the Kava. He goes to get the Stones and then they do a ritual. They have something in the form of a ship and place the stone inside with water. When they have done that, they come to the *Imalul* and get the Kava and a chicken and they speak to the spirits. Hopefully then, we will have good Kava for drinking.

13. There is only one *Ieni*. They talk in the ceremonies, such as the *Neil*, male circumcision and the *Toka* ceremony. They also talk to the Tupunis, especially the Tupunis for gardening and they tell them they will do something for the gardening that produces food and they take that to the Imalul to perform the ceremonies. The *Ieni* makes sure that the Tupinis is growing enough for the ceremonies.

14. The *Iaramara*, the High Chief, is there during meetings and ceremonies, but he does not do anything. What the *Ieni* is saying is from the *Iaramara*. He is saying everything belonging to the *Iaramara*. If the *Iaramara* wants something, he tells the *Ieni* and the *Ieni* goes and says it.

15. Another role of the *Ieni,* is to conduct bilateral relations with other villages. The *Ieni* from different *Imalul* (which might be called a different name in other languages) will talk to another *Ieni*. The *Ieni* will not talk to the ordinary people. He only speaks to the other *Ieni* and whatever they say is between them. Ordinary people cannot address them. If ordinary people said something to the *Ieni*, something might go wrong in the community, so there is only speaking between the *Ieni* and the *Ieni*. While he is doing all the talks between the *Ieni* and the *Ieni*, the people are doing their own things – they are doing the gardening and some other stuff, while the *Ieni* are doing the bilateral leadership.

16. Every day the men of the village will meet at the *Imalul* to drink Kava and connect to the spirits. The women support this by providing food to the men, to give to the spirits. It is very important for the women too.

Changes in the weather and our gardens

17. Before when I was a little boy, we used to perform ceremonies such as male circumcision, weddings, *Niel* and *Toka*. We used to pick Kava and other crops in the garden and pick pigs. The Kava and pigs were very big. We had plenty of those things for our ceremonies. As I have gone through the years, these ceremonial things are getting smaller and smaller up until now. There are no more big pigs, there is no more big Kava, there are no more big Yams in the garden. The Yams have vanished altogether.

18. The sun and rain have changed. Before the sun was okay. It was good rain and good sun. But now the sun that is shining is not good for the crops and the rain that is raining now is not good for the crops.

Signed: Alpi Nangia

Prepared on January 12, 2024

Witnessed: 2

Senior State Counsel
Office of the Attorney General

19. The rain that is raining now is destroying the crops and is doing all the landslides. It rains heavily but it washes away all the crops from the garden and we have landslides and it removes the stone from the riverbeds down to the sea. We did not have landslides when I was younger.

20. Before we had seasons for sun and rain. We have a special month for rain and a special month for sun. But up until now when it is the season for sun, the rain comes. When it is the season for rain, the sun comes. It is out of balance. It is not like before.

21. Because it is not raining or sun shining in the months it is meant to be, this is affecting the crops. Also, when it rains in the rainy season, it is heavier than before. It causes the crops to rot. It was not like that before.

22. Nowadays, when the sun shines. It is very hot and it is affecting the crops too. The crops are dying off.

23. The hot sun is affecting me too. When it is hot, it is hard for me to cool down. The hotter I am feeling, I have to go under the tree or I go down to the River for a swim. These are the only ways I have to cool down. But I am feeling the heat, which is different from before.

Yams

24. It has been 4 years since we have not been able to harvest Yam in Yakel. Since the time that we were having the Yam, I am happy because I can still taste the Yam. I miss the taste. It affects my hunger. Before when we had big Yams, we have big people. now we have little Yams, we have smaller people. This has happened slowly over time, but faster in recent years.

25. When we do not have the Yam and other crops, our body will grow weak and if we have a good garden, our bodies will be strong. Now our bodies are growing weak.

26. Now when there is no more Yam, I am not really feeling well because there are many things I do with the Yam, such as ceremonies in the *Imalul*, we do that with Yam. Yam is something that is related to the spirits within me. When I have Yam, I feel good. It makes may spirit also feel good. When I do not have Yam, my body is not feeling well and my spirit is also not feeling well.

27. It is the bad sun and bad rain that is affecting the Yam.

28. The name of the Yam is *Neok*, which is the name for all Yams. There are many varieties of Yams which are also the names we give to men. These are: *Namatuak*, *Noravenua*, *Neuksugar* (sweet yam), *Neuksugar Nalmeta* (sweet yam), *Neuksugar Haowan*. These varieties are the big Yams. Then we have littler Yams. *Naubi*, *Namiau*, *Naklak*, and *Kalaka*. The round yams are *Yati*, *Kuaseramoni*, *Magras*, *Matuk*, and *Kwanaolah*. All these Yams are gone. Now they are not here, we cannot perform that our Kastom ceremony anymore.

Signed: Alpi Nangia Prepared on January 12, 2024 Witnessed: 3

Senior State Counsel
Office of the Attorney General

29. *Kalbapeng* is the name of our Supreme God. The Yam is made by the *Kalbapeng*. *Kalbapeng* is a God from the Mountains. We believe all the stones from the Tupunis all come from *Kalpapen* to us. *Tupunis* is everything. The God, us human beings, and trees are all *Tupunis*. We are all connected and all one.

30. If any *Tupunis* disappear, there will be an effect. It affects our ceremonies. Hopefully, our children in the future, when they are doing ceremony, will have more Yams to make such ceremonies. Even though the Yam is gone, the Stones are still there. We will try our best to bring it back. I do not know how long it will be for the Yam to come back.

31. I keep trying to plant Yam, but in vain. It keeps disappearing. I tried to get Yam from other places to plant here, but it keeps disappearing.

Cyclones

32. Up until now, the cyclones are getting worse and worse.

33. Cyclone Uma was in 1987. During Uma, we had wind at night until morning and the same with Cyclone Pam in 2015, we had wind at night until morning. But Pam did a lot more destruction. It was the same amount of time, but more damage was done by Pam.

34. I was shocked and questioning – what is this? What type of cyclone is this? I have never seen anything like Pam. After Pam, I sat in the *Imalul* and could see far away. It had destroyed all the trees, destroyed everything. It destroyed all our crops. I was asking myself - is this another level or another type of cyclone?

35. The ones after Pam, Cyclone Judy and Cyclone Kevin came close together, it was also very damaging. I was shocked that there were two. Sitting down, I was thinking where will get the help I need because it destroyed so much.

36. Before Judy and Kevin, the Bananas were just giving fruits and the Taro and Coconut. After the cyclone, we eat the fallen Bananas, Coconuts and Taro and survived on that.

Message to the ICJ and States

37. When the lawyers and Attorney General came to talk to us about the ICJ and asked us to give a statement, we were more than happy and happy to spend time to talk about these things. I want to tell the world, now when we are doing things, we must be doing things together, not the English or Americans doing one thing and we another. We must understand each other and what they are doing that might hurt us here. We can get an understanding of what we are doing in the future. You and I are the same people. Even though I am black, we are the same people throughout the whole world.

Photos

38. The lawyer has taken photos of me and they said that they will give these photos to the Court.

Signed: Alpi Nangia

Prepared on January 12, 2024

Witnessed: 4

Senior State Counsel
Office of the Attorney General

Signed:
Alpi Nangia

Witness:

Christine Lava
Senior State Counsel, Office of the Attorney General

Data:
12 January 2024

Senior State Counsel
Office of the Attorney General

I, Werry Narua, from Port Resolution, Tanna, Vanuatu solemnly affirm and declare:

Background

1. I am a Vanuatu national and I live in Port Resolution on the island of Tanna in Vanuatu. The Kastom (custom) name for Port Resolution is Irepao.

2. I provide a statement to the International Court of Justice on the changes to the weather patterns that I have observed and experienced in Port Resolution and the impacts that this is having on my Kastom and on my home.

3. I speak Nafe, as my local language, and French, Bislama and English. I have given my testimony in English.

4. I have provided some photos to the lawyers and the lawyers took some photos when they visited my village and my place. I would have liked to have attached them to this statement, but there are no printing facilities for the photos and they will be provided to the Court in another way.

5. My testimony is based on my direct knowledge and my knowledge based on Kastom, which has been passed down to me from my parents, grandparents and great grandparents and my ancestors.

6. I am 45 years old. I have 4 children. My eldest daughter is Esdher, who is 14, the next eldest is my son Nowar, who is 13. Mary, another daughter is 8, and my youngest daughter Elizabeth is 5.

7. I come from two Chiefly lineages. My younger brother is the High Chief of Irepao, who makes the decisions for our village. My older brother is a Tupunis, which is a special type of Chief with special knowledge. His special knowledge is about the banana. In our tradition, I assist both brothers in their roles. My lineage provides me with a special status within the village, including entitlements related to yam and special knowledge and privilege related to banana.

8. I am a farmer. I grow all kind of bananas and other crops. My family and I have traditional and specialised knowledge about all aspects of the banana, including using it for traditional medicine.

9. I am also a manager of the Yacht Club at Port Resolution, which is owned by the five Tribes that live around the bay of Port Resolution.

Port Resolution and Irepao

10. Port Resolution has a lot of history and is very beautiful. It is a peninsula, where there is a curved inlet which is a Bay, and on the other side is the coast, including beaches. My village and my land is on a cliff, which overlooks the Bay of Port Resolution.

11. Port Resolution was named after the ship Resolution, which was the ship that Captain Cook was voyaging on when he anchored there in 1774. When Captain Cook came ashore, my ancestors met him. Captain Cook picked up the soil and asked the name. My ancestors told him it was Tanna, which means soil in my language. Tanna is now the name of the whole island.

12. Port Resolution was also the first place that the missionaries landed when they came to Tanna in around 1938/39.

Signed (Werry Narua): Prepared and signed on 12/01/2024 at Lanakulu, Tanna, Vanuatu. Witness: Senior State Counsel Office of the Attorney General

Kastom crops

13. We still live strong in our Kastom at Port Resolution. I am also a farmer and I rely on my crops for my subsistence as well as for my cultural living. Ninety percent of what I eat and what my family eats is from the garden. We do not rely on things in the shops. If we want to get something from the shops, we have to go to Lenakel which is 2 hours each way on difficult roads, which often flood or are damaged by the rainfall. The roads are flooding more now because of the heavier rains.

14. In my Kastom, there are specialised farmers who have a special role and specialised knowledge about growing certain Kastom crops. We call these Tupunis. These are Yams, Taro, Kava, Kumala (sweet potato), Cassava, Banana, Breadfruit and other fruit trees. We also call these knowledge holders Tupunis, which mark how special they are in my local language and refers to a kind of sacred medicine. Anything that is important in my kastom is Tupunis, like certain birds, fish, chicken and pig are also included. My older brother is the Tupunis for the banana and I assist him and I have special knowledge about the banana.

15. Bananas and other Tupunis crops are used for ceremony because they are sacred. For kastom weddings, the husband pays a bride dowry to the bride's family which will consist of mats, pigs and the Tupunis crops. All the extended family and village of the bride will put in crops, mats or pigs to support the Kastom wedding. This binds both families and villages together, which is also a basis for social cohension and peace.

16. For male circumcision, my first-born son must be circumcised around 6 to 8 years old. My extended family and village will provide Tupunis crops, mats and pigs for the circumcision ceremony. This ceremony is so important, that we start to prepare 1 to 2 years before the date of the ceremony to ensure we have enough Tupunis crops, mats and pigs. Again, this binds the families and villages together and I will also pitch in when someone else in my village needs crops, pigs and mats for their Kastom ceremonies.

17. Yam is considered the King of all foods in our Kastom and it is offered to the high status people in our village and around the island when it is first harvested on 1 April. Because I am from a Chiefly line and my high status, my family and I are offered the first harvest Yams. 1 April is a major date in our kastom, where we celebrate the first harvest of the Yam, with a traditional feast including dance.

The Banana

18. I know how to plant banana, which is based on a seasonal calendar and traditional knowledge that was passed down to me. We used to have many varieties. For example, we have *Nariram*, *Taiketoga*, *Sarawei*, *Kwankun*, *Nparius*, Finger, *Yatir*, and *Kawiren*. We ended up using an English name for the Finger variety of the Banana, but in our tradition all of these Bananas are my Ancestors and are extremely important to me. These Bananas are either eaten raw or are cooked. For example, the Finger Banana is eaten raw as a fruit, whereas the *Nariram* and *Kwankum* are cooked green. Both the Nariram and Kwankum are used in laplap, which is a savoury traditional food in Vanuatu.

Signed (Werry Narua):

Prepared and signed on 12/01/2024 at Ipnakulu, Tanna, Vanuatu.

Witness: Senior State Counsel Office of the Attorney General

19. We have a story about the first Banana from Port Resolution. I will only tell part of the story because it is very long. The story of the Banana is linked with origin of living. We believe that at the very beginning the people who lived in the very old days were not humans but were the birds or other living creatures. There was the sea snake, which is black and white. The sea snake ended up marrying a local bird, but I do not know the name in English. In my language it is *Piray*. That bird used to live on the side of the mountain, called Enkahi. The sea snake was from another place, but it married the bird and they lived together in that area and they had two children.

20. Those two children grew up and then they were playing around with other children, but the other creatures in the village were jealous about sea snake and bird. They wanted to kill the sea snake and this is the origin of jealousy. The sea snake actually knew that there was something going on and suspected that there was hatred between him and other creatures. He warned his wife and two children that if anything happened to him, they would have to cut off his head and bury his head close to his house. He told them to build a fence around it and they were to make sure that they cleared and cleaned the area every morning. You can see that this story is related to our everyday life, building a fence is about building gardens and clearing it and cleaning it everyday, is about our need to visit the gardens daily.

21. The other creatures wanted to kill the sea snake and they went to the Nakamal where Kava drinking happens, even to this day. They put a poison in the Kava and invited the sea snake to come. They gave the Kava to him and then he died. After he died in the Nakamal, the other creatures sent a message to his wife and children about his death. The bird and her two children went to the Nakamal to collect him and, following his instruction, they took him back to their home and cut off his head and buried it and built a fence around it, at the side of their house. They looked after the burial site in the the way that he instructed them to do. So they looked after the burial area every morning. Then crops began to grow. The first is the coconut.

22. The reason that the Coconut comes first is the promise that the sea snake made to the bird that he would he would "still be on your side." When the wife opened up the coconut, it looked like a head with a mouth and two eyes, which she kisses to drink.

23. Then comes the Banana, which is closely related to the Coconut. This is why it came second. The Coconut trunk and the Banana trunk are similar. The Coconut is male to us, and the Banana is female.

24. Next is the ocean, as there was no ocean at the time, so the ocean forms at this time. And then the sand, the coral, and the fish, and all the creatures and things from the ocean come up.

25. The Banana grew up and the mother (the bird) started to harvest the Banana and used the dried Coconut flesh to make milk to have with the green and the ripe Banana. At one time, while the mother went to her garden, she told the two sons if they are going to play with other children, they much not show them all the things that had grown in the fenced area - it was sacred and only for them. It is still the case that our gardens are to be secret. She prepared the Banana and the Coconut cream and showed them when they were hungry how to make it.

26. When the two children were playing with the others, they went to get the ripe Banana and took it out to the playing ground. They started to share. The other children did not have Banana at the time or creamy Coconut milk and the other children wanted to know what it is and how it was prepared. They start telling the whole story about what is secret inside the fence. And then they disobeyed what their mother said ,and they took the other children inside the fence.

Signed (Werry Narua):

Prepared and signed on 12/01/2024 at Ipnakulu, Tanna, Vanuatu.

Witness:
Senior State Counsel
Office of the Attorney General

27. All the children went inside and started to play around the ocean and started to destroy the reefs and the fish, and they were getting all the coconuts down. The mother came back in the afternoon and she saw that everything inside the fence was not in order. She was very disappointed and told her two sons that this property was meant to be for their private use, but because they had allowed everyone to be a part of it, she broke the fence.

28. This allowed the ocean to run and break down the land and created the Bay at Port Resolution, where I live. The mother took other Bananas and crops and sent them out, even Coconut. All these crops were bigger varieties. Only some things were left at Port Resolution and these were smaller varieties. The only things we have left are a few bBnanas and other Tupunis crops, such as the Coconut, Yam, a nut, and fruits and a few things from the ocean. That is why Bananas are very important to us.

29. This is also why the name of our village Irepao, which means the land of the child. When the mother broke the fence, the two children tried to prevent all the things inside the fence from leaving, but they were unsuccessful and were only able to keep some of the crops and ocean foods in Irepao.

30. As part of my special status and relationship to Banana, my family and I can decide when to plant Banana and others in the community must wait until we have first planted the Banana, then they can grow Bananas too. No one can plant Banana until my family and I do. When it comes to harvesting, no one can harvest Banana until my family and I harvest the Banana. This is the same for the other Tupunis or kastom crops, though there are others within our village and all of Tanna with specialised knowledge and status related to these other crops.

31. I normally plant Banana in March. I harvest them in the following February. By March, we start to plant the shoots, which starts the new process again. I have been doing this since I was a teenager. However, my parents used to take me out to their gardens from when I was really young, when they would transfer the knowledge to me about how to grow Bananas and other crops. I would watch them, and I would copy them and they would also talk to me about the Banana. The garden was an education.

Changes in weather, decline of our varieties of Banana and Yam

32. I have seen a lot of changes to the weather. I grow Banana and, as I said above, there were many varieties of Banana and I gave the name of eight varieties above. Since I have been growing Banana I have noticed major changes in the weather. The weather is more extreme. It rains more or it is drier and hotter than what it used to be. It has gotten worse over the last five to six years. This confuses the Banana and it fruits outside its season. The fruit is not as good quality now that the weather patterns have changed and become confused.

33. Some varieties do not grow anymore in my area. They stopped growing around 7 years ago, but I noticed these varieties were in decline for about 10 years beforehand. This more extreme heat stops the banana from fruiting successfully. I tried to find these varieties from other parts of the island to regrow them in my area, but this did not work. The varieties that have disappeared and that I can no longer grow include the Sarawei, Finger and Yatir. These is a deep spiritual loss because these Bananas are my ancestors and are part of the origin of my place.

34. Further, the cyclones are more intense than they were before and the Banana is very vulnerable to cyclone damage. We have always had a cyclone season, which is between December and

Signed (Wery Narua): Prepared and signed on 12/01/2024 at Ipnakulu, Tanna, Vanuatu. Witness: Senior State Counsel Office of the Attorney General

March, but cyclones are much stronger than they were before and last year a cyclone came in the offseason in November 2023.

35. For the Yam, when they were offered to my family as part of the first harvest, they used to be massive. Some were as tall as a metre and a half. Now, the Yams are much smaller. They are tiny, around 50 to 70cm. I grow Yams too. I think the problems is that there is too much rain now and too much humidity. The Yam can only take a little bit of sun and a little bit of rain, which is why we plant close to the dry season, when it is cooler. This is all changed and there is no balance now in the rain or the sun, which is why the Yams are not like before. All the other crops are suffering too.

Loss of traditional medicine

36. Our Bananas also have traditional medical uses. The medical uses are an important part of my specialized and traditional knowledge about the Banana, particularly the use of the different leaves, fruit, the trunk and roots. Each variety has different medicinal uses. The loss of the Sarawei, Finger and Yatir Bananas meanwe can no longer access the medicine they provide.

37. Traditional medicine is still very important in my village and the whole of Tanna. If someone is sick, a person will visit a traditional doctor and that doctor will say what medicine is required. The Banana is one of the medicines. Because my family and I have a special relationship to and knowledge about the Banana, they will come to us to ask for the medicine. There is a whole Kastom exchange that accompanies this request. They will take the traditional medicine, which will cure their sickness.

38. The loss of the varieties of banana means that we are unable to fulfil this traditional and important function as custodian of the Banana and this means that without the traditional medicine, the sickness cannot be cured.

Our gardening traditions ensured continuing abundance of fish on the coral reefs

39. We have a season for fishing in our traditions, which is from April until September/October. The fishing seasons are also connected to our Yam season, which also starts in April. The fishing seasons stops when we plant Yam (which is in around September/October). At that time, we apply restrictions on our method on catching fish.

40. In our knowledge systems, we know that after November it is the breeding season for the fish, so we restrict fishing at that time, and, as I said, this coincides with Yam planting. We call this a seasonal calendar, where the seas and our lands are linked through the seasons and our traditions. This is our traditional way, which is how our ancestors did it, our great grandparents did it, our grandparents did it, and how my parents did it and how we still maintain it.

41. We have different types of fishing methods, which relate to the fishing season (April to September/October). During the fishing season, people can fish with a net or diving speargun. From around September/October, people are prohibited from using those fishing methods and are restricted to using a fishing line, traditional spear and a poison arrow. This restricts how many fish any one person can catch and ensures that the fish are able to breed and repopulate during their breeding season, which keeps our seas and reefs sustainable. It is a Kastom form of resource management and harvesting which has been passed down to us from the generations.

Our reefs are dead and the fish are almost gone

Signed (Werry Narua): Prepared and signed on 12/01/2024 at Iapakulu, Tanna, Vanuatu. Witness: Senior State Counsel Office of the Attorney General

42. Fish is one of our main sources of protein and is very important to us as a coastal village.

43. When I was a child, I remember that the reefs were close to the shore, only around 3m from the beach. The coral was colourful and living. There were different shaped coral and a lot of fish.

44. One of the important eating fish is the Blue Parrott fish, which we call Makum in local language. There were plenty of these around the reef when I was a child and a teenager. I used to hunt the Makum with a spear when I was a teenager.

45. We used to also have the Trocar, which is a very large green sea snail. It is a delicacy for us and is very yummy.

46. I have been swimming and exploring the reef all my life, I can see the changes and know when coral is living and dead. The coral now is either severely damaged, but mostly dead. This is from the cyclones, the sun and the soil runoff from the landslides, which have become more frequent in recent years. I really started to notice the changes in the reefs in my early twenties.

47. I know the land. I know the sea. I have been learning about the land and the sea and observing both since I was a child. My grandparents and my parents passed on their knowledge about the land and sea to me as well. This is special knowledge that I have, so I am confident that what I am observing is happening and is different to what I saw and experienced before my twenties.

48. Because we are getting more frequent cyclones, the coral never has time to recover, though the bleaching from the sun and the soil runoff are also major factors in the ill health of our reefs.

49. The reef is not coming back. It is slowly disappearing. It is dying.

50. I have noticed that there are less and less fish. When I was a teenager there are plenty of fish and lots of different types of fish. There are no longer any Makum or Trocar near the shore on our reef.

Creation of Community Conservation Areas

51. The village decided to create some marine conservation areas using the Government's community conservation area (CCA) laws, which we did about 2 years ago. I am the chairperson of the committee that looks after the (CCA).

52. We decided to act because we were concerned about the loss of marine species and the damage to our reefs. We also wanted to ensure that we could enforce the restrictions in these CCAs because people were coming from outside our area to fish and they are not respecting the traditional calendar and traditional resource management, where we place restrictions through our customary law on fishing and harvesting seafood.

53. The marine conservation areas are protected by national law. Some of the CCAs are 'no take zones', where no fishing is allowed at all. Some of the CCAs are regulated, to ensure sustainable fishing.

54. I saw some species returning, such as the Trocar but not in the same numbers.

55. We are trying our best to see if we can have our resources recover, but if the reefs cannot recover from the damage caused by the sun, run-off, and cyclones, our marine areas will remain

Signed (Werry Narua): Prepared and signed on 12/01/2024 at Ipnakulu, Tanna, Vanuatu. Witness: Senior State Counsel Office of the Attorney General

impoverished. This makes me upset, because I know what our reefs were like when I was a teenager, when they were colourful, alive and full of life.

56. I have observed the coral in all of the CCAs for the last two years and the reefs are not recovering as they should. This is because they do not have enough time to recover before a cyclone hits. I am also concerned that coral bleaching is a factor and this might also mean that the reefs are unable to recover at all if it keeps getting hotter.

Relationship Tapunis

57. Our crops and seafood are very important in building and maintaining connection to extended family, Tribes and friends. Before, I had a lot of Banana, which I could contribute to traditional feasting, Kastom ceremonies or funerals. When my crops are destroyed, I can't help or contribute. This makes me ashamed. I have been struggling to meet my obligations for the last 3-4 years.

58. It also means that I can't go and visit relations or friends, as I should go with something in my hand in our tradition. Without food, it is hard to do that.

59. Not being able to fulfil my obligations and relationships through food affects the relationship and undermines the entire fabric of our society - our traditional connections and obligations.

60. Exchange of food also helps to keep the peace between our different villages and Tribes. Our traditional trading partners (Tribes) are inland. For example, we are meant to take something from the ocean, because these inland tribes cannot otherwise get access to seafood. But Banana is also very important, because it grows better in the coastal areas. We get Taro and Kava from these inland Tribes, which we can't grow well on the coast and which is very important to our Kastom.

61. Kava is an important drink for the governance of our village, where it is drunk in the Nakamal. The Nakamal is the traditional parliamentary house in the Tribe. We still use the Nakamal today and Chiefs can pass traditional laws for the governance of the village. Kava is a central part of all business of the nakamal, which is why this trading system is so fundamental to our law and governance.

62. This trading system is now collapsing. This is due to the death of the reef and the slow decline of our crops, including the Banana. The impact that the change in weather is having on the inland crops, is also a factor in this collapse.

Cyclones

63. I said above that the cyclones are getting more intense since Cyclone Pam in 2015. This affects more than my Banana crops and the reef. They can cause big waves, from the storm surge. I have noticed this getting worse as the sea rises, which I have also observed over my life. The waves are bigger. During Cyclone Judy and Kevin, the waves were around 5 metres high.

64. During Cyclone Pam most of the traditional houses in my village were destroyed. I was in Australia at the time, and my wife and children where inside the house. They survived and my house was fine. But it was devastating for the village. I came home two weeks later, and I saw the destruction. I could not figure out where the homes used to be, so much of the village had been destroyed.

Signed (Werry Narua):

Prepared and signed on 12/01/2024 at Ianakulu, Tanna, Vanuatu.

Witness:
Senior State Counsel
Office of the Attorney General

The Yacht Club

65. The cyclones have also destroyed our yacht club, which is an important institution in Port Resolution.
66. Because of its history, Port Resolution is an icon for Western sailors, and it is also close to Yasur, the name we call the active volcano on Tanna, which Cook writes about sighting in his journal. We also had a local Dugong, a very important cultural species for us, living in the Bay, because there was a lot of seagrass. Many yachts come to visit between April to November. We also have a lot of boat rallies, which might include up to 20-30 boats.

67. My dad and his cousin set up a Yacht Club in Port Resolution in 1990, when I was still at school. When my dad and cousin first built the club house, it was one simple round hut. It had a sleeping hammock for visitors if they wanted to stay in, and we also started to sell beer. It became a much-loved place for the sailors to come.

68. My dad and my cousin also built some simple bungalow for guests to sleep in. All up, we had 9 bungalows.

69. In 1999, I built a new club house, which included a restaurant, with the Port Resolution community. Part of my decision to do so, was because I noticed that the cliff had become less stable because of landslides. This was because the rain has gotten heavier, and because the cyclones are stronger now, and cause big waves to hit the cliff. It took us many years to build the new Yacht Club because we did not have much money to buy all the materials, and we had to ship materials from Port Vila, which is on another island in Vanuatu.

70. The Yacht Club is very important for the five Tribes living on the Peninsula of Port Resolution. I have permanent staff and I have temporary staff. The temporary staff are rotated around the different Tribes. This helps them to get some income, as there are few other cash employment opportunities on the island.

71. Some of the Bungalows were destroyed by Cyclone Pam.

72. In 2019, we took another hit because of Covid and the Vanuatu Government had to shut the borders. We did not get any visitors during this time. On 1 July 2022, the Government reopened the border and a few yachts started to visit us again that season, but not very many. However, the numbers started to gradually build up.

73. In February 2023, just before the yachting season was to begin, the two Cyclones Judy and Kevin hit Port Resolution and destroyed the Yacht Club. This was from the strong winds. Cyclone Judy was Category 4 when it hit Tanna at midnight on 1 March 2023. Cyclone Kevin was also Category 4 when it made landfall on 4 March 2023.

74. All the remaining Bungalows were destroyed too.

75. I built a basic temporary structure made of wood for the Yacht Club so I could still cater to the 2023 season. We have not been able to rebuild the Yacht Club to where it was or with restaurant facilities. We had 200 boats visiting from April to November last year. There were also four different rallies in 2023.

76. I estimate that it will take 6-7 million VATU to rebuild the Yacht Club, which is around $70,000-$80,000 Australian dollars.

Signed (Werry Narua):

Prepared and signed on 12/01/2024 at Ipnakulu, Tanna, Vanuatu.

Witness:
Senior State Counsel
Office of the Attorney General

Landslides and coastal erosion

77. As I said above, there are more landslides than before. The more intense cyclones and heavier rainfall causes landslides. We did not have landslides when I was younger.

78. We've also experienced more coastal erosion due to the rising seas. When I was a teenager there were many trees along the coast in the Bay and on the other side of the peninsula, including the Banyan tree. These coastal trees have been destroyed by the rising sea. They get rooted out by the water. This causes more coastal erosion too because the roots held the soil together.

79. This soil is also ending up in the sea and affecting the reef.

80. The cliff where I live has had many landslides. It used to go down to the sea as a gentle slope. Now it is a sheer drop. It is a cliff. This cliff keeps receding and I am worried that this will not stop.

Passing on my kastom to my children and the collapse of our way of life

81. My children attend school. On the holidays and weekends I will take them to the ocean and show them how to fish. I tell them that things are different now and that I used to fish differently. I also take them to the garden, and teach them about Bananas and growing other crops. They still learn, but not what I learnt because our environment has changed so much.

82. Because some of our traditional varieties of Banana has disappeared, they will never see them or know them. They will not know how to grow them, to look after them or their medicinal uses. This makes me extremely sad, because this is a knowledge that has been passed down through the generations and I am unable to pass this onto my children. I am frustrated because it is beyond my control and I have been unable to continue to grow these bananas, despite sourcing these varieties from other parts of the island to attempt regrow them. This failed.

83. I am worried about the future for my children, even my grandchildren as they will live a very difficult life compared to what I am living now. We have a name for Tanna, which is Tanauta, which means the land of plenty. I saw the abundance when I was a teenager, with our healthy reefs and crops but that has changed now. I believe I am seeing the slow collapse of our gardens. This also means the fabric of our society is slowly declining due to the change in the weather. We live close to the land, we know when things are not well. Everything is at risk.

84. I am also worried about Port Resolution and its historical significance, which covers our Kastom, Captain Cook and the early missionaries. We are at risk of losing this.

Message to the Court

85. My message to the International Court if Justice is that I am concerned about my future, and for future generations. I have been seeing all these changes and the impact over the course of the 45 years of my life, I recently realised that all of the changes are gradually building up and it will get worse. My concern is about the livelihood of my children that are alive and their unborn children. If you are able to stop it, to keep our culture alive and our future generation - stop it.

Signed (Werry Narua):

Prepared and signed on 12/01/2024 at Ipnakulu, Tanna, Vanuatu.

Witness: Sonia State Counsel Office of the Attorney General

Statement taken at Isanakulu, Tanna, Vanuatu on 12 January 2024.

Signed:

Witness:

Signed (Client):

Prepared and signed on 12/01/2024 at Isanakulu, Tanna, Vanuatu

Witness:

I, Mangau Iokai, from Yakel Village, Tanna, Vanuatu solemnly affirm and declare:

Background:

1. My name is Mangau Iokai, I am 78 years old. I was born in 1946 in Yakel Village on the island of Tanna, Vanuatu.

2. I am a Vanuatu national and I provide a statement to the International Court of Justice on changes to the weather and cyclones, the loss of the Yam, and what these changes mean for my Kastom.

3. My testimony is based on my direct knowledge and my knowledge based on Kastom, which has been passed down to me from my parents, grandparents, great-grandparents, and ancestors.

4. I speak *Nahvwaal* as my local language. I have given my testimony in Nahvwaal through a translator, John Kalwas. This written statement has been read back to me in its entirety in *Nahvwaal*. I have confirmed that the content of the statement is accurate.

5. This statement uses italics for words in my local language.

6. I have lived in Yakel Village all of my life. I have 14 grandchildren and seven great-grandchildren. All of them are living in Yakel Village.

7. Yakel Village is a Kastom village. This means we have chosen not to adopt Western ways of living but maintain our traditional ways. The center of our community is the *Imalul*. It is a place for the community to gather and also a place where we commune with the spirits. It is our place of governance and law. It is an open area surrounding by large Banyan trees. The *Imalul* was not made by man, it was put there by our Supreme God, *Kalbapeng*.

Changes in the weather

8. I've seen big changes in the weather over my lifetime. Before, I knew the weather pattern. But now, even though I am living in my homeland, it feels like I am living in a foreign land. It is strange. I don't know my place anymore.

9. In the past, we had a balance of rain and sun, and when I went to the garden to harvest, the crops always gave me enough. But now things are out of balance. We have too much rain and too much sun, and we don't get enough harvest. I have noticed this change more since Cyclone Pam in 2015.

10. From when I was young, I made the garden at the same time each year, and after the planting the rain would always come at the same time and help the plants to grow. But now, the rain is coming at the wrong times. For instance, it is already coming when I am planting. It is unpredictable.

Signed: Mangau Iokai - Prepared on January 12, 2024 Witnessed: 1

Sonia Kahare
Senior State Counsel
Office of the Attorney General, Republic of Vanuatu

11. The rain that came used to be a good rain, it gave my garden just enough water. But now, the rain that comes is a bad rain. It gives too much water and rains for too long. It washes away my garden and causes the crops to rot.

12. Before, we had good sun. When the crops were growing it was sunny and the crops were growing very well. But now, the sun is too strong and it is too hot. Because of the bad sun we have, the crops and the trees are dying. The sun is too strong. It is too hot for our crops to survive.

13. Because of these changes to the weather, our crops do not produce enough to eat. Due to food shortages, we are mostly eating Taro and the *Nimahnim* leaves, which are special leaves that only people on Tanna eat. Sometimes we have other crops, but it was not like before. Because of the food shortages, our health is not good like it was before.

14. When I was a little boy, I used to follow my father to the garden. My father did the real gardening, and I copied what my father was doing. That's how I learned how to do the gardening. By the time that I was a young man, I started to garden on my own. That's how we've always passed on our knowledge of gardening from generation to generation all the way back to our ancestors.

15. In my time, when I was young, I could follow our traditional pattern for gardening. Now with the weather change, I am seeing it is very difficult for my children, my grandchildren, and my great-grandchildren to learn or follow our gardening traditions, and to pass on the same knowledge.

The Yam is central to our Kastom

16. The Yam is the most important crop in our Kastom. I can plant all other crops, including Taro, Taro Fiji, Kumala (sweet potato), but out of all of the crops, Yam is the most important. We consider it to be the King of all crops. Of all the crops that I have in my garden, I need to have the Yam.

17. *Kalbapeng*, our Supreme God, gave us all of the Crops. The Crops first came to us as spirits that took the shape of Stones and these Stones also sometimes took the shape of human beings. The story is that when the spirits came to us, they came to the Eastern side of Tanna first, and then they traveled to the Western side of the island. The Yam spirit is male and all other Crop spirits are female. The Yam spirit and the Taro spirit are like husband and wife.

18. While the Spirits were traveling over to the West, they stopped and had a meeting at *Ianapik* this is at a creek which is a boundary between two areas. While the Spirits were there, two others came into the meeting. The first was *Nuwing* who is male, and who is the Spirit of the Wildcane. *Nuwing* is the Chief of the Yam because Wildcane is needed for Yam to grow. The other was *Nukia* who is female. *Nukia* is the Spirit of the entire garden, and is also the Chief of the Taro.

Signed: Mangau Iokai -

Prepared on January 12, 2024

Witnessed: 2

Senior State Counsel
Office of the Attorney General, Republic of Vanuatu

19. At the meeting, *Nuwing* and *Nukia* decided to split the Taro and the Yam. Taro went to the south of Tanna, following the land downwards, and Yam came to our region, which is known as *Tanna Azul*. *Tanna* means the soil or the ground and *Azul* means big, so in English the name of the is region is big land, it also means rich soil, because our land has always been so fertile.

20. After the Taro and Yam were separated, the Taro and all the other Crops left Tanna and went across the sea as far as the Americas. But the Yam stayed here, it was our only crop.

21. The Taro and all of the other Crops stayed in the Americas for a long time. But eventually, Taro began to miss her husband, the Yam. The Taro started to cry and wanted to come back to Tanna.

22. The Taro and all of the other Crops journeyed back to Tanna. Two different types of Taro were captain of the ship on the way back. The *Tahveta* Taro captained the ship when the seas were rough and the *Nawanwalah* Taro captained the ship when the seas were calm.

23. After their journey, the Taro and the other Crops landed on Tanna at a passage called *Iakilkaak*, which is down at the coast on the black sand beach. *Iakilkaak* means "the place where they disappeared," because this is where they left Tanna when they went to the Americas. It is also the place where they came back.

24. When the Taro and all the crops came ashore, they looked at the land and saw the mountains. They were talking among themselves about who would go to live on the mountains, because up there it is cold. The Taro responded that she would be the one to go and live in the mountains, and two other crops followed her up there: the *Wrurpei*, which is a type of banana, and *Kauvnak*, which is island cabbage. They followed the Taro up the mountains because they knew one day in the future when we are doing the ceremonies, Taro would be part of the ceremonies and, if they followed her, they would be too. And so, for ceremonies there has to be Taro, *Wrurpei*, and *Kauvnak*. The ceremonies are a time for husband (Yam) and wife (Taro) to meet.

25. So now, taking the story to our time, you can see why the Yam is our most important crop: because he stayed. When all of the other crops went to the Americas, he was the only one who stayed on Tanna. That is why the Yam is the King of the crops and the most special one.

26. This is also why Yam is essential to our Kastom and ceremonies. We include Taro and other types of crops in ceremonies, but Yam is always essential and is the only crop in our most important ceremony, the *Toka*.

My Spiritual Relationship to the Yam

27. In my village we have special people called *Tupunis* who have a special relationship with a particular crop, species, or element, and hold sacred knowledge about that the thing. For

Senior State Counsel
Office of the Attorney General, Republic of Vanuatu

example, we have a *Tupunis* for Taro, a *Tupunis* for Kava, and a *Tupunis* for the Weather. A *Tupunis* is also like a Chief. In other parts of Tanna, there are also *Tupunis*.

28. In my village, Yakel, I am the *Tupunis* for the Yam. I am responsible for looking after the Yam. I hold this position because my family is spiritually connected to the Yam through a Chiefly lineage. The spirit of Yam flows through my ancestors, my family and me.

29. The first *Tupunis* were spirits, as I explained in our story of the Yam, Taro and other Crops given by *Kalbapeng*. When the spirits were traveling, they took the form of Stones, but when they reached our place, they manifested as human beings. These were the first Tupunis. My first ancestor was the spirit of the Yam. He manifested as a human being in Yakel and my family has been here ever since, taking care of the Yam crop. I am also the custodian of the sacred Stones. I have these ancient Stones from way back.

30. As *Tupunis*, I am responsible for ensuring we get a good crop of Yam. I use sacred Stones to commune with the spirits, and to ask them to look after the crop and make sure that my community has enough harvest. The Stones are hidden in a secret place. The ritual that I perform is too sacred to talk about and I am unable to share it. It is only my family that can perform the ritual because the spirit of the Yam is in us and we have the Stones.

31. The Stones were given to my ancestors from *Kalbapeng*. The knowledge of how to use the Stones was also given to my ancestors from *Kalbapeng*. The knowledge has been passed down through my family. I learned about the Stones and how to use them from my father.

32. Only I can commune with the spirit of the Yam in this way, but all men confer with the spirits when they are planting yam. The men perform a ceremony called *Tamafah* at the *Imalul* every time we plant Yam. The ceremony is performed with a chicken and Kava. You kill the chicken and drink the Kava and that is how you make a connection to the spirits to ask for a good harvest. Kava is the gateway to the spirits. The knowledge of how to perform this ceremony is passed on from father to son. I have taught my sons how to do it.

The Yam has disappeared

33. The Yams we harvest have been getting smaller and smaller. I noticed this slowly happening before Cyclone Pam, but afterward the change happened much faster. Before, they were the size of a house post (approximately 3m). But they shrunk to the size of my hand and wrist (approximately 20cm). Four years ago, the Yam vanished altogether. We have been trying to plant each year, but no Yams come.

34. I think the changes of the weather I have observed have caused the Yam to vanish. I have been gardening all my life and I know the weather. Especially the rain has changed. Since Cyclone Pam in 2015, we have been getting too much rain and at the wrong times. It is causing the Yam to shrink and die. Yams do not like too much rain. The rain that is coming now is too heavy. It causes the leaves of the Yam to fall off, and the crops are turning bad.

Senior State Counsel
Office of the Attorney General - Republic of Vanuatu

There is something special about rain. In the past we had good rain, which the Yams drank and used to grow strong. But now we have bad rain that is killing the Yams.

35. I have been farming my whole life. I have been following the same practices I have always used. These practices were passed down from our ancestors. I learned these farming practices from my father, who learned them from his father.

36. When I plant Yam, the first thing that I do is clearing the bush. Then I leave the cleared land there for some time so that it will get dry. Next, I use fire for burning dry trees and dry leaves and then I do the plowing. After that I start planting Yam. The process for planting is that I have to dig into the ground, dig further, further down. When I plant Yam, my intention is that the Yam tuber will reach the bottom of the hole. But because of the changes in the weather and, especially because we are getting too much rain, the Yam tubers have not been filling the holes. They've been getting shorter and smaller until they vanished.

37. Even though the Yam has vanished, we are still trying to plant it. But our gardens are not like before. We used to plant Yam in very big mounds almost as tall as a man. Now we have very small Yam mounds. They are no bigger than 10cm. This is because each year we use the tubers from the last season to plant, and each season the yams grew tinier and tinier. It is not what it used to be.

38. Each season, I change the location where I plant the Yam. I also use a local plant *Lilahng*, which enriches the soil. Despite these efforts, the Yam doesn't grow. No matter where I plant or what I try, it won't grow.

39. The stem of the Yam needs a support to grow. They cannot grow on the soil because it is too hot for them and they die. We use Wildcane to build beds for the Yam. This is why, in our stories, Wildcane is the Chief of the Yam—because the Yam needs it to grow. The beds used to be much bigger and much longer because the Yam stems would creep along the beds, back and forth, to and fro, and when you harvest it you have big crops. Now, the Yam stems are much smaller and won't grow. We've had to make our beds much smaller. In some cases, we don't build a bed for the Yams at all. When we plant, all we get is a single, shriveled stem. It won't grow, so there is no point in building a bed. Even when we plant the Yams on the same day, some grow a little bit and we can make a small bed, and some don't grow at all. But no matter what, we don't get a harvest.

40. In recent years, because of the cyclones, we've been experiencing a shortage of Wildcane. Even with our much smaller gardens, we don't have enough Wildcane to build the beds. When we don't have Wildcane, we just go cut sticks and use them to prop up the Yam plant. It doesn't work as well. Wildcane is the chief of the Yam. It is for the Yam. But now Wildcane is nowhere to be found and we are just using wood. It isn't right. This is also a spiritual wound because it severs the connection between the Wildcane and the Yam. Likewise, the disappearance of the Yam has left the Taro all alone. She doesn't have her husband anymore

Signed: Mangau Iokai

Prepared on January 12, 2024

Witnessed: 5

Senior State Counsel
Office of the Attorney General, Republic of Vanuatu

41. In the past, we had very big Yam gardens. And when we built them, we would get the entire village to help plow and build the mounds. The mounds were so big it would require the entire village to help. Our gardens now are so small, planting them is the work of one person, or two persons at most.

42. The size of a person's Yam garden reflects their status. It is a matter of respect. An elder of the village or the Chief should have the biggest garden, and young people who are just beginning to garden should have gardens that are much, much smaller. But now everyone's gardens are the same size: the size of a beginner's garden. It's sad to see the size of the Yam gardens. This effects relationships and doesn't give the elders the respect they are entitled to.

43. Now that the Yam has vanished, my heart is broken. My connection with the Yam spirit is broken. Before, through my family and my ancestors, I was able to lean on the spirit when I needed it. But now I don't have anything to lean on. It just feels like empty space. Because the spirit is no longer there, I feel empty. I am walking around like an empty shell. I feel that I have failed in my duty that has been passed down from my ancestors, to my grandfathers, to me.

44. Even though the Yam is gone, I will continue doing the ritual with the sacred Stones as it is my duty. The Stones are part of me, my connection to the spirit. If I don't continue the ritual, I will get sick.

45. Even though the Yam is gone, I keep trying to grow it. I will try to pass the knowledge that has been passed down to me to my sons. I will teach them how to plant the Yam and how use the Stones and commune with the spirit. But because the yam is already vanished, I don't know if they will continue the practice. It is not the same without the Yam.

46. When I had the big Yams, and brought them to the *Imalul* in my heart I was very happy. Now I feel empty.

Use of the Yam in Kastom

47. There is only one spirit of the Yam, but he has given us many different varieties of Yam. Some Yams are big, including *Mtuak*, *Norahvamua*, and *Neuksugar*, which is a sweet yam. There are several varieties of *Neuksugar*, including *Neuksugar Nalmeta* and *Neuksugar Haowon.* These Yams grow to be around 3m. Some other Yams are smaller, like the *Naupi*, *Namiau*, *Naklak*, which are round Yams. We also have the *Kalaka, Yati*, *Se Kuaseramoni*, *Magras*, *Matuk*, *Kulanlulah*, which are little but long yams. Some of these names are also used for the names of men. This is because the Yam is inseparable from us. It is our identity.

48. We plant some Yams for eating. Other yams are essential for our important Kastom ceremonies. Our most important ceremonies include male circumcision ceremonies, wedding ceremonies, the *Niel*, and, most important of all, the *Naukial*. *Norahvamua* and *Neuksugar* are the most important for ceremonies because they are the biggest Yams. They

@Kalun
Senior State Counsel
Office of the Attorney
General, Republic of
Vanuatu

are the King of Kings. When the Taro went to the Americas and was crying it was because she missed these Yams, because they were her husband.

49. Male circumcision is an important ceremony for us. The Yam and other crops are used for this too, where there will be a celebration. The young boy, around the age of 6 will stay in the *Imalul* with other men from the village for 3 months. During this time, they are unable to see women. They will learn a lot of Kastom, undergo the circumcision (which is conducted by special knowledge holders) and heal there.

50. We have Kastom marriage. We are unable to marry within our village. It is Kastom for the bride to come to the village through marriage through the Kastom roads. The Kastom roads are a mutual relationship between two villages. Kastom marriages are essential for maintaining those relationships, At around the age of 20 to 25, a decision will be made for marriage with another village and the Chief of the other village will decide on whether it is a good match. There is a large gift given to the family of the bride. This must include Yams.

51. The *Niel* is a ceremony of giving. We have the *Niel* when we have an abundant harvest with lots of surplus crops. During the *Niel* we give any leftover crops from our garden that we don't need as a gift to someone else, maybe another family or another village. It is an important way that we maintain and strengthen relationships. It also shows our status as a gardener. When the harvest is not good, there is no *Niel*.

52. The *Naukial* is our most important ceremony. It is performed only every four or five years. It is a ceremony of dance. The ceremony itself involves four days of dancing and feasting. Everyone wants to be there for the whole four days because it is our most important ceremony.

53. Like how there are many different events performed during the Olympics, there are many different dances performed during the *Naukial* -- *Nao*, *Kaausascivah*, *Nasal*, *Napan*, *Ninimouio*, and *Toka*. Of these, the *Toka* is the most important because it's a male dance. It is essential to our governance. It is during the *Toka* that we decide who is *Ialmalu*, who is the high chief of our village. The *Ialmalu* is a symbolic leader, like a monarch. To perform the *Toka*, we must have Yam. It is only the Yam that is used in the *Toka*, this is how important it is. The practice for the *Toka* takes a full year. All of the other *Nikaowar* are female, so we eat the Yam but also can eat any other crops. The *Toka* is male and we must eat the Yam.

54. The Yam plays a vital role because the Yam is the chief of the crops and the *Toka* is the dance to decide the *Ialmalu*. The Yam also gives us the energy to us to dance for all four days.

55. During the *Toka*, if there is a dispute about who should be *Ialmalu* we do a test to determine who it should be by deciding who should wear huge feather (*Kweria*). The people who are dancing the *Toka* hold up the *Kweria*, and when it passes over the candidates, they can feel

Senior State Counsel,
Office of the Attorney
General, Republic of
Vanuatu.

whether they are worthy or not. It is a spiritual test. If you are not the real *Ialmalu* and you are crowned with the *Kweria* you will get very, very sick.

56. Now that the Yam is gone, the *Naukial* is not being done as much anymore. I am not sure if it can survive into the future.

57. Since the Yam has vanished, I am still doing the Kastom ceremonies, but I am using a different crop, Taro. It isn't right. When I am doing Kastom rituals it is very important that I have Yam. When I did the Kastom ceremony with the Yam, it was good and right. When I brought Yams to the *Imalul* to perform the ceremonies my heart felt happy. But now, although I am still performing the ceremony, it doesn't feel right in my heart. The ceremonies are worthless without the Yam.

58. The Kastom I am practicing is here. It is for this place. It is connected to the *Imalul* which was put here for us by *Kalbapeng*. I can't go get Yams from another place to use in the Kastom ceremonies. It wouldn't be connected to our place or our spirits.

59. We have stayed with our beliefs, even though other religious beliefs have come to Tanna. Now it is hard for us without the Yam.

60. Before, we also used the Yam to trade with people from the coast. I traded Yam for fish. But since the Yam has vanished, we don't do any trade with the coastal villages anymore. Those relationships are broken. Instead, when I want to eat fish, I have to buy it with money from the shop. I get money by selling Taro at the markets.

61. As I said, the Yam is our most important crop. Now that the Yam has disappeared, the spirit is telling me that the other crops will disappear in the near future too. I can see the changes happening to them now, I am worried for the future of my village, and for my grandchildren and my great-grandchildren. I am worried they will have nothing in their gardens and will not be able to maintain our Kastom. In some ways, as I have said, there has already been a severing because we cannot grow Yams and our Wildcane is hard to find.

Cyclones have become more destructive

62. In my lifetime, I have seen big changes in the cyclones.

63. Like I am a *Tupunis* for Yam, we also have *Tupunis* for the Weather. They are responsible for looking after the Weather. They used to be able to stop the cyclones from hitting us, but they can no longer. Whenever we have a cyclone coming, they go inside a special hut and do a sacred ritual with the sacred Stones for the Weather that would stop the storm from coming. It used to work, but now the rituals are not working anymore. The power is broken.

Senior State Counsel
Office of the Attorney General, Republic of Vanuatu.

64. The cyclones have grown more intense. The winds are stronger and the rains are heavier. I observed the cyclones becoming more intense starting with Cyclone Uma in 1987, but the worst was Cyclone Pam in 2015.

65. Before, when the cyclones came, they didn't damage the houses. But now the cyclones that are coming are doing a lot of damages to our houses.

66. During Cyclone Pam, my house fell down. All of the houses in the village fell down. Everyone had to go to Iepkisip, which is another village, to seek shelter in a "Tanna House." The Tanna House is a special type of house that is built to withstand cyclones. It was difficult to get to Iepkisip because so many trees were fallen all over the road.

67. While Pam was raging, there were so many people inside the Tanna House that we all had to stand. There was no room to sit. The house didn't fall over and we survived the night, but everything else was destroyed. During the twin cyclones, Kevin and Judy in 2023, the same thing happened again.

68. Our ordinary houses are made out of local materials. We use Wildcane stalks for the structures and Wildcane leaves for the thatched roof. Before, both our houses and the Wildcane would survive the cyclone, but now it is just the opposite. The cyclones not only destroy the houses but also destroy the Wildcane we need to build them back. We have to use axes and knives to cut materials from the fallen plants, but there are not enough materials to build what we need.

69. The cyclones are also damaging the trees that we need to build the Tanna Houses. We need a specific type of tree that has a curved trunk. Before the cyclones would pass and the trees would survive, but now they've all been destroyed.

70. Before when the cyclones came, they were beneficial to us in a way. The cyclones would prune the overgrown fruit trees. The trees would get twisted together and the cyclones would straighten them out. After the cyclone passed, the trees would still be growing, and because of the pruning, more fruit trees would be able to grow. But now, the cyclones are destroying all of the fruit trees.

71. It takes about a full year for fruit trees to grow back and bear fruit now after these bigger cyclones. I wait to eat the fruit, but just when they are about to bear fruit, another cyclone comes and destroys them again. The fruit trees cannot recover. This is not how it was before. This is a big loss for my village because we are spiritually connected to the fruit trees and they provide staple foods for us – Breadfruit, Coconut, *Namanmbe*, *Nantau*, and Banana. After the twin cyclones Kevin and Judy in 2023, all of the banana plants were destroyed. I haven't tasted a banana since. The banana plants are growing back but it's not too healthy. At least they are still giving a little bit of fruit, but they aren't nearly as big as before.

Signed: Mangau Iokai - Prepared on January 12, 2024 Witnessed: 9

Senior State Counsel
Office of the Attorney General, Republic of Vanuatu

72. It's the same for the crops in our gardens. Before, some crops would survive the cyclone. For example, even after Cyclone Uma, we still had crops growing. But after Cyclone Pam, it is just the opposite. Pam destroyed all of the gardens and all of the crops.

73. Starting with Cyclone Uma, a lot more rain comes with the cyclones and this causes landslides. Before Uma, we never experienced a landslide. But whenever we have cyclones now, we get landslides. The landslides damage our gardens.

74. My entire garden was destroyed by a landslide last year, during the twin cyclones, Kevin and Judy in February and March 2023. We used to get landslides only during major cyclones like Pam and Uma. But now we get landslides during smaller cyclones like Kevin and Judy too. This is because Cyclone Pam in 2015 cleared the whole area. It was just something waiting to happen. The trees that were on the slope helped to hold the soil together, but after Pam destroyed them, the garden became vulnerable to landslide. With the trees gone, the soil gets washed away easily.

75. Ever since Pam, the crops have never grown back as well. I think this is also related to the landslides, because when there is a landslide, they take all of the rich soil away and leave only the tough bedrock to garden on.

76. In the past, once the cyclone passed, we still had enough to eat. But now, when the cyclones come, they damage all of the food and we have to wait for the government to give us aid. We have to wait for about 3 months.

Visit to the United States of America

77. In 2008, I visited the United States of America. I went to New York, Montana, and Illinois. When I was in Illinois, I saw factories. I saw smoke going up from them that was very thick, the same as clouds.

78. When I saw the smoke, I knew it was bad. I knew it was affecting the gardens in my area. I knew my place was affected more than in the United States. In the United States, the products from the factory are going into the houses and are protected. But here we depend on our gardens which are outside. They are directly affected by the smoke. When it goes up into the atmosphere, its effect comes down here and harms us.

79. I'm very happy to be sharing my story with the International Court of Justice. Now our living has gone very differently and we are suffering. We have to say something to the world in order for things to get better. I want to tell the Court that they have to do something good for the people. If they do something good, I would be happy about that. I don't want them to do something bad that will harm our people.

80. I have asked the lawyers to come back and tell us the decision of the Court.

Signed: Mangau Iokai - Prepared on January 12, 2024 Witnessed: 10

Senior State Counsel, Office of the Attorney General, Republic of Vanuatu.

Tour of the gardens

81. I took the lawyers and the Attorney-General of Vanuatu on a tour of my gardens and other gardens in the village. I showed them different things. They took photos and videos and said that they will include them in the information that will be before the Court.

Signed:
Mangau Iokai

Witness: 

Christine Lava
Senior State Counsel, Office of the Attorney General

Data:
12 January 2024

Senior State Counsel
Office of the Attorney General, Republic of Vanuatu

We, Linet Iawain, Yalitea Iakaho, Sera Nawahata, Nelly Pilia, Nau Iaho, Nancy Iacitan, Sera Naburam, Yoba Mearangi, and Jenny Toata from Yakel Village, Tanna, Vanuatu solemnly affirm and declare:

Background

1. We are women from Yakel village. Our names and ages are: Linet Iawainn (51), Yalitea Iakaho (58), Sera Nawahata (48), Nelly Pilia (53), Nau Iaho (62), Nancy Iacitan (42), Sera Naburam (56), Yoba Mearangi (58), and Jenny Toata (61).

2. We have been asked to give testimony to the International Court of Justice about how the weather is changing and the impacts of this on our lives and our Kastom. We gathered together to share our views. Some of us have given individual statements. We are a community, and we feel more comfortable and more confident giving a statement together. We have chosen to share our voices as a group.

3. We speak our language, Nahvwaal. We have given our statement through an interpreter John Kalwas, who can speak Nahvwaal. He read this statement to us in Nahvwaal and we agree with the content of it.

4. Our testimony is based on our direct knowledge or our knowledge based on Kastom, which has been passed down to me from my parents, grandparents and my ancestors.

5. We do not know how to write so we have each signed this statement by marking an "X".

Impacts of changing weather on the duties of Women

6. As women, our Kastom duty is to do *Nahunu*. It is a big word with a big meaning. We will try to explain it in English as best as we can. *Nahunu* means bringing food and water to the Nakamal for the men to drink Kava there. The Nakamal is the centre of our village life. The men go there every evening when the sun is in a certain position to commune with the spirits and ask them for a good crop. The women bring the water that the men need to prepare the Kava. We bring the food because the Kava is bitter and it is needed to clear the throat of the bitter taste. The *Nahunu* is a duty that women owe to the Nakamal.

7. As women, we have to do the *Nahuna* every night. Before, it was easy for us to perform our duty because our gardens were close by and full of food. But after Cyclone Pam in 2015, landslides have destroyed our gardens. We can no longer garden close by. Instead we have to cross a ravine to get to another valley on the other side. We have to walk

Signed –
Linet Iawain
Yalitea Iakaho
Sera Nawahta
Nelly Pilia
Naus Iaho

Signed -
Nancy Iacitan
Sera Naburam
Yoba Merarangi
Jenny Toata

Signed: Witness
Senior State Counsel
Office of the Attorney General

down a steep mountain to the river at the bottom of the ravine and then walk back up the other side. It takes almost the whole day to get there and back.

8. The trip is so long to get to the garden and back that sometimes we cannot make it back to the village in time to do the *Nahunu*. When we are not able to perform our duty. We are feeling unhappy and sad that we are not doing those duties for the Nakamal.

Impacts of changing weather on food shortages

9. On top of that, the changing weather is causing our crops to shrink. The rain is too much and the sun is too strong. They are killing the crops. The repeated landslides and cyclones also destroy the crops. As a result of all these changes, we don't have enough food. Some of us have observed these changes since Cyclone Uma in 1987 but things have gotten much worse since Cyclone Pam.

10. The Yam is our most important crop. Because of all of these changes to the weather, especially the rain, the Yam has vanished entirely. It's been four years now with no Yam.

11. Before, we were thinking that we would be able to live in the same way as our grandparents and perform our duties. But it is hard for us to perform those duties because of the weather we are getting now, which is leading to a shortage of food from the gardens.

12. One of the roles of women in our community is to go down to the river to get fish and prawns.

13. Before, we could go down to the river whenever we wanted prawns and we got lots of them. But now, we can start in the morning and go until the afternoon and we are trapping maybe five prawns total. That's it.

14. The prawns have washed away due to landslides and floods, which happen when we get cyclones and when the rain is too heavy.

15. Prawn is a staple of our diet and we must have prawns to eat. When we don't have prawns, it affects our health. It is affecting the growth of both our children and adults. We are getting smaller. We are afraid that if we continue without having our staple foods, it will make us sick.

16. The heavy rains and landslides have also washed away all the fish and eel from the river. The flooding has washed away the stones from the riverbed that the fish use for

Signed –
Linet Iawain
Yalitea Iakaho
Sera Nawahta
Nelly Pilia
Naus Iaho

Signed –
Nancy Iacitan
Sera Naburam
Yoba Merarangi
Jenny Toata

Signed: Witness
Senior State Counsel
Office of the Attorney General.

breeding, so the fish population can't recover. Now we can't get fish at all. There is nothing.

17. Starting from Uma up until now, that's when all the prawns and fish have washed away. After Uma, some of the prawns and fish were washed away, but still they were coming back. They weren't gone entirely. From 2015, they disappeared quickly because of the rain and cyclones. We were waiting for the fish and the prawns to grow to a size that we could eat, but they weren't able to because the other cyclones came through and washed them away before they could grow.

Impacts of food shortages on community cohesion and gender-based violence

18. Because of the shortage of food, the community has changed a lot. Before we lived together peacefully, but now we have lots of quarrelling among men because of the shortage and the children are not having enough to eat.

19. The shortage of food and the cyclones are also disrupting the harmony between husbands and wives. And sometimes things get violent. Because of the stress of the shortages, men shout at us and swear at us and threaten us.

20. We want to go back to the way things were before. We were living in a different environment back then and there was harmony between us. We want that to come back.

21. The food shortages are also affecting our health. Our lifespans are getting shorter. The women are dying younger and they are not reaching the age when they are supposed to die.

22. These times are very hard. We are trying to do our best but things are only getting worse.

Impact of food shortages on Kastom

23. The food shortages are also impacting our ability to perform Kastom ceremonies.

24. Before, we had a hunting area where we could go for wild chicken and pigs. But now we don't have that anymore. The cyclones have destroyed the hunting places for chickens and pigs. During Cyclone Uma, we had little landslides. But the landslides that occurred during Cyclone Pam were much bigger and destroyed the entire place. We can't hunt there anymore.

25. With that place gone, we don't have any source of meat. If we want to eat meat, we have to eat the pigs and chickens we are raising in the village for use in ceremonies.

Signed –
Linet Iawain
Yalitea Iakaho
Sera Nawahta
Nelly Pilia
Naus Iaho

Signed -
Nancy Iacitan
Sera Naburam
Yoba Merarangi
Jenny Toata

Signed: Witness
Senior State Counsel
Office of the Attorney General.
3

26. Because of the disappearance of prawns and fish, the destruction of our gardens and hunting grounds, and the decline of our crops, we have very little food. We have very few options.

27. Because of the shortages, we are eating the ceremonial pigs and chickens. These animals are meant to be used for Kastom ceremonies at the Nakamal.

28. For this reason, we cannot perform our Kastom ceremonies until we have money to buy a pig or can find one. But often we cannot get the animals we need. We are avoiding doing the ceremonies when we are supposed to do them, and with each one we miss this is building up, it is causing us a lot of worry. We are thinking, where will we get the meat for the ceremony? Because we are not performing the ceremony, we feel like we owe something to the Nakamal. We are feeling bad.

29. We are feeling very depressed and worried. Some women in the community have become so worried about the Kastom ceremony they are supposed to be doing that they are having strokes.

30. When we are not able to do the Kastom ceremony, we feel shame. We feel like we are are isolated from the rest of the community. We feel wrong. But we can't help it.

31. This affects our husbands too, because the ceremonies belong to both men and women. But the worry is greater for women. Women marry into Yakel from other villages, and when we perform custom ceremonies, especially the male circumcision ceremony, we are supposed to give back to our fathers and brothers in the other village. For the woman, it is for their family, their brothers they are giving back to. The burden is falling on them really strongly, because they want to make sure they are pleasing their family. The ceremonies are about relationships. The male circumcision is a way of paying respect and giving thanks to the woman's family for sending her to the village.

32. It is a must for us to do the male circumcision ceremony, especially for the first born boy. If a women doesn't do it, that is a source of shame for her. She will feel very bad inside. She will be unhappy, worried, and depressed because she wasn't able to perform that ceremony.

33. The Yam is our most important crop and is essential for all of our Kastom ceremonies. Now that we have no Yam, if we want to do the ceremony, we try our best to get Yam from our families living in other villages. But if we can't get Yam from our families, we perform the ceremony without the Yam. Starting from Cyclone Pam until now, that is when we have been forced to perform the ceremonies without the Yam.

Signed –
Linet Iawain
Yalitea Iakaho
Sera Nawahta
Nelly Pilia
Naus Iaho

Signed -
Nancy Iacitan
Sera Naburam
Yoba Merarangi
Jenny Toata

Signed: Witness
Senior State Counsel
Office of the Attorney General

34. Performing the ceremony without the Yam doesn't feel good. It doesn't right. We have a word to describe the way it feels to do the ceremony without the Yam, but there is no English translation. The best way we can describe it is to say the ceremony is devalued. But that doesn't really capture the depth of our feeling or the meaning of doing the ceremony without yam.

Impacts of changes on transmission of culture

35. For us in the village, we are practicing what are grandparents taught us. We are doing it. We are also telling our children, especially the women and the girls, to do the same. But due to Western influences, it is getting harder. Because of the food shortages due to the changing weather, life is getting hard. Our children are looking elsewhere for a different life. They are leaving the village. As mothers, this makes us feel so sad, because we want them to keep our Kastom and our way of life.

Message for the Court

36. Today, the lawyers have come here to ask us questions and to get our views and about what we have to happen. What we want is to go back to the way things were so we can live a better life.

37. Seeing the changes in the climate has given us a lot of worries and we want to tell the Court to put a stop to this and how this is affecting us. If the Court can make it stop, it will make us more happy in the way that we will be living.

Prepared at Lenakel, Tanna, Vanuatu on 12 January 2024.

Signed –
Linet Iawain
Yalitea Iakaho
Sera Nawahta
Nelly Pilia
Naus Iaho

Signed -
Nancy Iacitan
Sera Naburam
Yoba Merarangi
Jenny Toata

Signed: Witness
Senior State Counsel
Office of the
Attorney General

I, Jenny Toata, from Yakel Village, Tanna, Vanuatu solemnly affirm and declare:

Background

1. My name is Jenny Toata. My Kastom name is Narua. I am a national of Vanuatu. I live in the village of Yakel on the island of Tanna in Vanuatu. I moved to Yakel in around 1986.

2. I was born in 1967.

3. I have eight children. Seven boys and a girl and 19 grandchildren.

4. I have been asked to give a testimony to the International Court of Justice about how the weather is changing, how my garden and my life in the village is affected by these changes.

5. I speak my language Nahvwaal. I have given my statement through an interpreter John Kalwas, who can speak Nahvwaal. He read this statement to me in Nahvwaal and I agree with the content of it.

6. My testimony is based on my direct knowledge or my knowledge based on Kastom, which has been passed down to me from my parents, grandparents and my ancestors.

Changes to my garden

7. When I was young, I used to see my mother go to the garden and when my mother comes back, she had plenty of food to come back and it was shared among us and many other people. The food that we have from those days could sustain us for quite a long time.

8. Before moving to Yakel, I lived in Lankuengah village, which is the same language group as Yakel and is an inland village in the same region as Yakel.

9. I started a garden as soon as I moved to Yakel and it gave good crops and plenty of crops. It was like my mothers garden.

10. Around 1987, I started to see the changes happening over time. I remember because this is when Cyclone Uma was. Anyway, even after Uma, it was a slow change but I am noticing it more in recent years.

11. I saw the changes in my yams, taros, kumula and the produce of those crops were starting to get smaller.

12. The food that I am harvesting now, it is getting smaller and it is not the same as before. It used to sustain us for a long time, but now it just lasts for a day.

13. The things that are affecting the crops are the rain and the sun. When the rain comes, it is supposed to be good for the crops and help them to grow, but now the rain is too heavy for the crops to survive. The sun shining is also supposed to help the crops grow, but now it is too strong and too hot. The crops do not grow as well as before.

Senior State Counsel
Office of the Attorney General

14. The weather pattern before was predictable, But now the rain comes when it is unexpected and same as the sun. The sun comes when it is supposed to rain. Before the weather had a pattern. I assumed the weather pattern would be the same as before and now it is different. It is bad for the crops.

15. Before when I do the gardening, the rain comes, it is a normal rain and now it is more heavy. Now when it rains, I have soil erosion and it is effecting my gardening. When it rains, due to soil erosion, the soil buries the crops and they cannot breathe and you cannot get a good harvest.

16. Now there are a lot of landslides too. I started to see them happen over time also from Cyclone Uma onwards and now there are more.

17. When I was doing the gardening, I used to plant crops, and plant fruit trees such as oranges. But my garden was destroyed by a landslide during Cyclone Pam in 2015. This has affected me and my children.

18. At that time, during that landslide I was sad, because it was time for the praying for the yam and we could not do that ceremony. At the time, during the landslide, I was expecting that we would do the ceremony for the yams, but then the landslide damaged the garden for the yams, I just took the kava to the Nakamal without yam. It felt wrong.

19. After Cyclone Pam, we had a lot of hunger. Yam is part of my day-to-day food and I also couldn't eat it. We depended on what was left, such as cassava, but this cassava was also not good and was rotten and I could only eat some of it. I also had a little bit of Kamala and our special leaves. It was not enough and I was hungry. So were my children.

20. The crop that I love most is the yam. The yam is completely gone from Yakel. I am so scared that there is no more yam. I am not happy that the yam is gone.

21. The yam was much harder to grow after Cyclone Pam in 2015, but now it has been gone for about 4 years.

22. I like yam so much, because I do most of the kastom ceremony with yams, like Niel, circumcision and other ceremonies.

23. I am still doing the yam garden, but it is so small. I am trying to keep it going but I am unable, I do not want to lose it, which is why I keep trying. It is the bad rain. It is so rainy. Also with the sun, it is not a good sun because it is shining on the crops.

Changes to my garden location

24. Before I was a healthy person, because my gardening was close by.

25. After the landslide destroyed my garden, everything changed. I can no longer garden close by. Instead, I have to cross a ravine at the bottom and climb all the way to the other side of the valley. I have to go way down the ravine, where I have to cross a

Senior State Counsel
Office of the Attorney General

river at the bottom of the ravine and then go all the way back up the other side of the valley. The walk is very steep. It takes me almost a full day to go there and come back I only have 30 minutes to 1 hour to garden. I must load the produce on my back and walk back with it and that effects my knees and my hurts my back also.

26. My daily routine when I go to the garden is I must do some chores at home, whether doing the dishes or feeding the pigs. When I am done, I have to walk to the garden which takes a long time, only to be able to garden for a short time. I have to be back in the village before 4pm when the men start to drink kava in the Nakamal.

27. I used to go to the garden daily, but now sometimes I feel too tired and cannot go up anymore. This is affecting my ability to feed myself and my families.

28. If there is something that is very important at the Nakamal, I will have to prepare myself a day or two beforehand. Before, I used to walk short distances. It is not like that anymore. It is a hardship on me.

29. The weather is making it hard to get to the garden too. Because of the heavy rains the river often floods. When the river floods, I cannot go to the garden.

30. When the heavy rain comes, that is when the river floods. When it rains, I am unable to go. For an example, the day before yesterday and yesterday, there was rain. When it rains that hard, I cannot get across.

31. I do not know what to do. When this happens and I do not go to the garden, I need to look for something to eat and to feed my family. But there is nothing to eat. We will only have leaves.

32. I have a husband and he has a garden. I used to depend on him to get food from the garden. Now he is getting old, too old to get food from the garden. My husband is relying on me.

33. Sometimes, my children will feed me when I am too tired to walk to the garden and back and sometimes my children will cook for me too.

34. I would like to tell that Court that they have to put a stop on the gas emissions that are ruining our gardens. They are living in continents and we are living on tiny islands. When they are doing these things, it effects my village, me, my family, my children and my grandchildren.

Signed: Jenny Toata

+

Witness:
Okalau
Senior State Counsel
Office of the Attorney General

Date: 12 January 2024.

+

Okalau
Senior State Counsel
Office of the Attorney General

I, Johnny Loh, from Yakel Village, Tanna, Vanuatu solemnly affirm and declare:

Background

1. My name is Johnny Loh and I am a national of Vanuatu. I live in the village of Yakel on the island of Tanna in Vanuatu. I have been living in Yakel all my life.

2. I was born in 1963.

3. I have 16 grandchildren and eight great-grandchildren. All of them live in Yakel.

4. Gardening is a key part of life at Yakel. I am a gardener. I eat what I produce. My crops provide most of the food that I eat. Crops are also essential to my Kastom. I grow crops for the many important ceremonies that we have in the *Imalul*, which is a central meeting place in the village. Our cultural life, politics, governance, and religious beliefs centres on the *Imalul*.

5. I have been asked to give a testimony to the International Court of Justice about how the weather is changing and how many of our crops are affected by these changes.

6. I speak my language *Nahvwaal*. I have given my statement through an interpreter John Kalwas, who can speak *Nahvwaal*. He read this statement to me in *Nahvwaal* and I agree with the content of it.

7. Where I use terms from my local language in this statement, it is in italic.

8. My testimony is based on my direct knowledge or my knowledge based on Kastom, which has been passed down to me from my parents, grandparents and my ancestors.

Gardening

9. I have been gardening by myself since I was 15. Before that, I would go to the gardens with my mother and father and they taught me how to garden.

10. I grow Taro, Kava—which we call *Nikkaowah* in my language, Banana, Kumala, and, before now, Yam.

11. Each growing season, I move my gardens to different areas, to allow the last area where I had my gardens time to rest, before I use it again.

12. I also use a cutting from a local plant, which acts as a fertiliser. In my language, we call it *Lilahng*. I will use this plant when I notice that weeds do not grow in the soil, I know that the soil is not good. I must go and take the plant and use it on the soil so that it can enrich the soil. This has been our tradition for generations. It worked for my parents and my grandparents.

13. At the time that I started to do my garden, that was when I was 15 years old, I was harvesting big Yams. Recently, the Yam started getting smaller and smaller. About four years ago, the Yam vanished altogether.

Signed: Johnny Loh JOHNNY

Prepared on January 12, 2024

Witness: 1
Senior State Counsel
Office of the Attorney General

14. Every other crop that I grew too, was big.

15. All of my crops have started to get smaller and smaller.

16. I took the lawyers and the Attorney-General and the translator for a tour of my gardens and other gardens in the community. I talked to them about my crops and some of the other crops in the gardens and showed them the different crops. They took photos and video of me showing them the different crops and the problems I and others are having. They told me that they will do a statement that will show these photos and some of the videos.

17. For example, the Banana. The Banana plants used to give much more fruit. Before, when I planted Banana, the bunches of Banana would be much bigger and there would be many more fruits. The branches would be full of Bananas and would hang down much lower. It is not healthy if it does not drop from the top to the bottom. Now, only a few Bananas grow at the top of the plant.

18. The same with the Coconut. Before, I used to get big Coconut fruits. But nowadays, it's getting smaller and smaller. We don't have big Coconuts anymore. The leaves are also dying. I've observed this change over the past four or five years. It never happened before.

19. The Taro has been affected too. These days, it is very common to see sick Taro leaves. Healthy Taro leaves are a vibrant green and are so big you can use them as an umbrella when it rains and not get wet, Now, they are small, have turned a yellow-brown, and have holes in them.

20. The plant we use for Laplap is also dying. Like the Taro, the leaves used to be vibrant and so big we could use them for an umbrella. We still grow them now, but the leaves don't look healthy, they are smaller, they die off easily.

21. We also have a tree called *Nigulk*, it bears a tasty fruit that everyone loves. Right now, in January, it is supposed to be in season. The branches should be so heavy with fruit, but there are none. This is because while the tree was flowering, heavy rain came and washed away all the flowers. The rain is not supposed to be heavy like that.

22. My *Nikkaowah* started to fail just before Cyclone Judy and Kevin hit us in February/March 2023. Now it is all dead. *Nikkaowah* is essential to our Kastom. It is how we commune with the spirits. I was planting my *Nikkaowah* for ceremonies at the *Imalul*. Now that the *Nikkaowah* is dying off, I can't perform those ceremonies anymore. I'm trying very hard, because we must have *Nikkaowah* to do the ceremonies, but no matter what I do, the *Nikkaowah* keeps dying.

23. These changes started around the time of Cyclone Uma, which was in 1987. After this cyclone, my crops have been slowly getting smaller. But it was after Cyclone Pam in 2015, that I have noticed that things are getting worse, including the Yam, which got smaller and smaller and now can't grow anymore.

24. I still practice resting areas and use the *Lilahng* to make the soil rich, but it is not giving any good results.

Signed: Johnny Loh
JOHNNY

Prepared on January 12, 2024

Witness: 2
Senior State Counsel
Office of the Attorney General

25. Tanna has always been an island with plenty. Our land is naturally fertile. Our people were never hungry. We always had food in the garden. Our people were very self-sufficient in terms of subsistence farming. We had lots. But it is very different now. The harvests are getting smaller and smaller, and every time you have a small harvest, you have less and less to plant.

Observations about the weather

26. There are three changes to the weather which I have observed. First, the cyclones come and moves the trees. Second, is the sun, and then the third is the rain.

27. Since Cyclone Uma, we've been experiencing cyclones that are much more severe. Pam was the worst. It removed all of the trees from some of the sloped areas where we garden. The trees are important because they hold all of the soil together. Without them, we get landslides. We started having landslides after Cyclone Uma. We used to have landslides only when we got the strongest cyclones, like Pam and Uma. But now, because all of the trees are destroyed, we get landslides when we have smaller storms, or even too much rain.

28. We used to plant some of our gardens in a sloped area. The soil was rich. But the landslides took all of the topsoil and all that is left is the bedrock. We can't plant there anymore.

29. A good number of people used to do their gardening on that slope. But now these people have no place to do their subsistence garden. They have to borrow land to do their garden, but the size of the land is much reduced because they are using part of someone else's land. It is no longer their land and their garden. To lose custom land like this, is to lose everything. Your customary ground is your mother, it provides everything that you need. It is to lose the past until now and the future. It is like death. This loss of land is also causing hunger in our community.

30. The sun is also affecting the crops. We used to have a good sun that would help the crops grow, but now when we have sun, it is too strong and too hot. It causes the leaves to burn and the plants to die.

31. The same with the rain. Before, we had good rain that the crops would drink and use to grow strong. But now we are getting too much rain. It is too heavy and lasts for too long. It washes away the leaves and the fruits and causes the crops to rot.

32. Everything is out of balance. Before, the sun and the rain gave us just what we needed, and our gardens flourished. But now both the sun and the rain are too strong. It is all wrong.

The Imalul

33. I perform the ceremonies of the *Imalul*. There are many different ceremonies.

34. Each of the ceremonies require different crops. The Yam is the King of the crops and plays a central role in all ceremonies. Yam is the King of all the crops because when all

the root crops are put in *Niel* and if only a Yam or more than one Yam is put into in the *Nail* it adds value to the *Niel* because Yam is considered as the King of all crops.

35. However, *Nikkaowah* is also important. *Nikkaowah* is how we access the spirits. It is like a gateway to the spirits. We need the *Nikkaowah* because that is how we talk to the spirits.

36. I go to the *Imalul* every day, in the afternoon/early evening, and it is my Kastom for the men of the village to do so. It is also Kastom for me to take *Nikkaowah* with me, as all men who attend should. All the *Nikkaowah* will be prepared together and shared among us. We drink it in coconut bowls. We each have our own bowl.

37. Each evening when the men go to the *Imalul*, we will drink the *Nikkaowah* which is social, but it is an important bond between elders and children. This is where the young boys and men meet to learn about the Kastom and ways of life.

38. Sometimes we will perform a ceremony called the *Tamafah*. We drink the *Nikkaowah* and commune with the spirits to ask them to look after our crops. Drinking *Nikkaowah* is like a prayer. We pray for the garden crops.

39. I am worried about the *Nikkaowah* because the crop has been failing. I used to be able to take *Nikkaowah* to the *Imalul* daily, but now I can't now because my crop failed. I still go to the *Imalul* even if I don't have enough *Nikkaowah*, and those who do share. But sometimes there is not enough *Nikkaowah* among all the men in the village to perform the *Tamafah*.

40. We used to perform the *Tamafah* daily, as is our Kastom, as it has always been. But now, because there is not enough *Nikkaowah*, the *Tamafah* is an on and off thing.

41. Before, when I was doing the *Tamafah*, I felt like my prayer was something meaningful. But now, because I am not doing it as much as I did, I do not feel like I am connecting with the spirits. Something feels broken.

42. I do not know when the *Imalul* started, but it has been there a long time up until now. It is our way of life. When the sun moves to a certain place in the sky, it's time for the men of the village to come to the *Imalul* and drink *Nikkaowah*.

Worries About the Future

43. Because the Yam has already vanished, I am worried about all of the other crops. I am worried they will disappear too. I want them to be there for my children, my grandchildren, and future generations so that they have something to survive on and so they can practice our Kastom.

44. I am worried too because we are losing all of our arable land, which we use for gardening. When all of the arable land is gone, where will our people garden in the future? How will they survive? I am worried for my children and my grandchildren.

Office of the Attorney General Senior State Counsel

45. I've been living here my whole life, but I've been hearing stories about factories far away putting up big smoke. I don't want the big smoke to come here and harm my *Imalul* and my people.

46. To the Judges of the International Court of Justice, I want to say: The changes are causing us to really suffer. If it is the big factories that are causing all of these changes, I want the Judges to put a stop to the factories putting up the big smoke.

Signed:
Johnny Loh
JOHNNY

Witness:
Christine Lava
Senior State Counsel, Office of the Attorney General

Date:
12 January 2024

I, Jimmy Namile, from Iautapunga Village, Tanna, Vanuatu solemly affirm and declare:

BACKGROUND

1. My name is Jimmy Namile. I am 71 years old. I was born on November 12, 1952 in Louwangou Health Center, on the island of Tanna, Vanuatu. I live in Iautapunga Village within Naurarimine Tribe.

2. I am a Vanuatu National and I provide a statement to the International Court of Justice on changes in the weather I have observed, my experience living through cyclones, including category 5 Cyclone Pam, and my concerns for my grandchildren and future generations.

3. I speak Nafe, as my local language, as well as Bislam which is one of Vanuatu's national languages. I have given my testimony in Bislama and Nafe through a translator. This written statement has been read back to me in its entirety in a language I understand and I have certified its accuracy.

4. My testimony is based on my direct knowledge or my knowledge based on kastom, which has been passed down to me from my parents, grandparents, great grandparents, and ancestors.

5. Iautapunga is an inland village located near the volcano, which in my language is called Yasur, meaning God.

6. I have six children, four grandchildren, three great grandchildren, and one great-great grandchild. I also have one great-great grandchild on the way.

7. I am the Chief of the Naurarimine Tribe. My duty as Chief is to look after my tribe and to make sure the people have unity.

8. I have lived on Tanna in Iautapunga Village for my whole life. I have seen big changes to the weather in my lifetime. I have also lived through several cyclones. I have experienced the cyclones getting more intense over time and causing more damage to my community.

CHANGES TO THE WEATHER

9. The weather has changed a lot during my lifetime. During my days, for the first 50 years of my life, the climate was normal – we got just enough rain and just enough sunshine. We were able to grow enough food.

10. Things changed after about 2000 or 2001. Since then, we've been experiencing more intense rain and thunder, hotter and more intense sun, and more earthquakes. Because of these changes we are no longer able to grow enough food. When the sun is strong, the crops are not able to produce. And then when the rain comes, the crops go rotten. The rain especially affects the root crops.

Signed: Prepared on 09/01/2024 at Ianakulu, Tanna, Vanuatu CounterSigned: 1

JIMMY

Senior State Counsel
Office of the Attorney General, Republic of Vanuatu.

11. The rain no longer cools the temperature down like it used to. Before, the rain would cool everything down. Now, even after the rain we still feel hot. Because of this I often feel too hot and have a hard time cooling down.

CYCLONES

12. I've lived through several cyclones. In the past, before 1972, we didn't experience too many impacts from the cyclones. But since then and especially after Pam, the cyclones have intensified, and the impact has been very huge on the people.

13. In 2015, Cyclone Pam came and destroyed everything. All of the houses were flattened, even the cyclone shelters.

14. When Pam hit, I was in my house with my wife, six children, and four grandchildren. The grandchildren were aged from about seven to 13. The house fell down around us. We had to run outside and hide under a big banyan tree for shelter.

15. After the cyclone passed, everything was destroyed. We had nowhere else to go so we continued living under that banyan tree for about two weeks while we built back our house. We built a traditional house using local materials. We build the roof out of coconut leaves that had fallen. We had to use them quickly before they rotted. We made the wall out of bamboo that had been knocked over by the storm, and held the house together using nalaus, which is a rope made out of a local plant.

16. All of the rain from Cyclone Pam caused graves to be washed away. Graves belonging to my grandfather, my father, and my brothers all washed away. My heart was broken when the graves were washed away. I cried.

17. The grave site is a tabu because that's where the spirits live. By washing away the graves, the cyclone disturbed the spirits. In our kastom we believe disturbed spirits bring sickness and disease.

18. In kastom, after the graves were washed away, I had to go get new soil and put it back where the graves were. I then had to go get a kava and a pig, and kill the pig at the Nakamal to stop the spirits from walking around, to put them back at peace. I wasn't able to do that until the water dried out and the soil was really dry. The nakamal is the centre of life for the village. It's a gathering place for performing ceremonies and rituals for everyone in the village.

19. Pam also destroyed all of our gardens. All of the crops for the whole village were gone. We had no food. The women would go look for anything they could find to feed the children in the debris. Any food they found in the debris went to the children. I ate the dried coconut flesh and the stem of the Taro Fiji plant. This part of the plant isn't really edible. It burns your throat if you try to eat it. It is very painful. But we were starving. We

Signed: JIMMY

Prepared on 09/01/2024 at Ianakulu, Tanna, Vanuatu

Counter-Signed: 2
Senior State Counsel
Office of the Attorney General, Republic of Vanuatu.

didn't have any other option. I baked it on a hot stone to reduce how painful it was to eat, but it didn't help that much.

20. Our village is on a hill about 100 or 200 meters from the side of a valley. All of the rain from Pam caused the valley to fill with water. The waters raised right up to our village and even breached the Nakamal where some people were seeking shelter. Those people had to move.

21. We kept gardens on the other side of the valley, about 1 kilometer away. After Pam, I went there to check to see if there was any food. Normally we would walk through the valley to get to our gardens. But because the valley was flooded, I had to swim. I made a raft and paddle out of bamboo and paddled across the flooded valley. But when I got there, I saw that the gardens were destroyed. The water and the winds had rooted out all of the crops.

22. We lived like that, with no food, for about one month, until the government was able to get rations to us.

23. It was also hard to get fresh water. All of the flood water was stinking because of the rotten leaves. To get drinking water we used plastic water bottles to collect water from our water catchments. But we had to wait for the rain to come. While we were waiting for clean water to come, we had to drink from the flood water. I didn't get sick from the water, but the children did. They got sick and experienced flu-like symptoms.

24. After Pam, we slowly tried to recover. It was hard because the gardens were not giving good produce like they used to. Then, in 2019, we got hit by another cyclone and had to start recovering all over again. The same again in 2023, we got hit by the twin cyclones, Judy and Kevin, within one day of each other, and had to start all over.

25. The children really suffered. After Pam they couldn't go to school for three to four months. The same thing happened after the twin cyclone in 2023. My grandchildren were frightened by living through Pam and they still have that feeling whenever there is heavy rain or storm.

26. The changes we are experiencing is making life difficult. The hotter and rainier conditions plus the repeated cyclones is making it hard to grow food. When I was young, we used to have lots of fruits, taro, cassava, kumala (sweet potato). But now there is nothing.

27. In the future I will be dead already, but I worry for my grandchildren and great-grandchildren. I wish these changes to the weather and cyclones would stop.

28. Climate change is really affecting our way of life, but we didn't cause it. It is caused by all of those big countries emitting gases. I wish they would stop so we can continue to enjoy our way of life.

Signed: JIMMY

Prepared on 09/01/2024 at Ianakulu, Tanna, Vanuatu

Counter-Signed: 3
Senior State Counsel
Office of the Attorney General, Republic of Vanuatu.

I, Naus Iaho, from Yakel Village, Tanna, Vanuatu, solemnly affirm and declare:

Background

1. My name is Naus Iaho. I am a national of Vanuatu. I live in the village of Yakel on the island of Tanna in Vanuatu. I am 62 years old.

2. I have been asked to give a testimony to the International Court of Justice about how the weather is changing and how this affects the practice of traditional medicine in my village.

3. I speak my language Nahvwaal, I have given my statement through an interpreter John Kalwas, who can speak Nahvwaal. He read this statement to me in Nahvwaal and I agree with the content of it.

4. My testimony is based on my direct knowledge or my knowledge based on Kastom, which has been passed down to me from my parents, grandparents and my ancestors.

Traditional medicine

5. In Yakel, we have traditional herbs that we use for medicine. A very important medicine is an herb that we use to help young women to get pregnant.

6. I am responsible for preparing that medicine. Only myself and one other woman in my village, Linet Iawain, know how to prepare the medicine.

7. I am asked to prepare the medicine every time a woman wants to have a baby. They ask me every time because the medicine is so important.

8. The knowledge of the medicine and how to prepare it was passed from my ancestors, to my mother, and then passed on to me. The knowledge of the plants and how to prepare them is secret and sacred. It is too sacred for me to talk about in more detail.

Changes to the rain is damaging medicinal plants

9. Before, it was easy to find the herbs that I use for the medicine, but now, it is hard to find those herbs.

10. I think this is due to the bad rain that is coming and making the plants die off. The bad rain is too heavy. In the past, when we had good rain and the medicinal herbs grow very well. When the bad rain is coming it makes the plants die off. The bad rain affects the leaves, the leaves die and are falling off due to the bad rain. This is because when we get too much rain, the soil is absorbing too much water. That's why it is affecting the plant.

11. These changes started with Cyclone Uma. Before Cyclone Uma, it easy for me to make the medicine. When Cyclone Uma came it destroyed some of the medicine, but it was still there for me to do the medicine, up until Cyclone Pam. But after Cyclone Pam so many of the plants have died that it is hard for me to do the medicine.

Senior State Counsel
Office of the Attorney General

12. When someone asks me to do the medicine, I used to always be able to make it. But now, when I can't find the herbs, sometimes when they come and ask me, I cannot make the medicine.

13. Making the medicine is my sacred duty. It's something that I must do. If a woman is asking me to make that medicine so that she can get pregnant, it is a must for me. I have to look everywhere for the plant, so that I can make the woman pregnant. When I can't do it, to me it is a failure.

14. I worry about the future when there won't be any plants and it will be impossible to make the medicine. The knowledge that I have about the medicine, I have passed on to my daughters. I am worried that when I am gone, my daughter won't be able to keep practicing medicine because the plant is dying.

15. The last thing that I want to say is that we humans came to this planet, this world, to reproduce. When they are not able to reproduce, people come to me for the medicine so they can get babies. Now I am so worried about the future when there is no more medicine to produce the babies, I am worried.

Signed: Naus Iaho

Witness:
Senior State Counsel
Office of the Attorney
Date: 12 January 2024.

Exhibit N

I, Sera Nawahta, from Yakel Village, Tanna, Vanuatu solely affirm and declare that:

1. I am a Vanuatu national, living in Yakel village in Tanna. We live a very traditional life, from the time of the ancestors.

2. I do the medicine for fever and headache and joint pains. This medicine is disappearing due to heavy rains, which are different to what the rains used to be like when I learnt this medicine.

3. I use customary knowledge and plants for this medicine.

4. Before, when the people came to me to do the medicine, it was not difficult for me to find the medicine. I had plenty of that particular plant to do that medicine. After Cyclone Uma in 1987, I still have the plants but after Cyclone Pam in 2015 the plants are disappearing. It is hard for me to do the medicine. Also due to the rains that are falling, there are bad rains that are making the plants die and not grow. It is hard for me nowadays to do medicine.

5. The bad rain comes and it will wash the plants. I was thinking that the plants will be Okay but the sun comes and the leaves become yellowish and fail.

6. It is a bad rain because when it falls it is so heavy and it is destroying the plant. It did not rain like this before.

7. My great grandfather taught my grandfather who taught my father-in-law and then my father-in-law taught me. Men or women can do this medicine. But only few people, including myself know this medicine.

8. Now, because of the changes in the weather, I was going to teach my daughter about the medicine but due to the weather this is happening. I do not know whether I am going to teach my daughter about the medicine or not. I would like my daughter to learn this medicine so she can serve the community by saving their lives when they are sick. If the plant is not growing anymore, she may not be able to find the plants to practice the medicine.

9. Because the medicine is for fever, headache and joint pains, I am asked a lot for this medicine. For the elders, if they have joint problems, can do that also to help them. For the fever, I work with people who are very sick in the community and I do this medicine for them.

10. This is essential medicine for the community and I am worried about the community because if the community is getting sick I am there to make the medicine for them. I am there to serve my community. Without the plants to make the medicine, I cannot look after the community's medical needs.

Signed: Sera Nawahta

X

Witness:
Senior State Counsel
Office of the Attorney General
Date: 12 January 2024

Signed: Sera Nawahta Prepared at Lenakel, Tanna, Vanuatu on 12 January, 2024 Signed: Witness 1

X

Senior State Counsel
Office of the Attorney General

I, Robsin Tigona, Lecturer in Environmental Sciences at the Vanuatu National University, the Republic of Vanuatu, solemnly affirm and declare:

BACKGROUND

1. My name is Robsin Tigona, and I am a national of the Republic of Vanuatu ("Vanuatu"). I was born on 13 July 1975 in Silimauri Health Centre, Tongoa Island, Vanuatu

2. I am currently a Lecturer in Environmental Sciences at the Vanuatu National University. I have been in this position since 2022. Prior to that I was undertaking PhD studies at the University of the South Pacific in Fiji for 3 years whilst also acting as a teacher's assistant in the postgraduate diploma in climate change course.

3. My PhD dissertation, which is currently being finalised, is entitled "Improved seasonal rainfall predictions in the Tropical Pacific Islands". My PhD attempts to assist the meteorology departments of Vanuatu, Fiji, Tonga, Solomon Islands and Tuvalu to improve their predictions of seasonal rainfall in the southwest Pacific. Particularly, how accurately they can predict rainfall in the southwest Pacific after the announcement of an El Nino or La Nina weather event.

4. From 2002 to 2019, prior to undertaking my PhD studies, I worked for 17 years with the Vanuatu Meteorology and Geo-hazard Department ("Vanuatu Meteorology"). Whilst at Vanuatu Meteorology I held several different positions including; weather observer, climate forecaster, weather forecaster, climate officer as well as Principal Scientific Officer for the climate division within the Vanuatu Meteorology.

5. During my time at Vanuatu Meteorology I undertook masters studies at the University of Auckland in New Zealand. My masters research paper was on the relationship between the El Nino-Southern oscillation and rainfall in Vanuatu.

6. The matters that I speak about in this Statement are based on my research as well as my work with Vanuatu Meteorology. The opinions I express in this statement are based on my expertise.

CLIMATE CHANGE HAS INCREASED INTENSITY OF CYCLONES IN VANUATU

7. In Vanuatu, we have two main climate seasons, which are the dry season and the wet season. Normally, the dry season is from May to October, and the wet season is from November to April. The normal tropical cyclone season in Vanuatu is from November to April.

8. There are 5 tropical cyclone categories. Categories 1 and 2 are considered less severe cyclones and categories 3 to 5 are severe cyclones.

JLS
Senior State Counsel
Office of the
Attorney General

RST

9. People in Vanuatu plan around the seasonal calendar. Both the planting calendar for crops and the customary ceremony calendar are based around the seasonal calendar. For example, the dry season is the planting time, people may plant yam between May and October and harvest it the following April.The customary ceremony calendar is linked to when certain crops are ready to be harvested.

10. In the past, the planting calendar most ni-Vanuatu lived their lives around was assisted by the cyclone season. Less severe cyclones would occur after the dry season, usually bringing with them much needed rain. This was especially so if there had been a drought that year. The category 1 and 2 cyclones were generally welcomed because they would bring a lot of rainfall for the planting without too much wind causing destruction.

11. Since 1970, tropical cyclone data has improved and become more accurate with the introduction of satellite technology. From data collected since 1970, we know that in the past, Vanuatu's cyclone season consisted of mostly category 1 and 2 cyclones followed by the possibility of a category 3 cyclone in January, February or March.

12. I have observed that this historical weather pattern has changed from about the year 2000 onwards. In 2002, Vanuatu was hit by severe tropical cyclone (TC) Zoe, a category 5 cyclone, that formed in the Solomon Islands and destroyed the island of Tikopia before heading towards Vanuatu. Frequent and intense tropical cyclones have been on the rise since then.

13. In Vanuatu, the number of cyclones as a whole that we expect during tropical cyclone season has not really changed. But now, instead of getting less severe cyclones with the possibility of maybe 1 severe cyclone, almost all the cyclones that hit us during cyclone season are severe cyclones.

14. When the IPCC reports state that climate change will cause less frequent cyclones but more intense cyclones, for us in Vanuatu, it means less category 1 and 2 cyclones and more category 3 to 5 cyclones. So overall we may get the same number of cyclones as we did in typical tropical cyclone season but now, instead of mostly category 1 and 2 cyclones, almost all our cyclones during cyclone season are severe cyclones.

15. I have also observed in the last few years that severe tropical cyclones are falling outside the peak severe cyclone months of January, February and March. For example, TC Lola in 2023, occurred in October, even before the tropical cyclone season started. So now we are starting to experience severe tropical cyclones outside the normal tropical cyclone season as well as outside those peak severe cyclone months.

EXTREME WEATHER EVENTS IN VANUATU ARE CAUSED AND AMPLIFIED BY CLIMATE CHANGE

JLS
Senior State Counsel
Office of the
Attorney General

RST

Climate Change results in increased intensity and frequency of El Nino and La Nina Events

16. The increase in frequency of El Nino and La Nina events can also be attributed to global warming. The rising sea surface temperatures are causing more frequent and more intense El Nino and La Nina weather events.

17. Looking at the trend of El Nino and La Nina events since Vanuatu's Independence in 1980 it is evident that there has been an increase in frequency of El Nino and La Nina events. The first El Nino since Independence was from 1982-1983. The second El Nino was from 1987-1988. Followed by a La Nina from 1989-1990. Then there were El Nino like conditions from 1991-1993. El Nino again from 1997-1998. La Nina from 1999-2000. Between 2000-2009 there were possibly 2 El Ninos. Then a La Nina in 2013 and an El Nino in 2015.

18. From 2020-2022, we had three years in a row of La Nina. According to the World Meteorological Organisation, that's the first time we have experienced three La Nina's in a row.

Climate change-induced exacerbation of ENSO events results in more severe cyclones

19. The increased frequency and intensity of the ENSO as a result of climate change is likely the cause of the changes to cyclone patterns in Vanuatu.

20. To try and understand why TC Lola occurred when it did, I went back and looked at the data on tropical cyclones since 1970. I observed that there have been 6 tropical cyclones that formed in October in the Southwest Pacific since 1970: TC Ann in 1970, TC Bebe in 1972, TCs Martin and Lucy in 1997 and TC Xavier in 2006. Of these 6 tropical cyclones, only TC Lola reached category 5 status. So although a tropical cyclone forming outside of the tropical cyclone season may not have been totally surprising, what was surprising was its intensity.

21. When I went back and checked the climate situation, I found that each of these early cyclones was caused by the onset of an El Nino weather event. In October 1970, I found that an El Nino weather event started in September of that year and then TC Ann formed in October. In 1972, the El Nino started in September, then TC Bebe formed in October. In 1997, the El Nino started in September and TCs Lucy and Martin formed in October. In 2006, the El Nino started in September and TC Xavier formed in October. In 2023, the El Nino started in September, and TC Lola formed in October.

22. The El Nino means higher sea surface temperatures, which is a condition that is more conducive to severe cyclone formation. Specifically, there is potential for a cyclone to form when the sea surface temperature is 28 degrees celsius and above. Prior to TC Pam forming in 2015, the sea surface temperature was about 34 degrees celsius for 3 to 4 days. Cyclone

JLS
Senior State Counsel
Office of the
Attorney General

RST

Lola in 2023, formed just east of the Solomon Islands where the sea surface temperature was around 29 to 30 degrees celsius. These high sea surface temperatures were caused by global warming and exacerbated by the El Nino event. In isolation, El Nino makes it more likely that those temperatures will be reached.

23. Climate change exacerbates this by causing ocean temperatures to rise. Generally, an El Nino event means higher temperatures but an El Nino event coupled with global warming means even higher temperatures.

24. The increased ocean temperatures are also causing more frequent and more intense marine heat waves. Marine heat waves were not considered a climate disaster in Vanuatu and were not listed as an extreme event by the Vanuatu Meteorology up until the later 2000s. They are now considered an extreme weather event of concern for Vanuatu and are monitored by the Vanuatu Meteorology.

25. If we continue to experience increased frequency of El Nino events, combined with rising sea surface temperatures and more frequent marine heatwaves, then we should expect a lot more tropical cyclones. Whereas in the past, the development of an El Nino event might form a tropical cyclone at the beginning of the El Nino event, from the experience with TC Pam, I have observed that a more intense El Nino event may cause a tropical cyclone to form both at the beginning and at the end of the El Nino event.

26. TC Pam started developing at the beginning of the 2015-2016 El Nino event. Then towards the end of the same El Nino event, TC Winston formed. So we can say that the El Nino event of 2015-2016 created two tropical cyclones, one at the beginning and one at the end of the event. Both TC Pam and TC Winston were classified as category 5 cyclones.

27. There is also the increased possibility of severe twin cyclones. Whilst twin cyclones are not unusual for Vanuatu, in the past they have been less severe. Now, as we can see from TCs Judy and Kevin in 2023, both category 4 cyclones, twin cyclones are also becoming more severe.

Climate change-induced exacerbation of ENSO events results in more extreme weather

28. The El Nino and La Nina weather events are the biggest influence on rainfall and drought in Vanuatu.

29. My PhD dissertation looked at how climate change has caused the increase in frequency and intensity of the El Nino and La Nina weather events and what this means for rainfall in the Western Pacific and how we can better predict rainfall.

30. In 2022, I also contributed to a paper called the "Historical and Future Drought in the Tropical Pacific Islands and Atolls". This paper considers the increased frequency and

JLS
Senior State Counsel
Office of the
Attorney General

RST

intensity of El Nino and La Nina events and how we can predict and prepare for drought events in the Pacific Islands.

31. An El Nino event means extreme below normal rainfall and may lead to drought in Vanuatu and other Pacific Islands. This was what happened in 2015. TC Pam happened at the start of the El Nino and while people were trying to recover from its destruction, there was a drought, so that means Vanuatu was dealing with two natural disasters simultaneously. This drought was broken by TC Winston, but because TC Winston was severe, it came with a lot of rain and extreme wind. So instead of a welcome relief from the drought, TC Winston brought destruction and disruption to parts of Vanuatu.

32. As previously stated, ni-Vanuatu plan their lives around the seasonal calendar. When you have the intrusion of extreme weather events, it not only disrupts their lives but also their livelihoods. For example, normally you have a dry season from May to October, which is the time to plant food, but with 3 La Nina events in a row from 2020-2022, there was extreme rainfall and people could not plant food.

33. The World Meteorological Organisation said it was the first time there were 3 La Nina events in a row. During the same period there were also tropical cyclones occurring, including TC Harold, a category 4 cyclone, in 2020.

34. The impacts of climate change have placed Vanuatu in a very difficult position. Climate change has increased the frequency and intensity of El Nino events; meaning extremely low rainfall. At the same time, climate change has led to the increase in frequency and intensity of La Nina events meaning extremely high rainfall. So you either have a lot of rainfall that causes flooding and landslides or you have drought. In between this, you have severe tropical cyclones. All of this affects people's lives and livelihoods. That's the reality in Vanuatu right now because of climate change.

HOW CLIMATE CHANGE AFFECTS WEATHER FORECASTING

35. The role of the Vanuatu Meteorology is not just to observe and forecast weather and climate events but also to give out the information, advice and warning. If there's a tropical cyclone roaming around Vanuatu which is not a direct danger to the people then the Vanuatu Meteorology will just give information and advice. If the tropical cyclone or any other weather event is of danger to the people then it will give out a warning and advice.

36. The Vanuatu Meteorology also plays a role in disaster recovery in forecasting rainfall because rainfall can assist crop recovery in a country dependent on agriculture.

37. Normally, it is very easy to do seasonal forecasting in tropical climates such as Vanuatu because we only have 2 seasons. However, now with climate change and the increased

JLS
Senior State Counsel
Office of the
Attorney General

frequency and intensity of extreme weather and climate events, it has affected the confidence we have in forecasting.

38. With El Nino and La Nina events, our general forecast may be accurate but it doesn't show the full picture of how this will impact people's lives. For example, during El Nino, the forecast will be of extreme below normal rainfall. That forecast is correct but that forecast does not accurately reflect how much below normal rainfall there will be and so people cannot adequately prepare for the El Nino event. Similarly, with a La Nina event, we can correctly forecast extreme above normal rainfall but what the exact rainfall will be and what this means for the livelihood of people is more difficult to predict. This is especially so when El Nino and La Nina events are happening more frequently and with more intensity.

39. This is why I focused on this issue in my PhD. I analysed sea surface temperature, the south oscillation index, as well as cloud cover, and then tried to determine how those parameters could be used to improve seasonal rainfall predictions in Solomon Islands Islands, Vanuatu, Fiji, Tonga, Tuvalu. From there, once there's a declaration of El Nino in the southwest Pacific, we can predict how long we have before rainfall drops to below normal levels or if there is a La Nina declared, we can predict how long before increased rainfall occurs in the southwest Pacific.

40. Changes to the climate also make it more difficult to predict cyclones, both in terms of when they might occur and how severe they might be. For a trend to be recognised as a new weather pattern by the World Meteorological Organisation there has to be 30 years of baseline data. So for example, because of events like TC Lola, if we wanted to revise the cyclone season in Vanuatu to start in October instead of November, we would need to observe this trend over 30 years. Without supporting baseline data over a 30 year period, events like TC Lola and the 3 consecutive La Ninas remain outside the normal weather patterns and are difficult to predict.

41. In terms of predicting the severity of tropical cyclones, the current cyclone scale does not accurately reflect the intensity of some of the cyclones we are getting in Vanuatu. The World Meteorology Organisation has a scale for tropical cyclones that only goes up to category 5. These categories are determined by the wind speed of the cyclone. In terms of severe cyclones; category 3 cyclones have a wind speed of between 64 to 85 knots, category 4 cyclones have a wind speed of between 86 to 107 knots and category 5 cyclones are any cyclone with a wind speed of 108 knots and above.

42. From the current tropical cyclone scale, we see that there is a range of about 21 knots within each cyclone category. So a hypothetical category 6 would have wind speeds of 130 to 151 knots and a hypothetical category 7 would have wind speeds of 152 to 173 knots.

JLS
Senior State Counsel
Office of the
Attorney General

RST

43. TC Pam, in 2015, had a wind speed of 134 knots and Cyclone Winston, in 2016, had a wind speed of 151 knots. If there were cyclone categories beyond category 5, then both Cyclone Pam and Cyclone Winston would be considered category 6 cyclones.

44. Vanuatu is now working on deploying measuring devices in the ocean as well as radar, which will assist us in forecasting extreme weather events, especially extreme rainfall and flooding.

WHAT DO FREQUENT, INTENSE AND SIMULTANEOUS CLIMATE CHANGE INDUCED EXTREME WEATHER EVENTS MEAN FOR VANUATU'S FUTURE?

45. In the paper I co-authored in 2022, we find that Vanuatu has been in a constant mode of disaster recovery for several years. That means one disaster strikes after another, or disasters strike simultaneously. People are trying to recover from one disaster and just as they are about to finish recovering or whilst they are still in recovery, another disaster strikes. For example, TC Harold, a category 4 cyclone struck Vanuatu in April, 2020. The recovery was on-going between 2021, 2022 and 2023, whilst La Nina events were taking place, and then in 2020 we had TC Harold, category 5, and in 2023 TCs Kevin and Judy, category 4, and TC Lola, category 5, strike, so the country was stuck in recovery for multiple disasters.

Signed: Robson Tigona

Signed: Witness

Senior State Counsel
Office of the Attorney General

Date: 14 March 2024

I, Rothina Ilo NOKA, Director for the Department of Women's Affairs, the Republic of Vanuatu, solemnly and sincerely affirm and declare:

BACKGROUND

1. My name is Rothina Ilo NOKA and I am a national of the Republic of Vanuatu ("Vanuatu"). I was born on 21st of September 1974 in Vanuatu.

2. I have worked at the Department of Women's Affairs for 16 years. I have been the Director of the Department for Women's Affairs since 2019.

3. The Department of Women's Affairs (the "Department") sits within the Ministry of Justice and Community Services. The Department seeks to advance the status of ni-Vanuatu (Indigenous) women and all women living in Vanuatu and to enhance their lives through focused policy formulation, targeted action plans and working in strategic partnerships. The Department's mandate is underpinned by the "Women in Development" approach and by the "Gender and Development" approach.

4. We take a Gender and Development approach to ensure there are shared responsibilities and shared and equal opportunities available to both men and women. This requires us to work with both men and women to address issues affecting women, looking particularly at the empowerment of women and girls in all aspects of their lives. Our approach means that men are also included in addressing issues affecting women's lives.

5. The Department of Women's Affairs is primarily responsible for coordinating the implementation of the National Gender Equality Policy.

6. We are also leading the Gender Protection Cluster. The Vanuatu Government made a decision post TC Pam to have a standing National cluster system to enable humanitarian agencies and government to development and implement disaster preparedness activities during peace time. A Government Agency holds the lead role, and a humanitarian partner holds a co-lead role. The co-leads for the Gender Protection Cluster are Save the Children and CARE International.

7. The Gender Protection Cluster's main vision is around gender mainstreaming to ensure a safe and secure society where women and men of all ages and abilities live in harmony and work together for a better Vanuatu. There are several sub-clusters within the Gender Protection Cluster, they include the gender-based violence (GBV) cluster, the child protection cluster and the people with disabilities cluster.

RN

JLS
Senior State Counsel
Office of the Attorney General

8. The Gender Protection Cluster was formed in 2014 and was intended to be led by the Director-General of the Ministry of Justice and Community Services, at the Ministerial level, to ensure that gender and protection cuts across all Ministerial portfolios and Departments and intersects with other vulnerable groups, like children and people living with disability. However, since 2015 my department has been responsible for the Gender Protection Cluster.

9. The matters that I speak about in this Statement are based on my direct knowledge of the facts stated and that have been reported to me by Departmental staff, as part of my role and function as Director of Women's Affairs, and by Government and non-government partners as part of my work leading the Gender Protection Cluster. The opinions I express in this statement are based on my expertise and on data, studies and surveys undertaken by the Department of Women as well as other partners working with the Gender Protection Cluster.

HOW CLIMATE CHANGE IMPACTS ON ADVANCING THE STATUS OF WOMEN

10. Vanuatu's population was over 270,000 people with 51% males and 49% females as per the National Census report of 2016. About 70% of the population live in the rural areas while the remaining in the Urban areas.

11. Climate change affects the national strategic machinery in place in Vanuatu for the advancement of women. I will speak of my experience since 2015 when I started leading the work of the Gender Protection Cluster.

12. Since at least 2015, my Department has been struggling to strategically and effectively implement the National Gender Equality Policy, towards enhanced lives for Ni-Vanuatu women, because of the frequency of what I understand to be climate change induced natural disasters; specifically, intense tropical cyclones making landfall in Vanuatu. These impacts, when coupled with significant and unforeseen circumstances, such as COVID and non-climate induced natural disasters, make it very difficult for my Department to progress our strategic objectives.

13. In 2015, Vanuatu was hit by Tropical Cyclone (TC) Pam, a category 5 cyclone. Then in 2017 we experienced the Ambae volcanic eruption. In 2020, Vanuatu was hit by TC Harold, a category 5 cyclone, and then from 2020 to 2022, we were affected by COVID. Then when everybody was recuperating from COVID, in January 2023, TC Irene, a category three cyclone hit, and then at the beginning of March 2023, the twin cyclones, TC Judy and TC Kevin, category 4 cyclones, hit Vanuatu. Most recently, in October 2023, we were hit by TC Lola, a category 5 cyclone.

RW

JLS
Senior State Counsel
Office of the Attorney General

14. We were told NDMO that severe (category 3-5) cyclones are likely to happen every 5 years. That's not true for us in Vanuatu now. We have had 3 severe cyclones in less than a year.

15. Whenever there is a national disaster, the Department of Women's Affairs has to respond, not just within our Department and Ministry but across the public service because of the fact that we are leading the Gender Protection Cluster. We automatically drop our development hat and put on our humanitarian hat to respond.

16. Because the Department is constantly in emergency response mode, we cannot carry out our development work and advance the strategic areas in the National Gender Equality Policy. 2023 has been an especially difficult year for my colleagues. Everybody is tired. Every time we attempt to look at development plans, another cyclone happens and we have to drop everything and go into emergency response mode again.

17. After responding, my colleagues and I across the public service start working on recovery plans. We then send them up for finalization and just when donors are about to talk about the plans, another disaster strikes, and then we are back to responding and working on another recovery plan. It is such a hurdle. It is too much for the technical people who are doing this work. It also gives us no time and space to work on anything else. Ultimately, this means the Department of Women's Affairs is restricted from fulfilling our mandate to advance the status of Ni-Vanuatu women, to enhance their lives and to empower them.

HOW CLIMATE CHANGE INDUCED NATURAL DISASTERS AND OTHER IMPACTS AFFECT WOMEN

18. Women in Vanuatu are not just affected by climate change induced natural disasters such as cyclones, they are also affected by, what I understand to be, slow onset climate change impacts, such as rising sea levels and soil erosion. I will try to cover how both types of climate change impacts affect women in Vanuatu, however, given the frequency of high intensity cyclones in Vanuatu in recent years and their immediate and immense destruction, my testimony will inevitably largely focus on the impact of climate-change induced natural disasters.

19. The Gender Protection Cluster works with various Government authorities and services as well as non-Government authorities through a multi-service delivery protocol both in "peace" times and in emergency response times. Since its inception, the Gender Protection Cluster has developed a coordinated system to respond in the aftermath of natural disasters. This involves partners working together to coordinate our response. including within the subclusters of gender-based violence, child protection and disability.

RN

JLS
Senior State Counsel
Office of the Attorney General

20. In the aftermath of a natural disaster, the Gender Protection Cluster is primarily concerned with the physical and emotional wellbeing of people, in particular women and girls. I label the responses we coordinate under the Gender Protection Cluster as "software". Other Clusters deal with the "hardware" responses such as the provision of food and water.

21. In the aftermath of a natural disaster, the Gender Protection Cluster's approach for children involves responses like, creating safe spaces for children to play in, urgently repairing classrooms or providing temporary classrooms for children to return to normalcy and providing counselling support to traumatized children and their parents.

22. In terms of gender-based violence, the Gender Protection Cluster has worked hard to set up a reporting and referral system that has earned the respect of affected communities. This means that the affected communities are not trying to deal with the situation themselves but are aware of how to report and refer the matter to the police or other appropriate authorities. The Gender Protection Cluster itself also conducts rapid assessments of reports of abuse and escalates them appropriately.

The impact on the health and education of women

23. With the intense climate change induced cyclones that we are facing, it has placed a lot of strain on the work of the Gender Protection Cluster and on the limited Government services available in these affected communities. Most times, there are very limited health, education and infrastructure services in these communities to begin with. When these limited services are destroyed by cyclones, they are not available to respond in the aftermath. Now, with intense cyclones happening more frequently, there is very little opportunity for these services and infrastructure to be repaired before the next cyclone hits.

24. This exacerbates the situation for girls and women because there is nowhere for them to go to for assistance. We can establish women's rights, rights of people living with disabilities and rights of children but if we do not have services available to them then we can not expect them to exercise their rights and to access basic services. If they are already disadvantaged during peace times, they are even more so during crises and emergencies.

25. A classic example of this happened recently in Ambrym. When TC Lola occurred it destroyed the health clinic that was on the northwest side of Ambrym. The very next day, a pregnant woman experienced difficulties delivering her baby. She died in the process of delivering her baby because there were no health facilities available to assist her.

RN

JLS
Senior State Counsel
Office of the Attorney General

26. For children, including girl children, they have increasingly limited access to education. In January 2023, we had the twin cyclones and most children did not go to school for 2 to 3 months. Just as children returned to school and the national exams were about to start, TC Lola came through and damaged the very same schools again.

27. In Vanuatu, all children are culturally expected to support their parents at home. For girl children, there are heavier expectations placed on them to help their parents in the home. In the aftermath of a cyclone, children, and girl children especially, are expected to assist the family to recuperate and recover from what has happened; this further limits their access to education. This is especially the case when intense cyclones are occurring frequently, resulting in inordinate amounts of time being spent in recuperation and recovery.

The socio-economic impacts on women

28. Women in our traditional and rural communities rely a lot on the sale of plants and crops from their gardens for income. They also rely on flax plants, like pandandus, that they weave baskets, hats and other handicraft from to earn an income. On the coast, women earn an income from fishing and collecting other sea creatures like shells, found closer to the shoreline and in the mangroves. Fishing in the deeper waters is usually reserved for men.

29. The high intensity cyclones have destroyed women's gardens and flax plants. Other climate change impacts like soil erosion also destroy their gardens and income plants. Rising sea levels as well as the cyclones have destroyed mangroves and degraded shorelines, taking with it, the women's shallow fishing grounds.

30. Climate change is, therefore, destroying the few sources of economic livelihood for women in rural communities.

The gender-based violence impacts on women

31. Vanuatu has one of the highest rates of gender-based violence globally. A survey by the VNSO in partnership with the Vanuatu Women's Centre (VWC) in 2011 showed that 3 out of 5 women in Vanuatu were abused by their intimate partner. The rates of gender-based violence are exacerbated during disaster times and with other climate change impacts. In such times, when we experience shortage of food, shortage of money, these things contribute to domestic violence as people quarrel over resources.

32. The constant destruction of their home by cyclones leaves girls and women vulnerable to gender based violence. In the aftermath of disasters we have found cases of gender based violence happening in evacuation centers and around evacuation center areas, not only in the formal evacuation centers, but also in the informal evacuation centers.

RN

JLS
Senior State Counsel
Office of the Attorney General

33. Families do not have funds to rebuild their homes, let alone, "build back better". They do not have funds and resources to build a permanent house that can withstand category 5 cyclones. They are building temporary cyclone camps and before they are able to build a permanent home, there is another intense cyclone. This leaves girls and women almost permanently vulnerable to increased rates of gender based violence.

34. Since the Gender Protection Cluster set up the reporting and referral system, we now have a better understanding of the levels of gender-based violence happening in the aftermath of natural disasters.

35. The reporting and referral system relies largely on community leaders to start the process. This places a significant burden on them, including on women leaders, when they themselves may be suffering from trauma and the fatigue of being in constant recovery mode.

HOW CLIMATE CHANGE INDUCED NATURAL DISASTERS AND OTHER IMPACTS AFFECT WOMEN WITH OTHER VULNERABILITIES

36. We are a communal society in Vanuatu, but increasingly, I have witnessed that labor mobility has broken down our societal structure. Our youth, working population in rural communities are moving away to countries like Australia and New Zealand who now offer labour mobility pathways to Pacific Islanders to work in their under-resourced industries like farms and aged care. These labour mobility pathways are targeted at our young working population and ultimately removes the sector of our rural communities who would normally assist with rebuilding of homes and building and distribution of food and water and other recovery measures.

37. Without our young, working population or what I refer to as our "supporting population," recovery from climate change induced natural disasters takes longer and the most vulnerable in our communities, including older women, widows and women living with disabilities, are not given sufficient assistance.

38. After TC Pam in 2015 it took 3 to 4 months for people to move out from the evacuation centers and back into their homes. That is a very quick recovery for a category 5 cyclone. This was because we had our supporting population available to us. That is not the case today.

39. The absence of our supporting population is another reason why people are now building temporary cyclone houses instead of permanent homes after a cyclone. Not only do they not have the money to " build back better", they also do not have the people power; the labour and community they require to build back better in a timely and efficient manner.

RN

JLS
Senior State Counsel
Office of the Attorney General

40. If a woman who is fully abled is struggling to access services and struggling to respond and recover in the aftermath of a cyclone, a woman with disabilities is doubly or multi-discriminated in terms of accessing services, accessing response strategies. The Gender Protection Cluster is doing its best to work across the public service to ensure no one is left behind and everyone has access to available services but again, the frequency of high intensity cyclones makes it difficult to guarantee this.

WHAT CLIMATE CHANGE IMPACTS ON WOMEN MEAN FOR THE WHOLE NATION

41. In my experience, climate change impacts on the lives of women at all levels. Women as leaders, women as administrators, women as mothers in the home, women right down to the community level, women right down the village level, it affects all of them. When it impacts the lives of women, it affects the whole family because it is the woman where the burden of the family lies. So when women are affected, the whole family is affected, the whole community is affected, the whole province is affected. The whole nation is affected.

WHAT CLIMATE CHANGE IMPACTS MEAN FOR VANUATU'S SELF-DETERMINATION

42. At the end of the day, Pacific Islanders can't control climate change and all that is happening to us because of it. We do not have the resources to deal with the impacts of climate change. We are thankful to the New Zealand Government who has supported Vanuatu over a 4 year period to respond to climate change induced natural disasters. Part of those funds come to the Department of Women to operationalize the Gender Protection Cluster so we can respond to climate change induced natural disaster impacts on women.

43. This is good but when you look at the long term, after "response" then what? We seem to be caught in "response, response, response" because of the frequency of high intensity cyclones but how do we move from response to recovery and then to recovering permanently?

44. There is a lot of *vatu* coming in for humanitarian response, huge amounts of money, but how do we prioritize this money in such a way that it really reaches local people to build back better. The Vanuatu Government and our donors continue to give affected communities the message of building back better, but is this realistic on the ground? How do we compensate these people in such a way that they are able to withstand the next disaster?

45. The last thing we want to do is to make our people become dependent on aid. To become dependent on aid that may have strings attached to it. I am scared of the strings that may be attached to it. I am scared of the strings that may be attached to the aid we are receiving. Are Ni-Vanuatu suffocating ourselves with all this aid coming in?

RN

JLS
Senior State Counsel
Office of the Attorney General

46. The question remains, who is causing climate change and why does Vanuatu pay for something that we have no control over?

Signed:

Signed: Witness

Senior State Counsel
Office of the Attorney General

Date: 15 March 2024

I, Peter Korisa Kamil, Head of Disaster Recovery Coordination Unit –DSPPAC for the National Disaster Recovery Coordination Unit within the Department of Strategic Policy, Planning and Aid Coordination (DSPPAC), the Republic of Vanuatu , solemnly and sincerely affirm and declare :

BACKGROUND

1. My name is Peter Korisa Kamil and I am a national of the Republic of Vanuatu ("Vanuatu"). I was born on 26 June 1980 at Green Hill Dispensary, Tanna.

2. I have worked at DSPPAC for 3 years. I have been in the [Head of Disaster Recovery Coordination Unit] of the National Disaster Recovery Coordination Unit (the "Recovery Unit") in DSPPAC since 2021.

3. The DSPPAC sits within the Prime Minister's Office. DSPPAC exists to support the Prime Minister (and by extension the Council of Ministers) to make policy and ensure that it is made operational. Its functions are to assist and enable the Prime Minister to develop, implement and monitor the vision of the government and to provide strategic leadership for cross-sectoral policies or programs, both government and donor. DSPPAC has 5 units, the Recovery Unit, the Aid Coordination and Negotiation Unit, the Monitoring and Evaluation Unit, the Policy Unit and the Right to Information Unit.

4. Prior to working with DSPPAC, I worked in the National Disaster Management Office for almost 13 years [2009 to 2021]. The National Disaster Management Office is a government department under the Ministry of Climate Change and Adaptation. It is the government's agency responsible for coordination of responses to emergencies and disasters across Vanuatu.

5. When the Recovery Unit was created in DSPPAC in 2021, I moved to work there.

6. There are two phases in Vanuatu's natural disaster response. The first is the humanitarian response, which looks at basic needs and lifesaving activities, and the second, is the "recovery response" which happens a few weeks or months later, where the focus shifts to reconstruction, mitigation and adaptation. Vanuatu's National Disaster Management Office is concerned with the first phase, the humanitarian response, and the Recovery Unit within DSPPAC is concerned with the second phase, the medium to long term interventions in the aftermath of national disasters.

7. The Recovery Unit is tasked with coordinating the gathering of information and producing the Post Disaster Needs Assessment and associated Recovery Strategy and Recovery Plan. The Recovery Unit is also responsible for coordinating the recovery activities and requirements in the Post Disaster Needs Assessment and the Recovery Strategy and Recovery Plan.

CL.
Senior State Counsel
Office of the Attorney General PIC

8. More broadly, DSPPAC as a whole also focuses on implementation of the Vanuatu 2030 National Development Goals and its work is guided by the National Sustainable Development Policy. Within the National Sustainable Development Policy there are 3 pillars; society, environmental and economical pillars. The Recovery Unit has been mandated to carry out objective 3.3 of the environment pillar that is to strengthen post-disaster systems in planning, preparedness, response and recovery.

9. The matters that I speak about in this Statement are based on my direct knowledge of the facts stated and that have been reported to me by DSPPAC staff and our Government and non-government partners, as part of my role and function as [position] of the Recovery Unit within DSPPAC. The opinions I express in this statement are based on my expertise and on data, studies and surveys undertaken by DSPPAC as well as our partners.

HOW CLIMATE CHANGE INDUCED NATURAL DISASTERS IMPACT GOVERNMENT SYSTEMS

10. Vanuatu has several policies regarding disaster risk management; the Climate Change and Disaster Risk Reduction Policy and the Internal Displacement Policy, and the National Recovery Framework. These policies are all fairly recent and developed to respond to climate change. There is still no legal framework for most of these policies.

11. Within the Recovery Unit we are guided by the Recovery Framework and start our strategic process by conducting a Post-Disaster Risk Assessment. The purpose of this assessment is to calculate the loss and damage caused by a disaster. We worked with our partners, the World Bank, the Asian Development Bank, and UN agencies, to create the methodology used to conduct the risk assessment and calculate loss and damage.

12. Once we have calculated the monetary value of loss and damage, we measure it against Vanuatu's GDP for the year, to determine what the macroeconomic impacts of the disaster have been. From that measurement, we are able to draw conclusions on the human impact. We then work with consultants and economists, usually from donor agencies, to determine the "recovery needs."

13. Once we identify our recovery needs, the Recovery Unit creates a recovery strategy and a recovery plan in consultation with the other DSPPAC units. In terms of implementation, the recovery plan is usually identified as a Government project and it then follows the normal government process required to obtain approval and financing. Then it is up to the individual Government ministries identified in the plan to implement it.

14. In 2015, TC Pam was the first of a series of intense tropical cyclones over the last 8 years. We conducted a Post Disaster Risk Assessment and created policies and strategies from it that we started implementing a few years later but then TC Harold, another category 5 cyclone, hit us in 2020. Then only 3 years later, we had the twin cyclones, Judy and Kevin,

CL.
Senior State Counsel
Office of the Attorney General

both category 4 cyclones. So the loss and damage continues to accumulate and it is very difficult for us to address or mitigate the post-disaster risks.

15. The frequency of intense cyclones is a significant challenge to the capacity of relevant ministries engaged under any recovery strategy and plan. Currently, most ministries do not have a permanent project management unit to coordinate post-disaster risk activities stipulated in a recovery plan. You have the same people within these ministries dealing with multiple disasters, including frequent intense cyclones, over a prolonged period of time. It places these people under great stress and they cannot be expected to perform their duties within the required timeframes.

16. With each new disaster, Government ministries are constantly being forced to reprioritize their work. Let's take for instance TC Harold, a category 5 cyclone in 2020, its recovery plan was for a period of 1-5 years. The relevant ministries started implementing the plan and then the twin cyclones hit in 2022, so they have more activities and more responsibilities and they have to decide how to priorities them. In that time, COVID was also happening.

17. For the most part, in these circumstances, the ministries conduct the recovery plans for all the cyclones together. They implement all the recovery plans simultaneously because they don't want to lose their focus on one recovery which would mean those impacted communities remain even more vulnerable to the next disaster. So the ministries try to address everything at the same time.

18. We have so many recoveries running right now. The Recovery Unit only coordinates those projects that are within the common system. Ministries may also be coordinating projects on their own that are specific to their ministry. Then of course the UN agencies and civil society may also have their own recovery plans. So it is difficult to give an accurate picture of all the recovery plans running right now.

RESOURCE CONSTRAINTS IN RESPONDING TO NATURAL DISASTERS

19. The coordination of recovery plans largely depends on donor funding; whether the donor comes to DSPPAC, goes directly to a Ministry or runs its own recovery. Within DSPPAC, donor funding is handled by our Aid Coordination Unit. The Aid Coordination Unit allocates donor funding intended for disaster recovery to the Recovery Unit. However, donors are not required to work through DSPPAC and may approach Government ministries directly and this is why ministries may be running recovery plans outside of the Recovery Unit's purview. The Recovery Unit does not monitor recovery plans run by the UN and civil society independently.

20. DSPPAC is currently undergoing a comparative analysis, with the technical assistance of the World Bank, to determine how effective assistance from donors has been from 2015,

Senior State Counsel
Office of the Attorney General

P.K

with TC Pam, up to today. What we have observed so far is that the assistance coming from donors is declining. The preliminary findings is that donor funding is decreasing instead of increasing as Vanuatu faces more frequent high intensity cyclones. For TC Pam we received around 40-50% of the entire recovery cost from donors. For TC Harold in 2020, we only managed to receive 11% of the total recovery cost from donors. For TC Judy and Kevin in 2023, we received only about 1-2% of the total recovery costs from donors.

21. The accumulation of loss and damage from frequent intense climate induced disasters has placed Government resources under severe stress. We are currently experiencing problems with acquiring adequate resources to respond to the impact of disasters. It's overwhelming thinking about whether Vanuatu has the capacity to respond to all these climate-induced natural disasters.

22. Of the disaster risk management framework or risk management cycle, the recovery phase requires the largest portion of resourcing. The humanitarian phase may require about 20% of the overall resource allocation and the remaining 80% would be required by the recovery phase. However, the reality on the ground is that the recovery phase is only receiving about 10- 20% of the resourcing it requires.

23. The post-disaster humanitarian phase has a 1.5% budget allocation but the recovery phase is not currently budget appropriated. This means the Recovery Unit and the work we do relies on donor funding and on Government ministries allocating some of their funding to us or towards recovery plans. For both donors and Government ministries, their ability to allocate funding to recovery plans depends on whether they have sufficient funding in the first place and what their internal priorities are.

24. The current funding arrangement makes it challenging for the Recovery Unit to accelerate the recovery work. Donors, when they do assist in recovery, are focused on society building sectors, like social services, education and health. The areas that get the least resources in the recovery phase are essential sectors like infrastructure, telecommunications and the energy sector.

25. In addition, my understanding from my colleagues from the Aid Coordination Unit within DSPPAC is that the development banks like World Bank and ADB give us grants that are usually tied to both grant and loan component. So you can't receive grants without a loan. These loans make it very difficult for the Vanuatu Government to act freely to use the money to find solutions for our people. Not only is Vanuatu obligated to make loan repayments, the loans also impose reporting requirements, one of which is to deliver projects within a certain timeframe. When Vanuatu is being constantly hit by high intensity cyclones and there is no capacity within Government Ministries, it is very difficult to meet these reporting requirements.

CL.
Senior State Counsel
Office of the Attorney General

P.K

26. There is currently a bill before Parliament that has provisions that will require a budget allocation of 1.55% to be shared between both the humanitarian and recovery phases that may assist a little. That's only a 0.5% increase to the funding the humanitarian phase receives and it will have to be shared by both the humanitarian and recovery phases.

27. From our experiences with TC Harold, TC Pam and TCs Kevin and Judy, we have found that infrastructure, private housing and the production sectors are the most affected by intense tropical cyclones. The production sector includes agriculture. Some agriculture can recover quickly but not long-term cash crops.

28. At the moment, private housing recovery is the sole responsibility of the owners. The Government does not assist with repairing private housing. However, because this issue has become common and widespread with the onslaught of frequent intense cyclones, Government is in the process of developing a national housing policy to address it.

29. For public infrastructure, it's a real challenge. There's not much resource support, so the Recovery Unit and the relevant Ministries can't do much, this means the infrastructure remains damaged. For example, the Finance Building here in Port Vila was damaged during TC Pam in 2015, it's now 8 years later and it's still not repaired.

HOW NATURAL DISASTER'S IMPACT GOVERNMENT POLICY AND STRATEGIC PLANNING

30. As I've stated, the increasing frequency of climate change induced high intensity tropical cyclones (TC) has impacted DSPPAC's ability to respond to disasters, and we are constantly in recovery mode. This also impacts on DSPPAC's ability to focus on our policy and strategic direction. In 2023 alone, we had the category 4 twin cyclones, Judy and Kevin, and then the category 5, TC Lola. This means we don't have enough space or time to look at mitigation and adaptation to climate change. We are barely advancing the Post-Disaster Risk Assessment before the next cyclone hits.

31. The work of DSPPAC is ultimately guided by Vanuatu's National Sustainable Development Plan 2030. However, when we have unforeseen disasters happening so frequently, they disturb the Government's normal planning process and we have to constantly re-focus and re-priorities. We try to communicate and advocate the direction and priorities of Government to donors as best we can. We must rely on donors assistance, especially with the constant need to respond to disasters, we do not have the adequate resources to carry out our activities without donor assistance.

32. In terms of Government planning and development, a lot of focus has shifted towards disaster response and recovery. Vanuatu has the National Sustainable Development Policy 2030 but it's very difficult to stick to our policy objectives as we are required to

CL.
Senior State Counsel
Office of the Attorney General

P.K

continuously adjust them in line with the continuous disruption caused by intense tropical cyclones.

33. Not only do these climate change induced disasters throw us off our policy objectives, they also destroy work completed during peace times in pursuit of our sustainable development policy objectives. For example, as part of policy implementation, a sealed road may be built around one of the islands, and then a cyclone hits and damages that road and it has to be built again. This disrupts our economic progress, stresses our finances, and for many of these infrastructure projects, places us further in debt.

34. Our Government has taken loans from various banks and agencies to fund projects as part of the National Sustainable Development Policy as well as to fund response and recovery plans and activities. However, we have almost hit the debt threshold with multilateral funding agencies and they feel reluctant to continue lending to us. The World Bank and other multilateral funding institution losing interest to offer loan component for Recovery program, Vanuatu can only accept the grant.

35. From my understanding, tourism and the service industry and agriculture are the biggest contributors to Vanuatu's GDP and our economy. The COVID pandemic from 2019 until 2021 really affected our tourism and service industry and, as stated earlier, the tourism and service industry and the agriculture industry are two of the three most impacted sectors by climate induced intense cyclones. This makes it very difficult for Vanuatu to obtain and maintain loans for post-disaster recovery as well as for our development objectives.

36. With all the disruption and destruction from intense cyclones, especially since 2015, it is my opinion that the challenge is too great and that Vanuatu's National Sustainable Development Goals are too ambitious to be met by 2030. Vanuatu needs to do more risk informed development now that we are experiencing significant climate change impacts frequently. We need to do better planning but that is also difficult because a lot of our legislation is not suited to the changing environment. We also have serious legal and cultural discussions that need to be had, including around land tenure. We need to make these changes, but the government also does not have the time or resources to devote to this type of planning because, as I explained, we are always in disaster response and recovery mode.

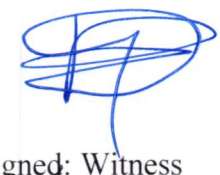
37. Some of the legislation that is not suited to addressing the climate change impacts Vanuatu is facing is our land tenure laws. In Vanuatu large areas of land belong to the ni-Vanuatu, the customary custodians. The Vanuatu Government knows that we need to plan for extreme heat and El Nino which would include conserving catchment areas and things like that but it is difficult for the Government to make those plans because the land is not owned by the Government but by Ni-Vanuatu.

CL
Senior State Counsel
Office of the Attorney General

P.K

38. One of the ways we can address this is to educate our people about the impacts of climate change and to advocate for solutions. Some of the solutions may mean letting go of some of our traditional systems. Climate change is changing the world and is changing Vanuatu and our people may need to change to adapt to the different situation. The impact, intensity and frequency of climate change are overwhelming our traditional knowledge. Our traditional coping systems are not working on their own anymore. So to survive this, we will be forced to bring in modern systems as well. As a nation, we have chosen to maintain our traditional ways. Now we are being forced to abandon them because of climate change.

Signed: Peter Korisa Kamil



Signed: Witness

Senior State Counsel
Office of the Attorney General

Date: 14 March 2024

I, Antoine Ravo, Director of the Department of Agriculture, the Republic of Vanuatu solemnly affirm and declare:

BACKGROUND

1. My name is Antoine Ravo and I am a national of the Republic of Vanuatu. I was born on Efate and my address is Agriculture Department Port – Vila, Vanuatu

2. I am the Director of the Republic of Vanuatu Department of Agriculture, a position which I have held for the past 7 years. I have been working for the Department of Agriculture since 2009. In 2016, I was appointed as the Director of the Department of Agriculture. I am also the Chairman of the Vanuatu Agricultural Research and Technical Center, which focuses on promoting sustainable and productive development of both subsistence and commercial agriculture in the country.

3. The Department of Agriculture has a broad mission. The overall goals of the Department are to improve livelihoods through improved agricultural innovation in all smallholder farming communities, to ensure food security for all citizens, to improve overall production of subsistence and cash crops, and to mitigate climate change-associated risks to food security. The Department aims to ensure that the country's agriculture resources are managed in an integrated and sustainable manner to provide food and income as well as protect the environment. These objectives seek to fulfill the commitments enshrined in the Constitution of Vanuatu, which states that it is the core duty of the Country to ensure that we manage our natural resources profitably and sustainably.

4. My responsibility as the director of the Department of Agriculture is to oversee and coordinate the overall management and implementation of 23 programs and priorities of the department. In recent years, many of our projects and priorities have been focused on climate change impact mitigation, adaptation, and disaster recovery. Since 2020, the primary focus of the Department has shifted to focus on assisting farmers, the private sector, and other stakeholders to cope with climate variability and cyclones, which are the two major challenges affecting the agricultural sector.

5. Currently, the Department has just 96 staff members to fulfill this mandate. However, due to increasing challenges as a result of changing weather, more frequent and intense extreme weather events, and more frequent and intense cyclones, the Department has been funded to expand to 204 staff by 2026.

6. The matters that I speak about in this Statement are based on my direct knowledge of the facts stated, have been reported to me by Departmental staff, as part of my role and function as Director of the Department of Agriculture. The opinions I express in this statement are based on my expertise and on data, studies and surveys undertaken by the Department of Agriculture or the Vanuatu Government.

AGRICULTURE IN VANUATU

7. Agriculture is the mainstay of livelihoods for the vast majority of Vanuatu's population. According to the 2022 National Agriculture Census, 77% of the nation's population depends upon agriculture. 98% of agriculture activity in Vanuatu is for subsistence purposes, while the remaining 2% of crops are grown for commercial sale. Commercial agriculture accounts for 3% of Vanuatu's GDP

8. Most agriculture in Vanuatu is focused on 19 crops. Of these, the major commercial crops include kava, coffee, cacao, and coconut. The staple food crops are root crops like taro,

JLS.
Senior State Counsel
Office of the Attorney General

yam, sweet potato, cassava, and fruit trees, including breadfruit and banana. Other important crops include mango, watermelon, pumpkin, and Tahitian limes.

9. To qualify as commercial agriculture, growing plots must occupy at least one hectare of land.

10. Subsistence agriculture means crops that are grown to meet food security needs and for small-scale exchange within and across communities. Staple subsistence crops include root crops such as taro, sweet potato, yam, and cassava, as well as fruit trees, such as breadfruit,banana and coconuts. Other important subsistence crops include pumpkin, watermelon, mango, and pineapple.

IMPACTS OF CLIMATE CHANGE

11. Food security is increasingly important with natural disasters, Climate Change and increasing cost of living. The impact of the twin cyclones Kevin and Judy on the productive sector was valued at 113.2 billion Vatu *(TC Kevin and TC Judy PDNA report 2023)*

12. Climate change is having major impacts on the ability of both subsistence and commercial farmers to grow crops. We have extreme weather events, such as cyclones, drought, flooding and storms, which have increased in frequency and intensity over the time I have been working at the Department of Agriculture. Sea-level rise is also causing saltwater contamination of soil and groundwater, which is damaging crops and forcing people to reduce their drinking water intake.

13. Rising temperatures have negatively affected crop development. Some staple crops including coconut, cocoa, coffee, banana, kava, island cabbage, yam, cassava, taro, sweet potato (kumala), breadfruit, citrus and leafy vegetables have specific temperature requirements for germination, flowering, and reaching maturity. This has caused a decrease in yields for all crops, including root crops, vegetables, and fruit trees.

14. For example, as a result of rising soil temperatures, our tomato plants, which are supposed to produce big tomatoes, cannot do so. The tomatoes cannot withstand the impacts and they grow very small. This means we have to import new variants from outside of the country, from places like Australia or from Fiji. This is very expensive for us.

15. Drought is also hitting the crops. Drought conditions cause crops to wilt, reduce the yield of most crops, and increase the risk of wildfire. As a result of drought conditions, the Department of Agriculture is encouraging subsistence farmers to relocate their farms to be closer to water sources, like river banks. But relocation is a major effort and most farmers cannot do it on their own. They need assistance from the Government.

16. From my observations, droughts are now prolonged compared to the past. The period of drought is getting longer and we have more droughts. In the past, we would have a drought every 10 years, but now drought is more frequent. When there is a cyclone, there will be a drought.

17. We also have been experiencing increased frequency and intensity of extreme rainfall events over time. Periods of heavy rain have been lasting longer and occurring closer together. These days we have periods of heavy rain that last for one and half days–longer than ever before. So much rain causes the water table to overflow. This results in increased flooding events, which is a big problem for agriculture. Floods now go through the land, into the houses, the farm, the livestock farm. Extreme rain also causes rivers to overflow, which damages villages and causes soil erosion as well.

JLS
Senior State Counsel
Office of the Attorney General

18. Another impact of climate change is an increase in pests and disease affecting crops. With increased temperature and humidity the number and distribution of pests increases. We see new weeds and new pests coming in that were never here before.

19. A serious concern is the coconut rhinoceros beetle (CRB), which is destroying our coconut trees. The CRB thrives under hotter conditions. They eat more food under hotter conditions, and we've even seen them beginning to infect other crops like sugar cane and taro. We've been working with the department of biosecurity to control the CRB, with cultural control, biological control, and chemical control, but with the increased temperatures and increased rainfall it has been difficult. We still haven't been able to come up with a proper solution.

20. In every coastal area in Vanuatu the groundwater and soil has been contaminated by saltwater due to sea-level rise. This is especially bad in the low-lying islands. But even in the volcanic islands, soil has been washed away by rough seas and cyclones.

21. These low-lying, coastal areas are traditional agricultural grounds where people have always planted. For example, if you go to Ambrym Island, you will see coconut, mango, and breadfruit trees standing in saltwater. Places that used to be farmland are now covered in saltwater.

22. Contamination of groundwater by incoming saltwater has affected household consumption of water as well. Because groundwater is contaminated with saltwater, people have reduced their intake of drinking water, as well as water used for cleaning, watering the plants, and washing food.

23. In the bigger islands, like Efate, when people see that the groundwater has been contaminated in coastal areas they move inland. But in smaller islands, like the Torres Islands, there is no place to move. Wherever you move you would still have saltwater contaminating the groundwater.

CYCLONES

24. Cyclones are one of the biggest threats to the agricultural sector. These events cause physical damage to the crops at every step in the supply chain, including post-harvest. When we get a category 4 or 5 cyclone, then it's 100 percent damage. Everything is destroyed. The Department has found that both the cash crops like kava, cacao, coffee and coconut, as well as food security crops like root crops and fruit trees are destroyed by category 4 or 5 cyclones.

25. After a cyclone, crops need time to recover. We've been promoting climate resilient crops like green vegetables and sweet potatoes, which only take 2-3 months to regrow. These crops are considered climate resilient because they are early maturity–they have a chance to grow before another cyclone hits. But most staple crops take longer. Cassava takes six months, while taro, yam, and banana take nine months to recover. Crops that are low to the ground are also more climate resilient, but crops like fruit trees, breadfruits, avocado all get blown away by the wind. After a Category 4 or 5 cyclone, there's no more trees. No more fruits.

26. The Department is teaching farmers about climate resilient crops and also encouraging them to make specific plantings of crops for disaster. We are also teaching the farmers how to prepare before a cyclone and store their crops in a safe place after a cyclone, so that they will have something to eat while waiting for government assistance.

JLS.
Senior State Counsel
Office of the Attorney General

27. With the repeated cyclones we've been experiencing, it has been very difficult for us to cope. We are supposed to get one Category 5 cyclone every five years. This year we have already had three Category 5 cyclones. Farmers and crops do not have a chance to recover from one cyclone before they are hit with another. Cyclones have also been staying in Vanuatu longer than in the past, lasting for longer periods of time.

28. Some communities, like those in North Pentecost, that keep getting battered by cyclones are really suffering. Their food security is compromised. Our advice is to manage food intake. Young people who still have energy have to eat less. They have to eat only once a day, at lunchtime, so there is enough food for more vulnerable groups, like the children, the old people, and the breastfeeding mothers. This usually continues for three months after a cyclone, until the quick crops (green vegetables and sweet potatoes) start growing again. For example, I was in Pentecost during Cyclone Harold (2020 Category 5 cyclone) and this is what occurred.

29. One of our major export crops, Tahitian Lime, is particularly vulnerable to cyclones. These trees are planted on sloped areas. With repeated cyclones these trees are lost due to soil erosion. After the twin cyclones in March only 4 of 11 Tahitian lime farms survived. And the eroded soil washes into the ocean and causes serious problems to the reef and marine resources as well.

30. Soil erosion has a number of cascading impacts. In addition to damaging the reef, soil erosion disturbs the habitats of many important pollinators for our staple crops. Soil erosion is also restricting access to farmlands by causing damage to roads. This is exacerbated by landslides, which occur during earthquakes and cyclones.

CYCLONE RESPONSE

31. When a cyclone hits, the Department of Agriculture is also responsible for disaster recovery and response through the Food Security and Agriculture Cluster (FSAC). FSAC works with the National Disaster Management Office (NDMO) to develop a plan for immediate response as well as short-term and long-term recovery in terms of community food security as well as the well-being of the agriculture sector.

32. When a cyclone hits, we stop our normal work and re-allocate our budget and our staff to deal with disaster recovery. The Department of Agriculture's annual budget is appropriated every year by parliament, and that is the budget to fulfill our normal business plan based on our policy and strategy. But when a cyclone hits and a state of emergency is declared, then all budget and resources are diverted to disaster response. This year there have already been three cyclones. We've been in a state of emergency for 7 months of the year, so our ability to carry out our normal work has been severely limited.

33. Right now, 100% of our staff is dealing with Cyclone Lola. When Cyclone Judy and Cyclone Kevin hit within a week of each other this March it was 100% of the staff working on disaster response for the duration of the 12-month state of emergency. When Cyclone Pam hit it was 100% of the staff for the duration of 24 months.

34. In terms of immediate response, normally if one island is hit, we work with other islands to take local food to feed the affected island. We also give out planting materials for climate resilient crops like cassava cuttings and sweet potato cuttings, as well as redirecting funding and resources to support this island. We try to coordinate sending food from nearby communities if possible, because it is very expensive to get food to the affected islands.

JLS
Senior State Counsel
Office of the Attorney General

35. These days, we are also worried about transferring food from one island to another–because what if another cyclone comes through and hits the island making the donation? Then where are we going to get the food? For example, there were twin cyclones that hit this March, one right after the other. Luckily, those cyclones passed through the same provinces, but if they had hit different locations we would have been in serious trouble.

36. We have to start planning for if a cyclone affects everyone. So we are beginning to pre-process our crops–for example making cassava flour, which we can store and send out as emergency food.

COMMERCIAL AGRICULTURE

37. A top priority of our department is ensuring the livelihoods of the people. Most of our population depends on agriculture, so despite the impacts of climate change, we need to ensure they can continue to make a living.

38. Vanuatu's most important export crop is kava. Kava accounts for 66% of Vanuatu's commercial export value. It also is the crop that most farmers earn income from. Kava grows best when the temperature is cooler, rainfall is consistent, and soil moisture is high. Climate change impacts, especially rising temperatures and increased drought conditions are affecting the ability of farmers to grow kava affecting 29,802 households planting 53,593,413 kava plants with a total volume of production (in metric tonnes) 153446.7 and total gross value of crop production (in billion Vatu) 240.175 *(Source: National Agriculture Census 2022).*

39. Cyclone damage also impacts kava farmers. For example, Cyclone Lola completely destroyed the kava.

40. The increasing intensity and frequency of cyclones in recent years have had a major effect on our commercial agricultural outputs. Before Cyclone Pam our exporting activity was so high. But after the cyclone, our export crops were destroyed. We had no more kava.

PREPARING FOR THE FUTURE

41. Looking ahead, the priority of the Department of Agriculture is to ensure that all of the people of Vanuatu have the fundamental right to eat. That they have to have food. We have to support people to ensure that they have enough food and that there is no food insecurity. Climate change is already impacting this. Especially after cyclones, there is not enough food available. People are already required to reduce their food intake. I worry for the future, where food security is already an issue in Vanuatu now because of these extreme weather events and other weather issues, such as drought.

42. As the impacts of climate change will continue, there will come a time when our resources will be scarce. So we need to prepare. We need to adapt and mitigate impacts on the resources that we have. We need science, good research to plan for the future. But a challenge is that the research capacity in our sector is too low and we do not have the resources required, especially when the Departmental capacity is redirected to response and recovery.

43. As my last statement: We need support! We need financial support to maintain our roles and responsibilities, to ensure that people have sufficient food and also increase the standard of living. The impact of climate change is here and will be ongoing. We need support in terms of infrastructure so that we can be more resilient in our response and adaptation to climate change.

JLS
Senior State Counsel
Office of the Attorney General

AL

Signed: Antoine Ravo

Signed: Witness

Senior State Counsel, Office of the Attorney General

Date: 15th March 2024

I, John Kaltau, Acting Director General of the Department of Education, Republic of Vanuatu, solemnly affirm and declare:

BACKGROUND

1. My name is John Kaltau and I am a national of the Republic of Vanuatu. I was born on 23rd June 1972 and my address is Department of Tertiary Education, Ministry of Education and Training, Port Vila, Vanuatu.

2. I am the Acting Director General of the Republic of Vanuatu Department of Education. I have been Acting Director General since 5th October 2023. The mandate of the Department of Education is to deliver high quality education to students in Vanuatu. We are responsible for normal schooling from the K1 to first year of primary education through to year 13, as well as higher education.

3. I have been working for the Department of Education since 1998. In addition to serving as Acting Director General, my regular post is Director of Tertiary Education. This means I am responsible for looking after scholarships, teacher development, TVET and higher education.

4. The matters that I speak about in this Statement are based on my direct knowledge of the facts stated or as have been reported to me by Departmental Staff, as part of my role and function as Acting Director General of the Department of Education.

5. I am giving a statement about the impact that climate change is having on the functioning of the Department and on student learning. One of the Department's biggest challenges are getting numeracy and literacy up to standard and preventing school drop-outs. Both of these challenges are exacerbated by climate change.

6. Climate change has also made it difficult for the Department to implement programming to address these challenges, because with more frequent and severe cyclones, we are almost always in a state of disaster response and recovery. This means our budget, resources, and personnel are focused on disaster response rather than improving education for our students.

CLIMATE CHANGE IMPACTS ON NUMERACY AND LITERACY

7. Climate change has really impacted the lives of our students and affected learning outcomes. Our basic issue is that numeracy and literacy are not up to standard. This is derived from the (1) The 2018 Education and Training Sector Analysis (ETSA); 2023 Joint

CL
Senior State Counsel
Office of the Attorney General

JK

Sector Review Report; 2021 data from the Pacific Islands Literacy and Numeracy Assessment (PILNA) and 2021 Vanuatu Standardised Tests of Achievement (VANSTA) identity multiple bottlenecks to improving primary literacy and numeracy rates.-Climate change affects numeracy and literacy in Vanuatu. We have other factors—the size of the classroom, the shortage of teachers in rural schools, multi-class, and all that. But climate change has really impacted on the lives of students and impacted learning outcomes.

8. The change of weather patterns affects students coming to school. When the weather is bad and there is flooding or storms, students can't come to school. For example, in North Ambae, they have had to change the timetable. Normally school is from 7:30 am to 3:00 pm. But so often it's raining and there is flooding, so the schools have to reduce their hours from 10:00 am to 1:00 pm to make sure there is enough time for students to make their way safely to school and to get back home before it gets dark. The Head of School will decide on an intervention that is suitable for the students and also for teachers at a particular moment in time of the event. This especially impacts disabled students and learners. Disabled kids can't go to school at all because it is not safe for them to travel in this bad weather.

9. Changes in weather also affect student learning at school. For example, when it is very hot, especially in rural areas where we have a multi-class where all of the students sit together, the classroom is very hot and it affects their learning. None of the classrooms in Vanuatu have any air conditioning. This wasn't a problem before. But now with more and more hot days, it affects students' learning.

10. The third major challenge is disasters. This year we have had three cyclones already. Schools have to close during cyclones and afterwards during recovery. So the minimum number of hours that teachers need to have with students is not met.

11. For these reasons, we cannot bring students and teachers together for enough hours to meet pedagogical requirements. This affects students' learning and their overall performance. So, based on my observation, this is a major factor as to why we see numeracy and literacy dropping below standards. We would like to do studies to substantiate this connection, but we have not been able to because we have been in constant disaster response for the last few years. However, the trend is clear based on observation.

12. Because their numeracy and literacy are not good, it is very hard for students to progress. So, because of that, a lot of year 10 students drop out. Recently, when students reach year 10, nearly half of the students drop out. We are doing interventions. We are doing bridging programs to get students into certificate courses, but if we didn't do that, they would have dropped out.

A
Senior State Counsel
Office of the Attorney General

EFFECTS OF CLIMATE-INDUCED DISASTERS ON STUDENT LEARNING

13. There are many instances in which schools have been destroyed or damaged by cyclones. When the cyclone hits, all the school materials are gone, the classrooms are destroyed, and there is nothing students can do except wait for help.

14. After a cyclone, students cannot go to class. Teachers prepare a homeschool packet with all of the materials and give it to the students to complete independently at home. But accountability is difficult in these circumstances where there is no classroom learning. We have an online school environment, but it is outdated and not accessible in many communities which do not have internet access.

15. When there isn't a disaster, students and teachers can go to school and spend time together and there is accountability there. But after a disaster, when the schools are damaged, the students and teachers cannot go to school and that accountability goes away.

16. It is up to the teachers to make sure that the homeschool packets are delivered, but teachers and principals are also part of the affected population when there is a cyclone. My staff has briefed me that teachers start to rebuild their own homes and take care of their own families before they can think about the students.

17. Another issue after cyclones is food security. Most of Vanuatu's population depends on subsistence agriculture for their daily food needs. The exact numbers can be provided to you by the Department of Agriculture. We know from experience, that after a cyclone, many of the subsistence crops are destroyed. There is not enough food. Students can't come to school when we have no food to give them to eat, and when they are hungry they cannot study well.

18. Thus, the focus of our disaster response is to get students learning materials as well as food rations. It's important. Even if you send the learning materials, students cannot learn when they are hungry. Once the cyclone is gone, we need to fix the classroom, so we fix the classroom. But once the students come, they need to have food.

19. Cyclone impacts have gotten much worse than they were in the past. Before we had one category 4 or 5 cyclone every five years. This year we've had three already. Many of our communities are still in recovery from the twin cyclones in March and Cyclone Lola in October. So right now, the Department is working hard just to figure out how to get food and learning materials to the students. But we are always short. We don't have enough resources to cope with the need.

CL Senai State Counsel
Office of the Attorney General

20. We have to figure out how to divide up the resources between the affected communities, and then other factors come into play, like shipping. If the weather is bad there are delays getting resources to the affected communities. There could be other ways of managing this problem, but we do not have time to reevaluate our approach when we are always responding to another cyclone.

21. On top of that, the secondary effects of the cyclones have gotten much worse. We call the communities that have been directly affected "Priority One" and focus all of the recovery efforts on them. But these days, our Department has noticed that more areas receive secondary effects of cyclones, for example heavy rains that lead to landslides. Even in communities and islands that are not hit by the cyclone, the rain causes all sorts of problems. Students cannot access schools when they are hit by heavy rain and landslides, and that affects the quality of education. Plus, we don't have enough resources to cope with the needs of the Priority One communities anyway, let alone all of these other communities that are affected.

22. Recovery after a cyclone can take a long time. Sometimes it takes forever. Some of the schools are in really remote locations, and it's hard to get materials there. Plus, we have to look for funding and the funding processes are long. Some schools still haven't been repaired from Cyclone Harold which struck in 2020. Right now, approximately 65% of schools in Vanuatu have cyclone damage.

23. The Department recently went touring the islands, and I saw some of the schools, their roofs are not there. Here in Vila, we talk about "oh we can do this, we can do that," but then when you get to the islands, it is a different story. It's complex. First you have to get the materials there, and then take the materials from the shore to the school. And if you don't put the materials in a safe place, people come and take them. Plus, we could be in the middle of fixing a school and then another cyclone comes through and we have to start all over again. We want to build schools, we want to repair schools, but we can't because every time we fix one school, the next cyclone comes.

24. We are trying to build cyclone resilient schools. For example, in Tanna, after schools were destroyed by Cyclone Pam, the World Bank helped us to build good schools that are resilient. So when Cyclones Judy and Kevin hit Tanna, we didn't get much damage. If we could build all of our schools to be resilient, that would reduce our burden of fixing them time after time. But we don't have the resources to do that. Right now, only about 10% of schools in Vanuatu are cyclone resilient.

CL
Senior State Counsel
Office of the Attorney General

JH

25. Cyclones have a direct impact on student drop-outs. There learning is so frequently interrupted by disasters, emergencies, and climate change. I think it's the perception that students have, that the hammer keeps dropping, because disasters are coming all the time. And then the question comes, why school? Because their school materials are damaged, their houses are damaged, and their gardens damaged. So students are sitting and thinking, what's next? What's the point?

CLIMATE CHANGE IN CURRICULUM

26. Climate change affects everything now in Vanuatu, so we have changed the curriculum to address this. We now teach classes on climate change so that students will be able to understand what is climate change, what is resilience, and actually apply that to their lives.

27. We implemented climate change into the curriculum starting in 2012. We started integrating it into the curriculum where we could. But now we are actually developing courses that are more climate change focused that students can enroll in.

Signed: John Kaltau

Signed: Witness
Senior State Counsel
Office of the Attorney General.

Date: 14 March 2024

I, Abraham Nasak, Director of the Vanuatu National Disaster Management Office, Republic of Vanuatu, solemnly affirm and declare:

BACKGROUND

1. My name is Abraham Nasak and I am a national of the Republic of Vanuatu. I was born on 1st of April 1979 and my address is Beverly Hills, Port Vila, Vanuatu.

2. I am the Director of the Vanuatu National Disaster Management Office (NDMO). I have been Director of NDMO since 2017.

3. The matters that I speak about in this Statement are based on my direct knowledge of the facts stated, have been reported to me by NDMO staff, as part of my role and function as Director of the NDMO. The opinions I express in this statement are based on my expertise and on data, studies and surveys undertaken by NDMO or the Vanuatu Government.

4. NDMO is responsible for disaster risk reduction and disaster risk management in Vanuatu, as well as harmonizing climate change adaptation into disaster management. NDMO has a staff of 17 people. Our mandate is to develop a more resilient nation and more resilient communities.

5. At the government level, NDMO's objectives are to mainstream climate adaptation and disaster risk reduction and disaster risk management and to effectively coordinate disaster response. We also coordinate climate adaptation projects that also improve disaster resiliency to improve access to water, access to health, access to food security, and the other livelihoods, things like livestock, forestry and all of that.

6. One of our other focus areas is building durable solutions at the community level. We try to not just work on disaster response, but also on the small improvements that could be done before the disaster strikes to improve resiliency, whether that be strengthening a seawall or growing back mangroves.

7. But in recent years, it has been hard for us to implement any of our goals because we are always in disaster response. While we can plan big, we can only implement projects that can be achieved in say a one-month, two-month, three-month window, because that's the most time we have before we are hit with another disaster.

Changing disaster conditions

C.L.
Senior State Counsel
Office of the Attorney General

AN

8. Since 2017, Vanuatu has experienced increasing incidences of extreme weather. These include severe marine weather disturbances with waves and wind, extreme rainfall that is much higher than normal, and periods of drought that are much longer than they were previously and for a longer period than usual.

9. Based on the historical trend for Tropical Cyclones ('TC'), normally we would expect one Category 4 or 5 TC every 7 years. We built our resiliency plan based on this prediction. However, since TC Pam in 2015, we've also seen a shift in the intensity of TC that has stayed with us until now. TC Harold came in 2020, before that 7-year prediction, and then the two in March of 2023, TC Judy and TC Kevin, were a curveball based on our experience. And then TC Lola came October 2023. So now we have asked the Vanuatu Department of Meteorology to provide annual forecasts for TC, because we can no longer rely on the longer-term predictions that were part of our official forecasting.

10. Since TC Pam, the extent of the country affected by TC has increased. TC Pam affected pretty much the entire country, which no TC has ever done before. And then TC Harold came and did the same for Santo, Malekula, Ambrym, and South Pentecost. In my experience, this is new. These areas, which are in the north of the country, historically have not been affected by TC damage.

11. More areas and people are impacted than normal, and the disaster response needs are much higher. The communities in these areas were not prepared to cope with a TC since they had never been hit before, so that magnified the impacts a lot.

12. We've seen corresponding changes in the level of damage sustained, and the level of effort required to recover. In the past, TC would damage houses, damage gardens, affect access to water, things like that and our response would be focused on these things. But now on top of these things, we are seeing the general infrastructure and the transportation infrastructure being damaged. We thought the roads were quite solid, but somehow the water has dug across the roads and the bridges. So that was a shock to all of us because it hadn't happened before.

13. The quantity of water coming down and the impact of the severe weather on these infrastructures takes a toll. From my observations, the severe weather and heavy rain exposure has broken the roads, disturbed the bridges, and then even some of the buildings that considered strong, now we have to look at again. That's why as of 2023, "climate-informed infrastructure" is now a mandated requirement for our infrastructure development. And that's from road infrastructure right through to airports and buildings. Because what we think is strong–the TC will always test it.

CL.
Senior State Counsel
Office of the Attorney General

AN

We, at the NDMO, deal with disaster response. We do not deal with the science of these disasters. But we do notice these unusual things are happening. So that's why we keep coming back to the scientists and asking them what's happening. They gave us an analysis predicting one Category 5 TC in 7years, and that's what we planned for and then we get hit with TC Harold in less than 5 years followed by the twin TC within 24 hours of one another, which is unheard of. And then TC Lola, which hit before TC season is supposed to start and sped up to a Category 5 before dropping to a tropical low, which has never happen before.

14. The NDMO deal with the aftermath. So that's why for us it makes sense to have things to plan for. But there have just been so many unprecedented events in the past few years, it has been impossible to plan.

15. The procedures that we've previously relied on to prepare for TC are no longer reliable. The Department of Meteorology would typically do TC mapping based on the strength of a system, its position, and how long it would take for a system to arrive in Vanuatu. But this no longer applies. Now, a system can come in as a tropical low, and become a TC within the next hour. I mean TC Lola, it came in hidden as a cloud system. We called the Department of Meteorology and asked about it and they said it's a cloud system, and the next hour they called back and said, now its a Category 5. Now that predictions are inaccurate, how can we prepare? That leaves people totally unprepared.

16. The agreed standards of issuing alerts and mobilizing resources are based on previous, predictable experiences. That's not how it is anymore. So we've asked the Department of Meteorology to expand their mapping area so we have a much earlier warning of a weather system coming–even if it is just a tropical low or a cloud system–we want to know about it. And we told them to issue a severe weather alert so at least we are tracking it. Because now we don't know. It could turn into a TC.

17. Another challenge is that our disaster response system only caters to severe TC, not to other extreme weather like extreme rain, extreme drought. Because in the past those didn't cause such big problem. But now things are changing and we have to start thinking about these events. For example, I think it was 2022 we had a Category 1, 2 TC that came around New Caledonia and South Tanna. It stayed at the category that didn't even trigger a response but the wind and water damage was quite big because it hung around for 48 hours. But we couldn't respond to it because it didn't trigger the agreed requirements for national response, which is only for category 3 and above. This is unprecedented too. We expect TC to just pass straight through, not to hang around for 48 hours. With all of these unexpected surprises, it is almost impossible to prepare for disaster.

E.L.
Senior State Counsel
Office of the Attorney General.

AN

18. The impacts compound with the amount of TC that we are getting. Some of the comments that we get from locals in the aftermath of TC is that their place looks like somebody came across with a weed cutter, cut down everything, and then came along with the rake and then raked everything away. So there's no more trees and no more natural barriers to stop the wind and stop the erosion and everything. That's happening a lot recently. More so than in the past.

19. I'm not sure. Maybe only in Santo will we still find the big ancient trees. Everywhere else the ancient trees are down now. The forests are clear. Those trees were landmarks actually. They could link up the trees to stories and say this is where this event happened and this event. You could orient yourself based on the trees and gauge where you were. They were also used to indicate ownership of land. So that's a reality that we have to live with.

20. And then you have the coconuts. I mean when you see a straight coconut tree, you know the TC can't get through there. It was my wall that protected me. But now that the TC have repeatedly blown through, the coconut trees are twisted up in all sorts of shapes, and that leaves everyone more vulnerable.

21. I observed a change in the frequency and intensity of the TC we are getting with TC Pam in 2015. I think Pam signaled the change in the weather. Previously we had TC, but there was a longer period between them.

Cyclone Response

22. The TC season is supposed to run from November 1 to April 30. Each year, the Department of Meteorology gives us a TC forecast for the year. But that's the forecast, it doesn't mean that's what happens.

23. To prepare for the TC season NDMO has a pre-season meeting with all of the government agencies who are also the cluster leads. In addition, we also conduct meeting with the Humanitarian Partners. There are 11 clusters namely Logistics, Transport and Infrastructure, Emergency Shelter, Evacuation Centre, Emergency Telecommunication, Energy Services, Water Sanitation and Hygiene, Health, Food Security and Agriculture, Gender and Protection and Education. We let them know the forecast from the Department of Meteorology and the TC we are expecting. We also inform them and they inform us of the improvements they've been making since the last TC season, whether it be strengthening a community setup or a particular response planning, or improvements made with another department's information. Finally, we discuss all of the in-country capability that is available for disaster relief, and if there are short-comings relative to expected needs

CL.
Senior State Counsel
Office of the Attorney General

AN

we discuss where we would need to bring in additional support. That's the only pre-season meeting we have.

24. As soon as we have a warning for a TC or tropical storm, I issue an activation for the National Emergency Operation Center (EOC). The EOC sits within NDMO and monitors the event before it becomes a TC. If the event does turn into a TC that's hitting the country, the EOC stays activated to provide information to the public on preparedness activities, as well as collect any information coming back about what the impact is. All the information collected during this time is to inform emergency response immediately after impact.

25. There is an EOC office in each of the six provinces. The offices in whichever provinces the TC is hitting are also activated. And the other offices are monitoring, and if the TC shifts to them, then they are activated.

26. As soon as we have an event, all of the other agencies that have a responsibility for disaster response also mobilize their teams. So after impact they immediately begin moving and report back here. They can move even if communications are down, because in the pre-season meeting we would have already informed them of the different responsibilities, and different actions to be taken before, during, and after impact.

27. For each TC we also develop a TC response plan. This is actually a new improvement we had to do in response to recent TC. We used to have a TC support plan that detailed the support component and the response component in one. But because of the frequency of recent TC we decided to break it up.

28. The support information is the same for any TC–any partner can look at this in the context of any TC and get involved in support–but each TC needs its own response plan. So by breaking it up, response partners can get the support information they need without having to wait for us to pull it together, which is important given how many TC we've had.

29. A response plans is developed for each TC based on our surveillance of the damage in a 24 hour post-impact assessment and a 72-hour post-impact assessment. We use this information to develop an emergency response plan for the first 6-months after the impact.

30. Then after response, we enter into recovery. Recovery is the process of getting people back to normal life. This is another challenge for us–even getting to the recovery stage, because we keep getting hit. For example, we closed the response period for TC Judy and TC Kevin, which hit in March 2023, on October 14, 2023. But then we had TC Lola hit the same areas and we activated the Lola response plan seven days later.

C-L.
Senior State Counsel
Office of the Attorney General

AN

31. Recovery used to be under NDMO but in 2018 it got moved to the Prime Minister's Office in a newly created National Recovery Committee. That's a change we had to make in response to the frequency of disasters. Recovery consists of three parts which are preparedness, disaster response and recovery cycle. But we took out recovery and put it in the Prime Minister's office because we are frequently in the response mode

32. We no longer have a six-month to one-year break between disasters. Every year we go through many disasters. I think in 2020 we had the most, we had 8 disasters. With that many disasters we never get out of response and we aren't able to work on recovery, so we had to move recovery to the Prime Minister's office.

33. Constant response doesn't just drain NDMO's resources, it affects the entire government.

34. We're a small country with limited resources. So in each agency, it's the same staff of professionals that have to be involved in all of the regular operations of government, regulatory function, providing public services, servicing the productive sector, as well as in disaster response. But of course providing those regular government services is also part of recovery because the quicker people get back to their normal lives, it means we are recovering. But when our officers are constantly responding to disasters then that capacity to provide normal services doesn't exist until the response is over.

35. Because government is constantly in response these days, it also means they can't focus on programming to build resilience to the next disaster. For example, when one community is hit, we focus on them until we have to respond to the next one. So if that community have the capability to be able to continue with the improvement, then it stalls progress until the government team can come back and assist.

36. For example, in March 2023 TC Judy and TC Kevin affected part of Torba province and affected all the provinces of Vanuatu which are Sanma, Penama, Malampa, Shefa and Tafea but now we have TC Lola that hit Vanuatu in October 2023. So we have to reallocate the government resources from TC Judy and TC Kevin recovery to focus on TC Lola response to part of Torba, part of Shefa, Malampa and Penama provinces that were most affected. The rest of the southern part of Shefa province and Tafea province are saying, "Hey don't forget about us. We have not fully recovered from the impact of TC Judy and TC Kevin." But we have to shift our focus to the immediate emergency response, because we have limited resources. It does stretch our resources and manpower across to do constant response–there are only so many hours you can work before you need a break. And that's just thinking about response and recovery, without considering the other responsibilities government officials have.

C.L.
Senior State Counsel
Office of the Attorney General

AN

37. It's also a challenge because you have to understand and accept that the NDMO officers responding are also part of the affected population. So through TC Judy and TC Kevin, the team was busy responding and handling pressure from everywhere, but they were also part of the affected community. Their houses had been blown off. They're probably in the evacuation center. The gardens have been damaged, all that. But they do their best not to concentrate on that for the time being, but focus on service response going on before they eventually come back and look at the immediate needs.

38. NDMO also knows we have a part to play in climate change adaptation. We push actively for climate adaptation initiatives because the more initiatives and interventions we do at the community level to build resilience that helps. But doing this while also looking at what comes after response is difficult. We're only 17 staff for all this work.

39. The other government departments have also been very helpful in making sure disaster risk management is part of their normal operations. It's integrated into the business plan across all sectors. And that's very good because then that tells us that we are working towards improving adaptation and resilience. Then when we come to response, we are able to gauge a community's improvement level against the hazards that they are exposed to

40. It's challenging for us. But we know we don't control the weather. If we did, we'd probably put a pause on the weather and say come back to reactivating after one year. But we cannot. We're not scientists for the climate but we do notice the intensity increasing, the frequency increasing.

State of Emergency

41. On top of developing the disaster response, we declare a state of emergency when the needs of the impacted population are beyond the capacity of the normal service mandate to fulfill. The state of emergency reallocates government resources and manpower from their budgeted purpose to be used for disaster response. Normally government resource expenditures are guided by the business planning of the ministries that's budgeted for and then appropriated by parliament. When a state of emergency is declared, it allows us to reprioritize and divert resources to respond. When we have a major event, the level of impact will require multiple agencies to stop their normal programming and focus on emergency response.

42. The state of emergency is defined in the Constitution. It can be declared to respond to natural hazards and when we are in a state of war. The state of emergency for natural disasters became much more clearly defined in the Disaster Risk Management Act, which was legislated in 2019. The act was passed in response to the frequency of disasters. I mean,

CL.
Senior State Counsel
Office of the Attorney General

AN

previously, we had states of emergencies declared, but not that often because there weren't that many intense disasters. Since 2015, there's been 4 State of Emergencies, one in 2017, three in 2018, two in 2019, five in 2020, two in 2021 and three in 2023. I think the Office of the Attorney General has now become expert at issuing instruments authorizing states of emergency.

43. The state of emergency is declared based on an assessment of the damages. But when a category 4 or category 5 TC tracks through the country, we can anticipate the damage. So for Category 4 TC and above we have to declare a state of emergency.

44. The length of the state of emergency is determined based on our assessment of all of the challenges that must be met in order to meet needs, like supply shortages and logistical challenges of working inter-island. We have to take that into account when we make our plan because we only have a handful of planes and a handful of ships. So in the first two weeks after a disaster, NDMO might occupy all of the planes and ships, so normal travel stops. And then after that we say okay, we'll only use three ships and three charters so the rest can go back to normal operations. So those capacity constraints we have to take into account when determining the length of the state of emergency.

45. Prior to 2015, the entire agency would focus on response when a state of emergency was declared. Now, we have made improvements so that each agency can create teams and move them out of normal service to focus on disaster response, while still providing a little bit of normal service to the public. But when you move a particular officer to response, that particular capability that they have is no longer available until they move back into normal service again. So while departments do their best, because we are always in response, normal service is always limited, and that's something we're still working through.

46. It's also a challenge because the government has limited budgets, limited personnel, and we have multiple islands to assist. For example, TC Lola affected 16 islands. So anything you want to do you replicate it to sixteen islands. And NDMO has only 17 staff.

Bad weather impacts disaster preparedness

47. One of our challenge in response is that we are made up of islands, so everything we do has to be mobile, and we can only operate if the weather provides us good conditions to move by sea or by air, or even by land.

Extreme weather events

C.L
Senior State Counsel
Office of the Attorney General.

AN

48. We've also been facing challenges because our El Nino/La Nina cycle is destabilized. From my understanding and experience in the past, it is supposed to be every other cycle, El Nino, La Nina, El Nino, like that. But recently we've had three to four cycles of El Nino followed by three to four cycles of La Nina.

49. So we went from extreme dry to extreme rain and this presented problems for agriculture. Because during the extreme dry period they tried to introduce trial dry environment crops and things, and people started farming into areas where water used to be flowing, because when the usual farming areas were dry, those areas were green. They felt like they had to try to farm there because their normal areas were so dry. But then when the cycle switches, and we get La Nina and have lots of rain, those areas start to get flooded. Another challenge with that was that those crops were hybrids for dry weather environments. So then agriculture has to introduce the other varieties that are more used to lots of rain, a lot of water, and then we'll move out from that cycle to the dry one. So it is a lot of work. A lot of disruption.

50. For smaller countries like Vanuatu, you cannot plan everything in advance. We only have capability to react. We cannot build an entire preparedness system for a one in one hundred year event. But, for us now, those one in a hundred year events are no longer one in a hundred year. They are happening all the time. For example, Teouma Bridge. That bridge was built to withstand a one in a hundred year flooding event where the water would overflow the bridge. That bridge got flooded two times in one week in 2022 because of rain. It was supposed to happen once in a hundred years and it happened twice in a week. And as a result we had to evacuate people from the area, we had to move them out.

Signed: Abraham Nasak

Signed: Witness

Senior State Counsel
Office of the Attorney General.

Date: 15 March 2024

I, Dr. Vincent Lebot, root and tuber crop breeder and researcher with the French Agricultural Research Centre for International Development (CIRAD), the Republic of Vanuatu, solemnly affirm and declare:

BACKGROUND

1. My name is Vincent Lebot and I am a national of the Republic of France and of Vanuatu. I am 65 years old. I have lived in Vanuatu since November 1980.

2. I am currently a tuber crop breeder and researcher with CIRAD. I have been in this position since 1991. I obtained my PhD in 1989 and I have been working on root and tuber crops for the last 40 years. My area of expertise is root and tuber crops, breeding and genetics. I was the scientific coordinator of the SPYN (the South Pacific Yam Network), TANSAO (the Taro Network for South East Asia and Oceania) and INEA (International Network for Edible Aroids).

3. The matters that I speak about in this Statement are based on my direct knowledge of the facts stated, and that have been reported to me, during my research career over the past 40 years. The opinions I express in this statement are based on my expertise and on data, studies and surveys I have conducted, researched and written personally.

YAMS IN VANUATU

4. According to archeologists, who succeeded in dating starch yam found on stone tools recovered from caves in Papua New Guinea, yams were domesticated about 40,000 years ago. Very soon after the arrival of humans on the Sunda plate, when Papua New Guinea was attached to Australia; before the last ice age. Humans started domesticating the yam when they started to migrate from Southeast Asia to Northern Sahul. So, they are a very, very old plant.

5. Vanuatu is about 10 to 20 million years old. When humans arrived in Vanuatu, only 3000 years ago, there were no crops here. So, the first humans to Vanuatu, of the Lapita culture, introduced crops, including yams.

6. The Lapita introduced the yam as a piece of tuber in a box on a canoe. It came like this. Yams were in Papua New Guinea, they were in the Solomons Islands, and they were introduced by the Lapita to Vanuatu and other Pacific Islands by voyaging from one island to the other.

JLS Senior State Counsel Office of the Attorney General

VL

7. Yams were introduced clonally. There were no true botanical seeds. Yam is a tuber. A tuber is a stem which stores starch and it's a swollen underground stem. This means that you can take a piece of it and replant it and a growing butt will appear. We plant the tuber to get another tuber but from a botanical perspective it's not a seed. If you plant a tuber, you get a plant which is genetically identical to this. We call that a clone.

8. If you are a farmer in the western world, in Australia or in Europe, when you plant a seed, you understand that seeds are the product of sexual recombination. So, seeds can adapt to any sort of changes because you have genetic recombination. Genetic variation is the key to adaptation.

9. When you have clones, you don't have the genetic diversity which would enable the plant to adapt. What this means is that you have genetic vulnerability. So, if a change is introduced, the clone will not be able to adapt and will be impacted.

10. You have two people in Vanuatu, taro people and yam people. Scientifically, it comes from their adaptation to the local climate and environment. Culturally it means you plant "your" crop as the first one.

11. Traditionally, when a garden is started, a taro person plants taro first. A yam person, plants yam first. Then around Easter in April, after the taro or yam is harvested, cuttings of sweet potato are placed in the hole left by the harvest because sweet potato is a short cycle crop that gives better produce during the cool season.

12. Once the sweet potatoes are harvested, cuttings of cassava are planted in the same hole. Basically you have the very noble species in the first head of the growth cycle, sweet potato in the second head, and cassava is planted last. Cassava is grown last because it doesn't need rich soil. It can grow just as well on poor depleted soil. The other crops cannot. So, labor investment is optimized within the same hole.

THE SIGNIFICANCE OF YAM IN VANUATU

13. Yams are very, very complex. We have about seven different species, and within these species we have different varieties. So, the most important yam is what we call the "greater yam", which is the one being used for all the ceremonies. Throughout Vanuatu, they use the greater yam for ceremonies, except in Malekula where they use wild yams. The greater yam is used for ceremonies throughout the world and in the Pacific; in PNG, Solomons and Vanuatu. It has a cultural value and has beautiful varieties.

14. One of the reasons the greater yam is used for cultural ceremonies is because it is a very, very long tuber that the owner can show off at ceremonies. It takes a lot of effort to dig up a greater yam, you may have to be on your knees for 2 hours to dig one up, so it's not used for everyday consumption. Other varieties are used for everyday consumption.

JLS
Senior State Counsel
Office of the Attorney General

VL

15. The greater yam is also clonally material so it is also genetically vulnerable.

16. Nutritionally, yams are a fantastic food. Yams are very dense in fiber, very rich in proteins in, of all the root and tuber crops, it's probably the most complex and the most interesting in nutritional compositions. You have all sorts of antioxidants, secondary metabolites with physiological properties. It's a fantastic food. I have published several papers on its nutritional value.

17. In science, we call foods like yam a bio-functional food. It means that when you eat it, it's not just plain food, it also acts almost as a medicinal plant. Asia is completely fanatical about yams because of this. There are a lot of publications about the yam from Taiwan, China and Japan.

18. Yam is a superfood and you don't need to eat much to have a feeling of satisfaction. In *bislama* we say, "*em i holim bel*" or "it holds your stomach". So you eat a small yam in the morning and you are okay for the whole day because it's rich in active ingredients.

THE VULNERABILITY OF YAMS IN VANUATU

19. In Vanuatu, we have a terrible disease for yams, which is called Anthracnose. It's so violent that sometimes farmers think it's the result of their yams being hit by thunder. When they tell me they have lost their crop and I ask them what happened, they respond, "Oh, thunder destroyed everything. They were all burned overnight."

20. Anthracnose is a fungus. It occurs when you have a very wet season. It's a well-documented fungus existing around the world. But in Vanuatu, the impact is really bad because the genetic base of the crop is narrow. So there is no room for adaptation. All the yams are genetically vulnerable.

21. When we discovered the genetic vulnerability of the yam about 40 years ago, we attempted to sexually reproduce and recombine them. My work as a plant breeder involves cross-breeding plants to get hybrids, but with yam it's very complex because you have the male flowers on one plant and female flowers on the other plant. They are both genetically vulnerable. So we were at a dead end and we couldn't achieve anything until about 15 years ago.

22. We found success when a good friend of mine in India agreed to give me true botanical seeds of yam. My team and I introduced them to Vanuatu, and by doing so, we introduced new blood, new genes, new genetic makeup. We raised these plants and we recombined them with our local yams. And now we have beautiful hybrids which are genetically resistant to Anthracnose.

JLS
Senior State Counsel
Office of the Attorney General

VL

23. Yams are tubers, sweet potato and cassava are swollen roots and taro is a basal stem. In Vanuatu, we don't speak about agriculture, we speak about veggeculture. It's all vegetatively, propagated, not sexually propagated.

24. In the western world, farmers are plant breeders because they sow wheat or corn, they select the best individuals, they replant. So each harvest produces a selection of the most adapted individuals. In Vanuatu, you cannot do that. When you replant, you replant identical plants, clones.

25. It's the same across the South Pacific because the islands were colonized through the same human migration. The same plants went all the way up to Hawaii with the Polynesians. So in Tahiti, they have the same problems as we have, in Hawaii they have the same problems as we do and so forth. The only way to correct this situation is to start breeding or to introduce new blood, to allow for adaptation. Unfortunately, there are no breeding programs in the South Pacific, and therefore it's going to be very difficult for these countries to adapt.

26. In Vanuatu, when we cross-breed, all the propagation is done by hand; a mini set. So it takes a lot of time. In other countries, they do tissue culture which is faster. Here, when we successfully propagate hybrids, we host open field days and farmers come and collect their hybrid yams; we are building up resistance through this system. But it takes time.

27. We saw this with Western Samoa in 1993. The whole economy was based on taro and when the taro leaf blight was introduced, overnight they lost everything. It took them almost 20 years or 30 years to go back to square one. They had to breed taro, introduce new blood, introduce new varieties, do it again, and do it again. It takes time.

28. Anthracnose was in Vanuatu in 1980 when Vanuatu got Independence but it was not so bad. There is always competition between the fungi population and the yam population. Anthracnose gets bad when the fungi population is too high and knocks down the yams. If the yam population is high and well organized, many plants can survive.

29. Anthracnose is very active when it's wet. When it's dry, you can grow yams. That's why yams are grown more on the lowland leeward side of Vanuatu and on the windward wet side, people grow taro. Even on the lowland leeward side, when it's dry, you can have nice yams. However, when you have a wet La Nina event for example, you lose your yams.

JLS
Senior State Counsel
Office of the Attorney General

VL

30. The hybrid yam we developed is resistant to anthracnose but they will not replace the place of the greater yam in ceremonies. The hybrid yams are delicious but maybe 2 out of 10 of them have an oxidizing flesh. Normally, when you cut a tuber, the flesh should remain a nice white color. But unfortunately, some of the hybrids oxidize, they turn brown, the taste is really good but the consumers in Vanuatu are very demanding. They know what a really good yam looks like.

31. Vanuatu's increasing human population is also a contributor to the increased anthracnose fungi population. As Vanuatu's population increases, there is increased pressure on the land. When human pressure builds up then humans reduce the land's fallow period; the land is not given enough rest. Before land in Vanuatu was given a fallow period of 8-15 years, now it is much shorter after independence. This means the land is building up the inoculum of pests and diseases and allows the fungi population to establish itself and start to expand.

32. On the other hand, what we know is that Vanuatu's human population was much more significant before the microbiological shock imposed by the introduction of the Europeans to Vanuatu. It's estimated that the population in Vanuatu was around 800-900,000 people before Europeans arrived in the 17th century. Then there was the microbiological shock. At Independence in 1980, the human population was estimated to have been reduced to 80-120,000. Now the population is around 320,000 and is doubling every 20 years in the country and every 10 years in town because of urban drift.

33. When you look at the map of Vanuatu you may observe that they have a lot of land. However, the reality is that they don't have much accessible land and good soil. As part of my work, I have mapped all the soils of Vanuatu. I know exactly where the good soils are. And unsurprisingly, the population is already living on the good soils. The island of Ambrym, is a good example. It's a big island but the populations are only in the tips of the triangles because that's where the good land is.

34. There are some places where there is still good land, but in order to access it, you need to walk for three or four hours. There are no roads, there is a lack of infrastructure and this is a major constraint to agricultural development because you cannot extract the harvest. This leads to people being concentrated in areas and putting a lot of pressure on the lands on those areas.

THE VULNERABILITY OF OTHER STAPLE CROPS IN VANUATU

35. None of the crops in Vanuatu originate from here because the islands of Vanuatu were burned by the steaming magma, it was a volcanic ash plane. Plants have been introduced through human migration, ocean drift and wind birds. Everything was introduced. This

JLS
Senior State Counsel
Office of the
Attorney General

VL

means the diversity is quite poor, especially if you compare Vanuatu to New Caledonia or even Fiji, which are parts of a continental plate.

36. Vanuatu is in a particularly difficult situation because all its important crops are not sexually propagated; yam, taro, sweet potato, cassava, kava, bananas. This means all the staple food crops are genetically vulnerable and the Pacific as a whole has not been moving fast enough into breeding staple crops. So now we are in a difficult position.

37. For now, taro is doing very well, we know our taros are vulnerable to pythium rot or taro leaf blight, another fungus, and we are touching wood that doesn't make its way to Vanuatu. It is already in the Solomons and Fiji. This is the same fungus that destroyed all of Western Samoa's taro in the 1990s.

38. The taro leaf blight thrives in hot rainy weather. The taro itself is a crop for very wet, high rainfall areas but the same conditions are also suited to the fungus. So taro needs to be bred. Unlike yams, we know how to breed taro. Yams were very difficult to breed, but taro is okay although it took us about 2 decades to breed a palatable hybrid taro.

39. Taro and *kumara,* sweet potato, are highly resilient to cyclones. The cyclone winds may damage the leaves but because they're a cover crop, they almost always survive the most severe cyclones. The taro leaves will be destroyed by the cyclone but it'll shoot again.

40. Cassava is now becoming very popular in Vanuatu. It's quite resilient to drought and it's tolerant to heavy rainfall. You can grow cassava on the banks where you have four meters of rainfall but not in flooded conditions. If it is flooded, the root system will rot away.

41. However, cassava is highly vulnerable to cyclones. If you don't prune it before the cyclone comes it will dislodge. Even without a cyclone, if winds are at speeds of 30-40 knots, cassava can dislodge and break and rot away.

42. We have been able to successfully breed cassava.

43. Right now in Vanuatu, kava is the dominant cash crop. Kava alone is about 90% of the total value of agriculture in Vanuatu and 68% of the total value of cash cropping. This is scary because kava is a highly vulnerable crop. Kava is the only plant species that we don't know how to breed. We attempted, we tried, we just don't know how to breed it.

44. Kava is a genetically complex plant species. Humans only have two sets of chromosomes. Kava has 10 sets of chromosomes. And because of this complex genetic makeup, we cannot generate new kava hybrids. There are 82 varieties of kava in Vanuatu. All 82 varieties are highly vulnerable.

JLS
Senior State Counsel
Office of the
Attorney General

VL

45. If there is a drought, the kava canopy is so huge compared to the root system that it dries overnight and it can die. Fortunately, it's a shade loathing plant. If farmers are smart, they will plant kava in what we call agroforestry systems under the trees. Ni-Vanuatu farmers should already know this because this is how they traditionally farmed. However, unfortunately, traditional knowledge is not well transferred from one generation to the next.

46. Pre-European arrival, the human population of Vanuatu was high, but the forests were maintained. This is because when the first humans arrived, they arrived with their crops, they had to plant them and wait for them to be harvested, they couldn't feed themselves until then. So they started to gather foods from the forest. Very soon they discovered that the forest itself was a source of food. There were no predators in the forest so plants were not biosynthesizing toxin, so many fruits were edible.

47. The first humans in Vanuatu realized the richness of the forest so they developed what we call the traditional garden, a resilient cropping system, an agroforestry cropping system. In other words, if you want to increase production, don't increase the size of the plot, but increase the number of small plots. So basically keep the plot small under the trees and it will be safe. If you start to open a big plot, then you are getting vulnerable to high strong winds, to droughts, to floods, to everything.

FOOD SECURITY IN VANUATU

48. Wild yams (not the Greater Yam) are a foodbank because they can stay in the ground for 5-8 years. Once harvested, yams can be stored for 4-5 months. In a yam barn at room temperatures, if you keep them at a cold temperature, yams can keep for up to a year. It's incredible. They have a great advantage compared to the other root crops.

49. Taro can last 3-4 weeks in the shade and same with sweet potato. Cassava does not last long, once you harvest it you need to eat it. However, in the ground, cassava can grow 3-4 years if there are no cyclones.

50. Like yam, taro has exceptional nutritional value. It's really rich in antioxidants, high in proteins, very low lipids and the advantage of taro compared to yam is that you can eat the leaves. The leaves are rich in proteins, vitamins, antioxidants, and minerals. It's the most digestible starch on earth because its starch grains are extremely small, really fine. Taro is an excellent food, frankly.

51. There are different varieties of taro for babies and for old people who cannot chew anymore. It's perfect for baby food because it's very easy to digest. On paper, scientifically, taro is an amazing food.

VL

JLS
Senior State Counsel
Office of the Attorney General

52. However, taro is very difficult to grow on a large scale.

53. Cassava on the other hand is easy to grow. It's become highly popular because it's the lazy man's crop. You throw cuttings in your backyard and they grow. However, cassava has very poor nutritional value. It is mostly plain starch, very poor in sugars, very poor in minerals.

54. Some young people are replacing their noble species with cassava. On the southeast part of the island of Tanna, for example, the young people have shifted from yam to cassava. After anthracnose became a problem and they couldn't get enough food from their local yams, they started planting cassava. Now, if there is a cyclone, they lose all their food overnight.

55. Bananas are also very vulnerable to cyclones. In places like Northern Malekula their diets are based on the local *malele* banana. If there is a cyclone going through, they lose all their bananas and, therefore, their food security.

56. Apart from cyclones and fungus affecting traditional food crops, globalisation has also meant people have diverted their energy and time away from substance gardens and towards growing and harvesting cash crops. Compared to when Vanuatu gained Independence, there is very little food in the ground for sustenance. In 1980, each household was planting 5-8 gardens. Now they're down to 1-2 gardens.

57. Once the Ni-Vanuatuans have cash in their hands from their cash crops, they go to the store and they buy food; mostly rice and tinned meat and fish. We did some studies on the household budgets and found that most of the household revenues goes towards the purchase of food or transport.

58. However, cash crops like the coconut have a declining industry because of the introduction of the rhinoceros beetle. Young farmers will not replant coconuts because they know the beetle is here. They are switching to kava as a cash crop, again, a highly vulnerable crop.

59. We cannot predict what will happen in the future but we know that the situation that we have in place right now is vulnerable because all our major crops are genetically vulnerable and we don't have breeding programs. Ni-Vanuatuans are not planting as much food for sustenance, especially of the more noble species like yam. On top of this, ava, the cash crop they are increasingly relying on to access cash to buy their store foods, is a highly complex and vulnerable plant that we do not know how to breed.

JLS
Senior State Counsel
Office of the Attorney General

VL

60. Ni-Vanuatu food security in terms of nutrition is also a concern. The major nutritional problem in the Pacific is the glycemic index. As stated earlier, Ni-Vanuatu are replacing foods like yam and taro with foods like rice and cassava. Cassava has very little nutritional value and rice is very rich in sugar because it's been polished in order to be easy to cook in 10 minutes. In other words, the proteins, the fibers, the cellulose, all these ingredients are removed from the rice grain. It's just plain starch that swallows very rapidly. So in order to have a feeling of satisfaction, you have to eat a big volume because it's not dense in fiber.

61. In the western world, we had the time to develop our agriculture before we were globalized. In the Pacific, they never had the time before they were globalized. They were bulldozed overnight without having the time to build up some resistance. So the impact has been huge.

62. Globalization, population growth and climate change, the three combined have created a lot of issues for the Pacific.

Signed: Vincent Lebot

Signed: Witness

Senior State Counsel, Office of the Attorney General

Date: 14 .....March 2024

Exhibit V

CLIMATE CHANGE IMPACTS ON ROOT CROP PRODUCTION IN VANUATU

AGRICULTURE



© Gina Ishmael

This case study examines climate change impacts on root crop production in Vanuatu using a step-by-step approach. Guidance around conducting this type of assessment is provided in more detail on the Vanuatu Climate Futures Portal, along with other case studies (called infobytes), factsheets, visualisation tools and technical resources. This case study can be used as an example for undertaking similar climate hazard-based impact assessments.

STEP 1 Understand the context and scope

The climate has been changing in Vanuatu [1], and these changes are projected to continue [2]. Understanding how these changes may impact root crop production is an important aspect of planning for the future in order to improve resilience to future conditions. In Vanuatu, root crops are grown mainly for local consumption. They include several species of yams, island taro, Fiji taro, cassava or manioc, and kumala (sweet potato) [3]. Aligning agricultural crop production to the climate is a key factor for any producer to consider. **Here we explore the temperature suitability for root crop production in Vanuatu under current and future climate conditions.** For information on how this climate hazard-based impact assessment fits into a broader risk framework, see the Climate risk factsheet.



Figure 1 Growing root crops in a garden (top left). Root crops for sale in the local markets in Tanna (top right) and Port Vila (bottom).

STEP 2 Engage and meet with stakeholders

In February and July of 2023, Van-KIRAP agriculture sector personnel, Vanuatu Meteorology and Geo-hazards Department (VMGD) staff and CSIRO scientist visited some gardens and farms where root crops are grown to discuss various aspects of production. In preparation of this document key literature was also drawn upon e.g. [4], as well as industry planning reports [3].

From these discussions and readings important climate variables affecting root crop production were identified, as well as gaining a better understanding of how and where root crops are typically grown.

STEP 3 Explore background information and historic climate data

Increasing greenhouse gases are changing the climate. Vanuatu has warmed by 0.7 °C since the pre-industrial period (1850–1900) [2], sea level has risen 3.5-5.0 mm/year since 1993 there has been little change in the annual average rainfall [5], extreme rainfall has increased slightly [1]. The frequency of tropical cyclones (TCs) affecting Vanuatu has declined, while the severity (i.e. average TC wind speed intensities) of TCs passing over Vanuatu has increased [1, 6]. The trends in drought between 1981–2010 and 1951–1980 [7], and consecutive dry days (1951–2020) [8], are statistically non-significant and mixed spatially, with Bauerfield, Efate, showing positive trends while Sola and Aneityum have negative trends.

Root crops are a staple food for people in Vanuatu and are grown using traditional methods. Growers have developed a cultural understanding for growing root crops. This is in relation to species/cultivar/location matching, timing of plant phases e.g. maturity, and crop preservation techniques. As different varieties are vegetatively propagated, exact genotypes of cultivars are preserved in a district. There are more than 300 varieties of yam, and 400 varieties of taro distributed across the Vanuatu archipelago [3].

Annual average temperature of Vanuatu ranges from 20.4–30.9 °C for the 1970–2000 period, tending cooler in the south and more elevated areas (Figure 2) [1, 5]. Annual rainfall ranges from around 1700 mm up to nearly 5000 mm (1970–2000), tending wetter in the north [1, 5].

The preferred climate 'envelope' for root crop production varies slightly with the different species. The average temperature range for sweet potato, yam, taro, and cassava is as follows [4, 9]:

- Sweet potatoes: 24–34 °C
  (above which tuber formation is impaired)
- Yam: 25–30 °C
- Taro: 25–35 °C, 30 °C optimum
- Cassava: 25–29 °C optimal, but 12–40 °C is tolerated.

For taro, an evenly distributed annual rainfall of 1500–5000 mm is required, while cassava prefers drier conditions (1500–2000 mm) [4]. Across the archipelago, all but the more elevated areas have a climate supporting at least one species of root crop.

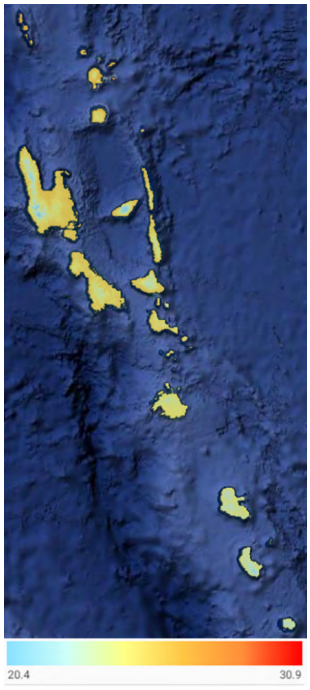


Figure 2 Annual average temperature (1970–2000) shown on the Vanuatu Climate Futures Portal (Data source: WorldClim).

Earlier maturity of some root crops is being reported by root crop farmers in the northern islands, like Torres and Banks, and they are harvesting earlier compared to the past [10]. This may be linked to the warmer temperatures being experienced in the northern province [1, 11]. Normally in northern Vanuatu the harvesting of yam will be around May to August. However, recently, farmers in the north are starting harvest around March [10]. This acceleration in the timing or seasonality of root crop production has also been reported in Fiji [12]. Earlier harvesting and change in seasonality are commonly reported around the world and most often linked to observed increases in temperature [13-15].

STEP 4 Collect information about future climate scenarios

In addition to the warming that has already occurred, the climate is projected to change further. Simulations of future climate indicate annual average temperatures will increase in Vanuatu from 0.7–1.3 °C by 2050, relative to 1986–2005 (Table 1). This warming will be associated with more heatwaves. It is unclear whether rainfall will increase or decrease by 2050 [1, 2] and while projected median changes in average rainfall by 2050 are small, the intensity of rainfall on the wettest days is projected to increase.

Table 1 Projected changes in Vanuatu average annual temperature and rainfall for 20-year periods centred on 2030 and 2050 relative to 1986–2005. Median changes from CMIP5 models are given, with the 10th–90th percentile uncertainty range in brackets. Changes are shown for low emissions (RCP2.6: green) and high emissions (RCP8.5: red). In 2030, changes are similar for low and high emissions [2].

	2030	2050
Temperature from 1986–2005 (°C)	0.6 (0.3 to 1.0)	0.7 (0.5 to 1.1)
		1.3 (0.8 to 2.0)
Annual rainfall from 1986–2005 (%)	1 (-9 to 13)	1 (-6 to 9)
		0 (-12 to 14)

The projected ranges take account of uncertainty in greenhouse gas emissions scenarios [8], regional climate responses simulated by climate models for each emissions scenario, and natural climate variability (see also Step 5).

STEP 5 Analyse climate-related impacts

To assist with decision making, it is useful to frame the analysis around relevant questions, while ensuring the full range of projected climate outcomes is captured: What would we do under a 'least warming, drier' or 'more warming, wetter' future climate scenario? This is known as the 'storyline approach' [16]. The scenarios account for uncertainty in future greenhouse gas emissions, the regional climate responses to those emissions, and natural climate variability. Using this approach, by 2050 suitability for taro production may improve in the south as the climate warms, more so under a higher warming scenario (Figure 3). This is because the region currently has a below optimum temperature for this crop [9].

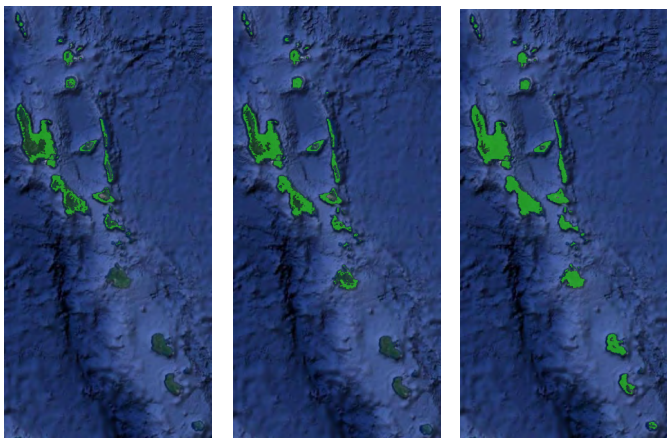


Figure 3 Suitability for production of taro (indicated by light green shading), where annual average temperature ranges from 25–35 °C, and annual rainfall ranges from 1500–5000 mm, is indicated in light green for 1970–2000 (left), 2050 least warming drier (RCP2.6; GISS-E2-R model) (middle) and 2050 most warming wetter (RCP8.5; IPSL-CM5A-MR model) (right). The Vanuatu Climate Futures Portal has a tool where the various climate criteria can be adjusted to generate climate suitability maps for other species of root crop. NB: *'Suitability' is used as a guide ONLY. Micro-climate, soil, and other management factors will all influence taro productivity.*

The Vanuatu Climate Futures Portal provides options to explore different future scenarios for root crop production (and other crops), and the ability to interact with the climate variables separately to better understand the drivers of some of the shifts seen in Figure 3. Furthermore, future climate suitability for coffee and cocoa has also been undertaken and reported in separate infobytes. Collectively there appears a potential for shifts in climate suitability of some crops in some locations in Vanuatu. For example, while suitability for coffee production may decline under some future warmer scenarios, opportunities for cocoa and taro production, for example, may improve.

Regarding the timing of the plant's development phases, or phenology, these may also change under warmer conditions. This can affect cultural gardening practices. A study on the timing of harvest of taro in Fiji indicated that for each 1 °C increase in average temperature, there was about a two week reduction in timing of days to maturity (Figure 4) [17].

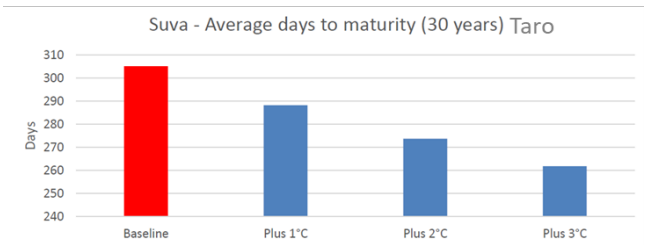


Figure 4 Using a crop production model APSIM (Agricultural Production Systems sIMulator) (Holzworth et al. 2014) the taro variety 'Tarapatan' in Fiji was assessed under baseline (1985–2015) temperature and rainfall conditions (red), and under +1 °C, +2 °C, and +3 °C temperature increments (blue) (reprinted with permission from Crimp et al. 2017 [17]).

Relating this relationship to taro in Vanuatu, by 2050 using plausible 'lower warming' and 'higher warming' models and a range of emission scenarios, earlier maturity of from one to four weeks may result (Table 2). Equivalent results have been reported for Fiji [18].

Table 2 Projected average annual temperature change (°C) for a 20-year period centred on 2050 (relative to 1986–2005) for selected CMIP5 models; a 'lower warming' model (GISS-E2-R) (left) and 'higher warming' model (IPSL-CM5A-MR) (right) for low (RCP2.6) and high (RCP8.5) emissions pathways. Estimated changes to maturity timing for taro are proposed.

2050	Projected temperature change (°C) relative to 1986–2005 [4]		Approximate change in timing of maturity (after Crimp, [17])	
	'Lower warming' model	'Higher warming' model	'Lower warming' model	'Higher warming' model
RCP2.6	0.4	0.8	1 week earlier	2 weeks earlier
RCP8.5	1.0	2.0	2 weeks earlier	4 weeks earlier

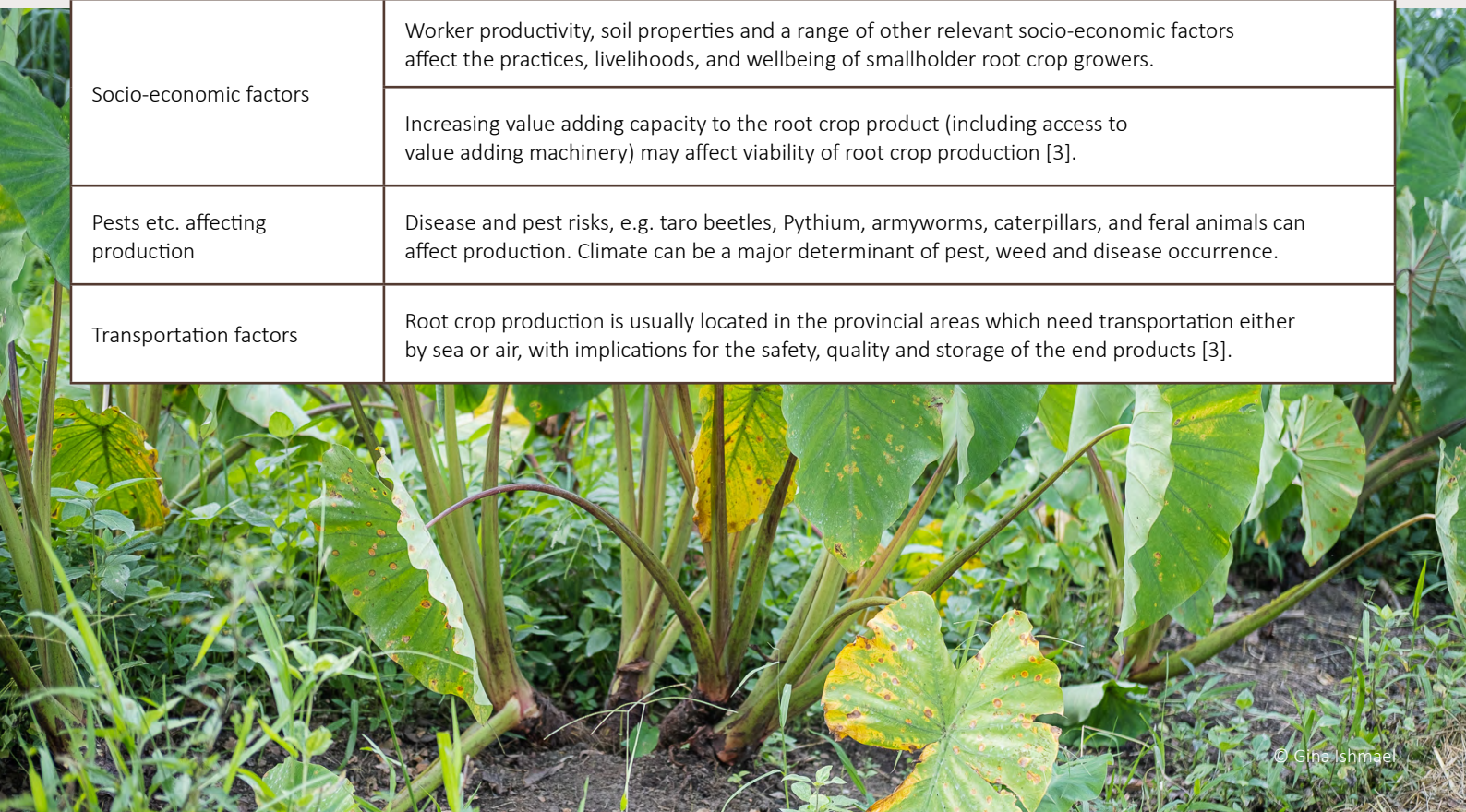


STEP 6

Evaluate other climate and non-climate factors

It is important to note that only average temperature and rainfall conditions are assessed in Step 5. Other climate and non-climate factors causing potential impacts are listed below that may also influence suitability. Further analysis around any or all of these may be prudent.

Climate factors affecting root crops	
Night-time temperature	Minimum temperature greater than 21 °C have been linked to Taro Leaf Blight (TLB) occurrence [9]. Reports indicate TLB has not yet been problematic in Vanuatu, while the disease has been devastating elsewhere in the Pacific [19]. Rising temperatures will increase the chance of incursions [9, 20].
Rainfall	While average rainfall is likely to remain adequate for root crop production across most of Vanuatu out to 2050, further analysis may be required to estimate impacts relating to the driest projections, 12 % reduction in rainfall (Table 1), particularly in the drier southern regions of Vanuatu. Increasing extreme rainfall may become an issue due to flooding risk [9].
Drought	Root crops are reported as being relatively drought tolerant according to the literature, though stakeholder groups [21] have reported reduced yields attributed to drought. Low soil moisture has also been linked to increases in cyanogen toxins in cassava [22] (see Drought factsheet for more information).
Tropical cyclones	Root crops can be negatively impacted by Tropical Cyclones (TCs) [9], as experienced in severe TC Harold (2020) [23] and Pam (2015) [24]. After TCs Judy and Kevin in 2023, sweet potato in Erromango appeared less affected with its lower growth habit, however taro leaves were reported damaged and cassava growing close to the sea was also impacted [10] (see Tropical cyclone factsheet for more information).
Sea level rise	Root crops can be vulnerable to salinity [25]. Direct inundation through sea level rise could occur in some lower lying areas (see Coastal inundation factsheet for more information).
El Niño Southern Oscillation (ENSO)	ENSO is a large-scale driver of climate variability in the Pacific, affecting rainfall, temperature, and drought [7]. In El Niño years, the South Pacific Convergence Zone (SPCZ) moves north-east, leading to drier conditions. In La Niña years, the SPCZ moves south-west, leading to wetter conditions. ENSO also affects tropical cyclone frequency [26]. Extreme La Niña and El Niño events are projected to increase in future [27, 28] (see Climate variability explainer for more information).
Non-climate factors affecting root crops	
Socio-economic factors	Worker productivity, soil properties and a range of other relevant socio-economic factors affect the practices, livelihoods, and wellbeing of smallholder root crop growers.
	Increasing value adding capacity to the root crop product (including access to value adding machinery) may affect viability of root crop production [3].
Pests etc. affecting production	Disease and pest risks, e.g. taro beetles, Pythium, armyworms, caterpillars, and feral animals can affect production. Climate can be a major determinant of pest, weed and disease occurrence.
Transportation factors	Root crop production is usually located in the provincial areas which need transportation either by sea or air, with implications for the safety, quality and storage of the end products [3].



STEP 7

Plan future adaptation

There are several ways in which root crop growers can become more resilient to these climate challenges. Issues identified in Steps 1 to 6 provide valuable input to stakeholder discussions about actions that can build resilience. This is a complex participatory process. Adaptation can be incremental or transformative, with enablers and barriers, synergies and trade-offs, pathways and limits, costs and benefits. The process usually starts with consideration of adaptation options. Adaptation options that could be considered, tested, and verified in the community to improve resilience includes:

In the past, locals have been encouraged to make flour from cassava after the crop is damaged in a cyclone. This flour is rich in nutrients and will last for months, covering periods when food availability can be limited.



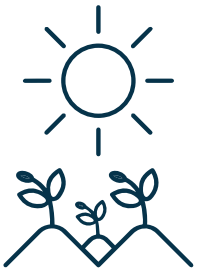
New farm management practices



Could either adopt new technologies and farming methods or, as preferred by the current farming community, adapt traditional farming methods



Farming on higher ground to avoid flood/ inundation prone areas



Change crops to more heat tolerant varieties



Diversify the farming system



Plan for cultivation of TLB-resistant taro varieties

Further analysis of adaptation options can be found in *Managing the Impacts of Climate Change on Root Crop Production and Value Chains in Fiji [12]* and *Vulnerability of Pacific Island agriculture and forestry to climate change [9]*.

STEP 8

Communicate findings

Communicating the assessment findings to key sector stakeholders is the final step of the climate hazard-based impact assessment. Multiple communication formats, co-designed and co-produced with target users in mind are more likely to support action and decision-making. The contents of this infobyte, together with other related resources shown below, can be disseminated and shared with key stakeholders to help them plan for and adapt to the changing climate.

Vanuatu Climate Futures Portal

Case Studies

Fact Sheets

Guidance Material

Videos

© Gina Ishmael



CLIMATE CHANGE IMPACTS ON ROOT CROP PRODUCTION IN VANUATU

232
AGRICULTURE



© Gina Ishmael

This publication should be cited as:

CSIRO and SPREP (2023). Climate change impacts on root crop production in Vanuatu. Infobyte prepared for the Vanuatu Meteorology and Geohazards Department as part of the Van-KIRAP project. CSIRO: Melbourne, Australia

Authors: Leanne Webb (CSIRO) and Pakoa Leo (Vanuatu Department of Agriculture and Rural Development).

References

1. Kirono, D.G.C, et al., *National and sub-national climate projections for Vanuatu.* 2023. CSIRO: Melbourne, Australia.
2. CSIRO and SPREP, *'NextGen' Projections for the Western Tropical Pacific: Current and Future Climate for Vanuatu.* 2021. CSIRO: Melbourne, Australia.
3. Department of Agriculture and Rural Development, *Vanuatu national root crop strategy 2022 - 2027.* 2021.
4. Lebot, V., *Tropical root and tuber crops.* 2nd Edition. 2019: CABI.
5. McGree, S., et al., *Climate Change in the Pacific 2022: Historical and Recent Variability, Extremes and Change.* 2022. SPC: Suva, Fiji. p. 220. Available from: https://library.sprep.org/content/climate-change-pacific-2022-historical-and-recent-variability-extremes-and-change
6. Sharma, K., et al., Impact of climate change on tropical cyclones over Vanuatu: A case for informing disaster planning and adaptation strategies. *Natural Hazards,* 2023 in prep.
7. McGree, S., S. Schreider, and Y. Kuleshov, Trends and variability in droughts in the Pacific Islands and Northeast Australia. *Journal of Climate,* 2016. 29(23): p. 8377-8397.
8. McGree, S., et al., *Atmosphere*. Pacific Climate Change Monitor: 2021., ed. Marra et al. (Eds.). 2022: The Pacific Islands-Regional Climate Centre (PI-RCC) Network Report to the Pacific Islands Climate Service (PICS) Panel and Pacific Meteorological Council (PMC).
9. Taylor, M., A. McGregor, and B. Dawson. *Vulnerability of Pacific Island agriculture and forestry to climate change.* 2016. SPC: Noumea, New Caledonia.
10. Leo, P. *Provincial Agriculture Officer, Sanma Province and Van-KIRAP Project Agriculture Focal Point,* Department of Agriculture and Rural Development. Personal Communication. 28 April 2023.
11. McGree, S., et al., Recent changes in mean and extreme temperature and precipitation in the Western Pacific Islands. *Journal of Climate*, 2019. 32(16): p. 4919-4941.
12. APCP and PHAMA, *Managing the Impacts of Climate Change on Root Crop Production and Value Chains in Fiji.* 2020. Pacific Horticulture and Agriculture Market Access (PHAMA) Plus Program and the Australia Pacific Climate Partnership: Suva, Fiji.
13. Schwartz, M.D., *Phenology: an integrative environmental science.* 2003. Springer.
14. Rosenzweig, C., et al., Attributing physical and biological impacts to anthropogenic climate change. *Nature*, 2008. 453(7193): p. 353-357.
15. Webb, L.B., et al., Earlier wine-grape ripening driven by climatic warming and drying and management practices. *Nature Clim. Change*, 2012. 2: p. 259-264.
16. Shepherd, T.G., Storyline approach to the construction of regional climate change information. *Proceedings of the Royal Society A,* 2019. 475(2225): p. 20190013.
17. Crimp, S., et al., *Understanding the response of taro and cassava to climate change: final report.* 2017. Available from https://www.aciar.gov.au/sites/default/files/project-page-docs/final_report_hort.2012.011.pdf
18. CSIRO and SPREP, *'NextGen' Projections for the Western Tropical Pacific: Climate hazard-based impacts on root crop production in Fiji.* 2022. CSIRO: Melbourne, Australia.
19. Singh, D., et al., Taro leaf blight—a threat to food security. *Agriculture*, 2012. 2(3): p. 182-203.
20. Taylor, M. and T. Iosefa, *Taro Leaf Blight: Manual.* 2013. SPC: Noumea, New Caledonia.
21. AECOM, *Pacific Horticultural and Agricultural Market Access (PHAMA) Program Cost Analysis of Root Crop Exports.* 2018. AECOM: Brisbane Australia.
22. Brown, A.L., et al., Interactive effects of temperature and drought on cassava growth and toxicity: implications for food security? *Global change biology*, 2016. 22(10): p. 3461-3473.
23. Government of Vanuatu, *Vanuatu Recovery Strategy 2020-2023: TC Harold and COVID-19.* 2020. Available from: https://www.preventionweb.net/publication/vanuatu-recovery-strategy-2020-2023-tc-harold-covid-19
24. Governemnt of Vanuatu, *Post-Disaster Needs Assessment Tropical Cyclone Pam, March 2015.* 2015. Available from: https://www.dfat.gov.au/sites/default/files/post-disaster-needs-assessment-cyclone-pam.pdf
25. Gleadow, R., A. Pegg, and C.K. Blomstedt, Resilience of cassava (Manihot esculenta Crantz) to salinity: implications for food security in low-lying regions. *Journal of experimental botany,* 2016. 67(18): p. 5403-5413.
26. CSIRO and SPREP, *Tropical Cyclones and Climate Change: implications for Pacific Island countries.* 2022. CSIRO: Melbourne, Australia.
27. Cai, W., et al., Increasing frequency of extreme El Nino events due to greenhouse warming. *Nature Climate Change,* 2014. 4(2): p. 111-116.
28. Cai, W., et al., Increased frequency of extreme La Niña events under greenhouse warming. *Nature Climate Change,* 2015. 5(2): p. 132-137.

Exhibit W

EXTREME HEAT IMPACTS ON ELECTRICITY DEMAND IN EFATE

233

INFRASTRUCTURE



This case study examines the impact of temperature on electricity demand in Efate. Guidance around conducting this type of assessment is provided in more detail on the Vanuatu Climate Futures Portal, along with other case studies (called infobytes), factsheets, visualisation tools and technical resources. This case study can be used as an example for undertaking similar climate hazard-based impact assessments.

STEP 1 Understand the context and scope

Electricity for about half of Efate (including Port Vila) is supplied by UNELCO, a private company operating since 1939, with electricity generation of 60 GWh in 2021 [1]. In 2022, total generation was almost 63 GWh, of which 92 % was from diesel, 4 % from wind, 3 % from solar and 1 % from an independent power producer (UNELCO, personal communication). This mix varies month-by-month depending on local and prevailing weather factors e.g. wind or solar input [2]. This energy mix is currently provided by two diesel power stations, two solar farms and one wind farm (UNELCO, personal communication). UNELCO had around 16,000 electricity customers in 2021 [1].

The National Energy Roadmap 2016–2030 (NERM, 2016) for Vanuatu lists five priorities for action and investment: (1) access to secure, reliable, and affordable electricity for all citizens by 2030, (2) reliable, secure and affordable petroleum supply, (3) a more affordable and low-cost energy service, (4) an energy secure Vanuatu, and (5) mitigating climate change through renewable energy and energy efficiency. While around two-thirds of Vanuatu's population can access the electricity grid [3], energy security can be disrupted by extreme weather events such as tropical cyclones.

An analysis of UNELCO electricity demand data for Efate during 2019–2022 showed that highest demand is required in the warmest months of the year, mainly for both public and private use of air conditioning (Figure 1). Climate change will increase the frequency, intensity, and duration of extreme heat, leading to greater use of air-conditioning and greater electricity demand. This infobyte assesses **the impact of extreme heat on electricity demand** in Efate, using data provided by UNELCO and Vanuatu Meteorology and Geo-hazards Department (VMGD), along with future climate change scenarios from CSIRO. For information on how this climate hazard-based impact study fits into a broader risk framework, see the Climate risk factsheet.

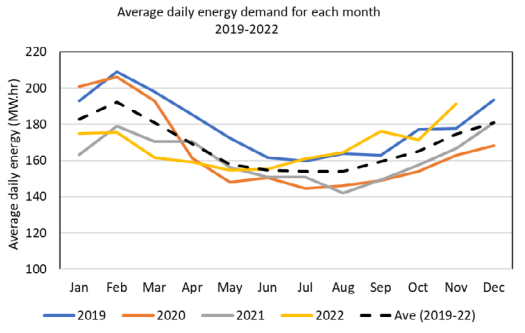


Figure 1: Average daily electricity demand for each month during 2019-2022 for Vanuatu.

STEP 2 Engage and meet with stakeholders

Van-KIRAP infrastructure sector experts, VMGD and CSIRO scientists liaised with UNELCO energy company in 2023 to discuss electricity production and demand and to review available data. Relevant literature was also drawn upon, including energy policy and planning reports.

STEP 3 Explore background information and historic climate data

For the 1986–2005 period, the hottest day of the year was, on average, 32–33 °C at all seven VMGD weather stations, with the hottest day being 33–34 °C. Over the past decades the number of cold nights in Port Vila has been decreasing, while the number of hot days has been increasing [4]. Over the period 1950–2020, there has been a clear warming of the hottest day of the year (Figure 2) [5, 6].

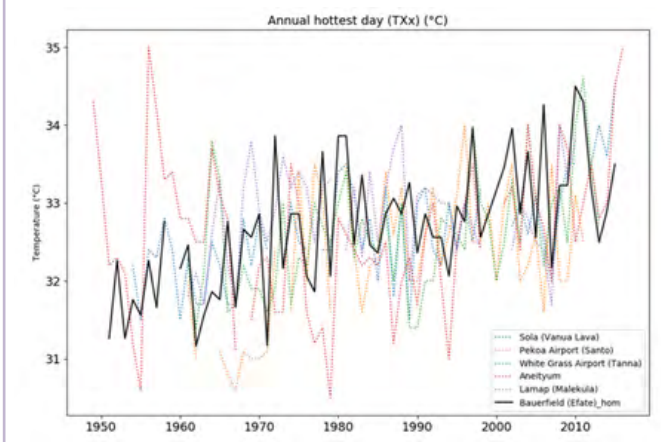
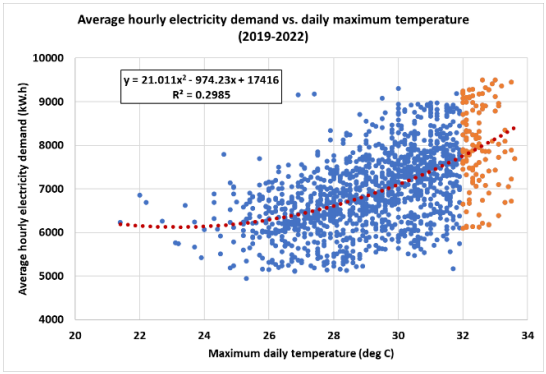


Figure 2 Temperature (°C) time series (1950–2020) of the annual hottest day for selected VMGD weather stations across Vanuatu. The station with homogenised data (Bauerfield, Efate) is shown with a solid line. Data source: [7]

Higher maximum temperatures correspond to higher electricity demand (around 30 % of the variation explained; Figure 3 top), mainly due to meeting an increasing demand for air conditioning. This correlation is strengthened through heatwave periods, with 40 % of the variability in electricity demand explained by variation in daily maximum temperature (Figure 3, bottom).



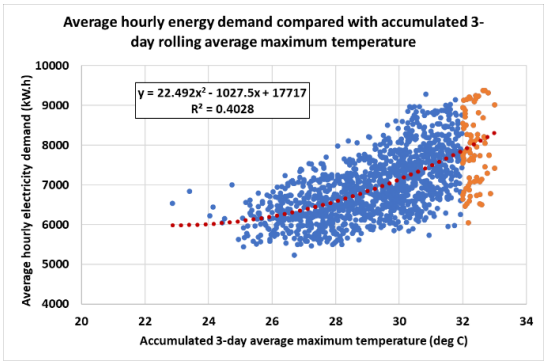


Figure 3 Average hourly energy demand (kW/hr) compared to daily maximum temperature (top) and average 3-day electricity demand compared to accumulated 3-day average maximum temperature (bottom). Non-linear regression lines (dashed) are statistically significant. Days with maximum temperature 32 °C and above are coloured orange. Electricity demand data courtesy of UNELCO. Temperature data procured from VMGD for Bauerfield, Port Vila.

The influence of other climate variables on electricity demand were explored in this assessment (e.g. relative humidity and minimum temperature) however maximum temperature was found to have the most influence.

STEP 4 Collect information about future climate scenarios

Extreme temperatures are projected to rise, consistent with the observed trends and projected warming in average temperatures. The projections are influenced by uncertainty in greenhouse gas emissions scenarios [8], regional climate responses simulated by climate models for each emissions scenario, and natural climate variability (see also Step 5). Under a high emissions scenario (RCP8.5), extreme temperatures are projected to be approximately 0.6–1.8 °C hotter by 2050 and 1.0–3.5 °C hotter by the end of the century (Figure 4).

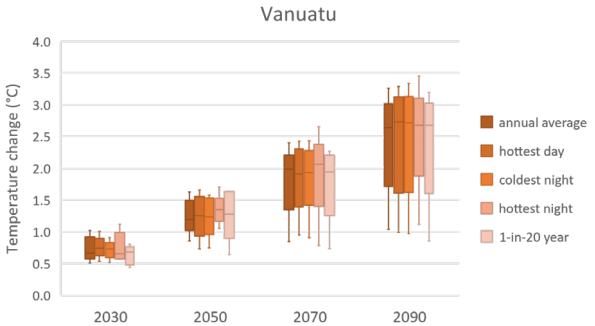


Figure 4 Projected changes in various temperature metrics: annual average, annual hottest day, annual coldest night, annual hottest night and 1-in-20 year hottest day, for the Vanuatu region over four future time periods (2030, 2050, 2070, 2090), relative to 20-years centred on 1995. The box plots show the multi-model minimum and maximum; 25th and 75th percentile; and median (50th percentile) based on the five CCAM climate model simulations under a high emissions scenario (RCP8.5).

STEP 5 Analyse climate-related impacts

When undertaking climate hazard-based impact assessments to inform climate change risk, it is important that a range of future climate change scenarios is considered. 'What would be the impact and what would we do (how would we adapt or otherwise manage or reduce risks) under a 'best-case' or 'worst-case' future climate scenario?' This is known as the 'storyline approach' [9].

Future daily maximum temperature timeseries for four years centred on 2050 and 2070 were created by adjusting four years of observed (2019–2022) maximum temperature data with the changes in temperature projected from climate models. The analysis considered low and high emissions scenarios, as well as a climate model projecting 'less warming' and a climate model projecting 'more warming' [10]. (See Climate projections for use in impact assessments factsheet for explanation of methods). Future electricity demand was estimated using these projected daily maximum temperature data in the electricity-temperature relationship derived in Step 3.

For low emissions (Figure 5 dashed lines), there was almost no change in electricity demand for the 'less warming' model, and around 4.0 % increase in electricity demand for the 'more warming' model by 2050. Under high emissions (Figure 5 solid lines), there was around 1.6 % increase in electricity demand for a 'less warming' model, and around 6.6 % increase for a 'more warming' model by 2050. Larger changes were estimated by 2070 e.g. high emissions and a 'high warming' model caused up to 11 % increase in electricity demand by 2070 (not shown).

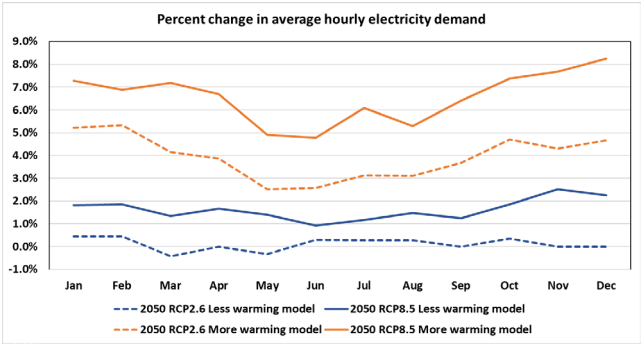


Figure 5 Per cent change in average hourly energy demand for Port Vila for 20-year periods centred on 2050 for a low emissions scenario (RCP2.6), a high emissions scenario (RCP8.5), a climate model with less warming (GISS-E2-R) and a climate model with more warming (IPSL-CM5A-MR).

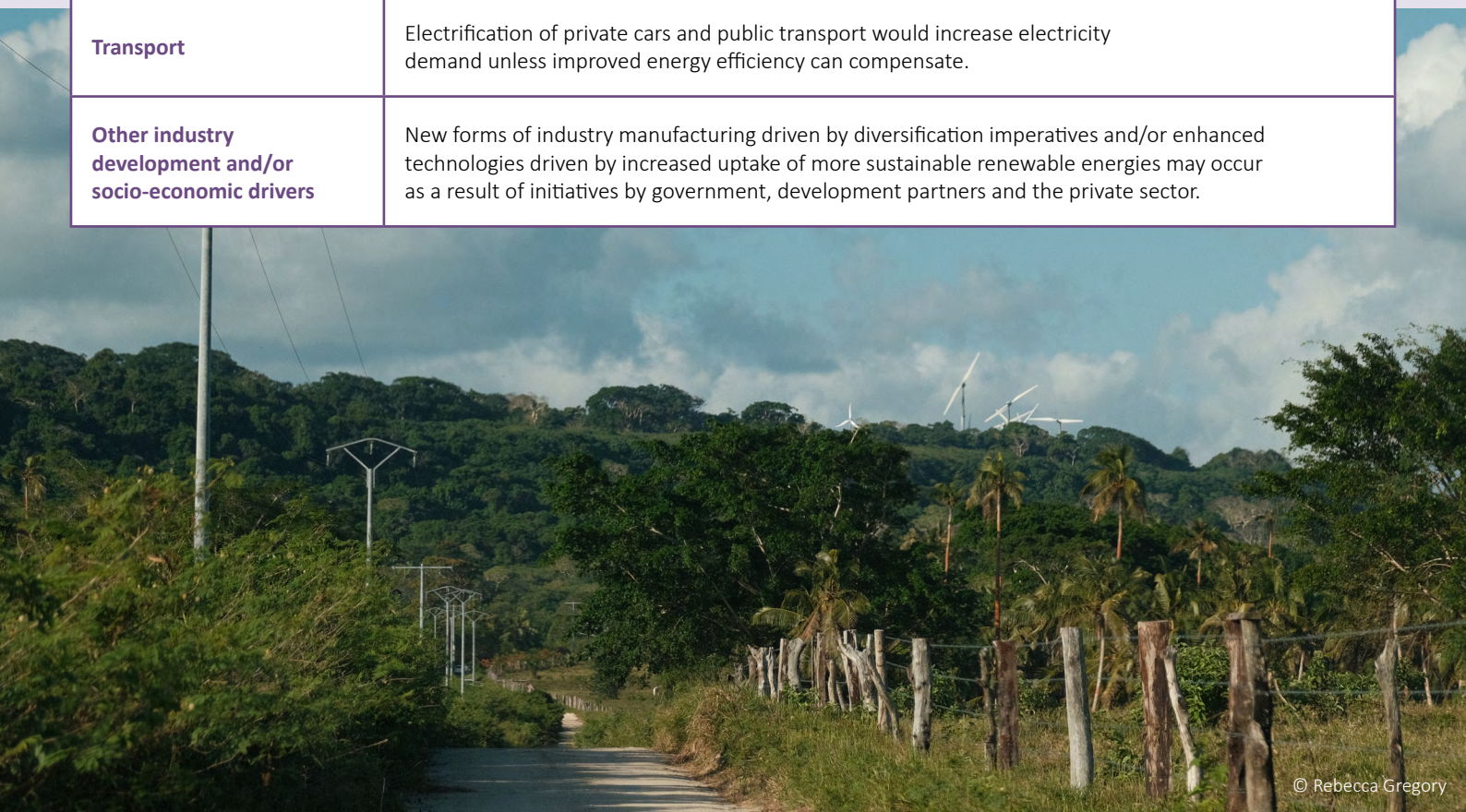
This analysis assumes no other change in demand based on possible new connections to the grid over the reporting period driven for instance by population growth, industry development and/or productivity gains, and/or improved socio-economic circumstances of the population more generally (see also Step 6). International studies indicate that an increase in energy demand is likely with future climate change, e.g. 25 % increase in the tropics by 2050 [11-13], a 4 % increase in Brisbane (Australia) for a 2–3 °C warming [14, 15], and while not as tropical, a 9.2 % increase for a 1.0 °C warming in the Yangtze River Delta, China [16].

STEP 6

Evaluate other climate and non-climate factors

It is important to note that only temperature conditions are assessed in Step 5. Other climate and non-climate factors are listed below that may also influence energy demand. Further analysis around these may be prudent.

Climate factors affecting electricity demand	
Extreme rainfall	Flooding associated with extreme rainfall may damage electricity sub-stations and other critical infrastructure, disrupting electricity distribution.
Tropical cyclones	Extreme wind associated with cyclones may damage critical infrastructure, disrupting electricity generation, transmission and distribution. Extreme wind can also require shutdown of wind turbines and cause damage to solar panels, limiting renewable energy generation.
Solar radiation	High solar radiation (low rainfall and cloud cover) can enhance solar electricity generation, while low solar radiation (high rainfall and cloud cover) can limit solar electricity generation.
El Niño Southern Oscillation (ENSO)	ENSO is a large-scale driver of climate variability in the Pacific, affecting rainfall, temperature and drought [17]. In El Niño years, the South Pacific Convergence Zone (SPCZ) moves north-east, leading to drier conditions. In La Niña years, the SPCZ moves south-west, leading to wetter conditions. ENSO also affects tropical cyclone frequency [18]. Extreme La Niña and El Niño events are projected to increase in future [19, 20].
Non-climate factors	
Socio-economic	Population growth and/or industry productivity growth and socio-economic wellbeing may increase uptake of electrical and cooling appliances, thereby increasing electricity demand. On the other hand, improved climate resilience and energy efficiency within industry and local communities may compensate.
Tourism	Increased tourism may increase electricity demand for hotel air conditioning and other electrical appliances.
Transport	Electrification of private cars and public transport would increase electricity demand unless improved energy efficiency can compensate.
Other industry development and/or socio-economic drivers	New forms of industry manufacturing driven by diversification imperatives and/or enhanced technologies driven by increased uptake of more sustainable renewable energies may occur as a result of initiatives by government, development partners and the private sector.



© Rebecca Gregory

STEP 7 Plan future adaptation

Adaptation can be incremental or transformative, with enablers and barriers, synergies and trade-offs, pathways and limits, costs and benefits. The process usually starts with consideration of adaptation options. A list of adaptation options and planning considerations for Vanuatu to reduce electricity demand increasing in a warmer climate that could be reviewed, tested, and verified as appropriate with local sectoral and community stakeholders include:



Installing ceiling insulation and building more energy efficient houses is more effective for reducing energy demand for residential cooling than increasing the energy efficiency of cooling systems or decreasing the uptake of cooling systems [21].



Passive cooling includes solar shading, window orientation, increased insulation, reflective materials and greater natural ventilation [22].



Changes to the design and built form of cities can contribute to reduction of the urban heat island effect and the impacts of heatwaves. Urban 'greening' includes parks, open spaces, forests, wetlands, and green roofs [21].



Increased energy demand may be sustainably managed by way of increased generation of and access to lower cost renewable energy supplies (e.g. mix of wind, solar and battery supply).



The National Energy Road Map (NERM) emphasises affordability, accessibility, sustainability, reliability, and the importance of transitioning to renewable energy generation [23].

STEP 8 Communicate findings

Communicating the assessment findings to key sector stakeholders is the final step of the climate hazard-based impact assessment. Multiple communication formats, co-designed and co-produced with target users in mind are more likely to support action and decision-making. The contents of this infobyte, together with other related resources shown below, can be disseminated and shared with key stakeholders to help them plan for and adapt to the changing climate.

Van-KIRAP Web Portal

Case Studies

Fact Sheets

Guidance Material

Videos



© Ellian Bangtor

EXTREME HEAT IMPACTS ON ELECTRICITY DEMAND IN EFATE

237
INFRASTRUCTURE


© Ellian Bangtor

This publication should be cited as:

CSIRO and SPREP (2023). Extreme heat impacts on electricity demand in Efate. Infobyte prepared for the Vanuatu Meteorology and Geo-hazards Department as part of the Van-KIRAP project. CSIRO: Melbourne, Australia

Authors: Leanne Webb (CSIRO), Kim Nguyen (CSIRO), Kevin Hennessy (Climate Comms) and Moirah Matou (Van-KIRAP).

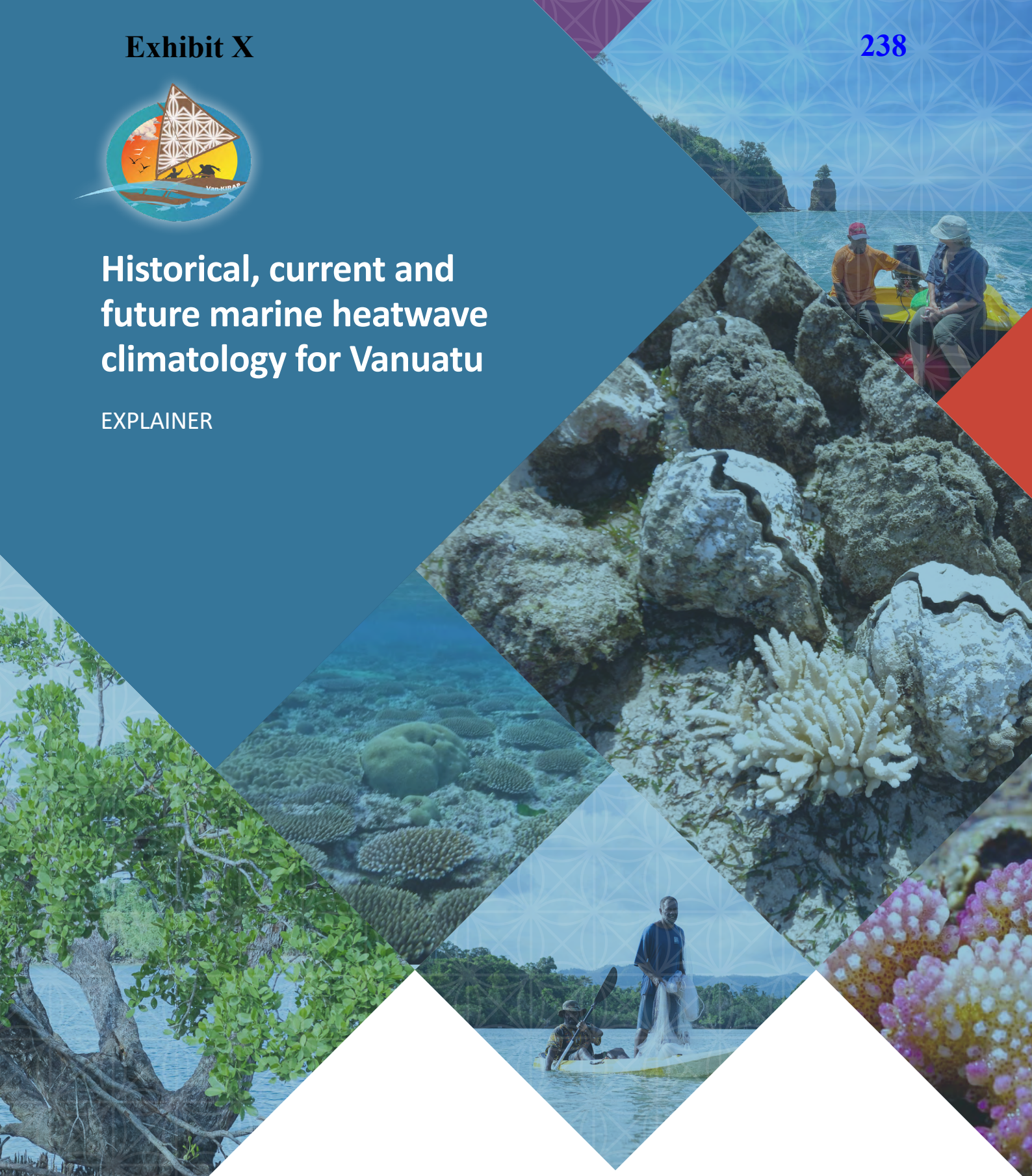
References

1. UNELCO Engie, *Annual report 2021.* 2021. Available from: https://unelco.engie.com/images/doc/UNELCO-Annual-Report-2021.pdf
2. Utilities Regulatory Authority, *Vanuatu monthly energy market snapshot.* 2023. Available from: www.ura.gov.vu
3. Hannah Ritchie, Max Roser, and Pablo Rosado. *"Energy" OurWorldInData.org. 2022.* Available from: https://ourworldindata.org/energy
4. McGree, S., et al., *Climate Change in the Pacific 2022: Historical and Recent Variability, Extremes and Change.* 2022. SPC: Suva, Fiji.
5. Kirono, D., et al., *National and sub-national climate projections for Vanuatu.* 2023. CSIRO: Melbourne, Australia.
6. McGree, S., et al., Recent changes in mean and extreme temperature and precipitation in the Western Pacific Islands. *Journal of Climate*, 2019. 32(16): p. 4919-4941.
7. Australian Bureau of Meteorology. *Pacific Climate Change Data Portal.* 2018. Available from: http://www.bom.gov.au/climate/pccsp/
8. Van Vuuren, D.P., et al., The representative concentration pathways: an overview. *Climatic Change,* 2011. 109(1-2): p. 5-31.
9. Shepherd, T.G., et al., Storylines: an alternative approach to representing uncertainty in physical aspects of climate change. *Climatic change*, 2018. 151: p. 555-571.
10. CSIRO and SPREP, *'NextGen' Projections for the Western Tropical Pacific: Current and Future Climate for Vanuatu.* 2021. CSIRO: Melbourne, Australia.
11. Auffhammer, M. and E.T. Mansur, Measuring climatic impacts on energy consumption: A review of the empirical literature. *Energy Economics,* 2014. 46: p. 522-530.
12. Auffhammer, M., P. Baylis, and C.H. Hausman, Climate change is projected to have severe impacts on the frequency and intensity of peak electricity demand across the United States. *Proceedings of the National Academy of Sciences, 2017.* 114(8): p. 1886-1891.
13. Van Ruijven, B.J., E. De Cian, and I. Sue Wing, Amplification of future energy demand growth due to climate change. *Nature communications,* 2019. 10(1): p. 2762.
14. Howden, S.M. and S. Crimp. Effect of climate change on electricity demand in Australia. . in *Proceedings of Integrating Models for Natural Resource Management across Disciplines, Issues and Scales (2), in "MODSIM 2001 International Congress on Modelling and Simulation".* 2004: Modelling and Simulation Society of Australia and New Zealand. Canberra.
15. Khan, I., et al., The effect of climate change on power generation in Australia. *Procedia Engineering,* 2013. 56: p. 656-660.
16. Li, Y., W.A. Pizer, and L. Wu, Climate change and residential electricity consumption in the Yangtze River Delta, China. *Proceedings of the National Academy of Sciences,* 2019. 116(2): p. 472-477.
17. McGree, S., S. Schreider, and Y. Kuleshov, Trends and variability in droughts in the Pacific Islands and Northeast Australia. *Journal of Climate,* 2016. 29(23): p. 8377-8397.
18. CSIRO and SPREP, *Tropical Cyclones and Climate Change: implications for Pacific Island countries.* 2022. CSIRO: Melbourne, Australia.
19. Cai, W., et al., Increasing frequency of extreme El Nino events due to greenhouse warming. *Nature Climate Change,* 2014.
20. Cai, W., et al., Increased frequency of extreme La Niña events under greenhouse warming. *Nature Climate Change,* 2015. 5(2): p. 132-137.
21. Seo, S., C.-H. Wang, and G. Grozev, Cooling energy consumption and reduction effect for residential buildings in South East Queensland, Australia. *Building and environment* 2013. 59: p. 408-416.
22. IPCC, *Summary for Policymakers. IPCC Sixth Assessment Report from Working Group 2 on Impacts, Adaptation and Vulnerability.* 2022. Available from: https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf
23. Ministry of Climate change, *National Energy Road Map (NERM).* 2016. Available from: https://www.nab.vu/vanuatu-national-energy-road-map

KLAEMET SAVE
REDI · ADAPT · PROTEKT
CSIRO
SPREP
Secretariat of the Pacific Regional Environment Programme
GREEN CLIMATE FUND

Historical, current and future marine heatwave climatology for Vanuatu

EXPLAINER



KLAEMET SAVE
REDI · ADAPT · PROTEKT

SPREP
Secretariat of the Pacific Regional Environment Programme

CSIRO

GREEN CLIMATE FUND

Contents

Summary 1

Introduction 2

Observed sea surface temperature, seasonal cycle and trends for Vanuatu 2

Definition of marine heatwaves 3

Detecting and measuring marine heatwaves from global gridded data sets 4

Observed marine heatwaves for sites of interest for Vanuatu's fisheries sector 5

Spatial analyses of trends in observed marine heatwaves for Vanuatu 6

Marine heatwaves and ENSO 7

Timing of marine heatwaves 7

Tracking marine heatwaves 7

Projected marine heatwaves 8

Impact of ocean temperatures on corals: degree heating weeks 9

Degree heating weeks exposure across Vanuatu 10

References 11

This publication should be cited as:

CSIRO, SPREP and VMGD (2023). Historical, current and future marine heatwave climatology for Vanuatu. A report to the Van-KIRAP project. Commonwealth Scientific and Industrial Research Organisation (CSIRO), Secretariat of the Pacific Regional Environment Programme (SPREP) and Vanuatu Meteorology and Geo-hazards Department (VMGD), CSIRO Technical Report, Melbourne, Australia.

The authors of the report:

Leanne Webb (CSIRO)

Vanessa Hernaman (CSIRO)

The project team would like to acknowledge Kevin Hennessy (Climate Comms), Alistair Hobday and Geoff Gooley (CSIRO) for providing helpful comments.

© Commonwealth Scientific and Industrial Research Organisation (CSIRO) 2023. To the extent permitted by law, all rights are reserved, and no part of this publication covered by copyright may be reproduced or copied in any form or by any means except with the written permission of CSIRO.

Important Disclaimer

CSIRO advises that the information contained in this publication comprises general statements based on scientific research. The reader is advised and needs to be aware that such information may be incomplete or unable to be used in any specific situation. No reliance or actions must therefore be made on that information without seeking prior expert professional, scientific and technical advice. To the extent permitted by law, CSIRO (including its employees and consultants) excludes all liability to any person for any consequences, including but not limited to all losses, damages, costs, expenses and any other compensation, arising directly or indirectly from using this publication (in part or in whole) and any information or material contained in it.

CSIRO is committed to providing web accessible content wherever possible. If you are having difficulties with accessing this document please contact csiro.au/contact

The project team would like to acknowledge Ellian Bangtor, Geoff Gooley, Gina Ishmael and Rebecca Gregory for images used on the front cover.



© Ellian Bangtor

Summary

- Marine heatwaves (MHWs) are defined as ‘discrete, prolonged anomalously warm water events which last for five or more days, with sea surface temperatures (SSTs) warmer than the 90th percentile relative to climatological values’.
- The most common drivers of MHWs include ocean currents which can build up areas of warm water and air-sea heat flux, or warming through the ocean surface from the atmosphere. Winds can enhance or suppress the warming in a marine heatwave.
- MHWs can have a very different temperature profile depending on the seasonal, regional-scale background ocean temperatures.
- Across Vanuatu historically there has been an increasing frequency of MHWs (1982–2021), mostly in the ‘Moderate’ to ‘Strong’ category.
- Broadly speaking, northern Vanuatu has experienced more frequent, longer duration and higher intensity MHWs than southern Vanuatu for the period 1982–2021.
- Across all sites, historically the typical number of MHWs is around 25 days per year (20-year average centred on 1995). Under the low greenhouse gas emissions scenario (SSP126), this is projected to increase to about 80–150 days per year by 2050. Under the high emissions scenario (SSP585) this increases to about 170–310 days per year by 2050, with many days in the ‘Strong’ and ‘Severe’ MHW categories.
- Degree heating weeks (DHW), a related MHW metric, provide a measure of coral stress.
- Using DHW estimates, more exposed reefs are found in northern Efate, west Epi, east Malekula and south-west Ambrym islands. Less exposed reefs, identified as historical refugia, are in Tanna, southern Efate, Ambrym, north Pentecost and west Maewo islands.
- Some of these refugia are projected to experience delayed impacts such as annual severe bleaching seven or more years later than the average for Vanuatu in 2040.



© Rebecca Gregory

Introduction

Marine heatwaves (MHWs) are episodes of prolonged and anomalously high ocean temperatures [1, 2]. They can have devastating impacts on aquaculture and marine ecosystems, including many that provide critical habitat and ecosystem services (e.g. coral reefs, seagrass, kelp beds). MHWs can be caused by a whole range of factors, and not all factors are important for each event. The most common drivers of MHWs include ocean currents which can build up areas of warm water, air-sea heat flux or warming through the ocean surface from the atmosphere. Winds can enhance or suppress the warming in a MHW, and climate variability drivers like ENSO can change the likelihood of events occurring in certain regions [3]. MHWs are often associated with periods of clear skies and more settled conditions, and consequently less wind-driven mixing of the surface ocean which enhances surface heating.

Globally, MHW frequency, intensity, and duration have increased over the last four decades [4], and climate projections indicate that this trend is set to continue for decades to come in many regions, including the Pacific [5]. This will have serious impacts on marine species and aquatic ecosystems over the coming decades [6], along with the coastal communities dependent on these natural resources for coastal protection, livelihood and environmental amenity (ecosystem services), with the rate of change depending on the global greenhouse gas emissions pathway followed in future [7]. This report describes what MHWs are, observed changes and how MHWs may increase in future (also see the Seagrass infobyte).

Observed sea surface temperature, seasonal cycle and trends for Vanuatu

Across the Vanuatu archipelago annual average sea surface temperatures (SSTs) range historically from about 25.5 °C to 28.5 °C from south to north (Figure 1). Through the 1993–2021 period, monthly-average SSTs at the Port Vila tide gauge ranged from around 29 °C in February–March to 25.5 °C in August (Figure 1, top right) [8], with individual monthly SSTs varying within 2 °C of the monthly average.

As part of the Van-KIRAP project case studies, SST observations taken from the NOAA daily Optimum Interpolation Sea Surface Temperature v2-1 data set[1] (hereafter called OISST v2-1; [9]), have been averaged over the Vanuatu Exclusive Economic Zone, revealing a historical warming trend of 0.23 °C per decade during 1981–2021 (Figure 1, bottom right) [8]. SSTs are now reaching record high levels globally [10] driven by global warming due to increases in greenhouse gases [11].

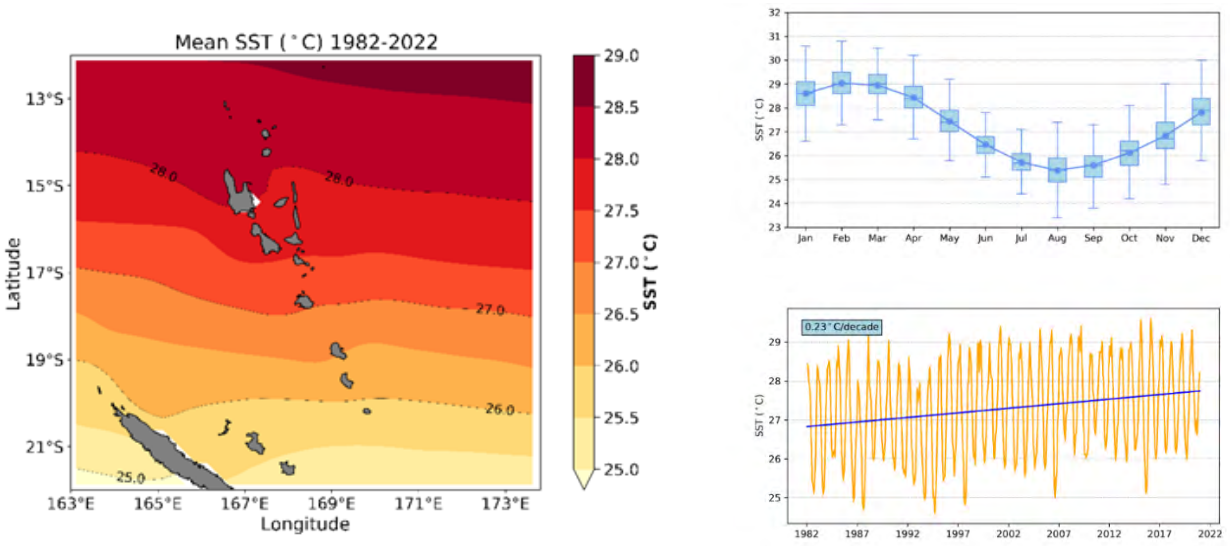


Figure 1 (left) Vanuatu annual average SST (°C) (1982–2022). (Top right) SST (°C) measured at the Port Vila tide gauge (1993–2021), with blue dots showing the monthly average, shaded boxes show the median (middle 50 % of observations) and lines showing the top and bottom 25 % of observations. (Bottom right) SST from satellite observations averaged across the Vanuatu region, with annual averages shown as the orange line. The blue line shows the linear regression trend [8]. Data source for left and bottom right plots: [9].

[1]Daily OISST data are constructed by combining observations from different platforms (satellites, ships, buoys, and Argo floats) on a regular 0.25 ° global grid (around 27 km between data points) with interpolation to fill any data gaps. Full year data are available from 1982–2022.

Definition of marine heatwaves

Marine heatwaves are defined as 'discrete, prolonged anomalously warm water events which last for five or more days, with SSTs warmer than the 90th percentile relative to climatological values' [1, 2] where:

- 'discrete' implies a well-defined start and end date, and separated from a previous MHW by more than two days
- 'anomalously warm' is warmer than the 90th percentile (top 10 % of events) in a 30-yr baseline period
- 90th percentile accounts for seasonal differences as it is uniquely computed for each calendar day.

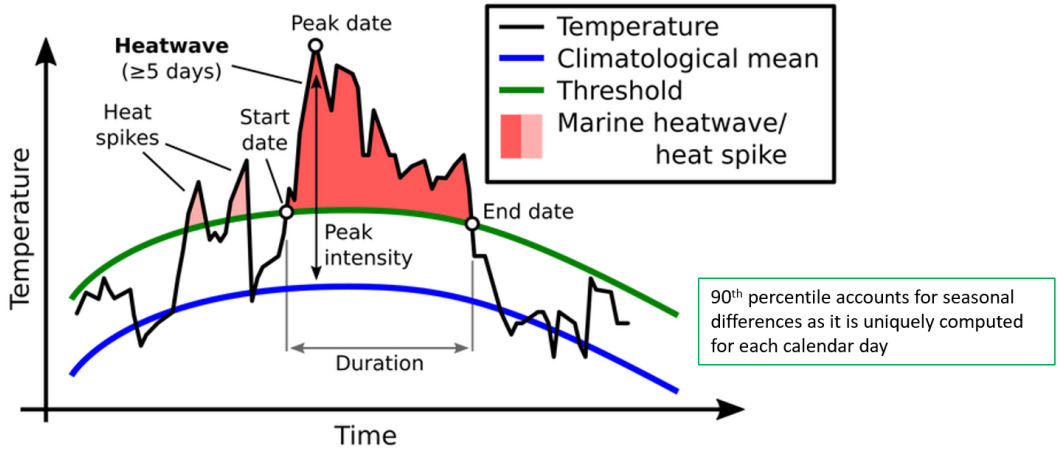


Figure 2 Diagram illustrating MHW definition: SST (°C) timeseries (black line) overlaid on the average SST (blue line) and the 90th percentile threshold (green line). When the SST exceeds the threshold for more than five days, it is defined as a MHW (red shading) [1, 2]. Heat spikes (pink shading) are not classified as a MHW because they are shorter than five days and are separated from the MHW by more than two days.

MHWs are categorised into four intensity categories, defined by multiples of the difference between the mean SST across a defined period and the 90th percentile threshold i.e. the difference (D) between the blue and green lines in Figure 3. For example, an event with moderate intensity is 1–2 x D. Intensity is defined as 'Moderate' (Category I, 1–2 x D), 'Strong' (Category II, 2–3 x D), 'Severe' (Category III, 3–4 × D), and 'Extreme' (Category IV, greater than 4 x D) [2].

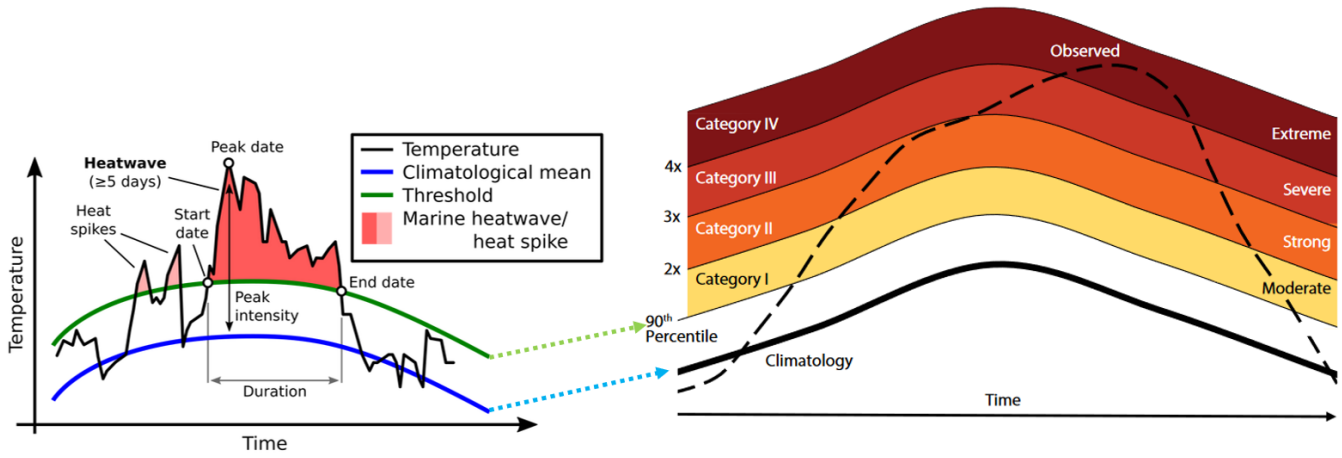


Figure 3 Multiples of the 90th percentile difference (2×D, 3×D, etc.) from the mean climatological value define each of the MHW categories I–IV, with corresponding descriptors from moderate to extreme. This example (dashed line) peaked as a Category IV (extreme) MHW [2].

Detecting and measuring marine heatwaves from global gridded data sets

To measure MHW occurrence, SST timeseries are extracted from the OISST v2-1 data for the closest grid cell best representing the location of interest. It is noted grid cells may not be centred on the exact location (Figure 4). Recent analysis undertaken for Fiji, Samoa, Palau, [5] and Cook Islands [12] indicates OISST v2-1 SST is usually very close to actual temperatures recorded in coastal areas and reef systems. Similarly, recent work in Vanuatu indicated that the OISST v2-1 data were very close to SST observations from marine Spotter wave buoys deployed around the coastline by the Van-KIRAP project (see Ocean monitoring factsheet).

In Figure 4, timeseries for the period 2002–2021 are shown for Pango (adjacent to Port Vila, Efate), in which a significant MHW event occurred, resulting in thousands of fish being killed [13]. The MHW in mid-February 2016 reached the 'Strong' category with SST between 1.75–2.0 °C above normal.

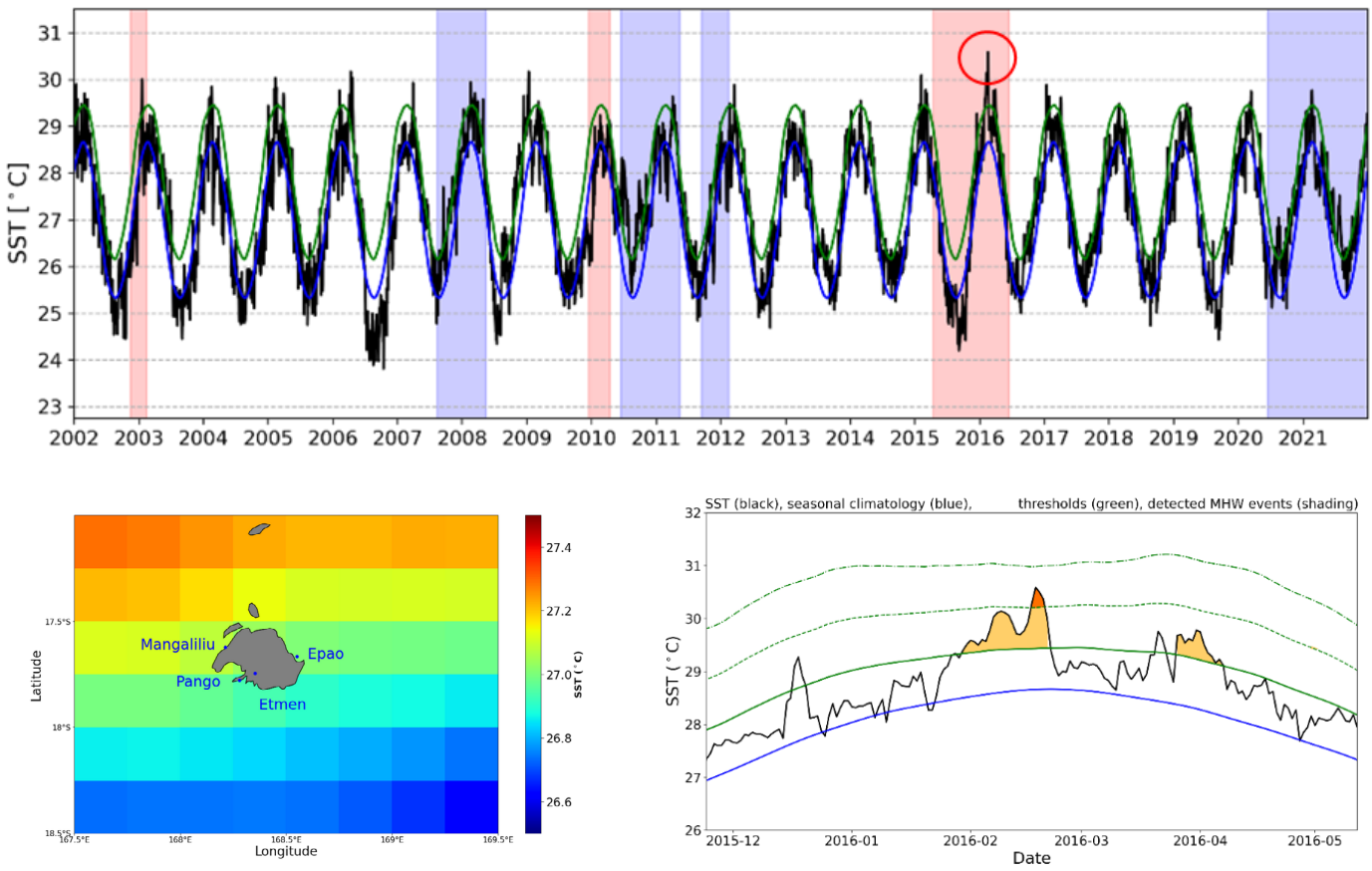


Figure 4 (top) SST (°C) timeseries from 2002–2021 for Pango region showing the observed daily values (black line), the seasonal mean climatology (blue line; based on 30-year baseline, 1986–2015), and the 90th percentile threshold (green line). Coloured bars denote strong El Niño (pink) and La Niña (blue) events. The February 2016 heatwave is highlighted with a red circle. (Bottom left) NOAA OISST v2-1 grid focused on Efate, noting the relative size of the grid cell from which each timeseries and MHW analysis is taken. (Bottom right) SST timeseries of the February 2016 event for Pango showing observed daily values (black line), seasonal mean climatology (blue line), 90th percentile threshold (green solid line), 2× threshold (dashed line), and 3× threshold (dash-dot line). Data source: [9].

Analysis of the longest MHW duration and cumulative intensity for Pango indicate the largest MHWs have occurred in the last 15–20 years (Figure 5), with cumulative intensity being the sum of the daily intensities through the duration of the MHW event.

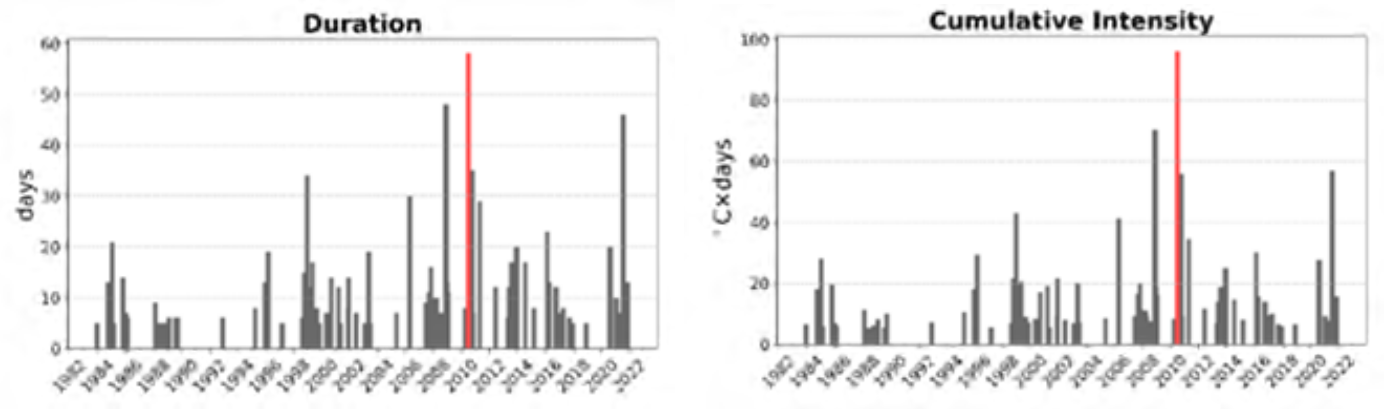


Figure 5 MHW duration (days) and cumulative intensity (°C x days). Data source: [9].

Observed marine heatwaves for sites of interest for Vanuatu's fisheries sector

Timeseries of MHW observations have been assessed for Vanuatu's fisheries sector. At eight sites of interest there has been an increasing frequency of MHW's during 1982–2021, mostly in the 'Moderate' to 'Strong' category (Figure 6).

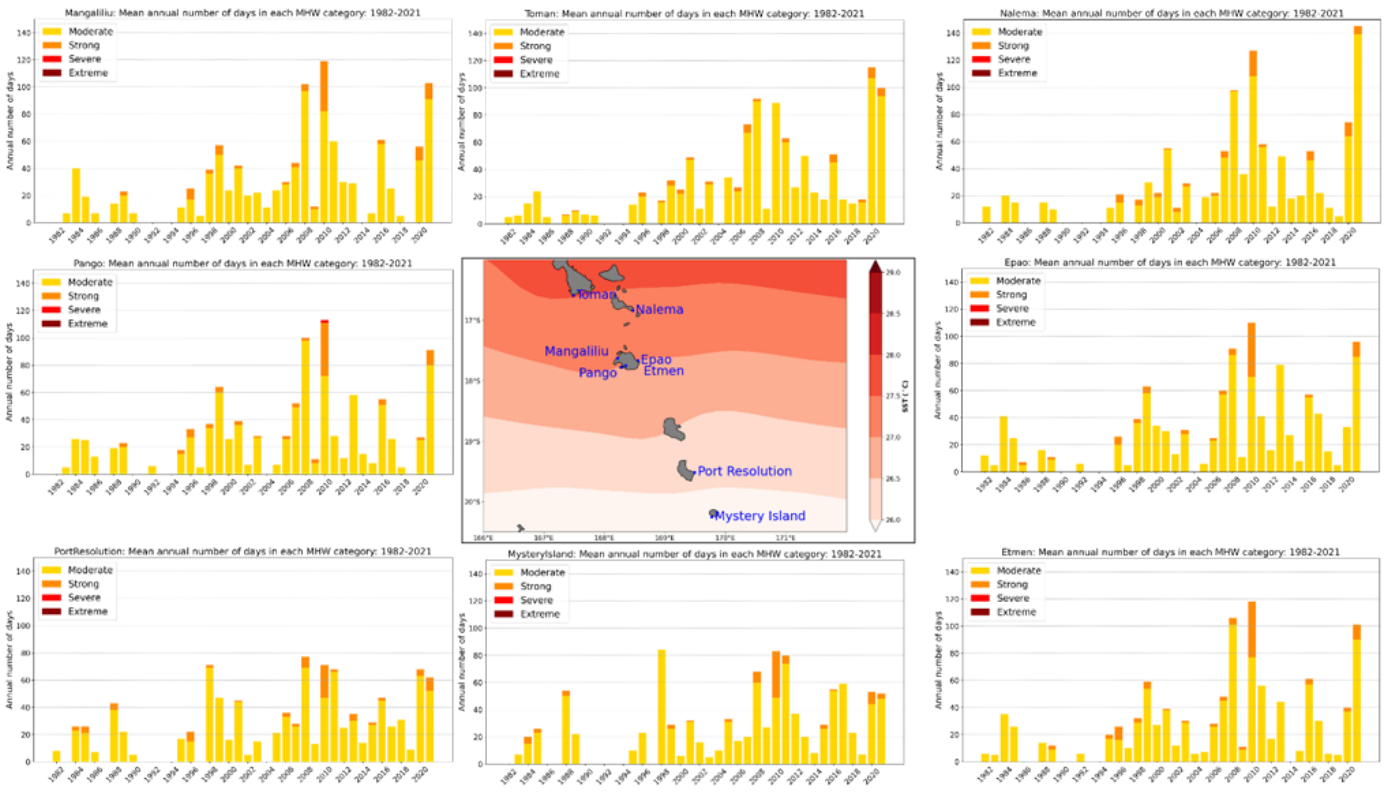


Figure 6 Mean SST (°C) (1982–2021) for Vanuatu fisheries sector sites of interest from north to south: Toman, Nalema, four sites on the coast of Efate, Port Resolution and Mystery Island (central map). For each site, the annual number of MHW days (1982–2021) is shown in each category [1, 2]. Data source: NOAA OISST v2-1 [9].

Spatial analyses of trends in observed marine heatwaves for Vanuatu

Spatial analyses of MHWs occurring in the Vanuatu region for 1982–2019 are presented in Figure 7. Note that MHWs are considered as separate events if a period of more than two days elapses since the occurrence of a previous MHW [1, 2]. Qualitative interpretation of trends in, and numbers of, observed MHWs are listed:

- Trends in annual MHW frequency are positive across the archipelago, with more occurring in the north than south (Figure 7, top left).
- The trend in annual MHW duration is mostly positive in the north, particularly around Sola and Avire, and negative in some sites in the south (Figure 7, top right).
- The trend in annual maximum MHW intensity is mostly positive in the north, and less in the south, with Aneityum (Mystery Island) having a trend to shorter duration MHWs through the specified time period (Figure 7, bottom left).
- The total number of MHW events over the period 1982–2019 varies across the region, mostly above 50, with more in the east (Figure 7, bottom right).

Regarding the fisheries sector sites of interest (Figure 6), Toman and Nalema were more exposed to MHWs, whereas the southern regions of Port Resolution and Mystery Island were less exposed.

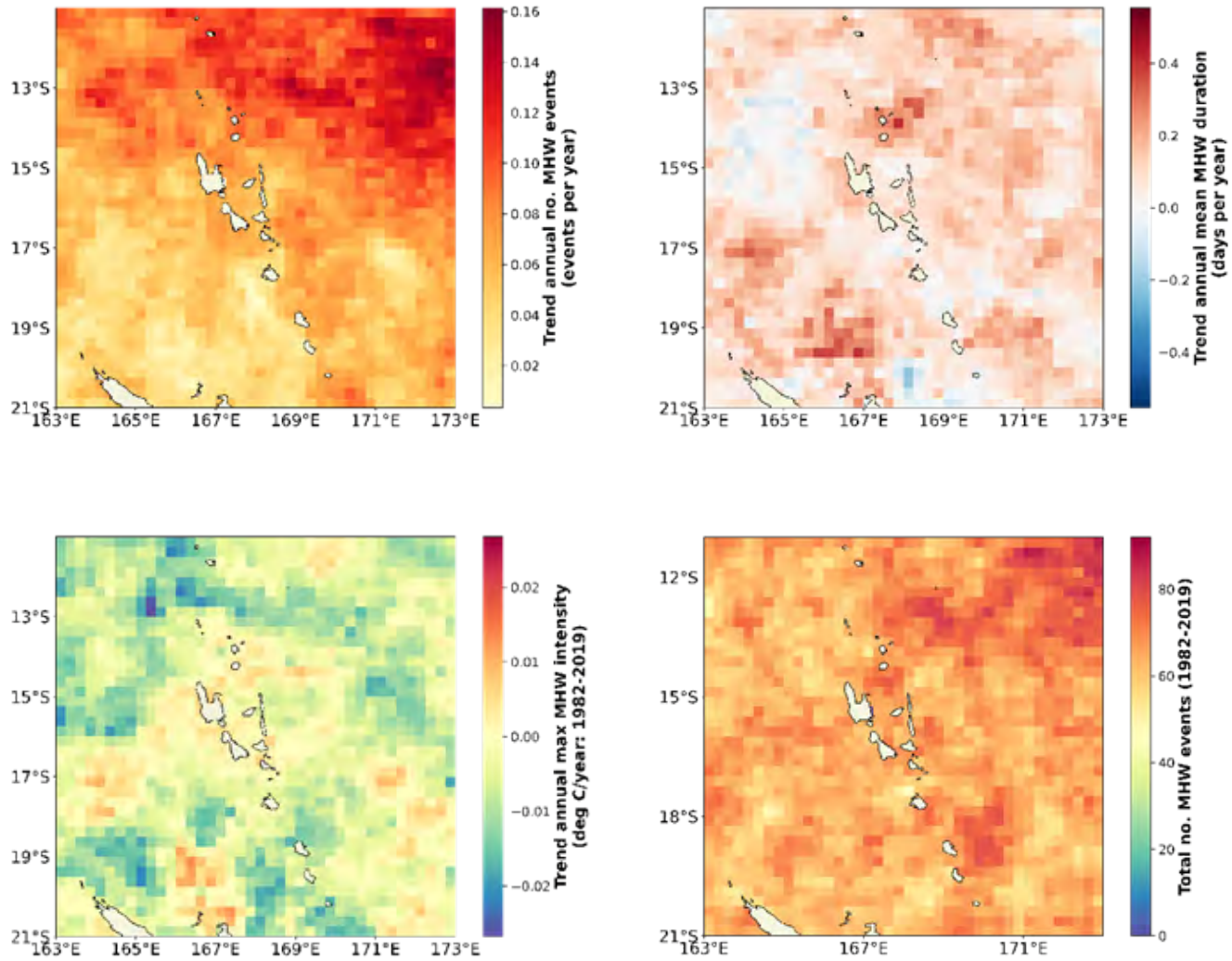


Figure 7 Trend in annual number of MHW events (top left), annual mean MHW duration (top right), annual maximum MHW intensity (bottom left), and total number of MHW events (bottom right). Source data: NOAA OISST v2-1 SST [9].

Marine heatwaves and ENSO

The incidence and intensity of MHWs is naturally influenced by the El Niño-Southern Oscillation (ENSO) and the Interdecadal Pacific Oscillation (IPO), as well as local factors such as circulation patterns and processes that affect air-sea heat fluxes [14]. During El Niño events, higher SST, rainfall and sea level are clearly apparent in the central tropical Pacific. For Vanuatu, in the western tropical Pacific, El Niño events are normally associated with cooler and drier conditions [14] (also see Climate variability explainer). There is a higher likelihood of MHWs in La Niña periods, but they can occur during any ENSO phase (e.g. the 2016 MHW occurred during an El Niño event, Figure 4).

Timing of marine heatwaves

MHWs can have a very different temperature profile depending on the seasonal and regional-scale background temperatures in the ocean. MHWs can occur in summer or winter – they are defined based on differences with expected temperatures for the location and time of year. For example a heatwave occurring in August, a cooler month in Vanuatu, is unlikely to reach temperatures as high as those occurring in February. However there may be other biological, hydrological and physical and chemical processes (e.g. fish spawning and recruitment, food web and critical habitat relationships, diurnal feeding and distributional patterns, nutrient cycling etc.) that would still be sensitive to MHWs in winter [15]. Winter MHWs on top of long-term warming can also enable establishment of invasive species in some instances where previously cool winters would have killed them off [16].

Tracking marine heatwaves

The Marine Heatwave (MHW) Tracker shows the occurrence of MHWs around the world in near-real-time (roughly a one-two day delay). The tracker also shows daily the historic records for the whole planet going back to 1 January 1982. There are several other data layers offered in the tracker [3]. The February 2016 MHW event can be selected on the tracker interface as depicted in Figure 8.

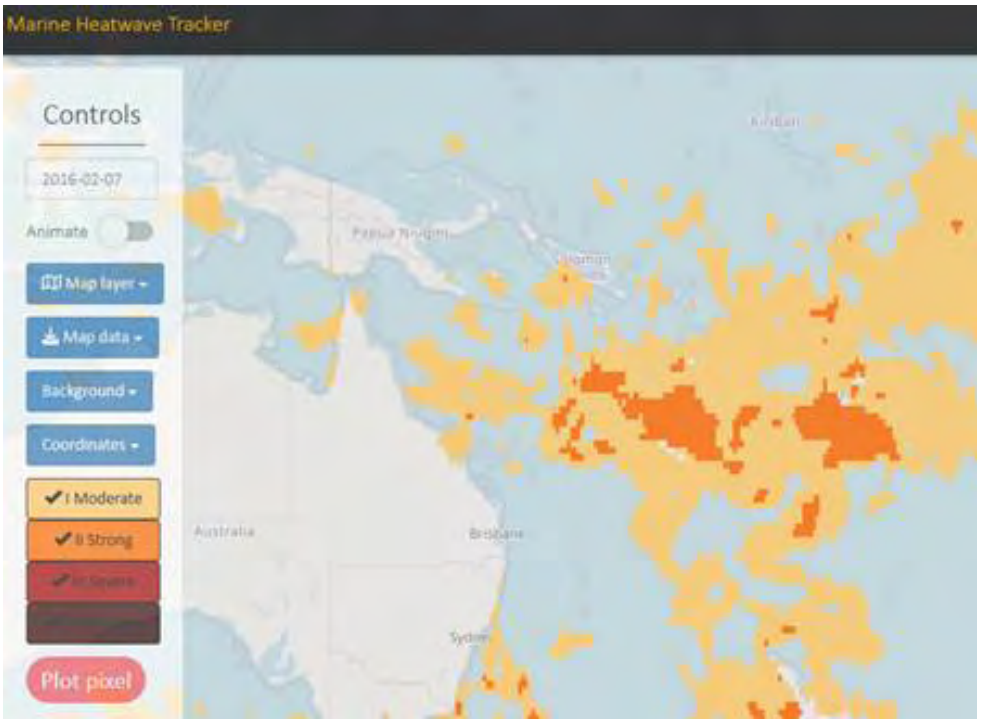


Figure 8 Marine Heatwave Tracker visualisation of the 7th of February 2016 'Strong' heatwave event (categories described here: [2]) that resulted in fish kills in Fiji and Vanuatu. http://www.marineheatwaves.org/tracker.html

Projected marine heatwaves

Projected MHWs out to the end of the century have been calculated for a lower-warming climate model (NorESM2-MM) and a higher-warming climate model (CanESM5), under low (SSP126) and high (SSP585) emissions scenarios, to capture the projected range of possible future change (Figure 9). To account for large interannual variability, data are averaged for 20-year periods centred on the years 2030, 2050, 2070 and 2090. The 20-year average (centred on the year 2005) from the OISST v2-1 observations are also plotted in Figure 9 by the left bar in each plot, denoted with an 'x'. Across all sites, the typical number of MHWs historically is around 25 days per year (20-year average centred on 2005; Figure 9). Under the low emissions scenario (SSP126) this increases to about 80–150 days per year by 2050 (20-year average centred on the year 2050; Figure 9). In Epao, under the high emissions scenario (SSP585) this increases to about 170–310 days per year by 2050, with many days in the 'Strong' and 'Severe' MHW categories (Figure 9).

By 2090, larger increases in MHWs are projected, more so in the north of Vanuatu. For a low emissions scenario the number of MHW days is 110–190, with a substantial increase in 'Strong' events. For a high emissions scenario the number of MHW days is 320–360, with a big increase in 'Severe' and 'Extreme' events (Figure 9).

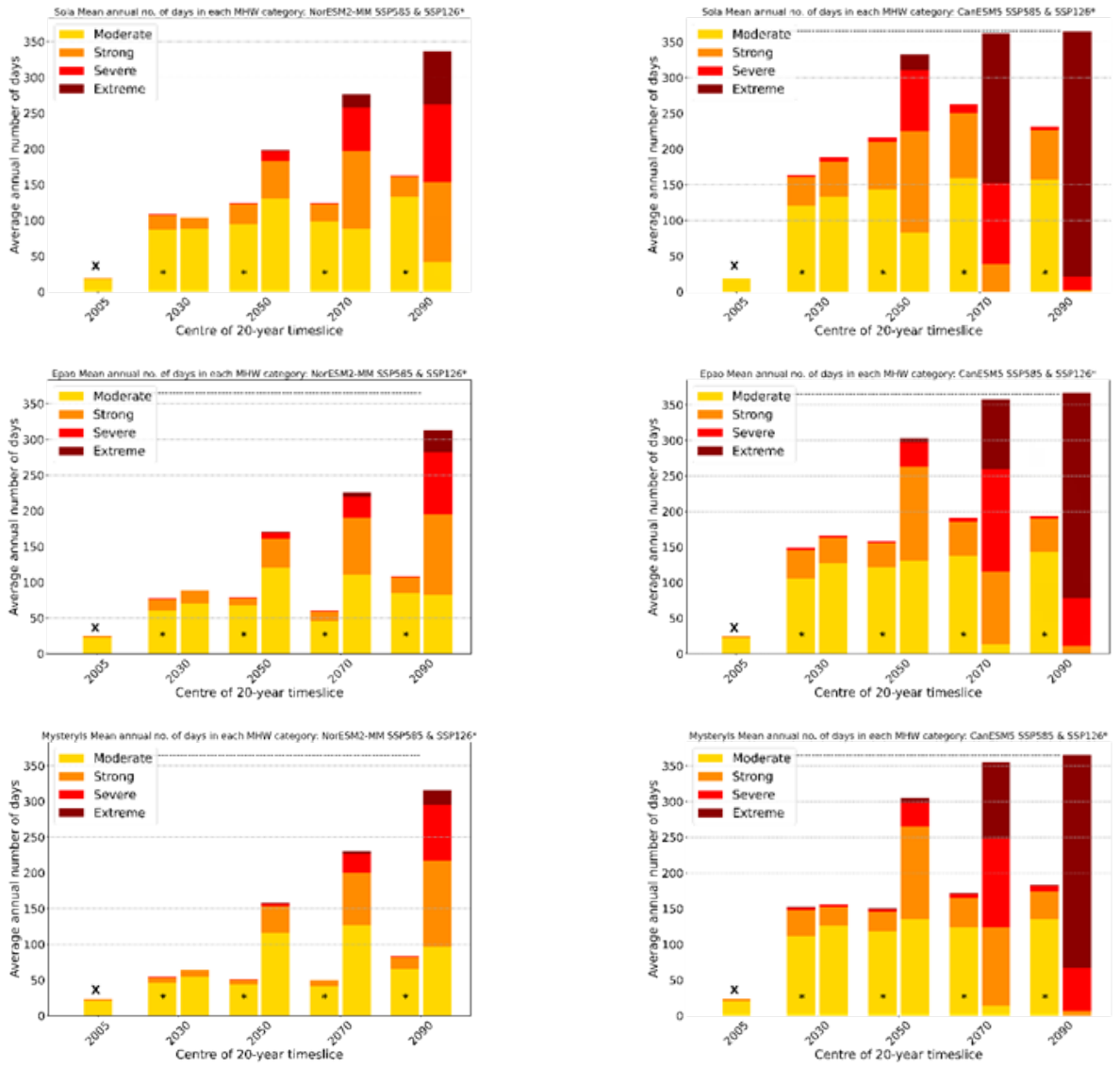


Figure 9 Projected average annual number of MHW days for an area-averaged domain encompassing northern through to southern regions of Vanuatu: (top) Sola, (middle) Epao, and (bottom) Mystery Island. The far left bar on each plot 'x', indicates historical MHWs for a 20-year period centred on 2005 (1995–2014) (x). Projections based on CMIP6 climate modelling indicate future MHW frequency for 20-year periods centred on 2030, 2050, 2070, and 2090. These are plotted for a lower warming model (NorESM2-MM; left panel) and higher warming model (CanESM5; right panel). For each future timeframe the low emissions scenario (SSP126) has an asterisk included in the bar (*), while the high emissions scenario (SSP585) has no asterisk. For all periods MHWs are categorised: moderate, strong, severe, and extreme [2]). (Data source: OISST v2-1 SST [9]: and CMIP6 climate models).

Impact of ocean temperatures on corals: degree heating weeks

Degree heating weeks (DHW) is another measure of ocean temperatures which also provides a useful measure of coral stress [17-19] (see Coral bleaching infobyte). Corals become stressed when SSTs are warmer than the bleaching threshold (solid blue line in Figure 10). This threshold is defined as 1.0 °C above the maximum of the monthly mean (MMM) SST climatology (indicated by the dashed blue line in Figure 10). Heat stress builds up the longer SST stays above the bleaching threshold. Both the magnitude of threshold exceedance and length of the exceedance are important factors in measuring stress, and thereby DHW. See Donner et al. [20] for a discussion of the metrics used.

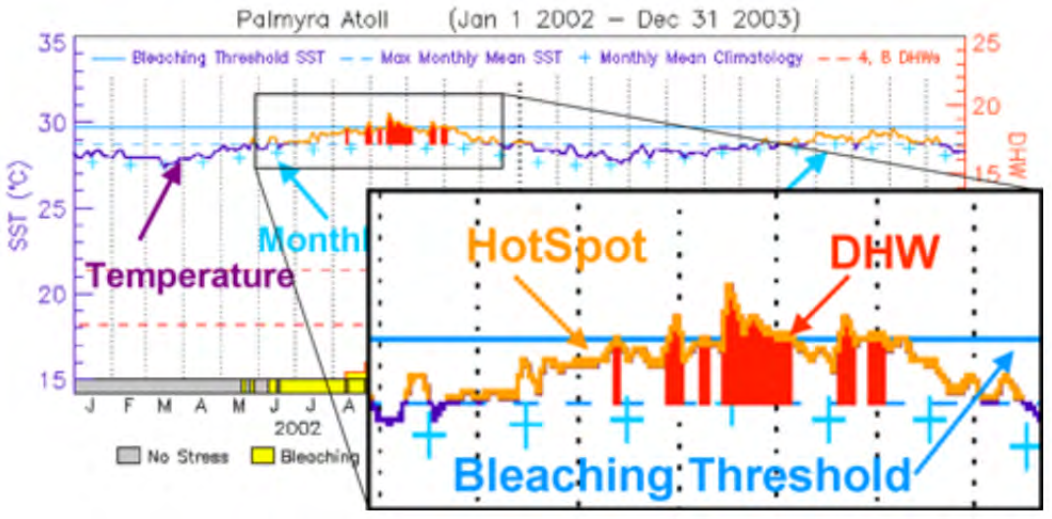


Figure 10 Simulated SST (°C) timeseries. A HotSpot is included in the DHW calculation when SST reaches or exceeds the bleaching threshold temperature. DHW (red region) is accumulated from HotSpot occurrence as the magnitude of exceedance above the MMM for a period of 12 weeks.

The term 'HotSpot' indicates the extent (in °C) that SST is above the MMM each day. DHW indicates how much heat stress has accumulated[2] and is calculated by summing the HotSpot values, over the previous 12 weeks, whenever the SST reached or exceeded the bleaching threshold. It is calculated as a running sum over a 12-week window (i.e. as you advance each day, you lose a day off the start of the 12-week window). The sum is divided by 7 to obtain the unit of '°C-weeks'. In that way a DHW of 2 is equivalent to one week of HotSpot values persistently at 2 °C (i.e. 2 °C x 7 days/7 =14/7 = 2), or two weeks of HotSpot values persistently at 1 °C (i.e., 1 °C x 14 days/7 =14/7 = 2) etc. (see : https://coralreefwatch.noaa.gov/product/5km/methodology.php#dhw). The United States National Oceanic and Atmospheric Administration (NOAA) monitors world SST and releases warnings for bleaching based on DHW (e.g. Figure 11).

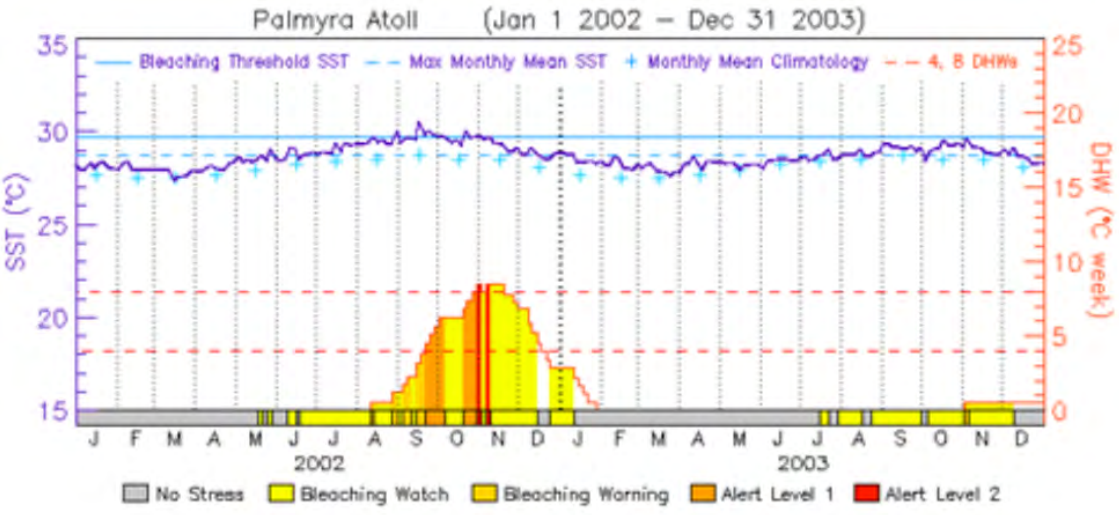


Figure 11 DHWs are plotted along the bottom of the graph, corresponding to the accumulated threshold exceedance of SST above bleaching threshold. The 4-DHW and 8-DHW thresholds are shown as dashed, horizontal red lines. The colours that fill below the DHW line correspond to established satellite bleaching alert levels (see Table 1).

A status level of 'Bleaching Watch' (Table 1) means that there is low-level thermal stress present at that location but not of sufficient magnitude to accumulate stress for corals, should they exist in that location. Alert Level 1 indicates that DHW is 4-8 and coral bleaching is likely to occur for some coral species. Alert Level 2 indicates DHW is greater than 8, so both widespread bleaching and significant coral mortality are likely. This scale has been successfully validated across historical observations at eight sites in the north-western Pacific Ocean [21].

[2]This anomaly is summed for the preceding 12-week period to produce 'Degree Heating Days' over 12 weeks. Dividing this by seven, can change the unit to 'Degree Heating Weeks' over 12 weeks.

Table 1 Coral bleaching thermal stress levels based on the NOAA Coral Reef Watch warnings.

STATUS	INTERPRETATION	DEFINITION
No Stress	No heat stress or bleaching is present.	HotSpot of less than or equal to 0.
Bleaching Watch	Low-level heat stress is present.	HotSpot greater than 0 but less than 1; Sea Surface Temperature (SST) below bleaching threshold.
Bleaching Warning	Heat stress is accumulating; possible coral bleaching.	HotSpot of 1 or greater; SST above bleaching threshold; Degree Heating Week (DHW) greater than 0 but less than 4.
Bleaching Alert Level 1	Significant coral bleaching likely.	HotSpot of 1 or greater; SST above bleaching threshold; DHW greater than or equal to 4 but less than 8.
Bleaching Alert Level 2	Severe bleaching and significant mortality likely.	HotSpot of 1 or greater; SST above bleaching threshold; DHW greater than or equal to 8.

Degree heating weeks exposure across Vanuatu

Many of the reef locations in Vanuatu have historically been refugia from thermal stress that causes coral bleaching. Using the DHW metric, these refugia were identified [22]. For the period 1985–2012 the frequency of events greater than 4-DHW (Alert Level 1) and 8-DHW (Alert Level 2) were mapped. More exposed reefs are in northern Efate, west Epi, east Malekula and south-west Ambrym islands. Less exposed reefs, identified as historical refugia, are in Tanna, southern Efate, Ambrym, north Pentecost and west Maewo islands [22].

In the Coral bleaching infobyte produced for Van-KIRAP, DHWs were compared for Port Resolution (Tanna) and Toman Island (Malekula), with projections for low warming by 2050 which indicates a higher frequency coral bleaching, i.e. where alert levels are exceeded, in the more northern site of Toman Island (Figure 12). This result aligns with the Maynard et al. study [22], where the onset of annual severe bleaching is shown to occur much later in Port Resolution than Toman Island [22]. Under a high warming scenario by 2050, and most concerningly, Alert level 2 is exceeded in 100 % of years at Toman Island, and 95 % of years at Port Resolution (see Coral bleaching infobyte).

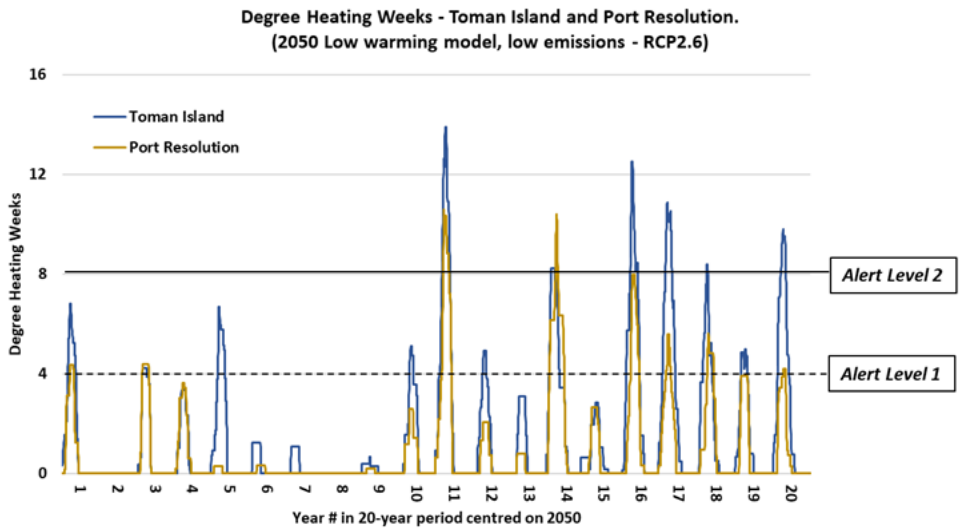


Figure 12 Regional variability of degree heating weeks (DHW) under warming. Timeseries of DHW (in °C-week) for a 20-year period centered on 2050 for 'low warming' (GISS-E2-R model, RCP2.6) for Toman Island, Malekula (blue), and Port Resolution, Tanna (brown). The horizontal lines show the risk limit: Alert Level 1, DHW >4 °C-week; significant coral bleaching is likely (dashed line) and Alert Level 2, DHW >8 °C-week; severe bleaching and significant coral mortality are likely (solid line). We assume no adaptation to thermal stress through the period. Method used here follows Langlais et al. 2017 [23]. Data source: OISST v2-1 SST [9].

This is important because, as an example, such assessments can inform adaptation planning, including opportunities for staged and prioritised management and protection of impacted reefs and other coastal resources around Vanuatu that are otherwise potentially facing severe impacts from projected changes in MHW climatology for Vanuatu over coming decades.

Climate Information Services developed by the Van-KIRAP project through the Vanuatu Climate Futures Portal are designed to facilitate such assessments and the application of the science-based evidence to inform decision making in order to build resilience to climate change in Vanuatu.

Also see Coral bleaching infobyte.

References

1. Hobday, A.J., et al., A hierarchical approach to defining marine heatwaves. *Progress in Oceanography,* 2016. 141: p. 227-238.
2. Hobday, A.J., et al., Categorizing and naming marine heatwaves. *Oceanography*, 2018. 31(2): p. 162-173.
3. Marine Heatwaves International Working Group. *Marine Heatwaves*. 2023. Available from: http://www.marineheatwaves.org/
4. Oliver, E.C., et al., Longer and more frequent marine heatwaves over the past century. *Nature communications*, 2018. 9(1): p. 1-12.
5. Holbrook, N.J., et al., Impacts of marine heatwaves on tropical western and central Pacific Island nations and their communities. *Global Planetary Change*, 2022. 208: p. 103680.
6. Smith, K.E., et al., Biological impacts of marine heatwaves. *Annual Review of Marine Science*, 2023. 15: p. 119-145.
7. Bell, J.D., J.E. Johnson, and A.J. Hobday, *Vulnerability of tropical Pacific fisheries and aquaculture to climate change.* 2011, Noumea, New Caledonia. Secretariat of the Pacific Community (SPC).
8. McGree, S., et al., *Climate Change in the Pacific 2022: Historical and Recent Variability, Extremes and Change.* 2022. SPC: Suva, Fiji.
9. Huang, B., et al., *NOAA 0.25-degree daily optimum interpolation sea surface temperature (OISST),* version 2.1. 2020. Available from: https://psl.noaa.gov/data/gridded/data.noaa.oisst.v2.html
10. Birkel, S.D. *Daily Sea Surface Temperature*. 2023. Available from: Climate Reanalyzer (https://ClimateReanalyzer.org)
11. IPCC, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.* 2021.
12. CSIRO and SPREP, *'NextGen' Projections for the Western Tropical Pacific: Climate change projections to inform black pearl production vulnerability in the Cook Islands.* 2022. CSIRO: Melbourne, Australia.
13. SPC, *Concern over dead fish in Fiji and Vanuatu.* 2016. Available from: https://www.spc.int/updates/news/2016/02/concern-over-dead-fish-fiji-and-vanuatu
14. Dhage, L. and M.J. Widlansky, Assessment of 21st century changing sea surface temperature, rainfall, and sea surface height patterns in the tropical Pacific Islands using CMIP6 greenhouse warming projections. *Earth's Future*, 2022. DOI: 10.1029/2021EF002524.
15. Shanks, A.L., et al., Marine heat waves, climate change, and failed spawning by coastal invertebrates. *Limnology Oceanography,* 2020. 65(3): p. 627-636.
16. Atkinson, J., et al., Summer and winter marine heatwaves favor an invasive over native seaweeds. *Journal of Phycology*, 2020. 56(6): p. 1591-1600.
17. Skirving, W., et al., CoralTemp and the Coral Reef Watch Coral Bleaching Heat Stress Product Suite Version 3.1. *Remote Sens.,* 2020. 12: p. 3856 DOI: https://doi.org/10.3390/rs12233856.
18. Liu, G., et al., NOAA Coral Reef Watch's 5km Satellite Coral Bleaching Heat Stress Monitoring Product Suite Version 3 and Four-Month Outlook Version 4. *Reef Encounter 45*, 2017. 32(1): p. 39-45.
19. NOAA. *Coral Reef Watch Satellite Monitoring and Modeled Outlooks.* 2023. Available from: https://coralreefwatch.noaa.gov/satellite/index.php
20. Donner, S.D., An evaluation of the effect of recent temperature variability on the prediction of coral bleaching events. *Ecological Applications,* 2011. 21(5): p. 1718-1730.
21. Kayanne, H., Validation of degree heating weeks as a coral bleaching index in the northwestern Pacific. *Coral Reefs,* 2017. 36(1): p. 63-70.
22. Maynard J, et al., P*ast and projected future impacts of coral bleaching on the reefs of Vanuatu.* 2018. SPREP: Apia, Samoa. Available from: https://library.sprep.org/content/past-and-projected-future-impacts-coral-bleaching-reefs-vanuatu
23. Langlais, C., et al., Coral bleaching pathways under the control of regional temperature variability. *Nature Climate Change*, 2017. 7(11): p. 839-844.

https://doi.org/10.1038/s41586-019-1364-3

Committed emissions from existing energy infrastructure jeopardize 1.5 °C climate target

Dan Tong[1,2], Qiang Zhang[2]*, Yixuan Zheng[2,3], Ken Caldeira[3], Christine Shearer[4], Chaopeng Hong[1], Yue Qin[1] & Steven J. Davis[1,2,5]*

Net anthropogenic emissions of carbon dioxide (CO_2) must approach zero by mid-century (2050) in order to stabilize the global mean temperature at the level targeted by international efforts[1–5]. Yet continued expansion of fossil-fuel-burning energy infrastructure implies already 'committed' future CO_2 emissions[6–13]. Here we use detailed datasets of existing fossil-fuel energy infrastructure in 2018 to estimate regional and sectoral patterns of committed CO_2 emissions, the sensitivity of such emissions to assumed operating lifetimes and schedules, and the economic value of the associated infrastructure. We estimate that, if operated as historically, existing infrastructure will cumulatively emit about 658 gigatonnes of CO_2 (with a range of 226 to 1,479 gigatonnes CO_2, depending on the lifetimes and utilization rates assumed). More than half of these emissions are predicted to come from the electricity sector; infrastructure in China, the USA and the 28 member states of the European Union represents approximately 41 per cent, 9 per cent and 7 per cent of the total, respectively. If built, proposed power plants (planned, permitted or under construction) would emit roughly an extra 188 (range 37–427) gigatonnes CO_2. Committed emissions from existing and proposed energy infrastructure (about 846 gigatonnes CO_2) thus represent more than the entire carbon budget that remains if mean warming is to be limited to 1.5 degrees Celsius (°C) with a probability of 66 to 50 per cent (420–580 gigatonnes CO_2)[5], and perhaps two-thirds of the remaining carbon budget if mean warming is to be limited to less than 2 °C (1,170–1,500 gigatonnes CO_2)[5]. The remaining carbon budget estimates are varied and nuanced[14,15], and depend on the climate target and the availability of large-scale negative emissions[16]. Nevertheless, our estimates suggest that little or no new CO_2-emitting infrastructure can be commissioned, and that existing infrastructure may need to be retired early (or be retrofitted with carbon capture and storage technology) in order to meet the Paris Agreement climate goals[17]. Given the asset value per tonne of committed emissions, we suggest that the most cost-effective premature infrastructure retirements will be in the electricity and industry sectors, if non-emitting alternatives are available and affordable[4,18].

International efforts to limit the increase in global mean temperature to well below 2 °C, and to 'pursue efforts' to avoid a 1.5 °C increase, entail a transition to energy systems with net-zero emissions by mid-century[1–5]. Yet recent decades have witnessed an unprecedented expansion of historically long-lived, fossil-fuel-based energy infrastructure—particularly associated with the rapid economic development and industrialization of emerging markets such as China and India[9,10]—and a shift towards natural-gas-fired power plants in the USA. Although

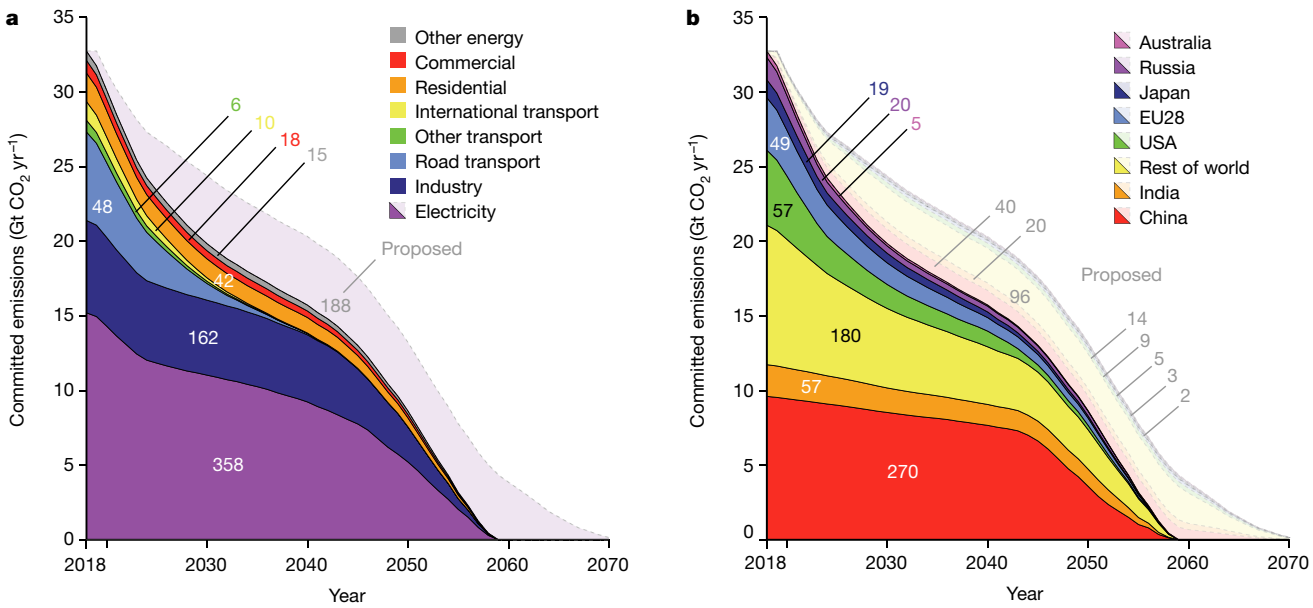


Fig. 1 | Committed annual CO_2 emissions from existing and proposed energy infrastructure. a, **b**, Estimates of future CO_2 emissions by industry sector (**a**; see also Supplementary Tables 1, 2) and country/region (**b**), assuming historical lifetimes and utilization rates. Emissions from existing infrastructure are shown with darker shading, and emissions from proposed power plants (that is, electricity) are more lightly shaded. Numbers within graphs show total amounts of emissions over the period shown.

[1]Department of Earth System Science, University of California, Irvine, CA, USA. [2]Ministry of Education, Key Laboratory for Earth System Modeling, Department of Earth System Science, Tsinghua University, Beijing, China. [3]Department of Global Ecology, Carnegie Institution for Science, Stanford, CA, USA. [4]Global Energy Monitor, San Francisco, CA, USA. [5]Department of Civil and Environmental Engineering, University of California, Irvine, CA, USA. *e-mail: qiangzhang@tsinghua.edu.cn; sjdavis@uci.edu

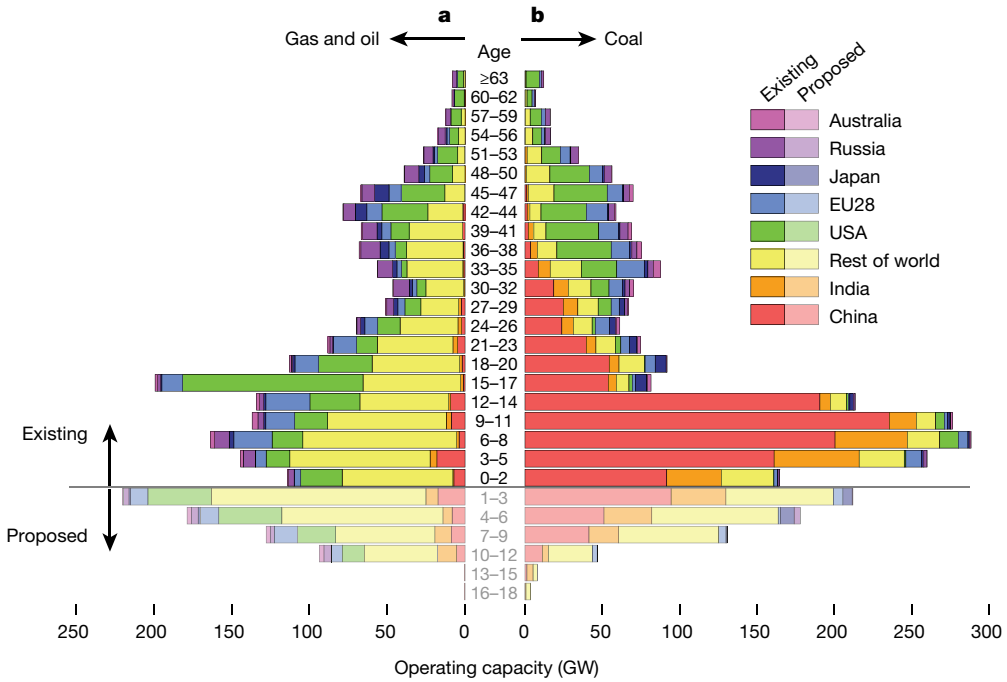


Fig. 2 | Age structure of global electricity-generating capacity. a, **b**, The operating capacity of gas- and oil-fired electricity-generating power units (**a**) and coal-fired units (**b**). The youngest existing units are shown at the bottom of the 'existing' section. The more lightly shaded bars underneath show proposed electricity-generating units according to the year (from now) that they are expected to be commissioned. The recent trends in Chinese and Indian coal-fired units (red and orange at the lower right) and US gas-fired units (green at the left) are easily apparent. '0 years old' means that the power units began operating in 2018.

such expansion may be slowing[19,20], substantial new electricity-generating capacity is proposed—and in many cases is already under construction[12]. Consequently, there is a tension between dwindling carbon-emissions budgets and future CO_2 emissions that are locked-in or 'committed' by existing and proposed energy infrastructure[6,21,22].

A 2010 study estimated that operating fossil-fuel energy infrastructure would emit roughly 500 Gt CO_2 over its lifetime[8]. Subsequent studies estimated that existing power plants alone committed around 300 Gt CO_2 as of 2012 (ref. [9]) and 2016 (ref. [12]), and that existing and proposed coal-fired power plants represented 340 Gt CO_2 as of 2016 (ref. [11]; Extended Data Table 1). Other studies have used integrated assessment models (IAMs) to assess the economic costs of 'unlocking' emissions under stringent climate goals[23,24], and to identify 'points of no return' past which no new infrastructure can be built without exceeding the 2 °C target[25]. Most recently, the potential climate responses to committed emissions were explored[13], using a reduced-complexity climate model and an idealized phase-out of fossil infrastructure to argue that aggressive mitigation of non-CO_2 forcing could yet limit global warming to 1.5 °C. However, it has been nearly a decade since a comprehensive bottom-up assessment of fossil infrastructure and committed emissions was made, during which years China's economy has grown tremendously, there has been a global financial crisis and a natural gas boom in the USA, and the Paris Agreement was ratified and entered into force. Substantial new fossil-fuel energy infrastructure has been commissioned over this period, proposals of new power plants have waxed and waned, and climate-mitigation efforts have grown more ambitious in many countries.

Here we present region- and sector-specific estimates of future CO_2 emissions related to fossil-fuel-burning infrastructure existing and power plants proposed as of the end of 2018, as well as the sensitivity of such estimates to assumed lifetime and utilization rates, and the economic value of associated energy assets. Our analyses are based upon a compilation of the most detailed and up-to-date datasets for energy infrastructure available (see Methods). Our central estimates assume historical lifetimes (for example, 40 years for power plants and industrial boilers and 15 years for light-duty vehicles) and utilization rates (for example, region- and fuel-specific power-plant capacity factors and region-specific averages of vehicle fuel economy and annual kilometres travelled).

Figure 1 shows future CO_2 emissions from existing and proposed energy and transportation infrastructure by sector (Fig. 1a) and country/region (Fig. 1b). We estimate that cumulative emissions by existing infrastructure, if operated as historically, will be 658 Gt CO_2. Of this total commitment, 54% or 358 Gt CO_2 is anticipated to come from existing electricity infrastructure (mainly power plants), reflecting the large share of annual emissions from electricity infrastructure (46% in 2018) and the long historical lifetimes of the infrastructure. Another 25% of the total, or 162 Gt CO_2, is related to industrial infrastructure, and 10% or 64 Gt CO_2 is related to the transportation sector (mainly on-road vehicles; Fig. 1a). This difference reveals the effect of infrastructure lifetimes: although industry and road-transportation sectors have similar annual CO_2 emissions (6.2 Gt and 5.9 Gt CO_2, respectively, in 2018), vehicle lifetimes are roughly a third as long as that of industrial capital. Finally, existing residential and commercial infrastructure represents respectively 42 Gt and 18 Gt CO_2 of committed emissions.

Global committed emissions are now at the apex of a 20-year trend. From 2002 to 2014, as China emerged as a global economic power, total committed emissions grew at an average annual rate of 9% per year (Extended Data Fig. 1a). Meanwhile, committed emissions related to infrastructure in the USA and the 28 member states of the European Union (EU28) have been shrinking since 2006 (Extended Data Fig. 1c). Since 2014, the rate of infrastructure expansion in China and India has also fallen, and committed emissions in China declined by 7% between 2014 and 2018, even as committed emissions in the rest of the world have continued to climb (Extended Data Fig. 1a, c). These most recent trends may reflect nascent shifts in China's economic structure[19] and global trade[20], and may be important harbingers of future changes in regional annual CO_2 emissions[9].

Figure 2 shows the age distribution of electricity-generating units worldwide. Overall, the youth of fossil-based generating units worldwide is striking: worldwide, 49% of the capacity now in operation was

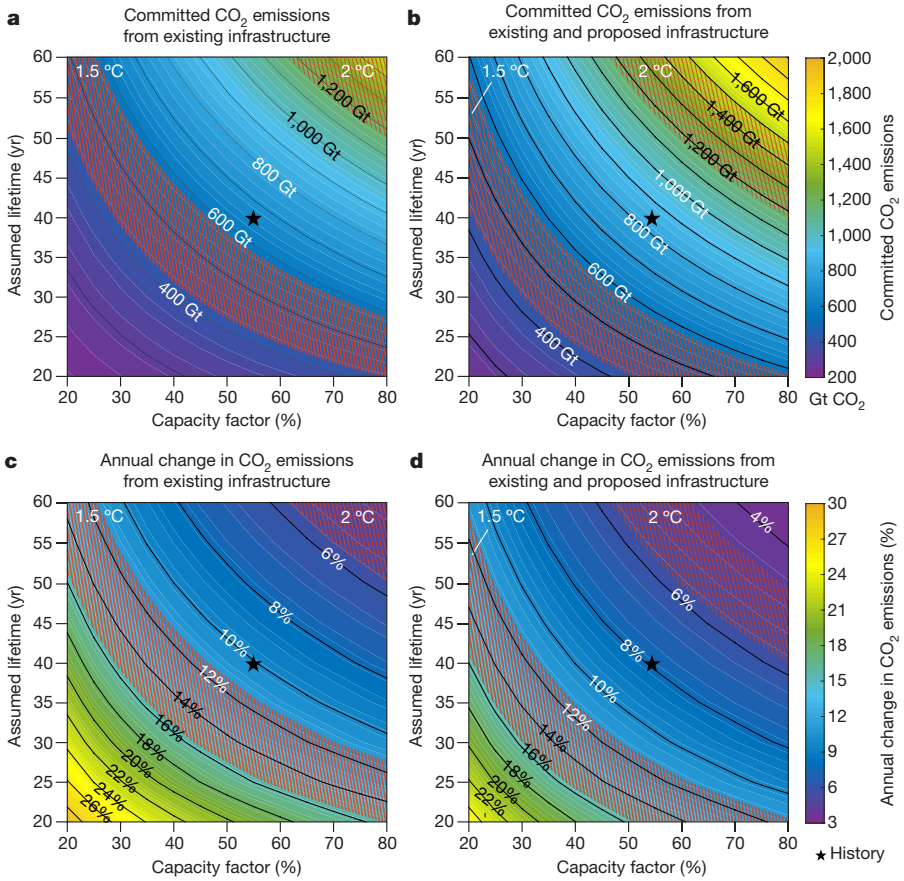


Fig. 3 | Sensitivity of committed emissions and mitigation rates to utilization rates and assumed lifetimes. a, **b**, Committed CO_2 emissions. Contours show estimates of committed CO_2 emissions related to existing infrastructure (**a**) and existing infrastructure plus proposed power plants (**b**) when the assumed lifetimes and utilization rates of electricity and industry infrastructure are varied from 20 years to 60 years (vertical axes) and from 20% to 80% (horizontal axes). **c**, **d**, Committed mitigation rates. For the same ranges of lifetime and utilization as in panels **a**, **b**, the annual rates of emission reduction span from 3% to 30% (**c**, **d**). Hatched orange and red zones indicate carbon budgets and mitigation rates that are likely to limit mean warming to 1.5 °C and 2 °C, respectively (see Methods), and stars denote committed emissions and mitigation rates if existing/and proposed infrastructure is operated as historically.

commissioned after 2004; in China and India, the post-2004 capacity is 79% and 69%, respectively. The average age of coal-fired power plants operating in China and India (11.1 and 12.2 years, respectively) is thus much lower than in the USA and EU28 (39.6 and 32.8 years, respectively; Fig. 2b), with correspondingly longer remaining lifetimes. The predominance of young Chinese infrastructure (which extends to the industrial and transportation sectors; Extended Data Figs. 2, 3) reflects the scale and speed of the country's industrialization and urbanization since the turn of the century. As a result, infrastructural inertia is greatest in China, accounting for 41% of all committed emissions (270 Gt CO_2; Fig. 1b). By comparison, infrastructure in India, the USA and the EU28 represents much smaller commitments: 57 Gt, 57 Gt and 49 Gt CO_2, respectively (Fig. 1b, Supplementary Table 1).

In addition to existing infrastructure, new power plants are being planned, permitted or constructed, and the committed emissions related to such proposed plants can be estimated[11,12]. As of the end of 2018, the best available data showed that 579 gigawatts (GW), 583 GW and 40 GW of coal-, gas- and oil-fired generating capacity respectively was proposed to be built over the next few years (some 20% of it in China; Fig. 2). If built and operated as historically, this proposed capacity would represent an additional 188 Gt CO_2 committed: 97 Gt CO_2 from coal-fired and 91 Gt CO_2 from gas-, oil- and other-fuel-fired generating units (Supplementary Table 2).

Together, committed emissions from existing infrastructure and proposed power plants total 846 Gt CO_2 if all proposed plants are built and all infrastructure is operated as historically (Fig. 1).

Existing electricity and industry infrastructure accounts for 79% of total committed emissions if operated as historically (that is, with a 40-year lifetime and 53% utilization rate; Fig. 1a). However, the lifetime and operation of such infrastructure will ultimately depend on the relative costs of competing technologies, which are in turn influenced by factors such as technological progress and the climate and energy policies in each region[22,26]. Figure 3 highlights the sensitivity of committed emissions (Fig. 3a, b) and the rate of annual emissions reductions (Fig. 3c, d; see Methods) with respect to assumed lifetimes and utilization rates (that is, the capacity factors) of industry and electricity infrastructure (note that the lifetimes and operation of infrastructure in other sectors do not vary from historical averages), with the star in each panel indicating historical average values. For example, total committed emissions related to existing infrastructure decrease to around 200 Gt CO_2 if lifetimes are 20 years and capacity factors are 20%, but increase to almost 1,500 Gt CO_2 if lifetimes and capacity factors are respectively 60 years and 80% (Fig. 3a). These ranges of lifetimes and utilization are quite wide, at the low end probably exceeding economic feasibility for recouping capital investments and covering fixed operating and maintenance costs. When proposed power plants are included, total committed emissions over the same range of lifetimes and capacity factors increase to 263–1,906 Gt CO_2 (Fig. 3b). Maintaining historical capacity factors, a 5-year difference in the lifetime of existing infrastructure represents roughly 70–100 Gt of future CO_2 emissions (Fig. 3a), or about 90–130 Gt if proposed power plants are included (Fig. 3b). Maintaining historical lifetimes and changing the assumed capacity factor by a comparable 9% (for example, from 46% to 55%) results in roughly the same changes in committed emissions, suggesting that these factors have a similar influence.

For comparison, the hatched red and orange zones in Fig. 3a, b show the Intergovernmental Panel on Climate Change (IPCC)'s most recent estimated ranges of remaining cumulative carbon budgets that span the 66%–50% probabilities of limiting global warming to 1.5 °C and 2 °C, relative to the preindustrial era[5]. Excluding proposed power plants, our central estimate of committed emissions (658 Gt CO_2; star in Fig. 3a) exceeds the range of the remaining 1.5 °C budget (420–580 Gt CO_2)[5]. When proposed plants are included, our estimate of committed emissions (846 Gt CO_2; star in Fig. 3b) is two-thirds of the lower estimates of the 2 °C budgets (1,170–1,500 Gt CO_2)[5]. This suggests that, unless compensated by negative-emissions technologies or by retrofitting with carbon capture and storage, 1.5 °C carbon budgets allow for no new emitting infrastructure and require substantial changes to the lifetime

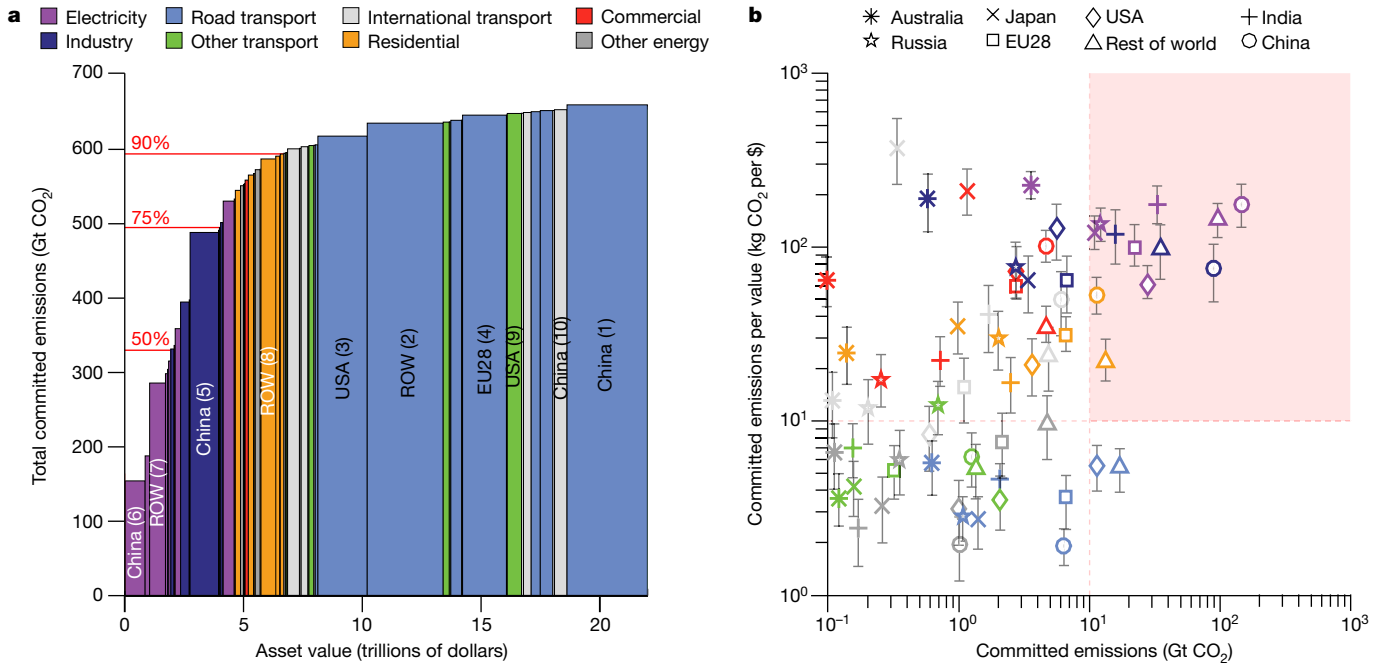


Fig. 4 | Asset value and committed emissions of existing infrastructure. **a**, Rank ordering of CO_2-emitting assets by committed emissions per dollar value reveals large disparities (coloured by sector). The horizontal red lines indicate 50%, 75% and 90% of total committed emissions (658 Gt CO_2) if operated as historically, and the top ten most valuable region sectors are labelled (see Extended Data Fig. 4 for region-specific versions). ROW, rest of world. **b**, Plotting emissions per value (in kilograms of CO_2 per US dollar) against committed emissions suggests targeted opportunities to 'unlock' future CO_2 emissions if alternative technologies become affordable (region sectors in the pink-shaded quadrant). Error bars denote 95% confidence intervals.

or operation of existing energy infrastructure (for example, decreasing lifetimes to less than 25 years or capacity factors to less than 30%; Fig. 3a). Moreover, CO_2 emissions related to the extraction and transport of fossil fuels[27], as well as non-energy CO_2 emissions (for example, resulting from land-use change)[28], are not included in our estimates and will further reduce the remaining carbon budgets.

Climate targets have sometimes been contextualized by the annual rate of emissions reduction they imply. For example, it has been shown[29] that, as of 2013, the cumulative carbon budgets likely to avoid 2 °C of mean warming imply necessary average annual reductions in global CO_2 emissions (that is, mitigation rates) of roughly 6% per year. The hatched areas in Fig. 3c, d show that such mitigation rates, recalculated from the latest carbon budgets, are about 5% per year for the 2 °C budgets (4.5–5.7%) and about 13% per year for the 1.5 °C budgets (11.4–15.7%). By comparison, the contours in the figure show mitigation rates if no new emitting infrastructure is commissioned (10.1%; star in Fig. 3c), or if only already-proposed power plants but no other emitting infrastructure is commissioned (7.9%; star in Fig. 3d). Again, the international targets leave little or no room for new infrastructure if existing plants operate as they have historically (stars), unless fully compensated by negative emissions or retrofitted with carbon capture and storage technology.

Given the constraints of 1.5 °C and 2 °C carbon budgets, we also explore the economic value of existing infrastructure relative to its associated committed emissions. Figure 4a highlights the disproportionality of committed emissions per unit asset value. Together, power and industry infrastructure (purple and dark blue, respectively, in Fig. 4a) represent more than 75% of total committed emissions (519 Gt of 658 Gt CO_2), but less than 25% of the estimated economic value of CO_2-emitting energy infrastructure (roughly US $5 trillion of US $22 trillion; Extended Data Fig. 4 and Supplementary Table 3; see Methods for details of how asset values were amortized). By contrast, transportation infrastructure, with shorter average lifetimes but high capacity costs and a vast number of discrete units, represents roughly two-thirds of the value of emitting assets and less than 10% of committed emissions (Fig. 4a). This analysis suggests that efforts to reduce committed emissions might cost-effectively target the early retirement of electricity and industry infrastructure—despite their often powerful influence on policy and institutions[6,21,22]—if non-emitting alternative technologies are affordable: the magnitude of commitments in these sectors is large and a single dollar of asset value is related to more than 10 kg of future CO_2 emissions (Fig. 4b, red rectangle). Industry and electricity sectors in China represent especially prime targets for unlocking future emissions: nearly half (46%) of these sectors' global committed emissions are associated with Chinese infrastructure (Fig. 4a).

Detailed and up-to-date analysis of existing and proposed CO_2-emitting energy infrastructure worldwide reveals incredibly tight constraints for present international climate targets, even if no new emitting infrastructure is ever built. Although climate and energy analysts have emphasized that avoiding, for example, 1.5 °C of warming remains "technically possible"[5], our results lend vivid context to that possibility: we would have a reasonable chance of achieving the 1.5 °C target with, first, a global prohibition of all new CO_2-emitting devices (including many or most of the already-proposed fossil-fuel-burning power plants); and second, substantial reductions in the historical lifetimes and/or utilization rates of existing industry and electricity infrastructure.

Barring such radical changes, the global climate goals adopted in the Paris Agreement are already in jeopardy and may be contingent upon widespread retrofitting of existing emitting infrastructure with carbon capture and storage technologies (which would be tremendously expensive[30]), large-scale deployment of negative emissions technologies[16], and/or solar-radiation management[4]. On the other hand, our results suggest that the precise level of future warming in excess of the Paris targets depends largely on infrastructure that has not yet been built (Extended Data Fig. 5).

Some important caveats and limitations apply to our findings. The trajectory of future emissions depicted in Fig. 1 represents a scenario in which existing (and proposed) emitting infrastructure 'ages out', and no new emitting infrastructure is ever commissioned. These constraints are not intended to be realistic; rather, they allow

us to isolate and quantify infrastructural—and related economic—lock-in of energy-related emissions[22]. Indeed, technological trends and climate-energy policies that encourage growth in renewable electricity (for example, solar and wind) may lead to early retirement of existing fossil-fuel power plants in some regions (although recent growth of renewable electricity generation has not always displaced fossil-fuel generation[18]). It is also instructive to compare our estimates of committed emissions with plausible energy-emissions scenarios generated by much more sophisticated (but less transparent) IAMs that calculate infrastructure lifetimes and capacity factors endogenously. For example, a recent IAM study of 1.5 °C scenarios found that large-scale CO_2 removal may be necessary to compensate for 'residual' emissions from long-lived and difficult-to-decarbonize sectors of the energy system (for example, freight, aviation and shipping[4])[31].

The size of carbon budgets associated with a given temperature target is also a complicated matter that is sensitive to a host of factors, such as climate sensitivity and non-CO_2 emissions[14,15]. The budgets from the recent IPCC special report[5] are estimates of cumulative net global anthropogenic CO_2 emissions from the start of 2018 until net-zero global CO_2 emissions are achieved (that is, climate is stabilized) with a 66%–50% probability of limiting an increase in mean near-surface air temperatures to 1.5 °C or 2 °C, with limited (less than 0.1 °C) or no overshoot (see Methods for further discussion).

Although ambitious climate targets such as 1.5 °C may help to motivate and accelerate the transition towards net-zero energy systems, their feasibility is often evaluated by the existence of consistent scenarios from IAMs. However, these models have been used to analyse a very large possibility space, and some scenarios may thus reflect aspirational trajectories of energy demand or technological progress and scale whose likelihood may be difficult to evaluate[32,33]. Our data-driven assessment of existing, operating and valuable energy infrastructure may therefore help to elucidate the infrastructural and economic implications of such targets, and also help to identify targeted regional and sectoral opportunities for unlocking future CO_2 emissions.

Online content

Any methods, additional references, Nature Research reporting summaries, source data, statements of code and data availability and associated accession codes are available at https://doi.org/10.1038/s41586-019-1364-3.

Received: 2 December 2018; Accepted: 10 May 2019;
Published online 1 July 2019.

1. Matthews, H. D. & Caldeira, K. Stabilizing climate requires near-zero emissions. *Geophys. Res. Lett.* **35**, L04705 (2008).
2. Meinshausen, M. et al. Greenhouse-gas emission targets for limiting global warming to 2 °C. *Nature* **458**, 1158–1162 (2009).
3. Rogelj, J. et al. Zero emission targets as long-term global goals for climate protection. *Environ. Res. Lett.* **10**, 105007 (2015).
4. Davis, S. J. et al. Net-zero emissions energy systems. *Science* **360**, eaas9793 (2018).
5. Rogelj, J. et al. Mitigation pathways compatible with 1.5°C in the context of sustainable development. In: *Global warming of 1.5 °C. An IPCC Special Report on the Impacts of Global warming of 1.5 °C above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty* (eds Masson-Delmotte, V. et al.) https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15_Chapter2_Low_Res.pdf (2018).
6. Unruh, G. C. & Carrillo-Hermosilla, J. Globalizing carbon lock-in. *Energy Policy* **34**, 1185–1197 (2006).
7. Matthews, H. D., Gillett, N. P., Stott, P. A. & Zickfeld, K. The proportionality of global warming to cumulative carbon emissions. *Nature* **459**, 829–832 (2009).
8. Davis, S. J., Caldeira, K. & Matthews, H. D. Future CO_2 emissions and climate change from existing energy infrastructure. *Science* **329**, 1330–1333 (2010).
9. Davis, S. J. & Socolow, R. H. Commitment accounting of CO_2 emissions. *Environ. Res. Lett.* **9**, 084018 (2014).
10. Tong, D. et al. Targeted emission reductions from global super-polluting power plant units. *Nat. Sustain.* **1**, 59–68 (2018).
11. Edenhofer, O., Steckel, J. C., Jakob, M. & Bertram, C. Reports of coal's terminal decline may be exaggerated. *Environ. Res. Lett.* **13**, 024019 (2018).
12. Pfeiffer, A., Hepburn, C., Vogt-Schilb, A. & Caldecott, B. Committed emissions from existing and planned power plants and asset stranding required to meet the Paris Agreement. *Environ. Res. Lett.* **13**, 054019 (2018).
13. Smith, C. J. et al. Current fossil fuel infrastructure does not yet commit us to 1.5 °C warming. *Nat. Commun.* **10**, 101 (2019).
14. Rogelj, J. et al. Differences between carbon budget estimates unravelled. *Nat. Clim. Chang.* **6**, 245–252 (2016).
15. Peters, G. P. Beyond carbon budgets. *Nat. Geosci.* **11**, 378–380 (2018).
16. Gasser, T., Guivarch, C., Tachiiri, K., Jones, C. D. & Ciais, P. Negative emissions physically needed to keep global warming below 2 °C. *Nat. Commun.* **6**, 7958 (2015).
17. United Nations Framework Convention on Climate Change *Adoption of the Paris Agreement*. Report No. FCCC/CP/2015/L.9/Rev.1 http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf (UNFCCC, 2015).
18. Le Quéré, C. et al. Drivers of declining CO_2 emissions in 18 developed economies. *Nat. Clim. Chang.* **9**, 213–217 (2019).
19. Guan, D. et al. Structural decline in China's CO_2 emissions through transitions in industry and energy systems. *Nat. Geosci.* **11**, 551–555 (2018).
20. Meng, J. et al. The rise of South–South trade and its effect on global CO_2 emissions. *Nat. Commun.* **9**, 1871 (2018).
21. Erickson, P., Kartha, S., Lazarus, M. & Tempest, K. Assessing carbon lock-in. *Environ. Res. Lett.* **10**, 084023 (2015).
22. Seto, K. C. et al. Carbon lock-in: types, causes, and policy implications. *Annu. Rev. Environ. Resour.* **41**, 425–452 (2016).
23. Bertram, C. et al. Carbon lock-in through capital stock inertia associated with weak near-term climate policies. *Technol. Forecast. Soc. Change* **90**, 62–72 (2015).
24. Johnson, N. et al. Stranded on a low-carbon planet: implications of climate policy for the phase-out of coal-based power plants. *Technol. Forecast. Soc. Change* **90**, 89–102 (2015).
25. Pfeiffer, A., Millar, R., Hepburn, C. & Beinhocker, E. The '2 °C capital stock' for electricity generation: committed cumulative carbon emissions from the electricity generation sector and the transition to a green economy. *Appl. Energy* **179**, 1395–1408 (2016).
26. Wilson, C., Grubler, A., Bauer, N., Krey, V. & Riahi, K. Future capacity growth of energy technologies: are scenarios consistent with historical evidence? *Clim. Change* **118**, 381–395 (2013).
27. Burnham, A. et al. Life-cycle greenhouse gas emissions of shale gas, natural gas, coal, and petroleum. *Environ. Sci. Technol.* **46**, 619–627 (2012).
28. Arneth, A. et al. Historical carbon dioxide emissions caused by land-use changes are possibly larger than assumed. *Nat. Geosci.* **10**, 79–84 (2017).
29. Raupach, M. R. et al. Sharing a quota on cumulative carbon emissions. *Nat. Clim. Chang.* **4**, 873–879 (2014).
30. Rubin, E. S. & Zhai, H. The cost of carbon capture and storage for natural gas combined cycle power plants. *Environ. Sci. Technol.* **46**, 3076–3084 (2012).
31. Luderer, G. et al. Residual fossil CO_2 emissions in 1.5–2 °C pathways. *Nat. Clim. Chang.* **8**, 626–633 (2018).
32. Rogelj, J. et al. Energy system transformations for limiting end-of-century warming to below 1.5 °C. *Nat. Clim. Chang.* **5**, 519–527 (2015); corrigendum **6**, 538 (2016).
33. Grubler, A. et al. A low energy demand scenario for meeting the 1.5 °C target and sustainable development goals without negative emission technologies. *Nat. Energy* **3**, 515–527 (2018).

Acknowledgements D.T. was supported by NASA's Interdisciplinary Research in Earth Science (IDS) programme (80NSSC17K0416) and the National Natural Science Foundation of China (41625020). Q.Z. was supported by the National Natural Science Foundation of China (41625020). C.H., Y.Q. and S.J.D. were supported by the US National Science Foundation (Innovations at the Nexus of Food, Energy and Water Systems (INFEWS) grant EAR 1639318).

Reviewer information *Nature* thanks Gunnar Luderer, Katsumasa Tanaka and the other anonymous reviewer(s) for their contribution to the peer review of this work.

Author contributions S.J.D., D.T. and Q.Z. designed the study. D.T. performed the analyses, with support from Q.Z., Y.Z. and C.S. on datasets, and from S.J.D., Q.Z., K.C., C.H. and Y.Q. on analytical approaches. D.T. and S.J.D. led the writing with input from all coauthors.

Competing interests The authors declare no competing interests.

Additional information
Extended data is available for this paper at https://doi.org/10.1038/s41586-019-1364-3.
Supplementary information is available for this paper at https://doi.org/10.1038/s41586-019-1364-3.
Reprints and permissions information is available at http://www.nature.com/reprints.
Correspondence and requests for materials should be addressed to Q.Z. or S.J.D.
Publisher's note: Springer Nature remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.

© The Author(s), under exclusive licence to Springer Nature Limited 2019

METHODS

Committed emissions from existing and proposed infrastructure. We extend the approach of ref. [9] to quantify the committed emissions from existing energy infrastructure by integrating more-detailed and up-to-date available data on energy infrastructure, including country- and duty-specific vehicle sales data, and unit-level details on global power plants and Chinese cement kilns and blast furnaces[10,34–39]. We also estimate committed emissions from proposed power plants by collecting information on all proposed power generators from the latest available databases[34,37], in recognition of substantial changes in the pipeline of planned power plants (especially coal) in recent years[34]. Energy infrastructure as quantified in this study is categorized into eight sectors: (1) electricity, (2) industry, (3) road transport, (4) other transport, (5) international transport, (6) residential, (7) commercial and (8) other energy infrastructure (see Supplementary Tables 4 and 5).

Electricity infrastructure. Emissions from electricity infrastructure in this study include all emissions under category 1A1 of the IPCC's revised guidelines[40]. Electricity infrastructure here mainly includes main activity electricity and heat production (1A1a) and petroleum refining (1A1b), as well as the manufacturing of solid fuels and other energy industries (1A1c) (Supplementary Table 5).

Emissions intensities of electricity infrastructure. Previously, we built and published a comprehensive global thermal power plants database (named the Global Power Emissions Database, or GPED) of the year 2010 by integrating high-quality national databases (from China, India and the USA)[10]. Here we update the GPED database to the year 2018 (named GPED-2018) using the latest power plant database from China (CPED)[36] and the Platts World Electric Power Plant (WEPP) database for other regions[37], including all retired and operating units through to the end of 2018. We obtain data and estimates of unit-based CO_2 emission intensity (that is, grams CO_2 per kilowatt-hour) for all units that were operating in 2010 from GPED. For units retired before 2010 or commissioned since 2010, we estimate unit-level CO_2 emission intensity by the methods of ref. [9] on the basis of the Carbon Monitoring for Action (CARMA) database[35] (for older units), or else use national or regional average CO_2 emission intensity for units with the same fuel type and similar nameplate capacity. As prior studies have done, we assume these emissions intensities are constant over a unit's lifetime[8,9].

Assumed lifetime of electricity infrastructure. In the resulting GPED-2018, the global average lifetimes of retired coal-, natural-gas- and oil-fired power units are 35.9, 37.1 and 33.9 years, respectively. Consistent with ref. [9], we simplify these ranges to a single reference lifetime of 40 years for all electricity-generating units for our 'as historically' case, and show the sensitivity of committed emissions to this assumption in Fig. 3. When units are already operating beyond their assumed lifetime, we randomly retire them over the next five years in order to avoid unrealistically abrupt changes in emissions between 2018 and 2019.

In addition, we assume that the age structure and lifetime of autoproducers (industrial and commercial facilities that generate their own electricity on-site)[40] and other energy industries are similar to the main-activity power plants in each region. Therefore, committed emissions from existing electricity infrastructure are quantified by using the survival curves derived from main-activity power plants, scaled to include these other types of electricity infrastructure by using country-level electricity emissions totals in 2018 from the International Energy Agency (IEA). Note that, because of data availability[41], we derived the country-level CO_2 emissions from fossil-fuel combustions for 2018 by multiplying country-level CO_2 emissions in 2016 by projected change rates during 2016–2018.

Finally, we quantify cumulative future CO_2 emissions from proposed power plants by the same procedure (assuming historical average unitization rates and lifetimes), using a database of proposed coal-fired units that has been developed by CoalSwarm[34] and the planned units fired with other fossil fuels from the 2018 (fourth quarter) WEPP database[37].

Industry infrastructure. Industrial emissions in this study include all emissions under category 1A2 of the IPCC's revised guidelines[40]. For all countries but China, we estimate cumulative future emissions from industry infrastructure by using country-level emissions data for the year 2018 obtained from the IEA, assuming that the age distribution and survival curves of each region's industry infrastructure are consistent with its electricity infrastructure. To derive China's industrial survival curves, we use unit-level details of cement kilns and blast furnaces (iron and steel) that are currently operating in China (Extended Data Fig. 2), obtained from China's Ministry of Ecology and Environment (MEE) (our unpublished data, referred to hereafter as the MEE database).

Our detailed data on Chinese infrastructure represent an important improvement over prior estimates of committed emissions, as China alone accounts for roughly 47% of total industrial emissions[41]. In particular, the iron/steel and non-metallic minerals (for example, cement and glass) industries account for about 50% of all industrial CO_2 emissions in recent years[41], and China produced 49.6% of the world's raw steel and 57.3% of the world's cement in 2016 (ref. [42]). The unit-level data on China's industrial infrastructure thus substantially decrease the uncertainty of committed industry emissions, by alleviating the need for assumptions related to almost half of global industry infrastructure (that is, 9.0% of global CO_2 emissions from all sources[41]). Moreover, we observe that the age distributions of electricity and industry infrastructure in China are quite similar (Extended Data Fig. 6), which lends support to our assumption that this is the case in other regions for which we lack detailed data on industrial infrastructure.

Transportation infrastructure. Transport emissions in this study include all emissions under category 1A3 of the IPCC's revised guidelines[40], which includes emissions from road transport, other transport and international transport (Supplementary Tables 4, 5).

We calculated cumulative future emissions from road transport following the approach in ref. [8] and further updating the activity rates with updated country-, region- and duty-specific vehicle sales data[38,39] (that is, 18% of global CO_2 emissions from all sources[41]). Specifically, we use the number, class and vintage of motor vehicles sold during 1977–2017 from 40 major countries and regions[38,39] (information for 2018 was derived by projecting 2016–2017 rates of change one additional year; Extended Data Fig. 3). Owing to data availability, we estimate the number of vehicles remaining on the road over time by using class and model year-specific survival rates of US and Chinese vehicles to represent developed (the USA) and developing (China) countries or regions[43,44]. We then calculate annual vehicle emissions by using the average miles driven per year (MPY) per vehicle by class, and carbon emission factors of 10.23 kg and 11.80 kg CO_2 per gallon of gas and diesel, respectively, and scale our estimated emissions to match country-level road-transport emissions in 2018 as reported by the IEA[41].

'Other transportation' infrastructure includes existing aviation, rail, pipeline, navigation and other non-specified transport. International transport infrastructure includes international marine bunkers and international aviation bunkers (Supplementary Table 4). Again, we follow ref. [8], estimating cumulative future CO_2 emissions from existing other and international transport by using country-level emissions data for 2018 from IEA, and assuming lifetimes and age distributions similar those of to motor vehicle fleets in each country/region.

Residential, commercial and other energy infrastructure. Residential and commercial emissions are included under category 1A4 of the IPCC's revised guidelines[40], and 'other energy' emissions include, for example, emissions from agriculture, forestry, fishing and aquaculture under category 1A4, as well as stationary, mobile and multilateral operations under category 1A5. We calculated cumulative future emissions from this infrastructure by using country-level emissions data for 2018 derived from the IEA[41], and assuming that age distributions and lifetimes of residential, commercial and other energy infrastructure in each region were similar to electricity infrastructure in the same region in the absence of better information.

The least-supported methodological assumptions that we make thus concern this residential, commercial and other energy infrastructure (representing around 10% of total fossil fuel CO_2 emissions in 2016; ref. [41]), where we lack any unit-level data. In order to test the sensitivity of total committed emissions from this infrastructure, we performed additional analyses of different assumed lifetimes. We found the committed emissions from residential, commercial and other energy infrastructure to be 29, 74 and 135 Gt CO_2 when lifetimes of respectively 20, 40 and 60 years are assumed (Extended Data Fig. 7). That is, our estimates of total committed emissions from all existing energy infrastructure decrease by 7% (to 613 Gt CO_2) if lifetimes of residential, commercial, and other energy infrastructure are assumed to be 20 years, and increase by 9% (to 719 Gt CO_2) if the lifetimes are assumed to be 60 years. In comparison with the carbon budgets associated with targets of 1.5 °C and 2 °C, these are relatively small effects, and not substantial enough to affect the main conclusions of our study.

Comparison of cumulative future emissions estimates. Other studies[8,9,11–13] have analysed committed emissions from various infrastructures in different ways, as mentioned in the text and summarized in Extended Data Table 1.

For example, refs [11,12] both reported committed emissions relating to existing and planned power plants using 2016 data. Although the latter analysed committed emissions from all fossil electricity infrastructure[12], the former focused particularly on coal-fired units[11]. Importantly, the 2018 data used herein reveal that substantial cancellations of proposed plants have occurred over the intervening two years: whereas the previous studies estimated that around 150 Gt CO_2 (ref. [11]) and 210 Gt CO_2 (ref. [12]) were committed by proposed coal plants, we estimate only around 100 Gt CO_2—that is, 50–100 Gt CO_2 less (or 10%–20% of the remaining carbon budget that is consistent with 1.5 °C warming). Moreover, our study contains more-detailed estimates of regional commitments and the sensitivity of these commitments to assumed lifetime and capacity factor.

Most recently, ref. [13] estimated the global warming related to committed emissions by using a reduced-complexity climate model (Finite Amplitude Impulse Response, or FaIR). Their study also included estimates of committed emissions from all sectors, but these relied on past estimates of the age distribution of fossil-fuel infrastructure and an idealized, linear phase-out of such infrastructure[13]. Because turnover of infrastructure has decreased the median

age of electricity-generating capacity in many regions (Fig. 2), our estimates of electric power sector commitments (358 Gt CO_2) are about 13 Gt CO_2 greater than those used in ref. [13] (345 Gt CO_2). Our data-driven approach also permits region-specific results, analysis of the trend in commitments over time, inclusion of proposed power plants, and an assessment of the economic value of underlying infrastructures. Yet, because the estimates of CO_2 emissions committed by other infrastructure in ref. [13] are larger than our bottom-up estimates (Extended Data Table 1), the overall estimate reached by their idealized approach (715 Gt CO_2) is nonetheless similar to ours (658 Gt CO_2).

The authors of ref. [13] assess global climate responses to committed CO_2 increases and conclude that the world is not yet committed to a 1.5 °C warming. However, it is difficult to directly compare the magnitude of the CO_2 emissions in the phase-out scenarios of ref. [13] with the 1.5 °C carbon budgets in the IPCC's special report[5] (SR1.5), for two reasons. First, although SR1.5 also used the FaIR model in its procedure for evaluating non-CO_2 forcing, it did not use the FaIR model's transient climate response to cumulative emissions (TCRE), which is smaller and would have led to considerably larger carbon budgets. Second, the mitigation scenarios evaluated ref. [13] also assumed that non-CO_2 emissions are completely phased out in parallel to CO_2 emissions, but the integrated assessment model scenarios on which SR1.5's non-CO_2 forcing (and carbon budgets) are based do not completely eliminate non-CO_2 emissions this century[45].

Variation in utilization rates and assumed lifetimes. As described above, cumulative future committed emissions from electricity and industry infrastructure depend on present utilization rates and assumed lifetimes. The longer the assumed lifetime and higher the utilization, the greater the estimate of committed emissions will be. Therefore, we test the sensitivity of committed emissions to assumed lifetimes and utilization rates of energy and industry infrastructure across lifetimes from 20 years to 60 years, and utilization rates of 20% to 80%.

Remaining carbon budgets to limit mean warming to 1.5 °C and 2 °C. As described in the text and discussed in recent literature, the size of carbon budgets associated with a given temperature target is a complicated matter that is sensitive to a host of factors[14,15], including: (1) whether the budget reflects cumulative net emissions until the temperature target is exceeded, or cumulative net emissions that limit the global temperature increase to below the target (that is, climate is stabilized); (2) whether there can be a temporary overshoot of the temperature target (and by how much)[46]; (3) the climate responses to CO_2 and non-CO_2 forcings[47]; (4) the magnitude and Earth-system response to negative emissions[48]; (5) how global temperature is calculated; (6) the pre-industrial baseline used[49]; (7) whether Earth-system feedbacks such as permafrost thawing are included[50–53]; and (8) future emissions of non-CO_2 greenhouse gases and aerosols[54,55].

The magnitude of non-CO_2 forcing is particularly relevant to assessments of committed emissions, because non-CO_2 forcing is inversely related to the remaining carbon budget[54,55], and because some non-CO_2 greenhouse gases and aerosols are directly related to the current energy system (for example, fugitive methane[56]) or are co-emitted with CO_2 by fossil-fuel-burning infrastructure. Other large sources of non-CO_2 gases and aerosols exist outside of the energy system, such as agriculture[57]. For the SR1.5 budgets[5], non-CO_2 forcing was estimated using integrated assessment model scenarios and a pair of reduced-complexity climate models (Model for the Assessment of Greenhouse-gas Induced Climate Change (MAGICC) and FaIR), with substantial uncertainties associated with both scenario variations (± 250 Gt CO_2) and climate responses (−400 Gt to 200 Gt CO_2) for the 1.5 °C budget. Non-CO_2 greenhouse gases and aerosols decline but do not reach zero in any of the scenarios assessed in the SR1.5 report. By contrast, ref. [13] modelled the complete phase-out of non-CO_2 emissions in parallel with energy-related CO_2 emissions—a formidable scenario that was found to have a high probability (64%) of limiting warming to 1.5 °C.

In this study, we compare our estimates of committed emissions to the SR1.5 budgets[5]. As defined in SR1.5, 'remaining' carbon budgets are the cumulative net global anthropogenic CO_2 emissions from a given start date (1 January 2018) to the year in which such emissions reach net zero that would result, at some probability, in limiting global warming to a given level[5]. By this definition, budgets are not simply cumulative emissions until the time at which mean temperature exceeds a given threshold[14], but rather what have been called 'threshold avoidance' or 'stabilization' budgets. The SR1.5 budgets were derived from the transient climate response to cumulative CO_2 emissions in climate model simulations that have been further adjusted to include additional climate forcing related to non-CO_2 greenhouse gases and aerosols[45]. They do not include Earth-system feedbacks (which SR1.5 suggests could reduce the remaining budgets by 100 Gt CO_2 over this century).

However, as remaining budgets associated with a mean surface warming of 1.5 °C dwindle, uncertainties in transient climate responses to CO_2 emissions[15,47] and the current and future non-CO_2 forcing loom large[53–55]. In order to make our results as useful, transparent and comparable as possible, we report positive, CO_2-only commitments from existing and proposed fossil-fuel-burning infrastructure, and compare these to the remaining (stabilization) carbon budgets reported by SR1.5 to give a 66%–50% probability of limiting warming to 1.5 °C and 2 °C with little (0.1 °C) or no overshoot: that is, 420–580 Gt CO_2 and 1,170–1,500 Gt CO_2, respectively (see table 2.2 in ref. [5]). Thus, if not offset by negative emissions, the total committed emissions that we estimate if existing infrastructure operates as it has historically (that is, 658 Gt CO_2) would make it likely that global temperatures will exceed 1.5 °C unless the remaining carbon budgets in SR1.5 are substantially wrong. For example, the climate response to CO_2 could be less than expected on the basis of the climate model simulations assessed in SR1.5, and/or non-CO_2 forcing in the future could be much less than it is on average in the integrated assessment model scenarios that were assessed by SR1.5. Indeed, ref. [13] analysed a future in which both are true.

Estimates of the annual rate of emission reductions. We estimate annual rates of emissions reduction ('mitigation rates') following ref. [29]:

$$f(t) = f_0(1 + (r+m)t)\exp(-mt)$$

where $f(t)$ is the emissions at time t; f_0 is the emissions at the start of mitigation ($t = 0$); r is an initially linear growth rate; m is the annual rate of emission reductions; and r and m both have units of 'per year'. We calculate the annual rate of emission reductions needed to meet a quota, q, from $t = 0$ onward (with emission time $T = q/f_0$) as:

$$m(q) = \frac{1+\sqrt{1+\frac{rq}{f_0}}}{\frac{q}{f_0}} = \frac{1+\sqrt{1+\frac{r}{T}}}{T}$$

We use initial emissions, f_0, at 2018 (32.7 Gt) and growth rates, r, averaged over 2013–2018 (0.028%) (obtained from the IEA[41]) to estimate mitigation rates under different cumulative CO_2 emissions, which we assumed to be equivalent to the carbon quota, q.

Estimates of asset value from existing infrastructure. We estimate the asset value by sector and by country/region using the following equation:

$$\mathrm{AV}_{i,s} = \sum_{n=\mathrm{PY}-\mathrm{LT}}^{\mathrm{PY}} \sum_{y} \{\mathrm{TC}_{i,s,n,y} \times \mathrm{CC}_{i,s,n,y} \times [(1-\mathrm{RV}) \times \mathrm{DR}_{i,s,n,y} + \mathrm{RV}]\}$$

where i, s, n and y represent the country/region, sector, years and combustion/production technology, respectively; AV is the asset value; TC is the equivalent total capacity/numbers; CC is the capital costs; RV is the ratio of residual value, with 5% applied for all infrastructure; DR is the depreciation rate; PY is the present year (2018 in this study); and LT is lifetime.

We adopt a sector-dependent method, and apply straight-line and geometric models for different infrastructures, as in Supplementary Table 6. We collected data on capital costs used to estimate asset values from previous literature[12,21,23–25,58,59] and various reports[60–64]. Wherever possible, we use interannual and national average capital costs for different combustion/production technologies and equipment. Where interannual and national averages are not available, we instead use an average for all of the countries in the same region for which capital cost data are available.

Electricity infrastructure. We estimate the total value of fossil-fuel-based electricity-generating assets according to each unit's power-generating capacity (in kilowatts) and age, as well as fuel- and technology-specific capital costs (in dollars per kilowatt).

The assumed lifetime of coal power plants is 40 years. Although plants can operate for considerably longer periods, shutting down a plant after its assumed lifetime will not result in any stranded capital investment, since the initial capital cost will have been fully paid[24]. Thus, our estimates only include the asset value of operating electricity-generating units that are now less than 40 years old. Unit-level details of electricity-generating technologies were obtained from the GPED-2018 database.

In addition, part of the committed CO_2 emissions in electricity infrastructure is from heating plants. We have evaluated the asset value of combined heat and power (CHP) plants along with that of other power plants, but we estimate the asset value of individual heating plants separately, using IEA data on heating output (in terajoules, TJ)[65,66] to estimate the capacity of such heating plants and converting this to an equivalent power capacity (in GW) by assuming that they operate with the average utilization rates of power-generating units in the same region. Supplementary Table 6 summarizes our assumptions in estimating asset values for individual heating plants.

Industrial infrastructure. 'Industrial infrastructure' includes various facilities and systems from different subindustrial sectors (Supplementary Tables 4 and 5). Considering the difficulty of collecting the operating capacity for all of the subindustrial sectors, we estimate the value of industry infrastructure as the combined asset values of cement, iron and steel plants, and industrial boilers. As described above, we estimated the asset values for cement, iron and steel capacity that has

been operating less than 40 years only. We quantified asset values from the cement, iron and steel industries through total capacity and capital investment per unit (Supplementary Table 6).

We estimate total capacities (in tonnes per hour, t h^{-1}) of industrial boilers at country- or region-specific level by fuel type, using total energy consumptions obtained from the IEA[65,66]. We assume the utilization rates of industrial boilers to be the same as the average utilization rates of electricity infrastructure. The related assumptions are shown in Supplementary Table 6.

Transport infrastructure. We quantify the asset values from road transport, other transport and international transport separately. For road-transport infrastructure, we estimate asset value using the number of annual vehicle sales, annual average new car prices, and a depreciation-rate function. The data sources for the number of annual vehicle sales are described above, and we further collect annual average new car prices by vehicle type and country/region[39]. Because depreciation rates tend to be considerably lower in developing countries than in industrialized countries[67], we adopt different depreciation-rate functions for developing and developed countries[67].

For international-transport infrastructure, we estimate the value of international ships and international airplanes. Owing to limited data availability, we use the same approach as with heating infrastructure, basing our estimates on the total energy consumption (fuels) for international aviation and international navigation from the IEA, and converting to the number of reference narrow-body aircraft and standardized international freight ships by such fuel consumption. Specifically, we assume 2 million kilometres per year for each aircraft, and 149 megajoules per airplane kilometre, for reference narrow-body aircrafts[21] (Supplementary Table 6); and 940 million annual tonnes per kilometre, and an average ship energy intensity of 0.125 megjoules per tonne kilometre, for international freight ships[21]. We use the same total average depreciation rates for international transport as we do for road-transport infrastructure.

We use a similar approach for other transport (that is, domestic ships, domestic airplanes and non-specific transport), adopting the same assumptions applied for international transport for domestic ships and domestic airplanes. For non-specific transport, we quantify asset values by converting to the number of conventional diesel heavy-duty freight trucks. The corresponding assumptions are shown in Supplementary Table 6.

Residential, commercial and other energy infrastructure. We quantify the asset values of residential, commercial and other energy infrastructure separately using sector- and fuel-specific energy-consumption data from the IEA[65,66].

Residential and commercial infrastructure uses energy for space heating, heating water, and cooking. Other energy infrastructure includes uses of energy for agriculture, fishing and other activities. Given very limited data, we quantify the value of residential and commercial infrastructure by using an equivalent capacity of normalized space heating units, water-heating units and cooking equipment. For the 'other energy' infrastructure, we quantify the asset value by converting to normalized agriculture machines, fishing boats and boilers. We then apply the total average depreciation rates of electricity infrastructure to these residential, commercial and other energy infrastructures.

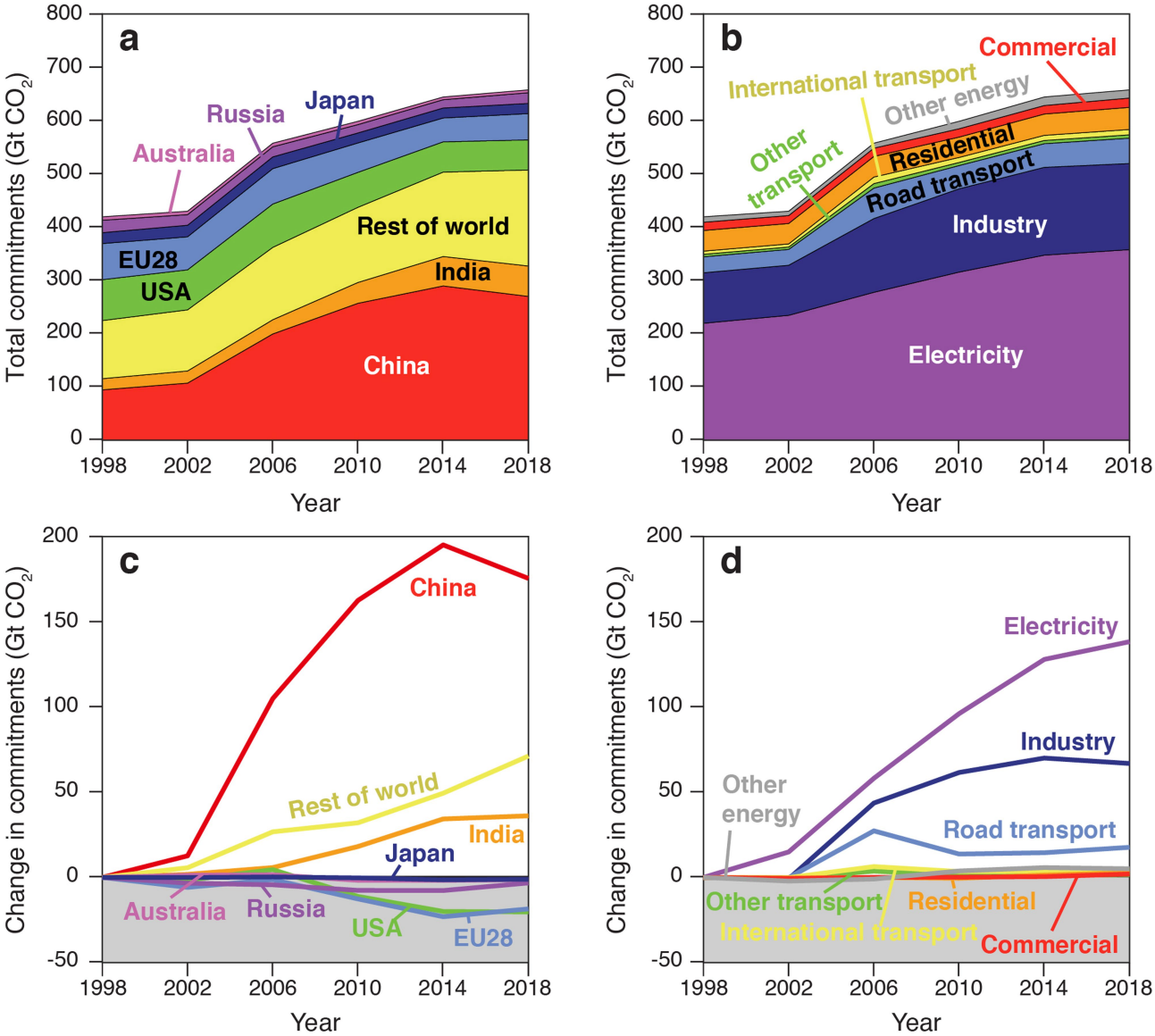
Uncertainty estimation. Our estimates of asset values are subject to uncertainty owing to incomplete knowledge of operating capacities, age structure and capital costs per unit. In order to more completely assess uncertainties in our results, we perform a Monte Carlo analysis of asset values by sector and by country/region, in which we vary key parameters according to published ranges[58,68,69] and collected capital costs data as above. The error bars in Fig. 4 depict the results of this analysis, showing the lower and upper bounds of a 95% confidence interval (CI) around our central estimate. The Monte Carlo simulation uses specified probability distributions for each input parameter (for example, capital cost per unit, and the ratio of residual value) to generate random variables[68]. The probability distribution of asset values is estimated according to a set of runs ($n = 10{,}000$) in a Monte Carlo framework with probability distributions of the input parameters. The ranges of sector and region parameter values vary in part because of the quality of their statistical infrastructures[69]. Supplementary Table 7 summarizes the probability distributions of the asset value estimation-related parameters.

Data availability

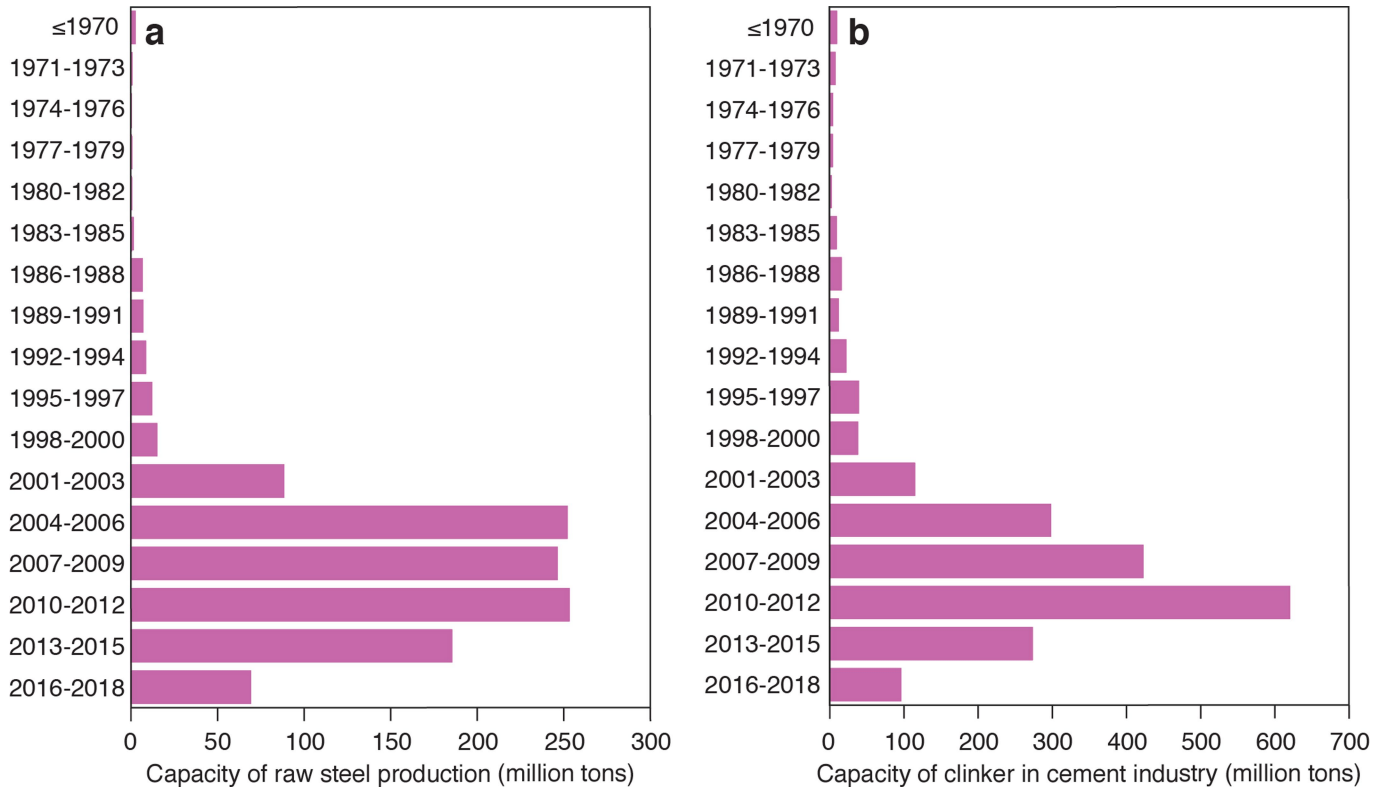
The numerical results plotted in Figs. 1–4 are provided with this paper. Our analysis relies on six different data sets, each used with permission and/or by license. Five are available from their original creators: (1) the GPED database: http://www.meicmodel.org/dataset-gped.html; (2) Platt's WEPP database: https://www.spglobal.com/platts/en/products-services/electric-power/world-electric-power-plants-database; (3) the Carbon Monitoring for Action (CARMA) database: http://carma.org/; (4) the CoalSwarm database: https://endcoal.org/tracker/; and (5) vehicle sales data: https://www.statista.com/markets/419/topic/487/vehicles-road-traffic/. The sixth data set includes unit-level data for Chinese iron, steel and cement infrastructure, which we obtained directly from the Chinese Ministry of Ecology and Environment. We do not have permission to share the raw data, but we provide it in an aggregated form (Extended Data Fig. 2).

34. Shearer, C. et al. *Boom and Bust 2018: Tracking the Global Coal Plant Pipeline*. March 2018 Report (CoalSwarm, Sierra Club and Greenpeace, 2018).
35. Ummel, K. *CARMA Revisited: An Updated Database of Carbon Dioxide Emissions From Power Plants Worldwide*. Working Paper 304 (Center for Global Development, 2012).
36. Tong, D. et al. Current emissions and future mitigation pathways of coal-fired power plants in China from 2010 to 2030. *Environ. Sci. Technol.* **52**, 12905–12914 (2018).
37. World Electric Power Plant Database (WEPP). *S&P Global Platts* https://www.spglobal.com/platts/en/products-services/electric-power/world-electric-power-plants-database (2018).
38. Ward's World Motor Vehicle Data. *Wards Intelligence* http://wardsauto.com/wards-world-motor-vehicle-data-0 (2008).
39. Statistics and Facts about Vehicles & Traffic, 2006-2017. *Statista* https://www.statista.com/ (2018).
40. *IPCC Guidelines for National Greenhouse Gas Inventories* Vol. 4 (Bracknell, 2006).
41. International Energy Agency. CO_2 emissions from fuel combustion statistics, 2016. *Organization for Economic Cooperation and Development (OECD)* https://www.oecd-ilibrary.org/energy/co2-emissions-from-fuel-combustion-2016_co2_fuel-2016-en (2016).
42. National Minerals Information Center. Commodity Statistics and Information. *United States Geological Survey* https://www.usgs.gov/centers/nmic/commodity-statistics-and-information (2016).
43. Davis, S. C. & Diegel, S. W. *Transportation Energy Data Book* 25th edn (Center for Transportation Analysis, Oak Ridge National Laboratory, 2006).
44. Zheng, B. et al. High-resolution mapping of vehicle emissions in China in 2008. *Atmos. Chem. Phys.* **14**, 9787–9805 (2014).
45. Forster, P. et al. *Mitigation Pathways Compatible with 1.5 °C in the Context of Sustainable Development: Supplementary Material* https://report.ipcc.ch/sr15/pdf/sr15_chapter2_supplementary_materials.pdf (2018).
46. Tanaka, K. & O'Neill, B. C. The Paris Agreement zero-emissions goal is not always consistent with the 1.5 °C and 2 °C temperature targets. *Nat. Clim. Chang.* **8**, 319–324 (2018).
47. Millar, R. J. et al. Emission budgets and pathways consistent with limiting warming to 1.5 °C. *Nat. Geosci.* **10**, 741–747 (2017); correction **11**, 454–455 (2018).
48. Jones, C. D. et al. Simulating the Earth system response to negative emissions. *Environ. Res. Lett.* **11**, 095012 (2016).
49. Schurer, A. P., Mann, M. E., Hawkins, E., Tett, S. F. B. & Hegerl, G. C. Importance of the pre-industrial baseline for likelihood of exceeding Paris goals. *Nat. Clim. Chang.* **7**, 563–567 (2017).
50. Lowe, J. A. & Bernie, D. The impact of Earth system feedbacks on carbon budgets and climate response. *Phil. Trans. Royal Soc. A* **376**, 20170263 (2018).
51. Comyn-Platt, E. et al. Carbon budgets for 1.5 and 2 °C targets lowered by natural wetland and permafrost feedbacks. *Nat. Geosci.* **11**, 568–573 (2018); correction **11**, 882–886 (2018).
52. Gasser, T. et al. Path-dependent reductions in CO_2 emission budgets caused by permafrost carbon release. *Nat. Geosci.* **11**, 830–835 (2018); correction **12**, 80 (2019).
53. MacDougall, A. H., Zickfeld, K., Knutti, R. & Matthews, H. D. Sensitivity of carbon budgets to permafrost carbon feedbacks and non-CO_2 forcings. *Environ. Res. Lett.* **10**, 125003 (2015); correction **11**, 019501 (2016).
54. Mengis, N., Partanen, A.-I., Jalbert, J. & Matthews, H. D. 1.5 °C carbon budget dependent on carbon cycle uncertainty and future non-CO2 forcing. *Sci. Rep.* **8**, 5831 (2018).
55. Rogelj, J., Meinshausen, M., Schaeffer, M., Knutti, R. & Riahi, K. Impact of short-lived non-CO_2 mitigation on carbon budgets for stabilizing global warming. *Environ. Res. Lett.* **10**, 075001 (2015).
56. Alvarez, R. A. et al. Assessment of methane emissions from the U.S. oil and gas supply chain. *Science* **361**, 186–188 (2018).
57. Carlson, K. M. et al. Greenhouse gas emissions intensity of global croplands. *Nat. Clim. Chang.* **7**, 63–68 (2017).
58. Hirth, L. & Steckel, J. C. The role of capital costs in decarbonizing the electricity sector. *Environ. Res. Lett.* **11**, 114010 (2016).
59. Meunier, G., Ponssard, J.-P. & Thomas, C. Capacity investment under demand uncertainty: the role of imports in the U.S. cement industry: capacity investment under demand uncertainty. *J. Econ. Manage. Strategy* **25**, 455–486 (2016).
60. U.S. Energy Information Administration. *Levelized Cost and Levelized Avoided Cost of New Generation Resources in the Annual Energy Outlook*. Report No AEO2019 https://www.eia.gov/outlooks/aeo/pdf/electricity_generation.pdf (2019).
61. U.S. Energy Information Administration. *Capital Cost Estimates for Utility Scale Electricity Generating Plants* https://www.eia.gov/analysis/studies/powerplants/capitalcost/pdf/capcost_assumption.pdf (2016).
62. Schröder, A., Kunz, F., Meiss, J., Mendelevitch, R. & Von Hirschhausen, C. *Data Documentation: Current and Prospective Costs of Electricity Generation until 2050*. Report No. 68 (Deutsches Institut für Wirtschaftsforschung, 2013).
63. Energy Technology Systems Analysis Programme. *Industrial Combustion Boilers*. Technology Brief I01. https://www.etsap.org (International Energy Authority, 2010).
64. Energy Technology Systems Analysis Programme. *Cooking Appliances*. Technology Brief R06. https://www.etsap.org (International Energy Authority, 2012).

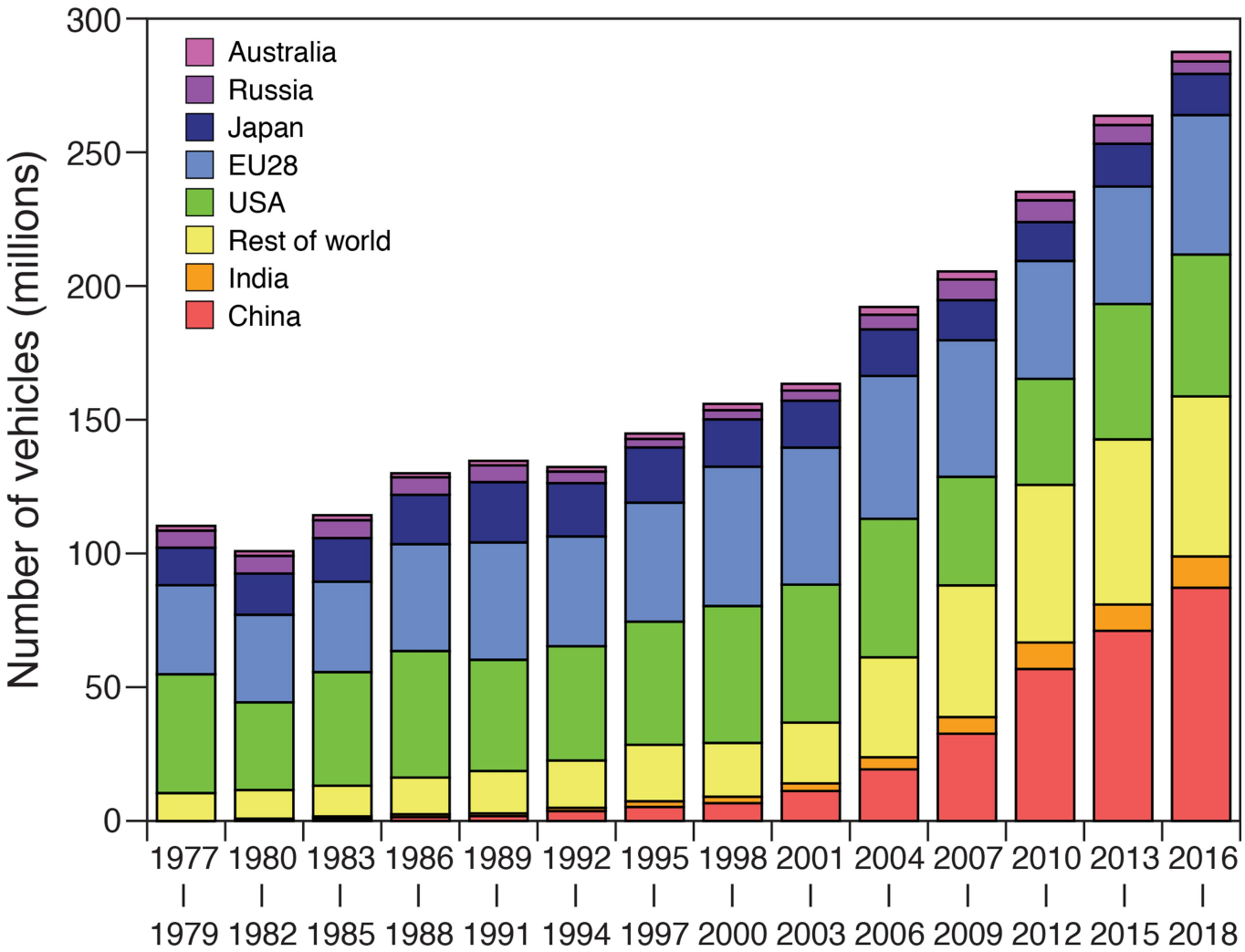
65. International Energy Agency. *Energy Statistics and Balances of OECD Countries 2015*. https://www.iea.org/classicstats/relateddatabases/worldenergystatisticsandbalances/(2016).
66. International Energy Agency. *Energy Statistics and Balances of Non-OECD Countries 2015*, (2016).
67. Storchmann, K. On the depreciation of automobiles: an international comparison. *Transportation* **31**, 371–408 (2004).
68. Liu, F. et al. High-resolution inventory of technologies, activities, and emissions of coal-fired power plants in China from 1990 to 2010. *Atmos. Chem. Phys.* **15**, 18787–18837 (2015).
69. Janssens-Maenhout, G. et al. HTAP_v2.2: a mosaic of regional and global emission grid maps for 2008 and 2010 to study hemispheric transport of air pollution. *Atmos. Chem. Phys.* **15**, 11411–11432 (2015).



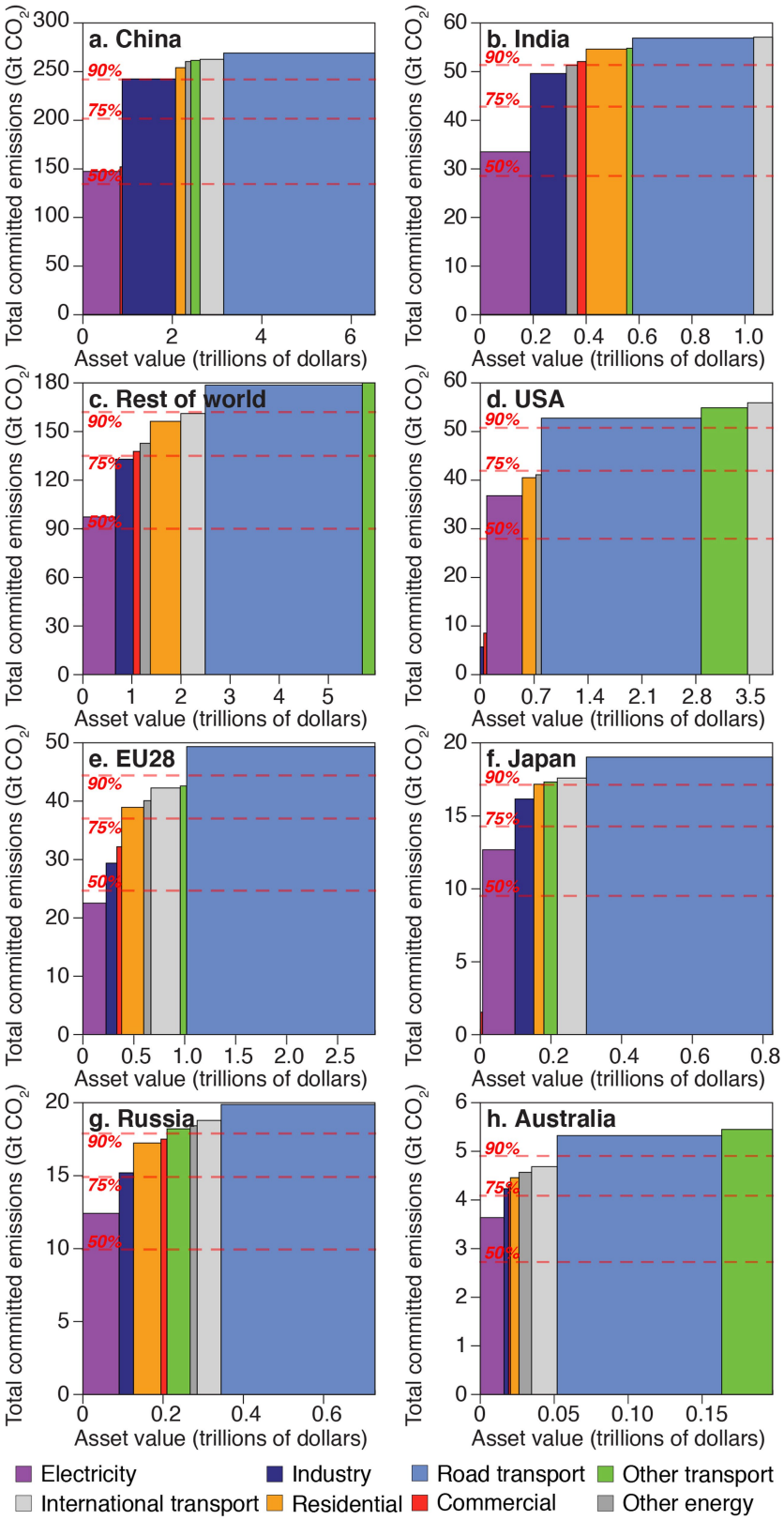
Extended Data Fig. 1 | Changes in commitments from existing energy infrastructure. a, **b**, Estimates of future CO_2 emissions every four years (1998, 2002, 2006, 2010, 2014 and 2018) by industry sector (**a**) and country/region (**b**), assuming historical lifetimes and utilization rates. **c**, **d**, Corresponding changes in remaining commitments by industry sector (**c**) and country/region (**d**).



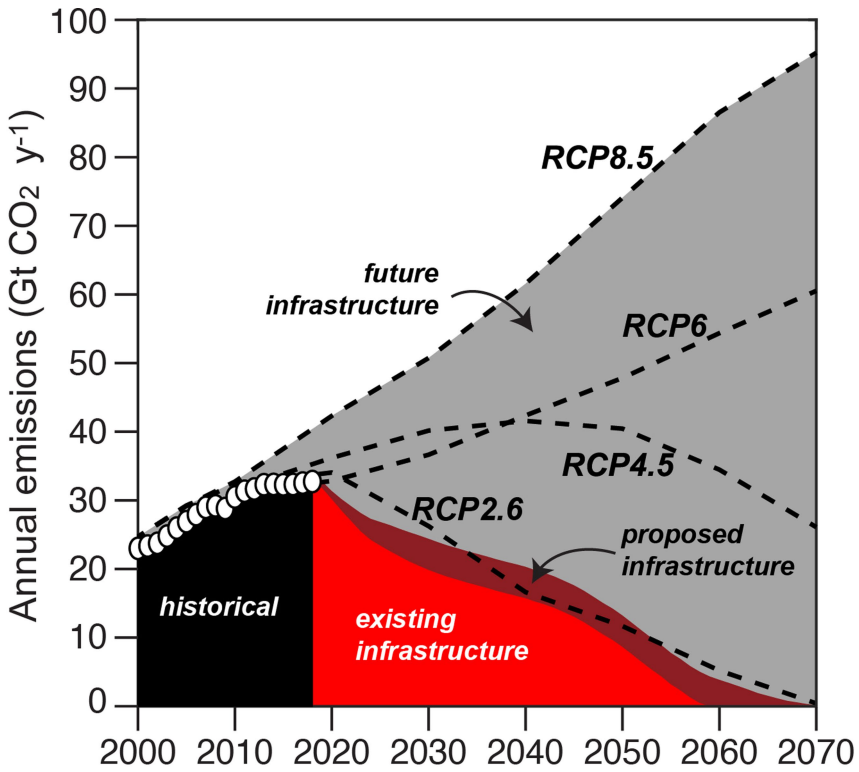
Extended Data Fig. 2 | Age structure of Chinese major industrial capacity. a, **b**, The operating capacity of raw steel in the iron and steel industry (**a**) and clinker in the cement industry (**b**). The youngest units are shown at the bottom.



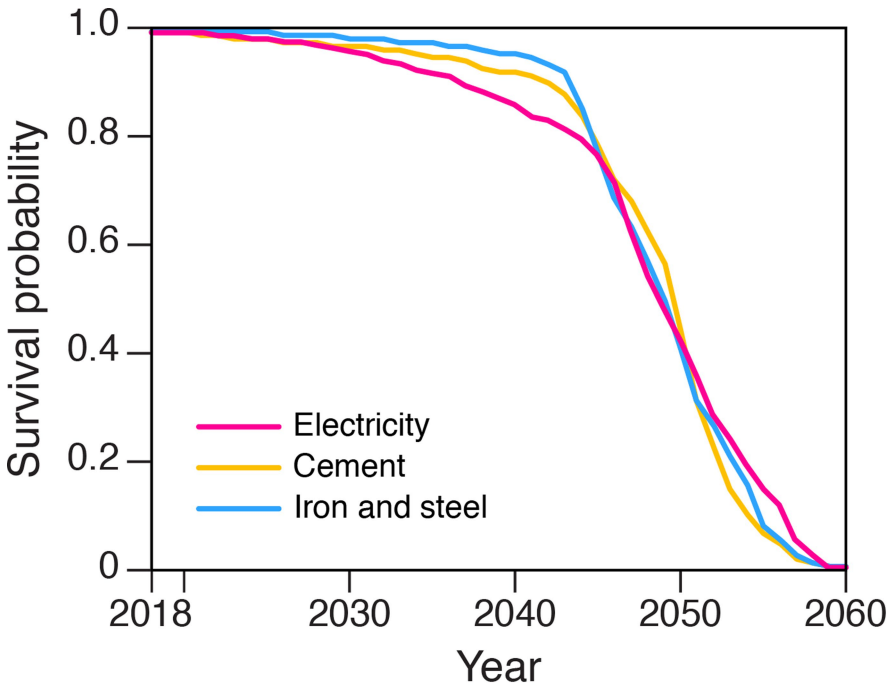
Extended Data Fig. 3 | Age structure of existing road-transport infrastructure. This figure shows the numbers of vehicle sales by country/region.



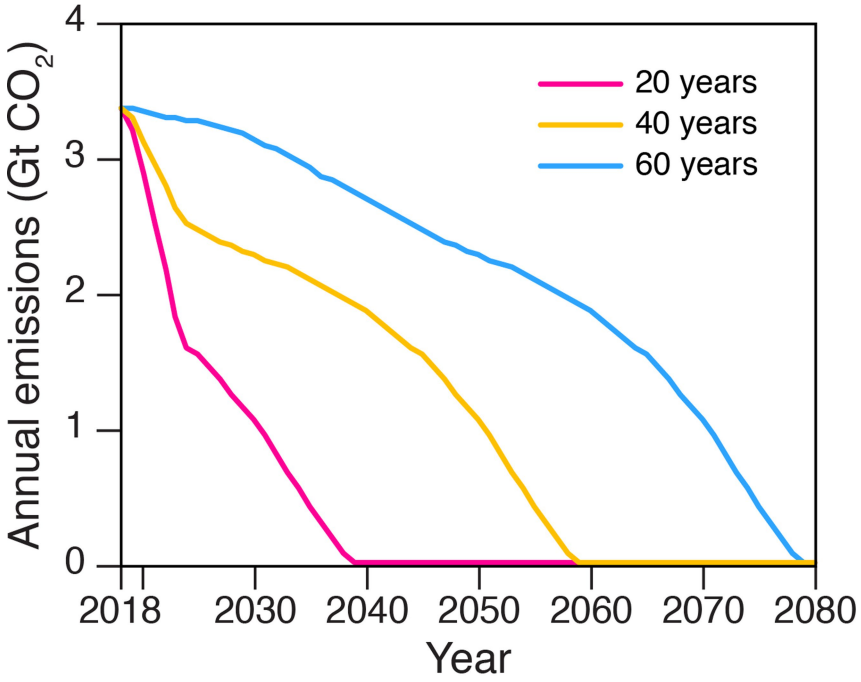
Extended Data Fig. 4 | Asset values and committed emissions for existing infrastructure. Total committed emissions are plotted against asset value, by country/region and sector. Dashed horizontal lines indicate 50%, 75% and 90% of total committed emissions if operated as historically.



Extended Data Fig. 5 | Annual emissions from existing, proposed and future infrastructure. The figure shows historical CO_2 emissions from fossil-fuel energy infrastructure (black), and future CO_2 emissions from existing (red) and proposed (dark red) energy infrastructure, as well as future infrastructure (dark grey) under particular representative concentration pathways (RCPs: RCP8.5, RCP6, RCP4.5 and RCP2.6).



Extended Data Fig. 6 | Survival curves for power and major industries in China. This figure shows survival curves for the electricity sector, cement industry, and iron and steel industry in China under the assumption of 40-year lifetimes.



Extended Data Fig. 7 | Annual emissions from residential, commercial and other energy infrastructure. The figure shows future annual CO_2 emissions from residential, commercial and other energy infrastructure under the assumptions of 20-, 40- and 60-year lifetimes.

Extended Data Table 1 | Comparison of committed emissions

		Ref. 8		Ref. 9		Ref. 11		Ref. 12		Ref. 13		This study	
		Gt CO_2	Year of dataset	Gt CO_2	Year of dataset	Gt CO_2	Year of dataset	Gt CO_2	Year of dataset	Gt CO_2	Year of dataset	Gt CO_2	Year of dataset
Existing	Electricity	224	2009	307	2012	-	-	308	2016	345 (261-451)	2009 *	358 (240-493) †	2018
	Coal		2009	206	2012	190	2016	220	2016	-	-	260 (175-358)	2018
	Gas, oil, and other fuels		2009	100	2012	-	-	88	2016	-	-	98 (65-135)	2018
	Industry	104	2009			-	-	-	-	154 (117-191)	2009	162 (110-219)	2017
	Transport	116	2009			-	-	-	-	92 (73-110)	2017	64 (53-75)	2017
	Residential, commercial, and other energy	53	2009			-	-	-	-	121 (91-158)	2009	74 (52-105)	2018
	All Sectors	**496 (282-701)**				-	-	-	-	**715 (546-909)**	-	**658 (455-892)**	-
Proposed	Electricity					-	-	271	2016	-	-	188 (142-234)	2018
	Coal					150	2016	210	2016	-	-	97 (74-121)	2018
	Gas, oil, and other fuels					-	-	61	2016	-	-	91 (68-113)	2018
All Sectors + Proposed Electricity												**846 (597-1,126)**	

Comparison of committed emissions by sector, estimated here and previously[8,9,11–13]. Note that, in some cases, the totals may not correspond to the sum of the underlying sectors, owing to rounding.
*The age distribution of infrastructure is the same as in 2009, but annual emissions from the infrastructure were adjusted up to 2018 levels.
†The range represents the committed emissions estimated under the assumption of 30–50-year lifetimes for all sectors except transportation (12–18-year lifetimes).

4

Climate-Induced Community Relocation in the Pacific: The Meaning and Importance of Land

JOHN CAMPBELL

I Introduction

In this chapter, the role of community relocation as an adaptation to climate change and variability is examined. In particular, the chapter addresses the importance of land to Pacific island communities, and the implications of this for those who may be forced to sever ties with it (in some extreme cases it is conceivable that land may even disappear). It also addresses the converse of this process—the implications for communities in Pacific island countries that may be required to provide resettlement areas to relocatees who have no traditional rights of access to that land.[1]

The Pacific Islands (see Figure 1) have been singled out as being among those places that may be rendered uninhabitable by the effects of climate change. In particular, it is anticipated by many that Pacific island communities may be among the vanguard of those who become environmentally forced relocatees.[2] Not all observers accept this view,[3] and while some leaders of atoll states earlier toyed with the notion of environmentally forced relocation (perhaps as a means of leverage to gain immigration access for their citizens in countries such as Australia and New Zealand),[4] many now reject such a response as unacceptable.[5] Nevertheless, the

[1] The term 'relocatee' is used in this chapter to refer to members of communities that are relocated as a group, as opposed to individual migrants. For a more detailed discussion of terminology, see section II below.

[2] See, eg N Myers, 'Environmental Refugees: A Growing Phenomenon of the 20th Century' (2002) 357 *Philosophical Transactions of the Royal Society B* 609; F Biermann and I Boas, 'Protecting Climate Refugees: The Case for a Global Protocol' (2008) 50 *Environment* 8.

[3] C Mortreux and J Barnett, 'Climate Change, Migration and Adaptation in Funafuti, Tuvalu' (2009) 19 *Global Environmental Change* 105.

[4] See Statement by the Hon Teleke P Lauti (Tuvalu) at COP 6 (The Hague, November 2000), cited in Climate Change Secretariat (UNFCCC), *Climate Change: Small Island Developing States* (Bonn, UNFCCC, 2005) 13.

[5] J McAdam and M Loughry, 'We Aren't Refugees', *Inside Story* (30 June 2009), http://inside.org.au/we-arent-refugees/.

Copyright 2010. Hart Publishing. All rights reserved. May not be reproduced in any form without permission from the publisher, except fair uses permitted under U.S. or applicable copyright law.

EBSCO Publishing : eBook Academic Collection (EBSCOhost) - printed on 3/18/2024 10:48 AM via UNIVERSITEIT VAN AMSTERDAM
AN: 359504 ; Jane McAdam.; Climate Change and Displacement : Multidisciplinary Perspectives
Account: uamster.main.ehost



Figure 1: Map of the Pacific Islands region. Map drawn by Max Oulton.

habitability of many settlement sites and the sustainability of their inhabitants' livelihoods may well be placed at risk by the effects of global warming. In some cases this may require people to move to more environmentally secure locations.

II Community Relocation

There are a number of terms used in the context of environmental variability and change and the movement of people.[6] The term 'relocation' is often used in relation to a variety of these concepts. For the purposes of this chapter, it is important to distinguish community relocation from other concepts such as evacuation, displacement, migration and the so-called 'environmental refugee', although there is often some overlap in the meanings of these notions. Lieber uses the general term 'resettlement' to refer to 'a process by which a number of homogenous people from one locale come to live together in a different locale'.[7] Building on Lieber's definition, the term relocation is used in this chapter to refer to the permanent (or long-term) movement of a community (or a significant part of it) from one

[6] Biermann and Boas, 'Protecting Climate Refugees', above n 2; D Kniveton, K Schmidt-Verkerk, C Smith and R Black, *Climate Change and Migration: Improving Methodologies to Estimate Flows* (Geneva, IOM Migration Research Series No 33, 2008).

[7] MD Lieber (ed), *Exiles and Migrants in Oceania* (Honolulu, University of Hawaii Press, 1977) 343.

EBSCOhost - printed on 3/18/2024 10:48 AM via UNIVERSITEIT VAN AMSTERDAM. All use subject to https://www.ebsco.com/terms-of-use

location to another, in which important characteristics of the original community, including its social structures, legal and political systems, cultural characteristics and worldviews, are retained: the community stays together at the destination in a social form that is similar to the community of origin. Community relocation, especially over long distances, may be considered as among the most radical forms of adaptation to climate change.

'Adaptation' has been defined by the Intergovernmental Panel on Climate Change (IPCC) as 'adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities'.[8] The IPCC acknowledges that adaptation may have costs, which include the 'costs of planning, preparing for, facilitating, and implementing *adaptation* measures, including transition costs'.[9] This implies that the costs of adaptation are finite and cease once the measure has been implemented. In this chapter I argue that community relocation cannot be achieved without long-term costs that may continue to be incurred over many generations. In the rural context of the Pacific Islands region, the relevant 'human systems' will be village communities, which may be seen as groups of people connected by kinship and linked by birthright and/or kinship to local land and sea resources.[10] Urban communities may also be impacted, but they are not considered in this chapter other than to note that most urban dwellers are migrants or the descendants of migrants, and therefore still have 'rights' to their ancestral homelands. The chapter seeks to identify some of the social costs of community relocation as an adaptive option. If a community is not able to re-establish itself in a new location, it may be considered to have failed to adapt successfully to change and variability. This is a distinct likelihood for the Pacific Islands region. Other forms of migration, which tend to be either individual or household-based, enable the possibility of individual people or households to be accommodated by host communities—an outcome that is much less likely for entire communities.

III Relocation as a Disaster-Reduction Measure

One of the most effective ways of reducing the impacts of extreme events is to avoid living in areas where they are common. In some jurisdictions (mostly in developed countries where land is held in fee simple and can be bought and sold), local government bodies encourage people living in hazardous sites to relocate through voluntary acquisition schemes, in which exposed properties are

[8] Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2007: Impacts, Adaptation and Vulnerability*: *Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge, Cambridge University Press, 2008) 869.

[9] ibid.

[10] P Hunnam, *Lessons in Conservation for People and Projects in the Pacific Islands Region* (New York, United Nations Development Programme, 2002).

EBSCOhost - printed on 3/18/2024 10:48 AM via UNIVERSITEIT VAN AMSTERDAM. All use subject to https://www.ebsco.com/terms-of-use

purchased (generally by the government), enabling the owners to purchase elsewhere in a safer place.[11] Moreover, in many such places, planning mechanisms exist that restrict subdivision and building on hazardous sites. Such approaches are viable in places where the dominant form of land ownership is through individual property rights. They are much more difficult to implement in places where property rights are not located in the marketplace but come under customary forms of tenure. In these settings, restricting land use on customary lands would place inequitable burdens on different communities, and those whose land is heavily exposed might find no alternatives for their settlements. The same considerations apply for communities that may find themselves increasingly exposed to the negative effects of climate change: coastal erosion and inundation, increased river flooding, and increased incidence of tropical cyclones and droughts.

There is no shortage of examples of Pacific island communities that have relocated to sites that are believed to be less exposed to natural extremes. Most commonly, such movements are to nearby locations that lie within customary land boundaries. However, in pre-colonial times and probably well into the colonial era, it was not unusual for communities to move on to neighbouring lands with the acknowledgement of the original landowners. Usually this was achieved through customary forms of negotiation and exchange. Less common, but by no means totally unusual, were movements across greater distances.

IV The Meaning of Land in Pacific Islands

Land in Pacific island countries tends to have meanings to those who 'belong' to or are 'part of' it that are often difficult to encapsulate in English or other colonial languages. Land has multiple meanings in the majority of Pacific island countries, and in many cases cannot be separated from those who 'belong' to it (see Box 1). By and large, most Pacific land is not, and cannot be, owned in fee simple or as freehold. While it can be exchanged, this is nearly always only possible under traditional arrangements. As Figure 2 shows, the great majority of land in the Pacific Islands region is held under customary forms of tenure, though these may differ from the arrangements that existed prior to contact and colonisation. Indeed, in those few countries where customary tenure accounts for less than 90 per cent of the land, 'public' forms of ownership make up the difference. By contrast, 'freehold' land makes up less than 10 per cent of land in the region. Most countries experienced some alienation of land prior to colonial rule, following which remaining areas of traditionally tenured land often became protected or, in some

[11] RW Perry and MK Lindell, 'Principles for Managing Community Relocation as a Hazard Mitigation Measure' (1997) 5 *Journal of Contingencies and Crisis Management* 49; NJ Ericksen, *Creating Flood Disaster? New Zealand's Need for a New Approach to Urban Flood Hazard* (Wellington, Water and Soil Directorate, Ministry of Works and Development, 1986).

EBSCOhost - printed on 3/18/2024 10:48 AM via UNIVERSITEIT VAN AMSTERDAM. All use subject to https://www.ebsco.com/terms-of-use

Box 1: Expressions of the importance of land

> Land to a ni-Vanuatu is what a mother is to a baby. It is with land that he defines his identity and it is with land that he maintains his spiritual strength. Ni-Vanuatu do allow others the use of their land, but they always retain the right of ownership.

The Hon Sethy Regenvanu, First Minister of Lands, quoted in HN van Trease, *The Politics of Land in Vanuatu: From Colony to Independence* (Suva, University of the South Pacific, 1987) xi.

> For example, in Cook Islands Maori, 'enua' means 'land, country, territory, after-birth': in Futuna (Wallace) 'fanua' means 'country, land, the people of a place'; in Tonga, 'fonua' means 'island, territory, estate, the people of the estate, placenta' and 'fonualoto', 'grave'. We can see that in some Polynesian languages, proto-fanua is both the people and the territory that nourishes them, as a placenta nourishes a baby.

W Pond, *The Land with All Woods and Water* (Waitangi Tribunal Rangahaua Whanui Series, Waitangi Tribunal, Wellington, 1997) 32, quoted in K Batibasaqa, J Overton, and P Horsley, '*Vanua*: Land, People and Culture in Fiji' in J Overton and R Scheyvens (eds), *Strategies for Sustainable Development: Experiences from the Pacific* (London, Zed Books, 1999) 100.

> The people of Nakorosule [a village in Fiji] cannot live without their physical embodiment in terms of their land, upon which survival of individuals and groups depends. It provides nourishment, shelter and protection, as well as a source of security and the material basis for identity and belonging. Land in this sense is thus an extension of the self; and conversely the people are an extension of the land.

A Ravuvu, *Development or Dependence: The Pattern of Change in a Fijian Village* (Suva, University of the South Pacific, 1988) 7.

> The land has even been viewed as possessing a sacred or spiritual quality, expressed in the mental attitudes of Marshallese when they think of the land as the very root of their worldly existence.

L Mason, 'Tenures from Subsistence to Star Wars' in RG Crocombe (ed), *Land Tenure in the Atolls: Cook Islands, Kiribati, Marshall Islands, Tokelau, Tuvalu* (Suva, University of the South Pacific, 1987) 4.

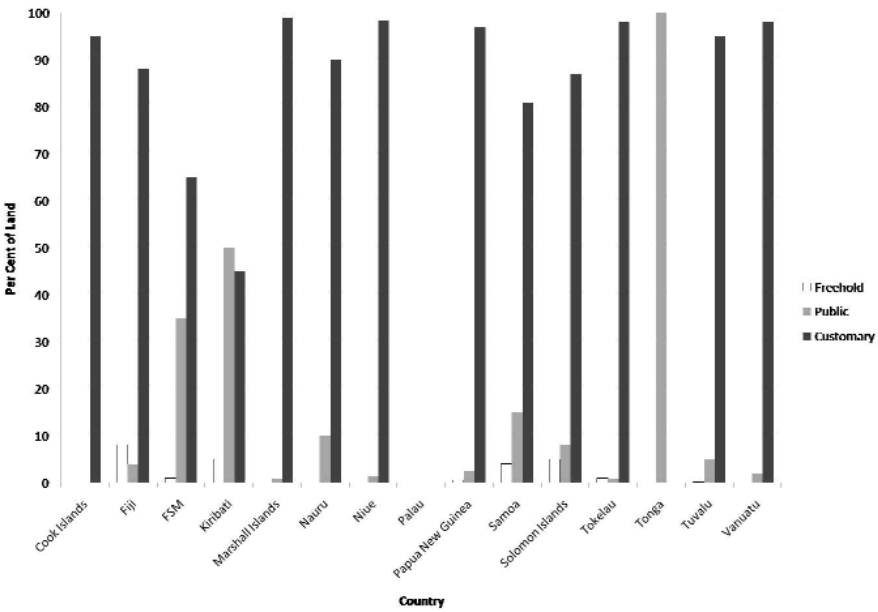
> For the people of Kapingamarangi Atoll, no other single concern seems to be as omnipresent and anxiety-provoking as their concern over land. No other single concern generates the intensity of interest and emotion as does land. People may insult one another, but the insults will be forgiven; tempers sometimes flare and end in fist fights, but others will intervene, and the opponents will apologize and forget the incident; marriages break up, but the wounds heal. But a land dispute is never forgotten, nor do the opponents forgive each other, nor is the matter ever really settled, even when the litigants are long deceased.

MD Lieber, 'Land Tenure on Kapingamarangi' in HP Lundsgaarde (ed), *Land Tenure in Oceania* (Honolulu, University Press of Hawaii, 1974) 70.

EBSCOhost - printed on 3/18/2024 10:48 AM via UNIVERSITEIT VAN AMSTERDAM. All use subject to https://www.ebsco.com/terms-of-use

cases, were returned to the original owners after independence. Thus Fiji, for example, has about 8 per cent of its land under freehold ownership. Much of this is prime land 'purchased' or taken for plantations by early colonists and coastal land that is now valued for resort subdivisions.

Figure 2: Broad land ownership categories in the pacific islands region



Source: Australian Agency for International Development (AusAID), *Making Land Work: Volume 1: Reconciling Customary Land and Development in the Pacific* (Canberra, Commonwealth of Australia, 2008) 4.

The nature of land 'boundaries' in Pacific island countries also needs to be considered, as relocation may involve crossing such borders. They exist in a variety of forms. The most highly codified system is in Fiji, where lands have been surveyed, boundaries established and the land registered according to *mataqali* (clan) membership, which for most children is registered at birth. In many other countries no such arrangements exist; boundaries may be flexible or fuzzy, and knowledge regarding them is transmitted orally. For many Pacific societies, particularly those on large land masses such as in Melanesia, landowners recognised a clear centre but their relationship to the land became increasingly vague with distance from it.[12]

[12] A Abramson, 'Bounding the Unbounded: Ancestral Land and Jural Relations in the Interior of Eastern Fiji' in A Abramson and D Theodossopoulos (eds), *Land, Law and Environment: Mythical Land, Legal Boundaries* (London, Pluto Press, 2000).

EBSCOhost - printed on 3/18/2024 10:48 AM via UNIVERSITEIT VAN AMSTERDAM. All use subject to https://www.ebsco.com/terms-of-use

The forms of customary tenure vary across the region, ranging from arrangements for individual rights to land through to communal ownership. Despite this, the idea that people are intimately connected to their land was, and to a large extent remains, widespread, as indicated in Box 1. In many parts of Polynesia and Melanesia the linkage between land and placenta is strong, and is encapsulated in the New Zealand Maori term *whenua*, which refers to both the land and placenta. The placenta is returned to the ancestral land following birth, and for many, their final resting place is on the ancestral *whenua* as well.[13] Bonnemaison uses the notion of being rooted to the land to describe the linkage of ni-Vanuatu men to their land, although women (who were traditionally likely to marry outside of their birthplace) are metaphorically described as birds that may flee their home.[14] While men were able to leave their land, long absences and distances were not encouraged. However, in other parts of the region long-distance travelling was not uncommon and the region was characterised by a very large number of trading networks, some of which covered considerable distances.[15]

It is important here not to represent Pacific people and their communities as being somehow physically bonded by their location. Waiko outlines the movement of his village in north-eastern Papua New Guinea, named Tabara, which had a 'history of fusion, division and travel' that extended over 130 kilometres in distance.[16] Jolly points to the co existence of mobility and stability in many Pacific places and invokes the paradoxical notion of both roots and routes as important aspects of Pacific island lives.[17] But venturing on routes does not suggest the loss of roots, the perhaps less tangible, but nonetheless visceral, bonds that exist and connect people with their place. Many migrants, even long-term ones, still consider themselves to belong to their land, even if they are physically dislocated from it.[18]

Accordingly, while this chapter examines the role of land tenure, or the meaning of land, in Pacific island countries, it is important to add the cautionary note that the region cannot be easily generalised into a single representation of land, nor any other characteristic—it is remarkably heterogeneous. While the specifics vary considerably, there are nevertheless some commonalities regarding the

[13] A Mikaere, *The Balance Destroyed: Consequences for Māori Women of the Colonisation of Tikanga Māori* (Auckland, International Research Institute for Māori and Indigenous Education, 2003); N Simmonds, 'Mana Wahine Geographies: Spiritual, Spatial and Embodied Understandings of Paptūānuku' (unpublished Masters Thesis, Department of Geography, Tourism and Environmental Planning, University of Waikato, New Zealand, 2009).

[14] J Bonnemaison, 'The Tree and the Canoe: Roots and Mobility in Vanuatu Societies' (1985) 26 *Pacific Viewpoint* 30.

[15] E Hau'ofa, 'Our Sea of Islands' in E Waddell (ed), *In a New Oceania: Rediscovering Our Sea of Islands* (Suva, University of the South Pacific, 1993); GR Lewthwaite, 'Geographical Knowledge of the Pacific Peoples' in HR Friis (ed), *The Pacific Basin: A History of Its Geographical Exploration* (New York, American Geographical Society, 1967).

[16] JD Waiko, 'Na Binandere, Imo Averi? We Are Binandere, Who Are You?' (1985) 26 *Pacific Viewpoint* 9, 9 (Special Issue: Mobility and Identity in the Island Pacific).

[17] M Jolly, 'On the Edge: Deserts, Oceans, Islands' (2001) 13 *The Contemporary Pacific* 417.

[18] AD Ravuvu, *Development or Dependence: The Pattern of Change in a Fijian Village* (Suva, University of the South Pacific, 1988).

EBSCOhost - printed on 3/18/2024 10:48 AM via UNIVERSITEIT VAN AMSTERDAM. All use subject to https://www.ebsco.com/terms-of-use

cultural links to land. The specific characteristics of the links may differ, but in a great many places they are very important in terms of identity, spirituality, culture and subsistence.

The effects of climate change upon the land, and the land's ability to sustain these myriad linkages, cannot be easily ignored. One of the outcomes may be that communities will have to move. Such climate-induced migration may have very serious implications, both for relocating communities and those who may have to make land available for them in their destinations. Above all, community relocation means that an important aspect of rootedness, having at least some people (kinfolk) there, sustaining the relationship with the land, or 'keeping the home fires burning', is lost. Secondly, where relocatees are moved to another place within their own country or elsewhere in the Pacific, the communal lands of other groups may need to be used. To leave one's roots is perhaps no more difficult than giving them up—in either case, there will be considerable loss: of cultural values, livelihoods, spirituality and identity. In the latter case, tensions may arise when people at the destinations feel aggrieved at having to give up land.

V Migration in and from Pacific Islands

As the discussion of roots and routes suggests, many Pacific island peoples have a great history of migration, and the ocean may be seen as a linking mechanism, a series of routes, rather than a barrier to mobility.[19] This may seem somewhat paradoxical given the strong ties to land outlined in the preceding sections. Following a symposium held in 1983 on the topic of population mobility, identity and politics, it was observed that 'if one theme overrode all the others . . . it was how the complex and deeply rooted meanings of land lay at the heart of islander identities and were in turn expressed through an astonishing diversity of movement behaviour'.[20]

The rootedness described by Bonnemaison helped explain the patterns of circular migration that were detected by early migration researchers in Pacific island countries (as well as Bonnemaison himself).[21] Migration has continued since these early studies, and for many Pacific island countries has expanded to international destinations such as Australia, New Zealand and California in the United States. For example, in the 2006 New Zealand census, the 'Pacific peoples' ethnic group included 265,000 people, an increase of 59 per cent since the 1991 census. Interestingly, 60 per cent of the 2006 Pacific island population was born in New Zealand. As well, Pacific urban centres are rapidly growing in size. Twenty-three per cent of the region's population is urban, and 10 out of 22 of the countries have

[19] Hau'ofa, 'Our Sea of Islands', above n 15.

[20] M Chapman, 'Introduction' (1985) 26 *Pacific Viewpoint* 1, 4 (Special Issue: Mobility and Identity in the Island Pacific).

[21] See, eg R Bedford, *New Hebridean Mobility: A Study of Circular Migration* (Canberra, Australian National University, 1973); Bonnemaison, 'The Tree and the Canoe', above n 14.

EBSCOhost - printed on 3/18/2024 10:48 AM via UNIVERSITEIT VAN AMSTERDAM. All use subject to https://www.ebsco.com/terms-of-use

more than half their populations living in urban areas away from their villages and customary lands.[22] The rapid urbanisation of the majority of Pacific island countries, and the burgeoning populations of Pacific islanders in the Pacific rim, does not, however, necessarily imply that the important link to land is lost. In many cases it remains just as strong and is sustained by remittances and return visits of individuals and households, as well as family reunions—often including hundreds of people, often spanning three or more generations, many of whom are returning from their Pacific rim homes.[23] Just as migrants and their descendents provide remittances, the non-migrants sustain the link to the homelands by supplying traditional foods and other products from the land to their urban and international kin.

VI Likely Effects of Climate Change on Migration

So, against this backdrop of mobility, what are the implications of climate change effects on Pacific island migration patterns? The most significant effects of climate change include reductions in agricultural productivity; coral reef and mangrove degradation, and associated reduction of marine productivity; reductions in water quantity and quality, with associated impacts on agriculture and health; increases in the frequency and magnitude of some climatic events; and coastal erosion and inundation as a result of extreme events and sea-level rise. In some cases the very habitability of places will be compromised, and in many others the combination of economic and spatial marginality (which has increased since the days of colonisation and continues to do so in the post-colonial globalised world) and increasing environmental marginality may provide sufficient 'push' factors to cause significant migrant flows. A major question is: where will such people go?

There are a number of possibilities for relocation, as shown in Figure 3. The path of least resistance, where possible, will be for communities to relocate within their own land boundaries. The link to land need not be broken and the likelihood of tensions arising from landowners who may have to cede land is negated. This kind of relocation is not at all uncommon in the Pacific Islands region and examples may be found in a number of countries. In many cases, such relocations take place after devastating climatic extremes, such as tropical cyclones with their associated river flooding and storm surge. The typical movement is inland and up to higher elevations, though it has not been unusual for lateral relocations to take place (for example, along the coast or river), only for more devastation at a later date when more climatic extremes occur. An example is the inland village of

[22] Secretariat of the Pacific Community, *Pacific Island Populations 2008* (Noumea, Secretariat of the Pacific Community, 2008).

[23] R Bedford, 'Pasifika Mobility: Pathways, Circuits and Challenges in the 21st Century' in A Bisley (ed), *Pacific Interactions: Pasifika in New Zealand, New Zealand in Pasifika* (Wellington, Institute of Policy Studies, 2008).

EBSCOhost - printed on 3/18/2024 10:48 AM via UNIVERSITEIT VAN AMSTERDAM. All use subject to https://www.ebsco.com/terms-of-use

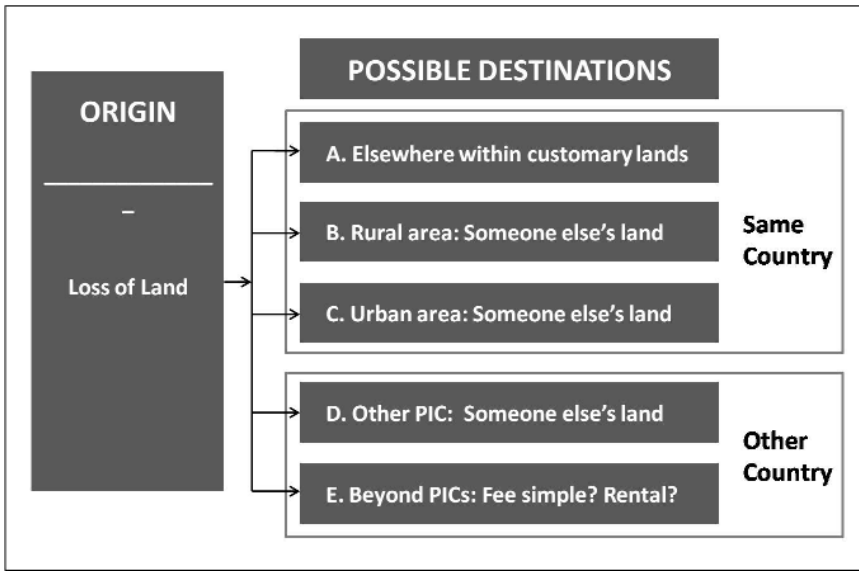


Figure 3: Options for relocation in and beyond Pacific island countries

Biausevu, located by the Biausevu River on the island of Viti Levu, in Fiji. The village occupied four different sites between 1881 and 1983, when it was finally established on a hill above the seemingly gentle river which was prone to flash flooding during tropical cyclones.[24]

Where such intra-communal shifts are not possible or feasible—the community may not have suitable options—resettlement elsewhere within the country may be required. This may range from being relocated on a neighbouring community's land, to a rural area some distance away, and even on another island. Such relocations are problematic because of the land issues discussed above. Even neighbouring communities guard their land jealously—it is 'part of' them and accordingly not something that can simply be given away or sold. Traditional means of exchange, where customary items of significant value (for example *tabua* or whale's teeth in Fiji), when presented to landowners may have enabled some relocation, are often now challenged by younger members of the 'host' or destination landowners who want evidence that legal transfer took place, even if it was generations ago when the relocation occurred.[25]

An alternative is relocation to an urban area. However, in most Pacific island towns and cities the same rules regarding land apply. While many of the early colonial administrative centres were established on relatively small areas of alienated

[24] J Campbell, 'International Relocation from Pacific Island Countries: Adaptation Failure?' (Environment, Forced Migration and Social Vulnerability Conference, Bonn, 9–11 October 2008).

[25] See, eg V Cagilaba, 'Fight or Flight? Resilience and Vulnerability in Rural Fiji' (unpublished Masters Thesis, University of Waikato, New Zealand, 2005).

EBSCOhost - printed on 3/18/2024 10:48 AM via UNIVERSITEIT VAN AMSTERDAM. All use subject to https://www.ebsco.com/terms-of-use

land, they have since far outgrown their original dimensions, especially in the post-colonial era. While it is not uncommon to find settlements of people from the same island or village in urban areas, in most cases their situation is tenuous. Because all but a small proportion of land is communally owned, even in the towns, and especially in the peri-urban[26] areas where most urban growth is taking place, new migrants are forced to live in temporary arrangements (the landowners not being prepared to accept signs of permanent settlement). Squatter settlements in Oceania are typically neglected by urban and/or national government authorities, have low levels of infrastructure provision, high levels of unemployment and under-employment, and are often highly exposed to the possibility of extreme events, including flooding and tropical cyclones. Indeed the inhabitants of many existing squatter settlements, many of which are on low-lying swampy lands and unstable slopes, may well be adversely affected by climate change and also in need of relocation. Increasing the inflow from rural areas is likely only to increase the exposure and vulnerability of the communities in these locations.

The third set of migration options includes those incorporating international relocation. These are mostly foreshadowed in the academic and popular literature as being necessary for the inhabitants of countries that are entirely composed of atolls, in which there is no 'up' to go to. There are two sets of options. The first is to relocate to another Pacific island country where the environmental, social and cultural conditions are likely to be perhaps relatively close to the place of origin, and the social, cultural, spiritual and economic costs of relocation will not be too onerous. Again, the problem of land remains, and it is unlikely that communities from one Pacific island country will be happy to give up their land to newcomers in a way that enables the newcomers to maintain their social, cultural, political and economic ways.

The second international relocation option is to relocate the community outside the Pacific Islands region, most likely in New Zealand, Australia or the United States, the three metropolitan countries with strong links to the atoll states. The possibilities for international relocation outside the region (as opposed to other forms of migration) are extremely bleak. It is unlikely that any country, including those in the Pacific, would cede sovereignty over a part of their territory to a relocated group, and it is equally unlikely that a relocated group could sustain its 'way' in a foreign land that did not accept or understand many of their cultural beliefs or practices, including their bond to the land. Indeed, with the exception of relocation within communal lands, all other forms of relocation will be fraught, whether internal or international. This leaves the possibility of separate migration decisions by individuals or groups to a variety of destinations that will see community integrity weakened, if not badly damaged. Moreover, if the land is to become uninhabited, uninhabitable, or at worst non-existent, the critical people–land union may decline. Given the essential nature of this connection, it

[26] This term refers to areas that lie outside formal urban boundaries. Typically, such areas do not have access to urban services and infrastructure.

EBSCOhost - printed on 3/18/2024 10:48 AM via UNIVERSITEIT VAN AMSTERDAM. All use subject to https://www.ebsco.com/terms-of-use

may be expected that social, cultural, emotional and spiritual impacts will emerge. The following two cases studies indicate some of the land-related issues that can arise as a result of community relocation.

VII In-Country Relocation: From the Carterets to Bougainville

An interesting case of possible environmentally, if not climatically, induced migration in the Pacific Islands is that of the attempted relocation of atoll dwellers from the Carteret Islands to the large plate boundary island of Bougainville in Papua New Guinea (see Figure 4 on the following page). The Carterets have been affected by unusually high (king) tides and experiencing considerable loss of coastal land. Singled out by the media in 2008 and 2009 as the world's first 'climate refugees',[27] the people of the Carteret Islands were engaged, in 2009, in a resettlement scheme at Tinputz, on the island of Bougainville. The Carterets are subsiding, although there seems to be no scientific certainty as to the cause. The area is tectonically unstable and this may be the reason, although the possibility of climate change-driven sea-level rise is a popular attribution. Irrespective of the causes of the subsidence relative to sea level, the Carterets provide much food for thought on the efficacy of relocation in Oceania. The case is not a new one: a group of colonial officials conducted a resource survey of the Carterets in 1964 and reported that 'erosion is a constant menace in these islands'.[28] Three years later a colonial officer visited the atoll and reported that the islands had lost hundreds of coconut palms and had been exposed to 'ruinous erosion'.[29] Population growth was adding to the stress on the atoll environment. By the late 1960s Carteret Islanders 'were reported to have a unanimous desire for resettlement as "heavy seas . . . devastated gardens and there [was] an obvious shortage of food crops" '.[30]

The North Solomons Provincial Government in Papua New Guinea began to organise a resettlement scheme in 1979 and land was set aside for the establishment of a village, but the first group of 10 families from the Carterets did not arrive until 1984. As O'Collins reported, while some dislocation was expected, the transition proved more difficult than anticipated:

[27] A Morton, 'First Climate Refugees Start Move to New Island Home', *The Age* (29 July 2009), www.theage.com.au/national/first-climate-refugees-start-move-to-new-island-home-20090728-e06x.html; N MacFarquhar, 'Refugees Join List of Climate-Change Issues', *The New York Times* (28 May 2009), www.nytimes.com/2009/05/29/world/29refugees.html.

[28] HJ Redmond, J Curran and T Sweeney, 'Resources Survey, Carteret Islands, Bougainville District' (unpublished report to District Commissioner, Kieta, 1964) quoted in M O'Collins, 'Carteret Islanders at the Atolls Resettlement Scheme: A Response to Land Loss and Population Growth' in J Pernetta and P Hughes (eds), *Implications of Expected Climate Changes in the South Pacific Region: An Overview* (Nairobi, United Nations Environment Programme, 1990) 253.

[29] Quoted in O'Collins, above n 28, 253.

[30] ibid, 250 (Letter from KJ Hanrahan, Assistant District Commissioner to the District Commissioner at Sohano, Buka Island, 11 January 1968).

EBSCOhost - printed on 3/18/2024 10:48 AM via UNIVERSITEIT VAN AMSTERDAM. All use subject to https://www.ebsco.com/terms-of-use

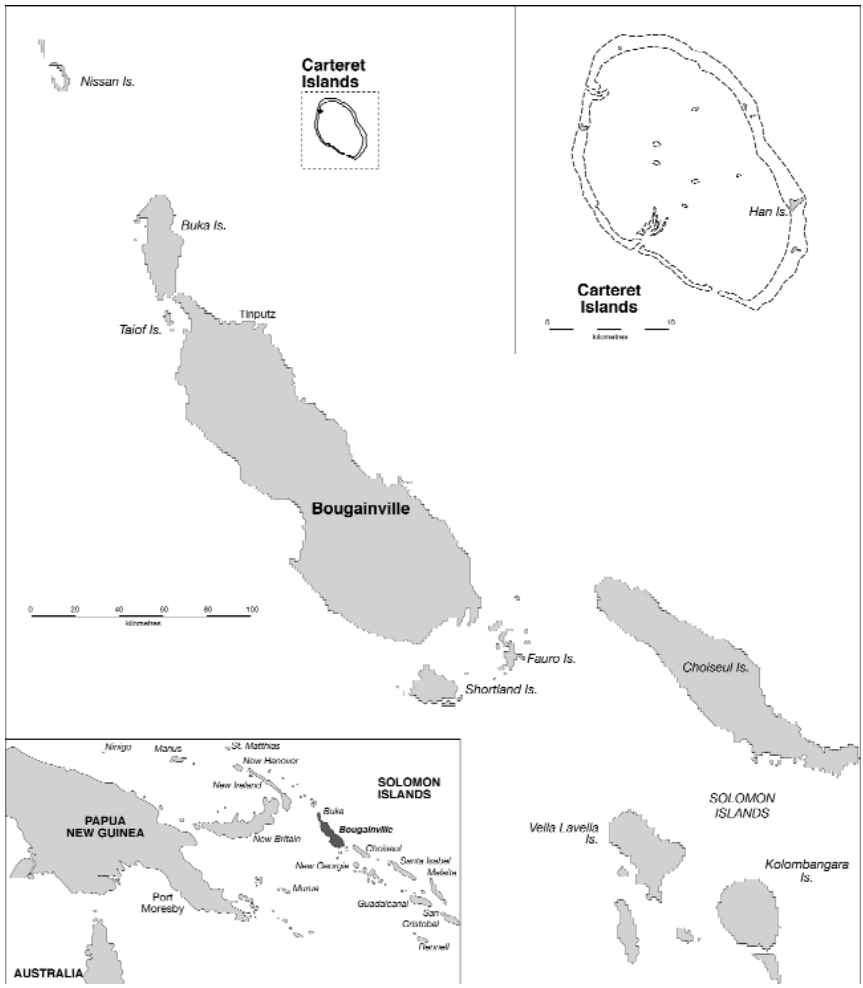


Figure 4: The Carteret Islands and Bougainville. Map drawn by Max Oulton.

The families and particularly those members engaged in clearing and establishing food gardens and in building houses, had to become used to many new food crops, new building materials and different techniques. Upon arrival the families had to accustom themselves to living under an iron roof, out of sight of the sea and surrounded by unfamiliar and rather frightening thick bush. . . . Children had to walk 6 km to school and this was a great distance for those who had no opportunity to walk any distance on their small atolls. Road traffic hazards, for those who had no experience of roads or vehicular traffic; fear of snakes for those who had no experience of walking on paths through thick bush; and the experience of being surrounded by tall trees, all required individual and community adjustment. … Many women sat for long periods of time thinking about their island homes.[31]

[31] O'Collins, above n 28, 253.

EBSCOhost - printed on 3/18/2024 10:48 AM via UNIVERSITEIT VAN AMSTERDAM. All use subject to https://www.ebsco.com/terms-of-use

By 1987, two of the original families had returned home. Others had adjusted relatively well, although there were concerns at delays in obtaining land on Bougainville for cocoa and copra production (their sole opportunity for cash production), and some worried that they would also lose their usufruct rights to the small and decreasing amounts of land left on the atoll. Moreover, there were serious concerns at the lack of support given to them to become self-sufficient.[32]

Little further information is available on the fate of these initial relocatees, and it is not clear what happened to the resettlement scheme. However, it was not long after this that Bougainville became involved in a prolonged and severe civil conflict (lasting from 1988 to 1997),[33] and in 1989 the people from the Carterets fled home.[34] A new group of relocatees has since reappeared, and these people have perhaps been reinvented in the news as the world's first 'climate refugees'. But given the reporting by O'Collins, we can see that this new wave is not the first group of environmentally induced relocatees, and this perhaps also casts doubt on whether or not the sole reason for their relocation is climate change, although it may well have an exacerbating effect. Nevertheless, the case study is instructive and we can also learn from the more recent scheme. Land was again to be made available, again on Bougainville, and an initial group of five male household heads moved to the new site in late April 2009.[35] But, like the 1980s attempt, success was hard to come by and by July 2009 it was reported that the men had returned:

> Three of these families complained that they were in frequent arguments with Tinputz landowners over land and that they were finding it difficult because they did not have gardens, sometimes no food and most of them no proper house.
>
> Earlier this year, acting administrator . . . told the *Post-Courier* that legal issues were hindering the efforts to resettle Carteret Islanders [and others from low-lying atolls] to Bougainville. He said that the Government's efforts on the resettlement exercise were being blocked as they were having trouble getting the legal rights to the land they needed.[36]

This article in Papua New Guinea's national press appeared three months to the day after the men arrived, indicating that the project had failed in a very short space of time. Moreover, it indicates the major difficulties likely to be encountered when relocating communities within Pacific island countries, when the relocation is on a different community's communal land. While most observers focus on the likely international relocation needs of atoll dwellers, internal relocation may be just as difficult, with the possibility of significant numbers of groups of internally displaced persons emerging. This issue has hardly been addressed in the discussion

[32] ibid, 267.

[33] P Reddy, 'Reconciliation in Bougainville: Civil War, Peacekeeping and Restorative Justice' (2008) 11 *Contemporary Justice Review* 117.

[34] U Rakova, 'How-to Guide for Environmental Refugees' (OurWorld 2.0, 16 June 2009).

[35] 'Carteret Islanders Become First Climate Refugees: PNG Relocates Families as Island Home Disappears', *Pacific Island Report* (4 May 2009), http://archives.pireport.org/archive/2009/may/05-04-09.htm, reporting a story from the *Papua New Guinea Post-Courier* (1 May 2009).

[36] T Vainerere, 'Climate Change Refugees Return to Bougainville Atolls', *New Guinea Post-Courier* (22 July 2009), http://lists.spc.int/pipermail/ppapd-fpocc_lists.spc.int/2009-July/000233.html.

EBSCOhost - printed on 3/18/2024 10:48 AM via UNIVERSITEIT VAN AMSTERDAM. All use subject to https://www.ebsco.com/terms-of-use

of the implications of climate change in Pacific island countries. The second case study below looks at the possibilities for relocation within the region drawing on the experiences of the Banaban community, relocated from what is now Kiribati, to Rabi in Fiji.

VIII International Relocation: Banaba to Rabi

There have been three cases of international relocation of Pacific island communities, all involving atoll or raised limestone island communities (see Figure 5). The first of these is a Micronesian community from Banaba (now part of Kiribati), which was devastated by phosphate mining since its discovery in 1900 through to 1979. Most members of this community now live on Rabi island in northern Fiji. The second instance is a Polynesian community from Vaitupu (now part of Tuvalu) which resettled on Kioa island in northern Fiji. The island was purchased in 1946 and settlement began on 26 October 1947.[37] The final case is that of the Gilbertese (I-Kiribati) communities in Wagani and Gizo, Western Province, Solomon Islands.[38] This last group of relocatees was placed in areas where land quality was poor, and in many cases they did not have security of land tenure.[39] Despite these disadvantages for the migrants, the relocation has also been a source of tension in the destination communities, and 'while saying they were not hostile to the Gilbertese as such, Western [Province] leaders resented the fact that their province took all the burden of Gilbertese resettlement'.[40]

The focus here is on the first case, the relocation from Banaba to Rabi (see Figure 6). The transfer to Kioa from Vaitupu was a partial one, with a substantial and sustainable population remaining in the home island. This enabled the link to land to be sustained, as well as the assurance of a community 'keeping the home fires burning'. The relocation to the Solomon Islands was also partial, and no single communities were completely translocated. In comparison, the relocation from Banaba to Rabi was to all intents and purposes complete, although some 'caretakers' have returned to their home island, particularly since the 1970s. Accordingly, it gives us considerable insights into the likely effects of complete community relocation, should it be required as a result of climate change. This section is based on the work of a number of authors who have written about

[37] K-F Koch, *Logs in the Current of the Sea* (Canberra, Australian National University Press, 1978).

[38] KE Knudson, 'Making Sense: A Study of a Banaban Meeting' in Lieber (ed), *Exiles and Migrants in Oceania*, above n 7.

[39] J Fraenkel, 'Minority Rights in Fiji and the Solomon Islands: Reinforcing Constitutional Protections, Establishing Land Rights and Overcoming Poverty' (Paper prepared for United Nations Commission on Human Rights, Sub-Commission on Promotion and Protection of Human Rights, Working Group on Minorities) UN Doc E/CN.4/Sub.2/AC.5/2003/WP.5 (5 May 2003).

[40] R Premdas, J Steeves and P Larmour, 'The Western Breakaway Movement in the Solomon Islands' (1984) 7 *Pacific Studies* 34, 45.

EBSCOhost - printed on 3/18/2024 10:48 AM via UNIVERSITEIT VAN AMSTERDAM. All use subject to https://www.ebsco.com/terms-of-use

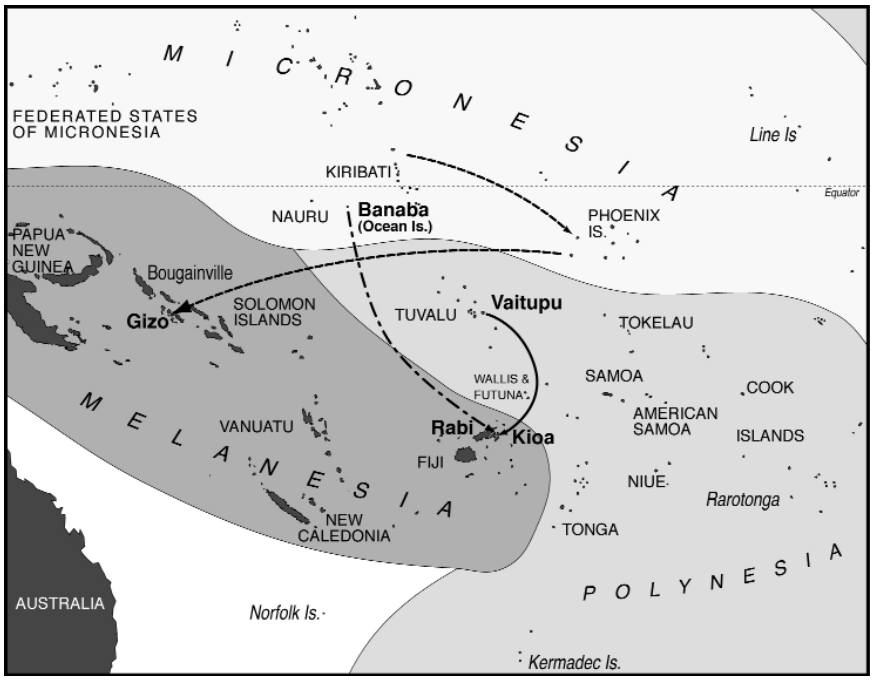


Figure 5: The 'international'-type relocations that took place during the colonial period under the colonial governance of the United Kingdom. The map shows the broad 'cultural regions' of Oceania and indicates that the three communities were relocated to quite distinct cultural milieux from their own. Map drawn by Max Oulton.

Banaba and Rabi.[41] Their work is summarised here as it is of considerable relevance to the issue of community relocation in Pacific island countries.

Banaba (also known as Ocean Island) is a raised limestone island lying close to the equator, a little less than 300 kilometres to the east of Nauru. Like Nauru, Banaba was covered by a thick layer of phosphate, and like Nauru this resource was mined aggressively, mostly to support the pastoral agricultural industries of New Zealand, Australia and the United Kingdom. Apart from some small

[41] W Kempf and E Hermann, 'Reconfigurations of Place and Ethnicity: Positionings, Performances and Politics of Relocated Banabans in Fiji' (2005) 75 *Oceania* 368; W Kempf, 'The Drama of Death as Narrative of Survival: Dance Theatre, Travelling and Thirdspace among the Banabans of Fiji' in T van Meijl and J Miedema (eds), *Shifting Images of Identity in the Pacific* (Leiden, KITLV Press, 2004); S King and K Sigrah, 'Legacy of a Miner's Daughter and Assessment of the Social Changes of the Banabans after Phospate Mining on Banaba' (Islands of the World VIII International Conference, 'Changing Islands: Changing Worlds', Kinmen Island (Quemoy), 1–7 November 2004); B Macdonald, *Cinderellas of the Empire: Towards a History of Kiribati and Tuvalu* (Suva, University of the South Pacific, 2001); MG Silverman, *Disconcerting Issue: Meaning and Struggle in a Resettled Pacific Community* (Chicago, University of Chicago Press, 1971); KM Teaiwa, 'Our Sea of Phosphate: The Diaspora of Ocean Island' in G Harvey and C Thompson (eds), *Indigenous Diasporas and Dislocations* (Aldershot, Ashgate, 2005).

EBSCOhost - printed on 3/18/2024 10:48 AM via UNIVERSITEIT VAN AMSTERDAM. All use subject to https://www.ebsco.com/terms-of-use

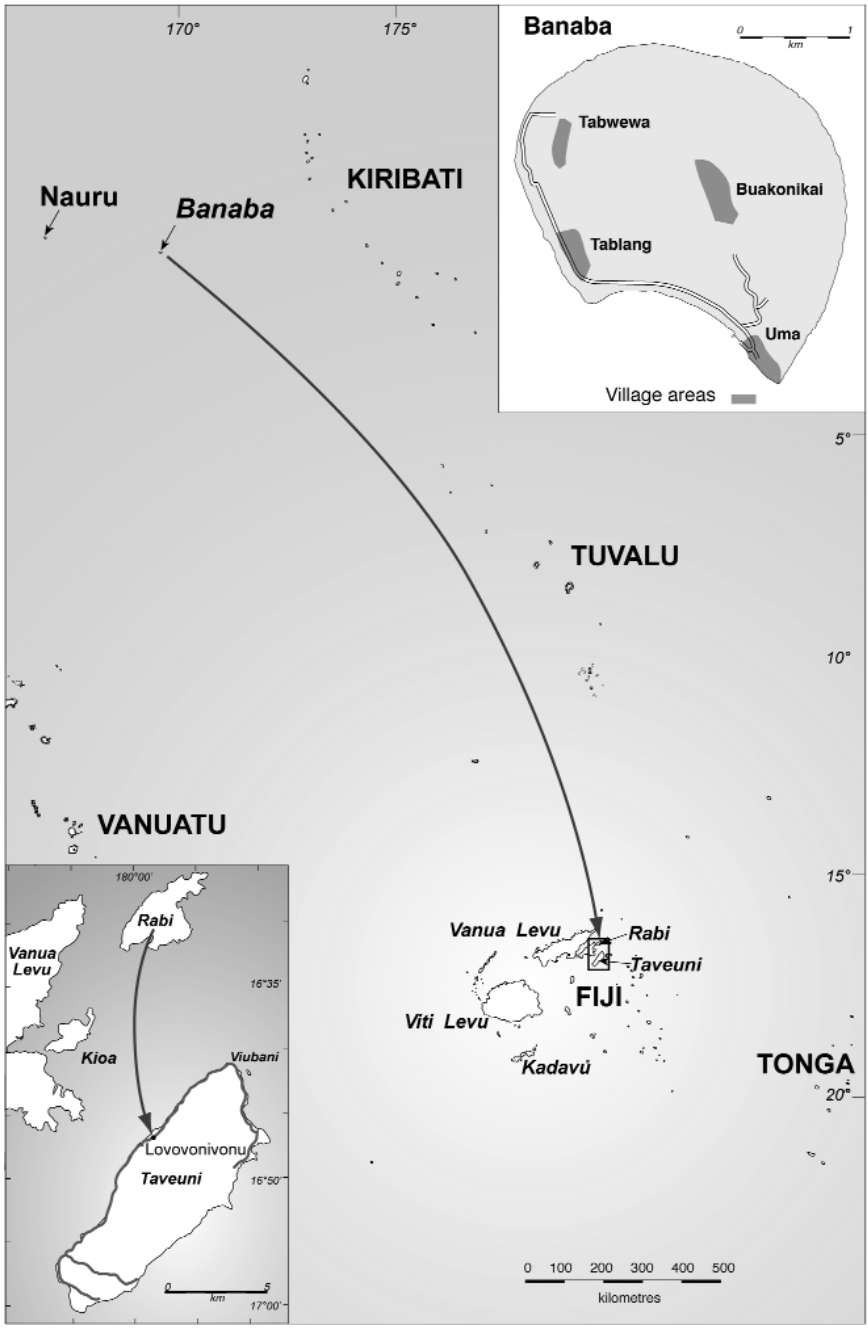


Figure 6: Banaba and Rabi. Map drawn by Max Oulton.

EBSCOhost - printed on 3/18/2024 10:48 AM via UNIVERSITEIT VAN AMSTERDAM. All use subject to https://www.ebsco.com/terms-of-use

amounts remaining on Nauru, these deposits have been largely exhausted, with the populations of both islands left with little to show for the massive environmental degradation caused by the mining. The Nauru case is relatively well known. Millions of dollars placed in trust were lost in a series of investment failures.[42] Nevertheless, the people of Nauru remain on their island and are citizens of their own sovereign state.

The case of the Banabans unfolded quite differently. Initially, Banaba was too small to excite British interest, and it was excluded from the British colonial entity, the Gilbert and Ellice Islands Protectorate, which was formed in 1892.[43] However, with the identification of phosphate on the island in 1900 it was not long before Banaba was included in the Protectorate, by 1907 having become its headquarters, so important was the phosphate industry.[44] The island became a bustling and multicultural economy as the British Phosphate Corporation (BPC) extracted the valuable mineral. However, as the extraction continued, the utility of Banaba as a home for the Banabans was declining, and by 1940 the Protectorate government was encouraging the people to consider relocating to another site. This would also enable the BPC to intensify its mining activities. Islands in Fiji, such as Wakaya and Rabi, that had been alienated from their customary owners prior to colonisation, were considered for relocation purposes. While some Banabans were keen to move, others were less enthusiastic, and most were concerned that if they did, they would lose sovereignty over Banaba.[45] However, plans were put on hold in 1942 when Banaba was occupied by Japanese forces, shortly after the phosphate company staff and colonial officials abandoned the 'Protectorate'. The following year the Japanese removed many of the Banabans from their island to three other locations in Micronesia: Kosrae (now part of the Federated States of Micronesia), Nauru, and Tarawa (now the capital of Kiribati, the former Gilbert Islands). In addition, almost 350 Banabans and I-Kiribati perished on the island during its occupation.[46] After the war, Australian forces reclaimed Banaba and, ostensibly because of the extent of war damage, rather than repatriate the Banabans, the British colonial government resettled them on the island of Rabi in north-eastern Fiji. The relocatees were given two years to decide whether they would stay on Rabi or return. Such an arrangement would enable the phosphate company to continue mining unhindered by the needs and presence of a local population.[47] While the majority of Banabans were opposed to relocation, they eventually conceded as a result of compulsory land expropriations and concern that an alternative environment would be necessary to sustain future generations.[48]

Rabi was an island owned by Lever Brothers, the huge British soap company which owned and operated a number of coconut plantations around Melanesia in

[42] J Connell, 'Nauru: The First Failed Pacific State?' (2006) 95 *The Round Table* 47.
[43] MacDonald, *Cinderellas of the Empire*, above n 41, 94.
[44] Silverman, *Disconcerting Issue*, above n 41, 99.
[45] ibid, 148.
[46] RK Sigrah and SM King, *Te Rii Ni Banaba* (Suva, University of the South Pacific, 2001) 257.
[47] ibid, 258–59.
[48] Kempf, 'The Drama of Death as Narrative of Survival', above n 41, 162.

EBSCOhost - printed on 3/18/2024 10:48 AM via UNIVERSITEIT VAN AMSTERDAM. All use subject to https://www.ebsco.com/terms-of-use

the first half of the twentieth century. Funds accumulated from phosphate royalties were used for the purchase, which was facilitated by the British colonial service in the form of the Western Pacific High Commission and the Governor of Fiji (one and the same person). The island had formerly been inhabited by Fijians, who were relocated in the village of Lovonivonu on the island of Taveuni to the south of Rabi in the pre-colonial era. Upon settling in Rabi, the Banabans set about reproducing a Banaban society in the new setting. A paradoxical condition ensued. Banabans set out to confirm both their status as the rightful inhabitants of Rabi, as well as retaining autonomy over Banaba (which was promised to them when the agreement to relocate to Rabi was settled). This proved to be less easily achieved than might have been expected. Their returns from royalties were much less than they anticipated, and at one point, the Gilbert and Ellice Islands Colony was receiving over 10 times the amount given to the Banabans.[49] By the end of the mining, the Banabans, while obtaining some payments for the phosphate, had received nothing in the order of royalties made available to the Nauru Trust Fund.

Seeking sovereignty for Banaba was a major way in which the link to the land could be sustained. It could also be used to leverage greater returns from the BPC in the mining era, and possibly as compensation in the future. In 1977, 100 young men, directed by their elders on Rabi, set up camp on Banaba while other representatives were taking legal action in London to have Banaba separated from the Gilbert and Ellice Island Colony.[50] Still more young people were sent to Banaba two years later, but on being informed that armed police might shoot to kill, the elders were forced to relent.[51] Meanwhile, the legal actions were to come to a head. They yielded relatively little joy for the Banabans, however, with the judge concluding that he was 'powerless to give . . . any relief', even though he considered that 'they have a raw deal'.[52] The finding did, however, assist in building political pressure in the United Kingdom and a A$10 million fund was established, although it took the Banabans four years before they would accept it.[53] When the last shipment of phosphate left Banaba, the machinery and plant was gifted to Kiribati, though from the perspective of King and Sigrah, this was merely a deft move to avoid spending millions of dollars in decommissioning plant and cleaning asbestos that had been used in some of the installations.[54] The island had been devastated, huge amounts of land removed and toxic waste left behind. The Banabans had no sovereign rights to the island, which became part of Kiribati upon its independence.

Anthropologist Martin Silverman wrote a detailed ethnology of Banaba/Rabi. He referred to the relationship between the people and the land of Banaba as one of mixed blood and mud—the two united and inseparable, as has been shown to

[49] Silverman, *Disconcerting Issue*, above n 41, 185.
[50] King and Sigrah, 'Legacy of a Miner's Daughter', above n 41, 950.
[51] ibid.
[52] ibid, 951.
[53] ibid.
[54] ibid.

EBSCOhost - printed on 3/18/2024 10:48 AM via UNIVERSITEIT VAN AMSTERDAM. All use subject to https://www.ebsco.com/terms-of-use

be the case in many other Pacific island countries.[55] People and the land were mutually constituted: blood mixed with the land and the mud was contained in the tissue of the people. Upon moving to Rabi, the mud of Banaba retained its primacy in the identity of the people and numerous strategies emerged to retain this essential linkage. Katerina Teaiwa observes a much more visceral aspect to the mud–blood thesis developed by Silverman. For her, the situation is much more complex, since a great proportion of the land (the mud) of Banaba has been removed from the island and has become scattered around the world. While acknowledging the value of Silverman's work, Teaiwa observes that he describes the mud–blood linkage, especially the notion of land, as symbolic (perhaps more socially constructed), rather than as material or real. This would infer that the link between Banaba and Banabans living in Rabi does not have a tangible reality. Reducing the link to being symbolic, or socially constructed, largely undermines its importance to those involved in the actual relationship. The mining saw 20 million tonnes of land removed from the island. This equates to roughly a little less than 32,000 tonnes per hectare. For Teaiwa, this has important consequences for the indelible mud–blood relationship. Just where is the mud now located? Obviously, a huge amount has been taken away from Banaba, just like the population. Given this, how can the mud–blood union enable the people now resident in Rabi to bond to Banaba? To what extent is the visceral connection broken, and what are the implications of this for Banaban people living away from their land? She also raises another intriguing question, though outside the scope of this chapter: how much of Banaba is now spread over New Zealand and Australia? A moot point is raised as to the possibility that this may serve as a basis for a claim to settlement in New Zealand or Australia!

The intricacies aside, it is clear that the situation for the Banabans of Rabi is ambiguous and paradoxical, even after more than 60 years have passed since their removal from Banaba. Numerous strategies have been developed to sustain the linkage to the original homeland, but the visceral mud–blood linkage may be seen as under threat. Moreover, for the people of Rabi, the ambiguity lies not only in relation to their own homeland, but to their new one as well. Fraenkel reports that the 'Banabans remain one of Fiji's most disadvantaged and politically marginalised communities. Affirmative action programmes for indigenous Fijian and Rotuman communities in the aftermath of the 1987 and 2000 coups have not been targeted at Banaban peoples.'[56] Moreover, the original inhabitants of Rabi, who were displaced to the nearby island of Fiji, are seeking to reclaim their island.[57] Kempf and Herman argue that the assertion of Banaban identity not only preserves the linkage with the land of Banaba, but is also important for Banabans positioning themselves in the context of post-colonial Fiji, which is partly marked by strong nationalist movements and coups which have the potential to threaten

[55] Silverman, *Disconcerting Issue*, above n 41, 72–79.

[56] Fraenkel, 'Minority Rights in Fiji and the Solomon Islands', above n 39, 12.

[57] 'Relocated Fiji Villagers Want Rabi Island Back', *Pacific Island Report* (5 June 2007), http://archives.pireport.org/archive/2007/june/06%2D05%2D06.htm.

EBSCOhost - printed on 3/18/2024 10:48 AM via UNIVERSITEIT VAN AMSTERDAM. All use subject to https://www.ebsco.com/terms-of-use

their security.[58] Clearly, the situation of these displaced people remains unsettled, both in terms of their dislocation from their original homeland and their security in their new island.

For climate migrants whose land no longer exists (either in its original state or through total inundation), Teaiwa's concerns have considerable resonance. How can this essential link exist if one of the elements no longer exists, or has been subjected to very high levels of environmental degradation? The case of Banaba/Rabi, then, should be of considerable relevance to those looking at community relocation in Pacific island countries as a response to climate change. The degradation of Banaba is not replicated in the other cases of long-distance intra-Pacific relocation. Climate change-induced degradation may be even more profound, and the implications for the relocatees even more devastating. Banaba has a 'caretaker' population physically sustaining the mud–blood union. Such arrangements may well also be the case for atolls that are facing inundation, coastal erosion or depletion, but in the end, under the most extreme scenarios, even that prospect may be rendered impossible.

All three of the international relocations discussed above took place in the context of colonialism, in particular the British colonial system in the Pacific, which included the Western Pacific High Commission (WPHC), responsible for Solomon Islands, New Hebrides (now Vanuatu), the Gilbert and Ellice Islands (now Kiribati and Tuvalu respectively) and the Colony of Fiji. The WPHC was based in Suva and at times the Governor of Fiji and the Western Pacific High Commissioner were the same individual. Movement of people among the colonies was orchestrated by the colonial services and did not require passports or contemporary protocols of residency, citizenship, visas and the like. Silverman noted a number of reasons why this is significant. Colonial administrations could make decisions about land and community locations with fewer constraints than is currently possible, where land is enshrined in laws established to protect customary land rights in the newly independent nations. Secondly, colonial administrations could easily move people across what are now international boundaries, as long as the territories were colonised by the same metropolitan power.[59]

While most Pacific island countries are now independent, as are all but one of the atoll countries (Tokelau), much can be learned from the colonial experiences. It is highly unlikely that it would be possible to transplant a community from one cultural and environmental setting to another in the contemporary Pacific. Where suitable land might become available (for instance, a freehold coconut plantation being sold, although they are no longer large in number), the descendants of the original inhabitants would most likely have priority in most countries in the region, if indeed the land was to be returned to customary ownership. Any community relocation that might take place could not be facilitated rapidly but would require

[58] Kempf and Hermann, 'Reconfigurations of Place and Ethnicity', above n 41, 369.

[59] MG Silverman, 'Introduction: Locating Relocation in Oceania' in Lieber (ed), *Exiles and Migrants in Oceania*, above n 7, 2–4.

EBSCOhost - printed on 3/18/2024 10:48 AM via UNIVERSITEIT VAN AMSTERDAM. All use subject to https://www.ebsco.com/terms-of-use

a long period of negotiation—between sovereign states, between communities at both origin and destination and their respective governments, and ultimately between the relocating and recipient communities themselves. Large amounts of compensation might be required for both groups, given the losses they would incur. It is difficult to see rapid, if any, progress given the barriers, not the least of which is the embodiment of Pacific island people in their land.

Relocation outside the region, if possible, would most likely be to countries such as Australia, New Zealand and the United States, where land is held in fee simple and where the current political economy is capitalist and lifestyles are individualistic. In this sense, any form of population movement would be more likely to occur as migration, with original community characteristics being considerably transformed, if not completely destroyed.

IX Conclusions

The purpose of this chapter has been to illustrate the predicament of those Pacific island communities that may be faced with extreme climate change scenarios that render their homelands uninhabitable, or may even cause them to be inundated altogether. There have been numerous calls for countries such as New Zealand and Australia to make it possible for Pacific island communities to migrate to these two countries in particular. Such calls, while well meaning, fail to account for the extremely important losses that dislocation from the land will bring about. At the same time, many observers do not appreciate the difficulties for people who are displaced to find alternative sites in their own country, even where there are lands that are less likely to be exposed to the adverse effects of climate change. Internally relocated communities are likely to suffer great losses as well.

Migration and relocation may also have major effects upon the cultures of those who are forced to relocate. I am not arguing here that climate change will devastate some Pacific cultures. Culture is ever-changing, and the fluidity of cultures and social structures in the Pacific (as elsewhere) cannot be denied. It is possible after numerous generations that relocated people may find peace, no longer yearn for the land which was part of their ancestors, and build successful and prosperous lives in other environs. But, given the strength, tenacity and indivisibility of the person–community–land bond, relocation is bound to be disruptive for a considerable length of time over many generations. Moreover, relocation is not just about severing people from their land. It is also about drastic changes in lifestyle, economy, politics, legal systems and cultural norms. Diets will change and, in the most extreme cases, there will no longer be people at home to send the important foods to those who have migrated—whether it be varieties of taro and other root and tree crops, delicacies cooked in coconut cream, or the massive range of marine resources.

EBSCOhost - printed on 3/18/2024 10:48 AM via UNIVERSITEIT VAN AMSTERDAM. All use subject to https://www.ebsco.com/terms-of-use

In the most extreme scenarios, Pacific communities forced to relocate as an entity (if they are lucky), or simply displaced as individuals and households, may find themselves placed in situations that are in some ways likely to be more hopeless than those faced by refugees, for the possibility of return may well be negligible. The land, once a visceral component of community and individual physicality and identity, may indeed become only a symbol of a former status.

EBSCOhost - printed on 3/18/2024 10:48 AM via UNIVERSITEIT VAN AMSTERDAM. All use subject to https://www.ebsco.com/terms-of-use

EBSCOhost - printed on 3/18/2024 10:48 AM via UNIVERSITEIT VAN AMSTERDAM. All use subject to https://www.ebsco.com/terms-of-use

Marine Pollution Bulletin 83 (2014) 408–416

Contents lists available at ScienceDirect

Marine Pollution Bulletin

journal homepage: www.elsevier.com/locate/marpolbul

Monitoring in the Western Pacific region shows evidence of seagrass decline in line with global trends

Frederick T. Short [a,b,*], Robert Coles [c], Miguel D. Fortes [d], Steven Victor [e], Maxwell Salik [f], Irwan Isnain [g], Jay Andrew [h], Aganto Seno [i]

[a] SeagrassNet, Washington State Department of Natural Resources, Olympia, WA 98504, USA
[b] University of New Hampshire, Durham, NH 03824, USA
[c] Seagrass Group – TropWater, James Cook University, Cairns, Queensland 4870, Australia
[d] Marine Science Institute, CS, University of the Philippines, Quezon City 1101, Philippines
[e] The Nature Conservancy, Koror 96940, Palau
[f] Department of Fisheries, Tofol, Kosrae 96944, Federated States of Micronesia
[g] Sabah Parks, 88100 Kota Kinabalu, Sabah, Malaysia
[h] Palau International Coral Reef Center, Koror 96940, Palau
[i] Komodo National Park, Labuan Bajo, Flores, NTT 86554, Indonesia

ARTICLE INFO

Article history:
Available online 16 April 2014

Keywords:
Seagrass
Monitoring
Western Pacific
Decline
Nutrients
Sedimentation

ABSTRACT

Seagrass systems of the Western Pacific region are biodiverse habitats, providing vital services to ecosystems and humans over a vast geographic range. SeagrassNet is a worldwide monitoring program that collects data on seagrass habitats, including the ten locations across the Western Pacific reported here where change at various scales was rapidly detected. Three sites remote from human influence were stable. Seagrasses declined largely due to increased nutrient loading (4 sites) and increased sedimentation (3 sites), the two most common stressors of seagrass worldwide. Two sites experienced near-total loss from of excess sedimentation, followed by partial recovery once sedimentation was reduced. Species shifts were observed at every site with recovering sites colonized by pioneer species. Regulation of watersheds is essential if marine protected areas are to preserve seagrass meadows. Seagrasses in the Western Pacific experience stress due to human impacts despite the vastness of the ocean area and low development pressures.

© 2014 Elsevier Ltd. All rights reserved.

1. Introduction

Seagrass meadows form the foundation of important shallow-water coastal systems and associated biodiversity globally (den Hartog, 1970; Green and Short, 2003, Duarte et al., 2008, Short et al. 2011). They provide an assortment of ecosystem services to resident species including the endangered dugong and green turtle, interconnected habitats (mangroves and coral reefs) and populations through direct (nursery and foraging areas) and indirect (carbon and nutrient sequestration and export) means as well as supporting the needs of human populations (fisheries, biological filtering, hydro-dynamic buffering). Nowhere is the importance of seagrass systems more evident than in the tropical Western Pacific region, which represents the highest biodiversity of seagrass species, the broadest area of seagrass meadow cover, and the largest gap in information on global seagrass distribution and status (Spaulding et al., 2003; Short et al., 2007; Waycott et al., 2009; Short et al., 2011).

Differences in the life history strategies of tropical seagrasses result in varying species assemblages. *Enhalus acoroides* is a slow turnover, persistent species with low resistance to perturbation (Bridges et al., 1981; Walker et al., 1999). In contrast, *Cymodocea serrulata, Halodule uninervis* and *Halophila ovalis* are more ephemeral (Birch and Birch, 1984). *H. uninervis* and *H. ovalis* are considered pioneer species, growing rapidly and surviving well in unstable or depositional environments (Bridges et al., 1981; Birch and Birch, 1984). *C. serrulata* is found associated with deep sediment layers, and has been linked to increased sediment accretion (Birch and Birch, 1984).

As with shallow coastal systems globally, seagrass habitats of the Western Pacific face a number of threats including the damage caused by rapidly growing human populations, declines in water quality, loss of biodiversity, and erosion of habitat structure (Short

* Corresponding author. Address: SeagrassNet, University of New Hampshire, Jackson Estuarine Laboratory, 85 Adams Point Road, Durham, NH 03824, USA. Tel.: +1 603 659 3313.
E-mail address: fredtshort@gmail.com (F.T. Short).

http://dx.doi.org/10.1016/j.marpolbul.2014.03.036
0025-326X/© 2014 Elsevier Ltd. All rights reserved.

and Wyllie-Echeverria, 1996; Orth et al., 2006). Deforestation of watersheds, destruction of mangroves, agriculture and aquaculture practices – all exacerbate sedimentation and habitat loss (Grech et al., 2012). The aim of SeagrassNet is to establish seagrass monitoring worldwide: preserving seagrass habitat, increasing awareness, and tracking the status of seagrasses as an indicator of trends in environmental health, using a standardized protocol (Short et al., 2006a). Teams have been established to monitor seagrass habitat simultaneously four times a year, using the same protocol, in 33 countries at 122 sites worldwide. In each case, it is the quarterly, repeated sampling of a series of specific locations across a seagrass meadow that provides evidence of change in the seagrass environment, including distribution, species composition, and abundance. The protocol (Short et al., 2006a) is based on a statistically valid and peer-reviewed sampling scheme (Burdick and Kendrick, 2001); results are comparable over time at a given site, and the repeated measures monitoring allows trend detection over relatively short time periods (1–2 years) even within diverse (3–7 species) communities. The protocol captures increments of change at seagrass sites representative of the area; widespread use of the protocol allows comparisons across countries, regions, and the world (Short et al., 2006b; Freeman et al., 2008).

The present study examines the spatial and temporal dynamics of monitoring sites in multi-species seagrass populations at various locations across the Western Pacific including insular Southeast Asia and northeast Australia (Fig. 1). These locations represent the variety of geographic and environmental conditions in which seagrasses occur and we use them to report on trends in seagrass condition in the Western Pacific.

2. Methods

Standard SeagrassNet methods were used (Short et al., 2006a, www.SeagrassNet.org). To summarize the monitoring protocol, a site consists of three, fixed, parallel 50 m transects, their midpoints located on a line laid out seaward, perpendicular to shore. The transects are at the nearshore, mid-depth, and deep parts of the seagrass bed. Monitoring was conducted at the 10 sites across the Western Pacific, over periods ranging from 3 to 8 years per site (Table 1, Fig. 1). Some sites experienced breaks in data collection from 1 to 2.5 years. All site monitoring commenced between 2001 and 2004 and was conducted at set times, four times per year. The sites themselves were chosen based on a set of parameters (Short et al., 2006a) designed to locate a typical or representative seagrass bed given the range of conditions of the area under consideration, either a site distant from anthropogenic stressors or one considered by the monitoring team to be affected by an ongoing stressor or having a potential stressor. The quarterly sampling is done at twelve 0.25 m^2 quadrats placed at pre-determined, random locations along each of the transects. Seagrass percent cover by species is visually estimated per quadrat using a photo guide representing various cover conditions. Percent cover data provide a good representation of overall ecosystem status in Western Pacific seagrass; seagrass decline is defined as the loss of percent cover over time (Freeman et al., 2008; Mellors et al., 2008; Coles et al., 2005; McKenzie et al., 2012).

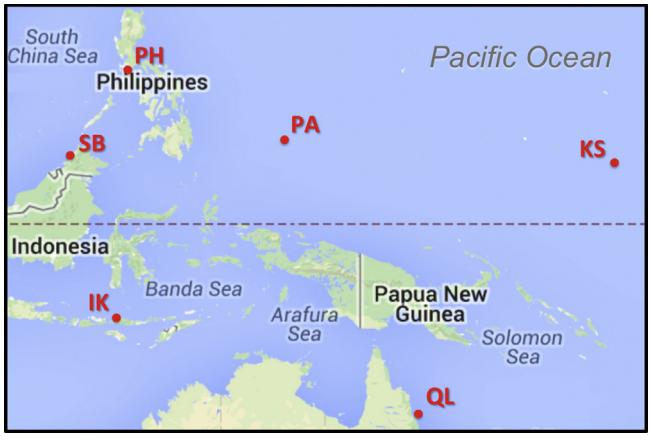


Fig. 1. Map of the Western Pacific with the position of the SeagrassNet sites in Kosrae (FSM; KS), Palau (PA), Mindoro (Philippines; PH), and Sabah (Malaysia; SB), Komodo (Indonesia; IK), Queensland (Australia; QL). Dashed line is the Equator.

Countries and locations were selected to represent wide geographic coverage of the Western Pacific region. In each location representative meadows were selected using knowledge from previous visits by seagrass scientists and local advice. To avoid potential bias, at least two sites were monitored at each location when possible, at least one of which was remote from population centers. Representative meadows included the dominant seagrass community type and average abundance. Intertidal sampling ensured local scientists and community members could carry out the quarterly monitoring long-term.

Change in distribution of seagrasses over time is captured by measurement of the position of the meadow relative to the permanent transects. Species composition is measured along the transects, and seagrass abundance is determined via measurements of plant percent cover, canopy height, density, and biomass. Voucher specimens are collected and prepared as herbarium sheets of each seagrass species (with flowering parts if present), archived at the International Seagrass Herbarium at the Smithsonian, Washington, DC, USA. Each quadrat is photographed quarterly to create a permanent record. Water temperature is monitored continuously with two Hobo Pendent data loggers at each site (Short et al., 2006a).

Correlation analysis with least square regression was used on data from the Western Pacific sites to examine trends over time with repeated-measures ANOVA for differences between transects and sites using JMP (SAS Institute Inc. Version 8.0). Significance was determined at $p < 0.05$ except for two instances of $p < 0.06$, as indicated.

3. Results

All ten sites were located within 17° of the Equator, with all but two sites in the Northern Hemisphere (Table 1). Three to seven seagrass species were found in each of the ten Western Pacific SeagrassNet sites analyzed here. Komodo, Indonesia had the most, with seven seagrass species while Kosrae, Federated States of Micronesia and one site in Palau had the lowest, at three species each. *Thalassia hemprichii* and *Cymodocea rotundata* were found at nine of the sites, with *T. hemprichii* absent only from a site in Malaysia and *C. rotundata* absent only from a site in Palau. *H. ovalis* was found at eight sites, *H. uninervis* at seven sites, *E. acoroides* at six and *C. serrulata* at four. *Syringodium isoetifolium* was found only in Komodo. The two Kosrae sites had all the seagrass species known to exist there (Green and Short, 2003), while other sites did not fully represent their country's seagrass species diversity. Seagrass percent cover at the site level (mean of total cover of the 3 transects at each site with replicate quadrats, $n = 12$) ranged from 2.4% (Sabah, SB5.2) to 90.1% (Kosrae, KS1.2).

Seagrass percent cover was stable at three of the ten sites (Fig. 2): Kosrae (KS1.1), the Philippines (PH4.1) and Australia (QL8.1). All three sites showed species shifts (Table 2) even though the overall site cover did not change. At the other seven sites, declines in seagrass percent cover occurred: PA3.1 (18%/y), SB5.1 (56%/y), SB5.2 (78%/y), IK16.1 (5.4%/y); PA3.2 (1.9%/y), PH4.2

Table 1
Western Pacific sites, locations, monitoring dates, and seagrass species. Seagrass species codes: Cr – *Cymodocea rotundata*, Cs – *Cymodocea serrulata*, Ea – *Enhalus acoroides*, Hn – *Halophila spinulosa*, Ho – *Halophila ovalis*, Hu – *Halodule uninervis*, Si – *Syringodium isoetifolium*, Th – *Thalassia hemprichii*.

Site	Country	Location	Latitude	Longitude	Monitoring dates	Species present
KS1.1	Federated States of Micronesia	Kosrae/Lacs, Okat Harbor	N 05° 20.29″	E 162° 57.01″	07/2001–01/2009	Cr, Ea, Th
KS1.2	Federated States of Micronesia	Kosrae/Lelu	N 05° 20.10″	E 163° 1.54″	04/2004–01/2009	Cr, Ea, Th
PA3.1	Republic of Palau	Koror/Ngermiid	N 07° 21.19″	E 134° 30.50″	07/2001–01/2009	Ea, Th, Ho
PA3.2	Republic of Palau	Babelthraup/Ngchesar	N 07° 25.83″	E 134° 36.35″	04/2004–01/2009	Th, Cr, Hu, Ea, Ho
PH4.1	Philippines	Mindoro/Paniquian	N 13° 31.10″	E 120° 57.07″	07/2001–01/2009	Th, Cr, Hu, Ea, Ho
PH4.2	Philippines	Mindoro/Sabang	N 13° 31.29″	E 120° 58.65″	07/2001–01/2009	Th, Cr, Hu, Ho
SB5.1	Malaysia	Sabah/Kuari Bay, Pulau Gaya	N 06° 00.50″	E 116° 02.05″	07/2001–01/2009	Hu, Cs, Cr, Ho
SB5.2	Malaysia	Sabah/Police Beach, Pulau Gaya	N 06° 02.14″	E 116° 00.90″	07/2001–01/2009	Hu, Th, Cr, Cs, Ho, Hn
QL8.1	Australia	Queensland/Green Island, Cairns	S 16° 45.5″	E 145° 58.4″	10/2001–01/2009	Th, Cr, Hu, Cs, Ho
IK16.1	Indonesia	Komodo/Seraya Kecil	S 8° 24.70″	E 119° 52.05″	07/2002–01/2009	Th, Cr, Cs, Ho, Ea, Hu, Si

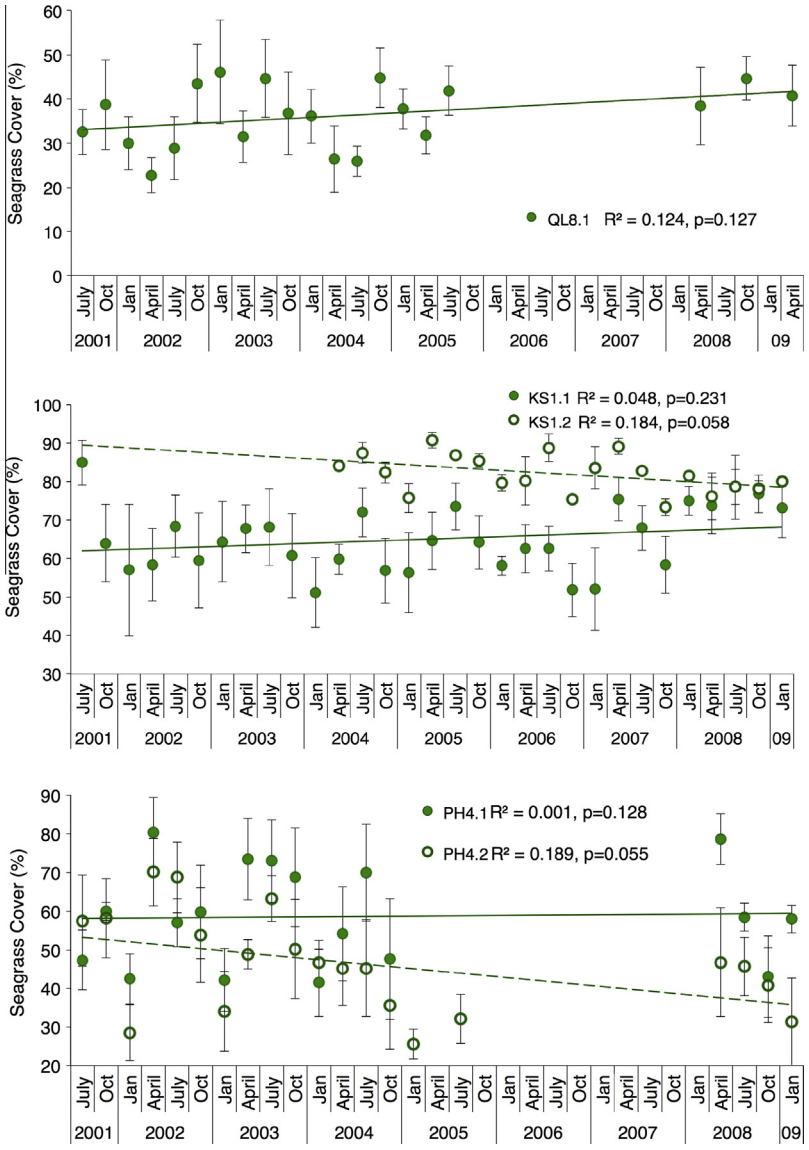


Fig. 2. Western Pacific sites with stable or lowest declines in seagrass populations between 2001–09 for KS1.1 and KS1.2, Kosrae (FSM); QL8.1, Queensland (Australia); PH4.1 and PH4.2, Mindoro (Philippines), with correlation coefficients and *p*-values.

(1.1%/y), and KS1.2 (0.4%/y) (Figs. 2–4). The Koror, Palau (PA3.1) site experienced wastewater discharge impacts as a result of sewer installation. Both sites in Sabah, Malaysia (SB5.1 and SB5.2) were affected by watershed deforestation and the resulting massive sediment loading that degraded the waters off much of western Sabah (Freeman et al., 2008). In Komodo, Indonesia, the site IK16.1 was affected by nutrient loading from beachside tourist cabins. Two sites, Kosrae (KS1.2) and Philippines (PH 4.2), showed lesser declines (Fig. 2a and c) and had nearby shoreline villages, presumably with some nutrient impact. Babelthraup, Palau (PA3.2) showed low level seagrass decline due to increased sediment loading from road construction (see Table 3).

Table 2
Summary of trends in seagrass species percent cover at transects (A, B, and C) of the ten Western Pacific sites, showing significant decreasing and increasing species cover as well as stable species cover (with *p*-values). Seagrass species codes in Table 1.

Transect	A			B			C		
Site	Species decrease	Species increase	Transect trend	Species decrease	Species increase	Transect trend	Species decrease	Species increase	Transect trend
KS1.1	Ea $p < 0.0001$	Cr $p = 0.0003$	Species shift			Stable		Th $p = 0.0096$	Increase $p = 0.0099$
KS1.2	Cr $p = 0.0179$	Th $p = 0.0514$	Species shift	Cr $p = 0.015$		Decline $p = 0.033$	Th $p = 0.040$		Stable
PA3.1	Ea $p < 0.0001$		Decline $p < 0.0001$	Ea $p < 0.0001$		Decline $p < 0.0001$	Ea $p < 0.0001$		Decline $p < 0.0001$
PA3.2	Ea $p = 0.0006$ Th $p = 0.039$ Cr $p = 0.016$	Cs $p = 0.004$	Stable	Ea $p = 0.0003$		Decline $p = 0.0162$	Ea $p < 0.0001$ Th $p = 0.019$ Cr $p = 0.029$	Cs $p = 0.0003$	Decline $p = 0.0032$
PH4.1			Stable			Stable		Cr $p = 0.016$	Stable
PH4.2	Cr $p = 0.047$ Hu $p = 0.044$		Decline $p = 0.038$	Cr $p = 0.001$ Hu $p = 0.038$	Th $p = 0.032$	Stable			Stable
SB5.1 2001-6	Cr $p = 0.0002$ Hu $p = 0.0002$		Decline $p = 0.0001$	Cs $p < 0.0001$ Hu $p = 0.0001$		Decline $p = 0.0001$	Hu $p = 0.0001$		Decline $p = 0.0001$
SB5.1 2006-9	Cr $p = 0.036$		Stable		Hu $p = 0.0076$	Recovery $p = 0.012$		Hu $p = 0.0007$ Cs $p = 0.0054$	Recovery $p = 0.0006$
SB5.2 2001-5	Hu $p = 0.0001$ Th $p = 0.0001$ Ho $p = 0.0001$ Cs $p = 0.0001$ Cr $p = 0.0001$		Decline $p = 0.0001$	Hu $p = 0.0001$ Th $p = 0.0001$ Ho $p = 0.0001$ Cs $p = 0.0001$ Cr $p = 0.0001$		Decline $p = 0.0001$	Th $p = 0.0001$ Ho $p = 0.0445$		Decline $p = 0.0001$
SB5.2 2007-9		Hu $p = 0.0122$	Recovery $p < 0.0001$		Hu $p = 0.0005$	Recovery $p < 0.001$			
QL8.1		Cr $p = 0.0196$	Stable			Stable		Cr $p = 0.0022$	Increase $p = 0.0237$
IK16.1	Ea $p = 0.047$		Stable	Ea $p = 0.015$		Decline $p = 0.007$	Th $p = 0.015$ Si $p = 0.019$		Decline $p = 0.025$

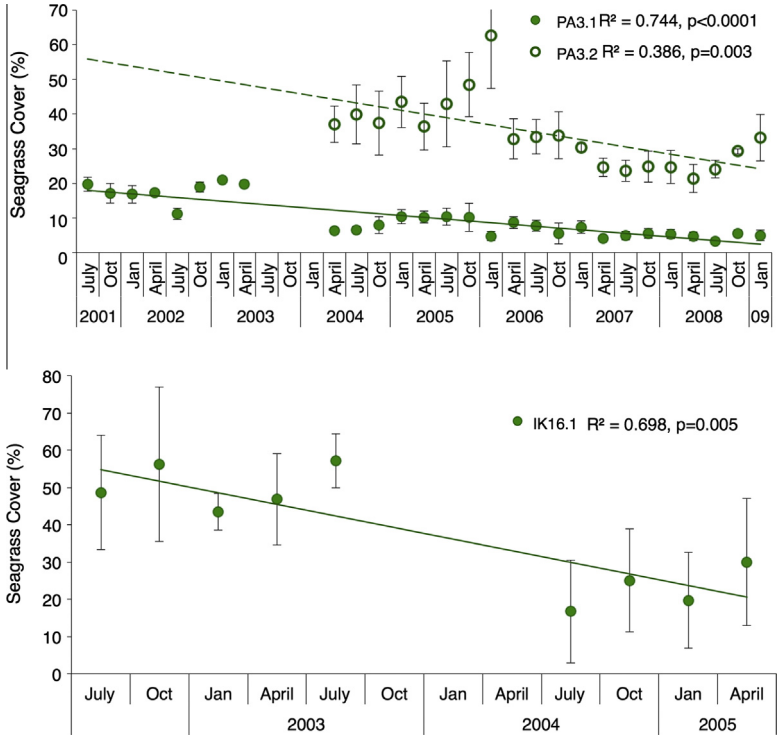


Fig. 3. Western Pacific sites with declining seagrass populations between 2001–09 for PA3.1 and PA3.2, Palau and between 2002–05 for IK16.1, Komodo (Indonesia), with correlation coefficient and *p*-value.

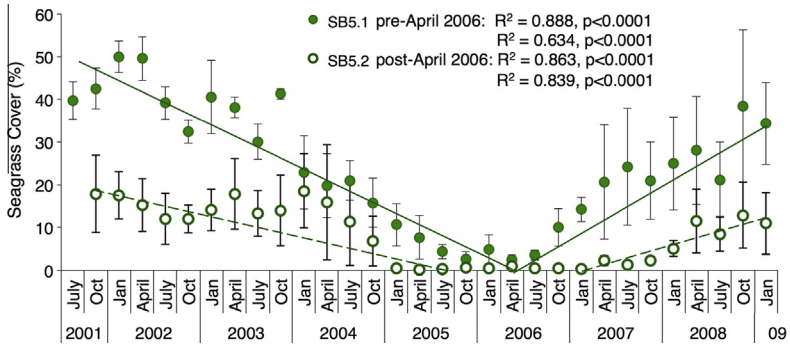


Fig. 4. Western Pacific sites experiencing decline and recovery between 2001–09, from seagrass populations in SB5.1 and SB5.2, Sabah (Malaysia), with correlation coefficients and p-values.

In Malaysia, after the 2004-6 decline, the two sites showed partial recovery: SB5.1 regained 71% of its seagrass cover and SB5.2 regained 68% of its previous cover (Fig. 4). The decline included all six seagrass species, but the recovery at both sites was dominated by a single species, *H. uninervis*. Both these sites rebounded as a result of reduced sediment loading after the watershed stabilized in 2006.

All of the Western Pacific sites showed species shifts over time, measured by percent cover of individual seagrass species. Species shifts were observed at the transect level even when total seagrass cover did not change, as seen at the Kosrae sites (Table 2). At the nearshore transect of KS1.1 (Fig. 5a), *E. acoroides* decreased and *C. rotundata* increased, creating a clear shift in species dominance. At this site's mid-bed transect (Fig. 5b), no species shifts were seen. Over the same time period, the deep transect (Fig. 5c) showed an increase in *T. hemprichii* and no change in the other species.

Significant species dynamics were observed at many sites (Table 2). At five sites, total seagrass percent cover declined with seagrass species shifts in each case. At PA3.1, *E. acoroides* declined at all three transects with no change in *T. hemprichii* or *H. ovalis* (Fig. 6). At PA3.2, *E. acoroides* and *T. hemprichii* declined while *C. serrulata* increased and *C. rotundata*, *S. isoetifolium*, *H. uninervis* and *H. ovalis* were stable. At PH4.2, decreases were seen in *C. rotundata* and *H. uninervis* while *T. hemprichii* and *H. ovalis* did not change. The site IK16.1 showed declines in *E. acoroides* and *S. isoetifolium*, with *C. rotundata, H. ovalis,* and *T. hemprichii* stable. Change in species cover was marked at many sites showing decline, as seen in the loss of *E. acoroides* and other stress intolerant species, while the more pioneering species remained stable or increased.

Both the Sabah, Malaysia sites showed declines of all species between 2001 and 2006 with a recovery between 2006 and 2009. At SB5.1, the whole seagrass community (*C. rotundata*, *C. serrulata*, *H. uninervis*) declined (up to April 2006); the three transects (A, B and C) were all dominated by different species (Fig. 7A–C) until 2006. At all three transects, only *H. uninervis* showed recovery. The decline at SB5.2 showed similar losses of all seagrass species, with *H. uninervis* the dominant species in recovery, followed by *H. ovalis*. Again the pioneering species showed the recovery after stress.

4. Discussion

Seagrass percent cover was used as an easy-to-measure parameter that represented the status of seagrasses at the site, as well as at the species, level (Short et al., 2006b; Mellors et al., 2008). Seagrass percent cover has been shown to be a suitable parameter for assessing change in tropical seagrass meadows (Freeman et al., 2008). In tropical environments, seagrass meadows rarely reach 100% cover; the measure of percent cover is directly proportional to aboveground biomass; percent cover changes rapidly in response to many stresses (Short unpublished). Thus, percent cover in these tropical meadows represents a good stand-in for other, more complex, measures of seagrass health and status. Percent cover estimates showed substantial change from one monitoring period to another; leaf material can be lost rapidly through herbivory, storm damage, high temperature stress, or exposure, and can rebound quickly as long as the meristem, roots and rhizomes remain intact (Rivers and Short, 2007; Short et al., 2006b; Orth et al., 2010; Kavieng, PNG data at www.SeagrassNet.org, respectively).

These Western Pacific sites represent a variety of biophysical conditions, geographic locations (including islands, reefs, and channels), and perturbations (including nutrient loading, sedimentation, temperature stress, and exposure on reef flats). The sites were chosen to include a wide range of conditions, with a site in each country that was undeveloped and well-flushed. In some countries, a second site with substantial human impact or the potential for such impact was also monitored. The dominant trend of the data was seagrass decline with 7 of 10 sites showing losses (at $p < 0.06$); none of the 10 sites showed overall increases in seagrass cover. Four sites declined from nutrient (KS1.2, PA3.1, PH4.2 &

Table 3
Western Pacific sites, years monitored, number of species (see Table 1), type of development impacting seagrasses, trend in seagrass cover and probable cause of seagrass change.

Site	Monitoring years	Number species present	Type of proximate development	Seagrass trends	Probable cause of change
KS1.1	8	3	MPA – Air strip – 2 km away	Stable with species shift	Unknown
KS1.2	5	3	Rural homes	Decreasing	Nutrients
PA3.1	8	3	City with sewage outfall	Decreasing	Nutrients
PA3.2	8	5	MPA – New road construction	Decreasing	Sediment
PH4.1	8	5	Distant city	Stable	
PH4.2	8	4	New city sewer outfall	Decreasing	Nutrients
SB5.1	8	4	MPA – Within an island park	Decline/partial recovery	Sediment
SB5.2	8	6	Village of stilt houses	Decline/partial recovery	Sediment
QL8.1	8	5	MPA – Resort	Stable	
IK16.1	7	7	MPA – Hotel cabins on beach	Decreasing	Nutrients

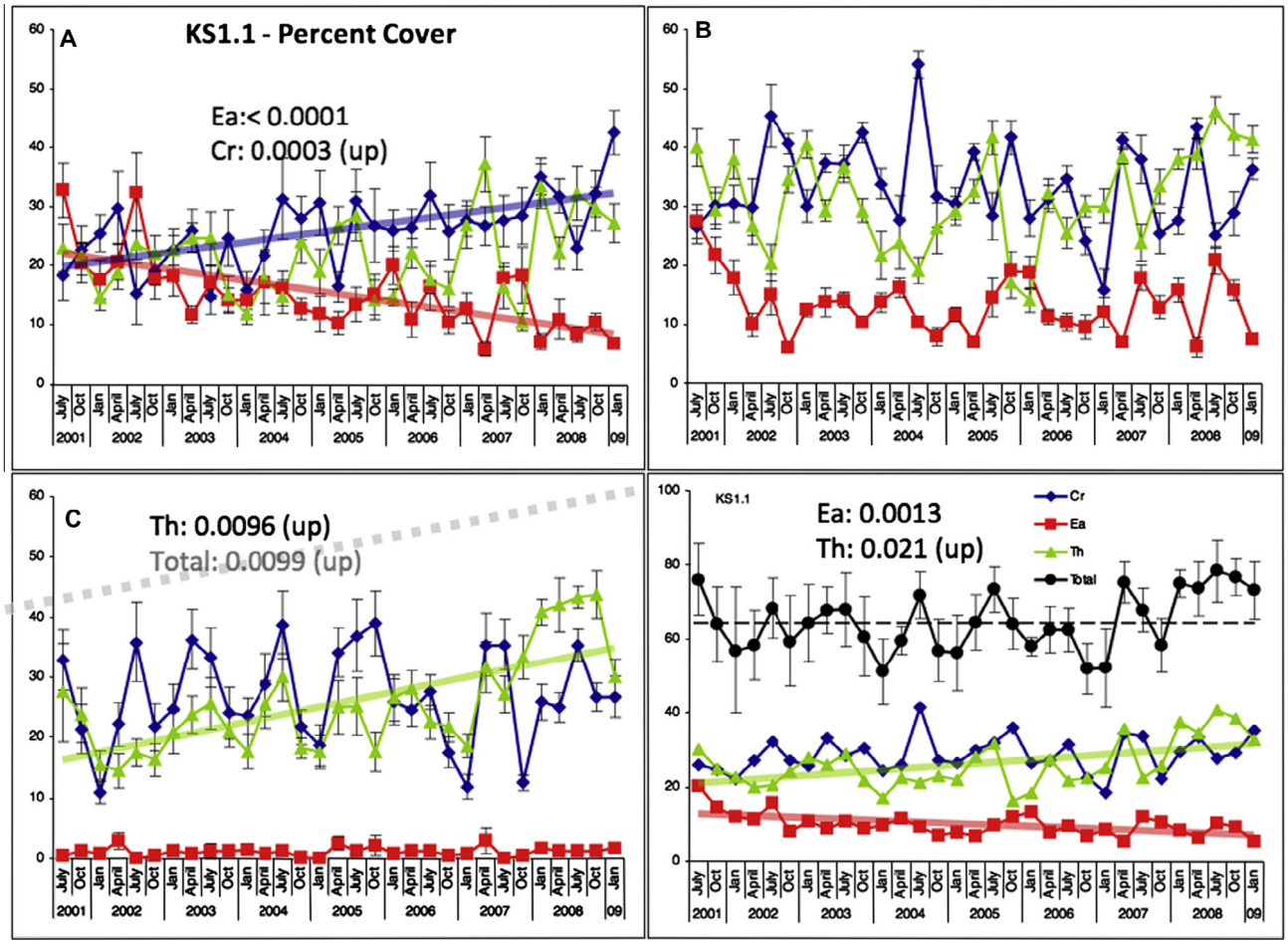


Fig. 5. Site in Kosrae (FSM) with stable seagrass populations between 2001–09. Panel A is the shallow transect, B the mid-bed transect, C the offshore transect, and KS1.1 is the sum of the data from A, B, and C. Symbols represent different species (see Table 1); species codes with *p*-values indicate significant linear trends; "up" indicates a positive trend.

IK16.1) and three from sediment (PA3.2, SB5.1 & SB5.2) impacts. Two sites that declined (SB5.1 & SB5.2) later showed partial recovery after severe sedimentation stress abated (Fig. 1). The three most stable sites (KS1.1, PH4.1 & QL8.1) were all in remote locations of low human impact (Table 3).

Stable sites (KS1.1, PH4.1 & QL8.1) were seen in Kosrae (FSM), Mindoro (Philippines), and Queensland (Australia) where the nearshore areas were well flushed and relatively unimpacted by human activities (Fig. 2). The seven sites with decreasing seagrass cover fell into two groups: three sites had a gradual loss in seagrass percent cover over several years, while four sites showed rapid decline in less than 2 years (Figs. 2 and 3). Two of the three sites with gradual declines were located near to small shoreline villages with steadily increasing nutrient pollution: Kosrae (KS1.2) and Mindoro (PH4.2). The third gradual decline occurred at Babelthraup, Palau (PA3.2), after stress of sediment loading from road construction and resulting watershed runoff. The rapidly declining sites all responded to diminishing water quality conditions from identified events: in Sabah (SB5.1 & SB5.2), the sediment from rapid land clearing for palm oil plantations (Freeman et al., 2008); in Koror, Palau, the installation of a sewage pumping station discharging upstream from the site (PA3.1) and in Komodo (IK16.1), the development of resort cabins on the beach.

The two sites in Sabah where monitoring documented total seagrass loss from excess sedimentation (Freeman et al., 2008) and subsequent, though partial, recovery after the alleviation of sediment loading, are examples of both the resilience of seagrass meadows (Fig. 4) and successional dynamics. The dramatic increase in sediment loading that engulfed most of the west coast of Sabah virtually eliminated seagrass habitat for over a year at SB5.1 in the Sabah Marine National Park and for more than 2 years at SB5.2 outside the park. Not only did the recovery occur sooner inside the park, but the rate of recovery was nearly twice as rapid within the marine protected area (MPA), where human stressors were somewhat less.

Three of the ten sites were located in MPAs, and two were adjacent to MPAs. Lacs, Kosrae (in a MPA set up to exclude snail, *Trocus,* harvesting) and Green Island, Queensland (the Great Barrier Reef Marine Park) had stable seagrass status (Table 3). The Sabah site in the Sabah Marine National Park lacked upland regulation and declined due to excessive sedimentation. The site in Babelthraup, Palau was adjacent to a Marine Park but similarly lacked upland regulation to prevent sediment runoff from watershed development. The site in Komodo, Indonesia is at a secluded offshore island on the border of Komodo National Park, and was impacted by a small development of tourist cabins that discharge sewage. Clearly, to ensure healthy seagrass meadows, more local controls as well as government protection of both waters and watersheds is needed, as well as actual protection and monitoring of MPAs.

Rapid seagrass losses were detectable in 1–2 years, given a suitable baseline. The monitoring protocol detects change in percent cover and species composition at the transect level as well as the site level. Within sites, the analysis of species and percent cover change at the shallow, mid and deep transects provides insight into

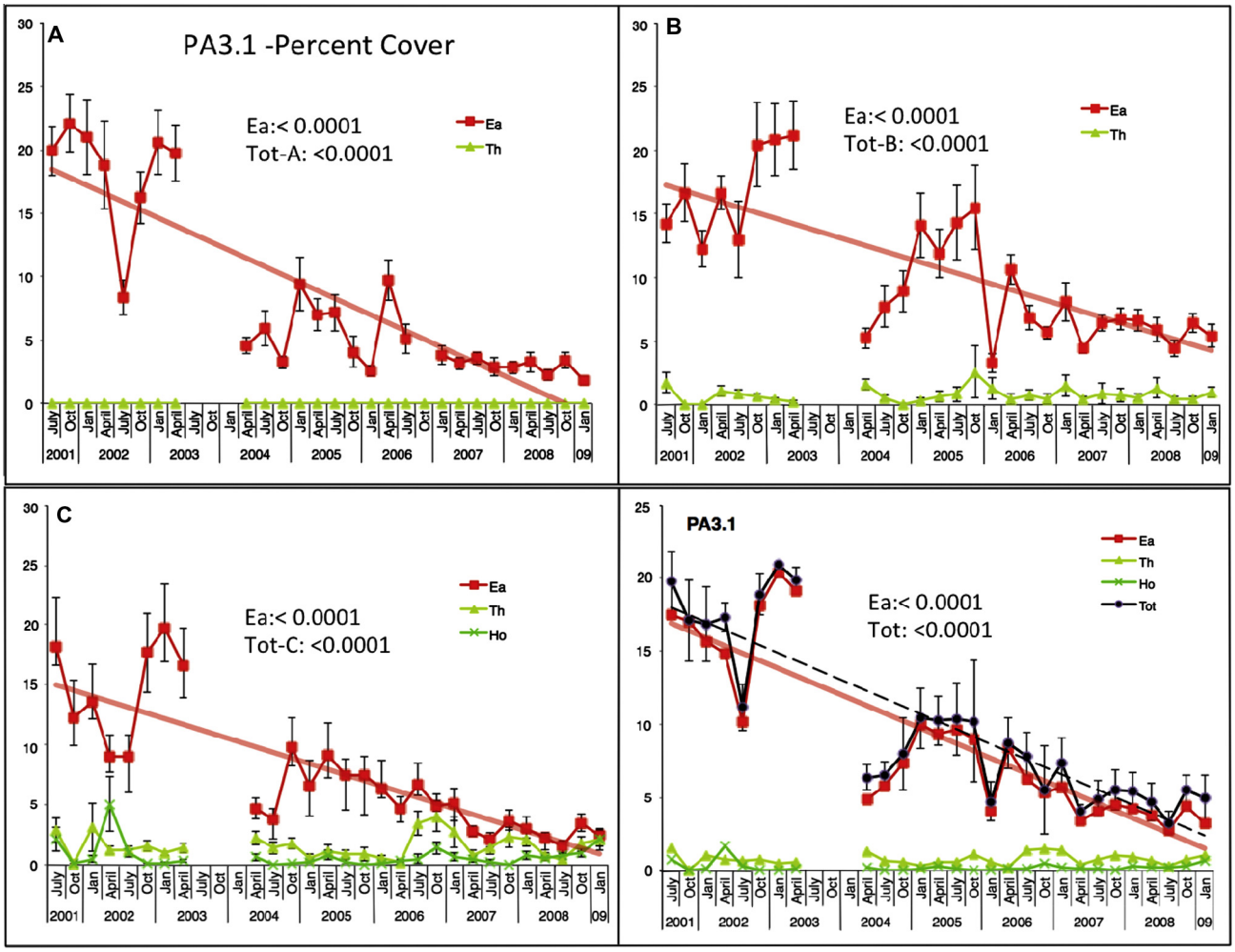


Fig. 6. Pristine Site in Palau with declining seagrass populations between 2001–09. Panel A is the shallow transect, B the mid-bed transect, C the offshore transect, and PA3.1 is the sum of the data from A, B, and C. Symbols represent different species (see Table 1); species codes with *p*-values indicate significant linear trends.

seagrass dynamics at different locations across the seagrass meadow. At the three sites that were stable, showing no significant overall trend in percent cover, many complex changes in species dynamics were documented. For example, in Kosrae at KS1.1 (Fig. 5), seagrasses showed species shift along the shallow transect (A) with a decline in *E. acoroides* over the 8 years of monitoring accompanied by a steady increase in *C. rotundata*. At transect C (deep) in contrast, a change in species dominance was seen: the larger species *T. hemprichii* increased over *C. rotundata*, and the transect showed an overall increase in seagrass percent cover which was balanced by insignificant changes in the other transects. The protocol reveals overall trends but also captures small-scale dynamics that, even in sites with stable percent seagrass cover, show interesting species shifts.

In Palau, where *E. acoroides* was dominant at PA3.1 (Fig. 6), the decline in *E. acoroides* was evident within a year at all transects, with no detectable change in the two understory species of seagrass. In Sabah at SB5.1 (Fig. 7) no single dominant species was present before the decline. The site had several abundant species, with a different species dominating each transect. The decline of *C. rotundata*, the dominant species at transect A, occurred within 1 year; *C. serrulata*, transect B's dominant species, virtually disappeared in less than 3 years and *H. uninervis*, the dominant seagrass at transect C, was nearly gone in 2 years. After the sedimentation stress was reduced at SB5.1, only *H. uninervis*, a pioneering species (den Hartog, 1970; Sidik et al., 2006), returned to colonize all three transects, with the entire site nearly a single-species stand of *H. uninervis* and very little regrowth of the climax species evident (Rollon et al., 1998).

The very large seagrass species in the Western Pacific, *E. acoroides*, grew at six of the ten monitoring sites and was found to be declining in four. Even in the remote environment of Kosrae KS1.1 where no overall site decline was observed and in the absence of any detectable stressor, *E. acoroides* declined and was replaced by *C. rotundata* and *T. hemprichii*. *E. acoroides* declined in several other sites, including Komodo (IK16.1). Such declines suggest that *E. acoroides* has very low tolerance to environmental stress. *E. acoroides* appears to be self-shading, even at moderate shoot densities (Bridges et al., 1981; Walker et al., 1999, Rattanachot et al., in preparation); its vulnerability to decreased light from suspended sediments or from competition with algal species may make it more susceptible to pollution than other seagrasses. The two sites where *E. acoroides* did not show a significant decline both had low levels of stress: Kosrae KS1.2 and the Philippines PH4.1. Our long-term monitoring suggests that *E. acoroides* is not a climax species in stressed environments. Alternatively, as seen in Kosrae KS1.1, a remote MPA, some region-wide stressor may be contributing to loss of *E. acoroides* and as a species it may be more susceptible to the impacts of global climate change and increasing temperatures (Unsworth et al., 2012).

Analysis of long-term results demonstrates losses of seagrass at sites across the Western Pacific region with the exception of

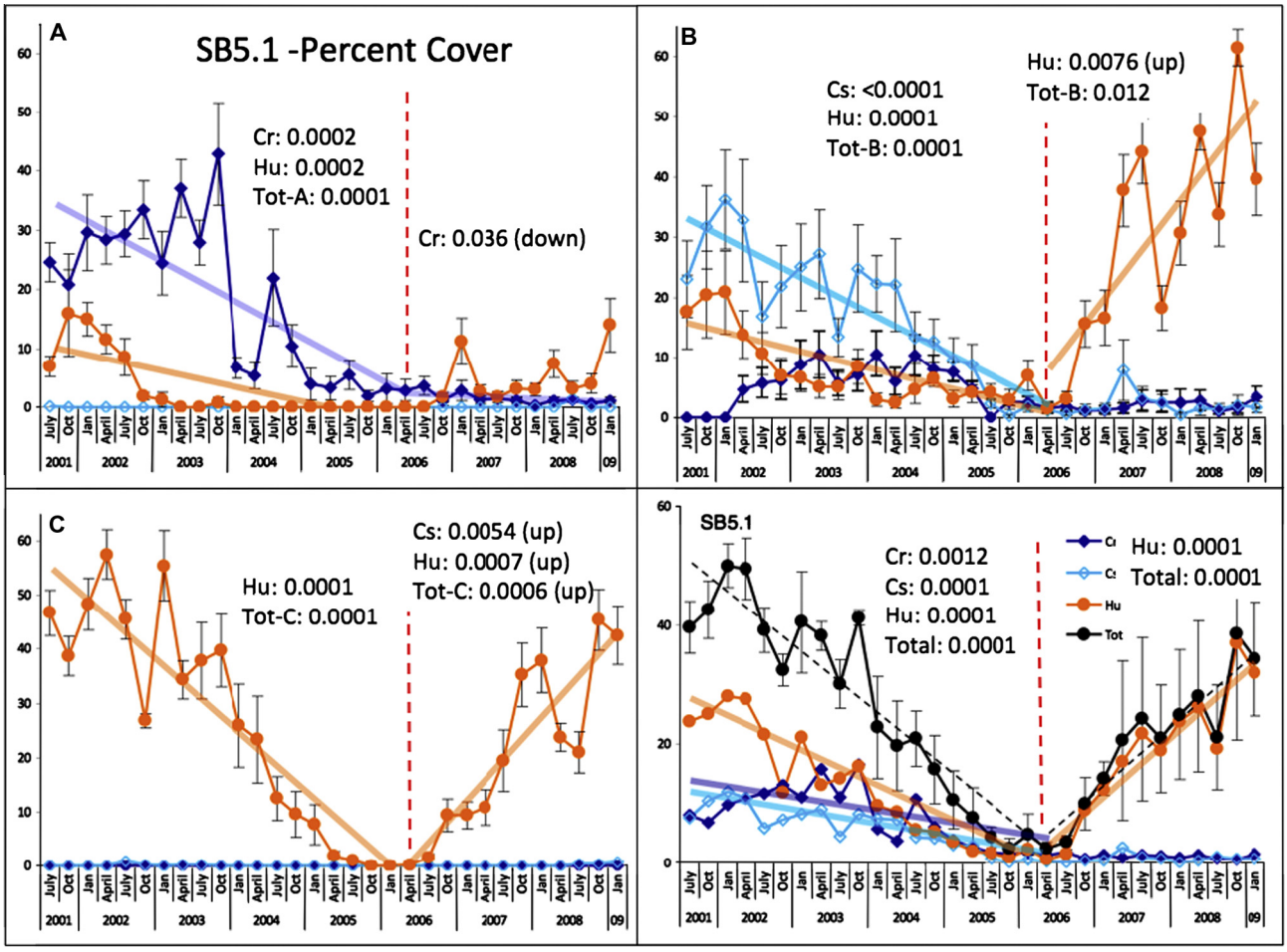


Fig. 7. Site in Sabah, Mayalsia with declining and recovering seagrass populations between 2001–09. Panel A is the shallow transect, B the mid-bed transect, C the offshore transect, and SB5.1 is the sum of the data from A, B, and C. Symbols represent different species (see Table 1); species codes with *p*-values indicate significant linear trends; "up" indicates a positive trend.

remote areas of low human population. The understanding and clarification of such dynamics and their underlying environmental conditions will allow scientists, resource managers, policy makers, and local communities to make sound and proactive decisions to protect seagrass systems and the many critical services they provide (Bjork et al., 2008), including the sequestration of organic (or blue) carbon (Fourqurean et al., 2012).

5. Conclusions

The assessment of ten sites in the Western Pacific showed seven sites in decline and three stable, a conclusion that does not bode well for these shallow marine ecosystems that provide vital resources to human populations in the Western Pacific region (de la Torres-Castro and Ronnback, 2004; Unsworth and Cullen, 2010). Analogous to the trend assessment for the more developed parts of the world (Waycott et al., 2009), the incidence of decline in seagrass habitats greatly outweighs stable systems.

The SeagrassNet methodology detected change rapidly, documenting losses in less than a year in Palau, Komodo, and Sabah. The monitoring protocol captured changes across the broad range of sites used in this study regardless of the specific geographic location, environmental conditions or types of perturbation at individual sites. Our wide ranging observations, the standardized protocol and the detailed, repeated measures of seagrass transects contribute to the robustness of the methodology and its ability to scientifically document seagrass ecological status and trends and the mechanisms driving change.

Overall, seagrasses in the Western Pacific are showing signs of stress and decline due to human impacts despite the vastness of the ocean area and relatively low development pressure. It may not be surprising that these Western Pacific seagrass beds are being impacted by a similar suite of anthropogenic perturbations as in other regions of the world. What is alarming is that many of the sites are located in fairly remote areas where the brunt of urban human population growth and associated development is absent. However, even in such wilderness/rural areas, small impacts create significant declines of multi-species seagrass ecosystems that have developed over time in the absence of humans. No part of our planet is immune from the impacts of human development. The management and conservation of seagrass habitats across the globe, and especially in the area of the richest biological diversity on our planet, must be a priority.

Acknowledgements

We are grateful to The David and Lucile Packard Foundation, Tom Haas and the New Hampshire Charitable Foundation, and the University of New Hampshire for financial support. Thanks to Cathy Short for assistance in writing and editing the manuscript and to Aaren Freeman, Jeff Gaeckle, Alyssa Novak, Nikki Sarrete, Len McKenzie, and the many graduate students and technicians who assisted with SeagrassNet over the years. Particular thanks

to the SeagrassNet teams across the Western Pacific for many years of effort in monitoring seagrass meadows and for educating governments and the public about the seagrass ecosystem.

References

Birch, W.R., Birch, M., 1984. Succession and pattern of tropical intertidal seagrasses in Cockle Bay, Queensland, Australia: a decade of observations. Aquat. Bot. 19, 343–367.

Bjork, M., Short F., Mcleod E., and Beer S., 2008. Managing Seagrass for Resilience to Climate Change. IUCN Gland Switzerland, p. 56.

Bridges, K.W., Phillips, R.C., Young, P.C., 1981. Patterns of some seagrass distribution in the Torres Strait, Queensland. Aust. J. Mar. Freshwater Res. 33, 273–283.

Burdick, D.M., Kendrick, G.A., 2001. Standards for seagrass collection, identification and sample design. In: Short, F., Coles, R. (Eds.), Global Seagrass Research Methods. Elsevier, Amsterdam, pp. 82–100.

Coles, R.G., McKenzie, L.J., Campbell, S.J., Yoshida, R.L., Edward, A., Short, F.T., 2005. The effect of causeway construction on seagrass meadows in the Western Pacific – a lesson from the ancient city of Nan Madol, Madolenihmw, Pohnpei, FSM. Pacific Conservation Biol. 11 (3), 212–220.

de la Torres-Castro, M., Ronnback, P., 2004. Links between humans and seagrasses – an example from tropical east Africa. Ocean Coastal Manage. 47, 361–387.

den Hartog, C., 1970. The Seagrasses of the World. Verhandelingen der Koninklijke Nederlandse Akademie van Wetenschappen Afdeling Natuurkunde 59, 1–275.

Duarte, C.M., Borum, J., Short, F.T., Walker, D.I., 2008. Seagrass ecosystems: their global status and prospects. In: Polunin, N.V.C. (Ed.), Aquatic Ecosystems: Trends and Global Prospects. Cambridge University Press, pp. 281–294.

Fourqurean, J.W., Duarte, C.M., Kennedy, H., Marbà, N., Holmer, M., Mateo, M.A., Apostolaki, E.T., Kendrick, G.A., Krause-Jensen, D., McGlathery, K.J., Serrano, O., 2012. Seagrass ecosystems as a globally significant carbon stock. Nat. Geosci.. http://dx.doi.org/10.1038/NGEO1477, pp. 1–5.

Freeman, A.S., Short, F.T., Isnain, I., Razak, F.A., Coles, R.G., 2008. Seagrass on the edge: land-use practices threaten coastal seagrass communities in Sabah, Malaysia. Biol. Conservation 141, 2993–3005.

Grech, A., Chartrand-Miller, K., Erftemeijer, P., Fonseca, M., McKenzie, L., Rasheed, R., Taylor, H., Coles, R.G., 2012. A comparison of threats, vulnerabilities and management opportunities in global seagrass bioregions. Environ. Res. Lett. 7, 024006.

Green, E.P., Short, F.T., 2003. World Atlas of Seagrasses. University of California Press.

McKenzie, L.J., Collier, C., Waycott, M., Unsworth, R., Yoshida, R.L. and Smith, N., 2012, Monitoring inshore seagrasses of the GBR, and responses to water quality. In: Proceedings of the 12th International Coral Reef Symposium, Cairns, Australia, 9–13 July 2012: 15B Seagrasses and seagrass ecosystems.

Mellors, J., McKenzie, L.J., Coles, R.G., 2008. Seagrass-watch: engaging Torres Strait Islanders in marine habitat monitoring. Continental Shelf Res. 28, 2339–2350.

Orth, R.J., Carruthers, T.J.B., Dennison, W.C., Duarte, C.M., Fourqurean, J.W., Heck, K.L., Hughes, A.R., Kendrick, G.A., Kenworthy, W.J., Olyarnik, S., Short, F.T., Waycott, M., Williams, S.L., 2006. A global crisis for seagrass ecosystems. Bioscience 56, 987–996.

Orth, R.J., Williams, M.R., Marion, S.R., Wilcox, D.J., Carruthers, T.J.B., Moore, K.A., Kemp, W.M., Dennison, W.C., Rybicki, N., Bergstrom, P., Batiuk, R.A., 2010. Long-term trends in submersed aquatic vegetation (SAV) in Chesapeake Bay, USA, related to water quality. Estuaries Coasts 33, 1144–1163.

Rattanachot, E., Short, F., Prathep, P. in preparation. Experimental shoot density reduction alters light availability and impacts the seagrass, *Enhalus acoroides* in Haad Chao Mai National Park, Thailand.

Rivers, D.O., Short, F.T., 2007. Impact of grazing by Canada geese (*Branta canadensis*) on an eelgrass (*Zostera marina* L.) meadow, New Hampshire, USA. Mar. Ecol. Progr. Ser. 333, 271–279.

Rollon, R.N., De Ruyter Van Steveninck, E.D., Van Vierssen, W., Fortes, M.D., 1998. Contrasting recolonization strategies in multi-species seagrass meadows. Mar. Pollut. Bull. 37, 450–459.

Short, F.T., Wyllie-Echeverria, S., 1996. Natural and human induced disturbance of seagrasses. Environ. Conservation 23, 17–27.

Short, F.T., McKenzie, L.J., Coles, R.G., Vidler, K.P., Gaeckle, J.L., 2006a. SeagrassNet manual for scientific monitoring of seagrass habitat – Worldwide Edition. University of New Hampshire Publication, Durham, NH, USA, p. 76.

Short, F.T., Koch, E.W., Creed, J.C., Magalhaes, K.M., Fernandez, E., Gaeckle, J.L., 2006b. SeagrassNet monitoring across the Americas: case studies of seagrass decline. Mar. Ecol. – Evolutionary Perspect. 27, 277–289.

Short, F., Carruthers, T., Dennison, W., Waycott, M., 2007. Global seagrass distribution and diversity: a bioregional model. J. Exp. Mar. Biol. Ecol. 350, 3–20.

Short, F.T., Polidoro, B., Livingstone, S.R., Carpenter, K.E., Bandeira, S., Bujang, J.S., Calumpong, H.P., Carruthers, T.J.B., Coles, R.G., Dennison, W.C., Erftemeijer, P.L.A., Fortes, M.D., Freeman, A.S., Jagtap, T.G., Kamal, A.H.M., Kendrick, G.A., Kenworthy, W.J., La Nafie, Y.A., Nasution, I.M., Orth, R.J., Prathep, A., Sanciangco, J.C., van Tussenbroek, B., Vergara, S.G., Waycott, M., Zieman, J.C., 2011. Extinction risk assessment of the World's seagrass species. Biol. Conservation 144, 1961–1971.

Sidik, B.J., Harah, Z.M., Arshad, A., 2006. Distribution and significance of seagrass ecosystems in Malaysia. Aquat. Ecosystem Health Manage. 9, 203–214.

Spaulding, M., Taylor, M., Ravilious, C., Short, F., Green, E., 2003. Global overview: the distribution and status of seagrasses. In: Green, E.P., Short, F.T. (Eds.), World Atlas of Seagrasses. University of California Press, Berkeley, USA.

Unsworth, R.K.F., Cullen, L.C., 2010. Recognizing the necessity for Indo-Pacific seagrass conservation. Conservation Lett. 3, 63–73.

Unsworth, K.F., Rasheed, M.A., Chartrand, K.M., Roelofs, A.J., 2012. Solar radiation and tidal exposure as environmental drivers of *Enhalus acoroides* dominated seagrass meadows. PLoS ONE 7 (3), e34133. http://dx.doi.org/10.1371/journal.pone.0034133.

Walker, D.I., Dennison, W.C., Edgar, G., 1999. Status of Australian seagrass research and knowledge. In: Butler, A., Jernakoff, P. (Eds.), Seagrass in Australia: Strategic review and development of an R & D Plan. CSIRO, Collingwood, pp. 1–24.

Waycott, M., Duarte, C.M., Carruthers, T.J.B., Orth, R.J., Dennison, W.C., Olyarnik, S., Calladine, A., Fourqurean, J.W., Heck Jr, K.L., Hughes, A.R., Kendrick, G.A., Kenworthy, W.J., Short, F.T., Williams, S.L., 2009. Accelerating loss of seagrasses across the globe threatens coastal ecosystems. Proc. Natl. Acad. Sci. 106, 12377–12381.

nature geoscience

ARTICLES

https://doi.org/10.1038/s41561-021-00695-3

Check for updates

Projections of tropical heat stress constrained by atmospheric dynamics

Yi Zhang[1]✉, Isaac Held[1] and Stephan Fueglistaler[1,2]

Extreme heat under global warming is a concerning issue for the growing tropical population. However, model projections of extreme temperatures, a widely used metric for extreme heat, are uncertain on regional scales. In addition, humidity needs to be taken into account to estimate the health impact of extreme heat. Here we show that an integrated temperature–humidity metric for the health impact of heat, namely, the extreme wet-bulb temperature (TW), is controlled by established atmospheric dynamics and thus can be robustly projected on regional scales. For each 1 °C of tropical mean warming, global climate models project extreme TW (the annual maximum of daily mean or 3-hourly values) to increase roughly uniformly between 20° S and 20° N latitude by about 1 °C. This projection is consistent with theoretical expectation based on tropical atmospheric dynamics, and observations over the past 40 years, which gives confidence to the model projection. For a 1.5 °C warmer world, the probable (66% confidence interval) increase of regional extreme TW is projected to be 1.33–1.49 °C, whereas the uncertainty of projected extreme temperatures is 3.7 times as large. These results suggest that limiting global warming to 1.5 °C will prevent most of the tropics from reaching a TW of 35 °C, the limit of human adaptation.

The impact of global warming on local extreme heat is projected to be detectable earliest in the tropics[1–3], where baseline temperatures are already high. In addition, countries located between 20° S and 20° N latitude will soon become major contributors to the global population growth[4], and there is thus a pressing need for accurate projections of extreme heat in the tropics down to regional scales.

The most widely used metric for extreme heat has been the extreme temperature. However, projections of extreme temperatures have large regional uncertainty arising from insufficient model representation of important land processes[5]. Moreover, to facilitate the estimation of heat-induced health impact (or heat stress), the effect of humidity should also be included[6,7]. This is because the major way for humans to lose metabolic heat in hot weather is evaporative cooling (sweating)[8,9], the efficiency of which anti-correlates with humidity. In particular, the inclusion of humidity is necessary for assessing heat stress in the tropics, the warmest and the most humid places on Earth.

The importance of humid heat has been increasingly recognized[10,11]. Studies have shown that increased humidity with temperature following the Clausius–Clapeyron relationship can worsen summer heat stress in the tropics[12,13], while other work has noticed a reduction in either relative humidity[14] or specific humidity[15] on the hottest days (not limited to the tropics). Given the possibility that humidity can interact with temperature in extreme heat, it is necessary to better quantify and improve our mechanistic understanding for the control of humid heat.

Here, we use the extreme wet-bulb temperature (TW), an integrated temperature–humidity metric for heat stress (Methods). TW by definition is the lowest temperature that human skin can be cooled to through evaporation of sweat. Therefore, the closer TW is to the upper limit of human skin temperature (around 35 °C), the more intolerable the heat is, with a survival limit of TW = 35 °C (ref. [16]) (high TW values below this survival limit also have adverse health impact). Furthermore, TW is a major component in the wet-bulb globe temperature (WBGT; Methods)[17], which is the standard metric for workplace heat stress. In this article, we argue that the regional extreme TW in the tropics is controlled mainly by robust atmospheric dynamics that have been established previously[18–21], rather than by local processes that are more uncertain. Therefore, tropical extreme TW can be robustly projected on regional scales under global warming.

Global climate model projections

Figure 1a shows the projections of extreme TW (TW_{max}) and extreme temperatures (T_{max}) by 22 global climate models (Supplementary Table 1) from the Coupled Model Intercomparison Project phase 5 (CMIP5)[22] under the representative concentration pathway 8.5 (RCP 8.5) emission scenario (TW_{max} and T_{max} refer mostly to the annual maximum of daily mean values in this paper and refer to the annual maximum of 3-hourly values when specifically stated). The multi-model mean of T_{max} averaged over tropical land within 20° S–20° N warms faster than the tropical mean temperature. However, TW_{max} closely follows the tropical mean warming, similar to an earlier finding using an atmospheric model coupled to a slab ocean[16]. These results also hold when analysing 3-hourly data that resolve the diurnal cycle from two models (GFDL-CM3 and IPSL-CM5A-LR) (Fig. 1b,c).

Figure 1d,e shows T_{max} and TW_{max} trends for all locations normalized by the tropical mean warming under RCP 8.5. T_{max} warming is spatially inhomogeneous over land ranging from 1.0 °C to 2.3 °C for each 1 °C of tropical mean warming (Fig. 1d), consistent with previous findings. By contrast, we find that increases of TW_{max} have no notable land–ocean contrast ranging from 0.8 °C to 1.3 °C for each 1 °C of tropical mean warming (Fig. 1e). Using the annual-maximum 3-hourly TW for TW_{max} does not change this result (Supplementary Fig. 1).

The spatially uniform TW_{max} trend (Fig. 1e) is not a cancellation of errors among different models. Instead, all models show good agreement on TW_{max} trend, even down to regional scales. Fig. 2 shows the model spread (2.5–97.5th percentiles) of T_{max} and TW_{max} projections for four selected regions that have caught substantial

[1]Program in Atmospheric and Oceanic Sciences, Princeton University, Princeton, NJ, USA. [2]Department of Geosciences, Princeton University, Princeton, NJ, USA. ✉e-mail: yz8@princeton.edu

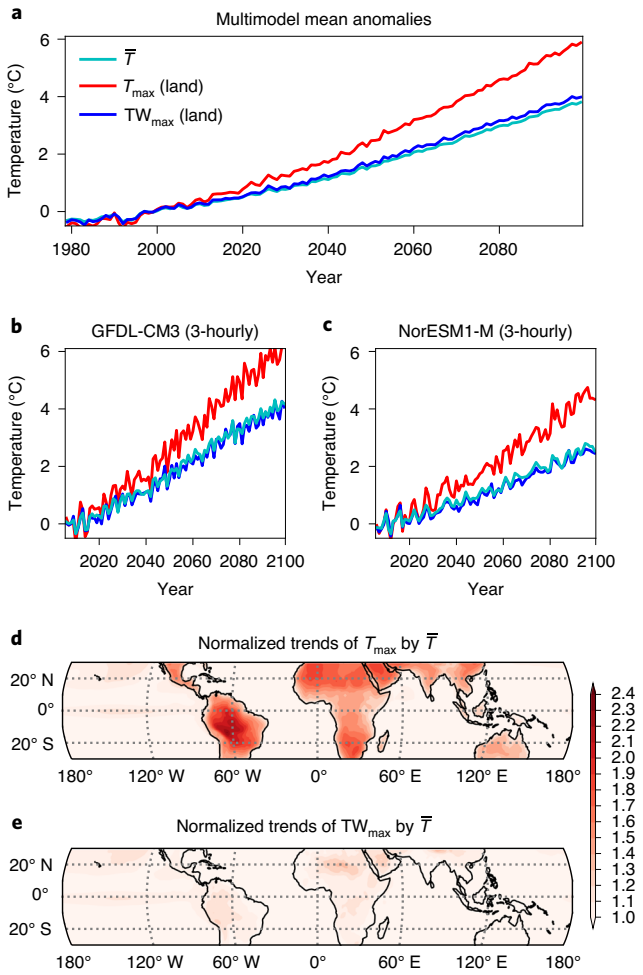


Fig. 1 | TW_{max} and T_{max} trends in climate models under RCP 8.5. a, Multimodel-mean time series of the tropical mean (20° S–20° N) temperature ($\overline{T}$; cyan), land-mean T_{max} (red) and land-mean TW_{max} (blue). **b**,**c**, The same as **a** but using the annual-maximum 3-hourly values for T_{max} and TW_{max} for two individual models. **d**,**e**, Multimodel-mean location-specific T_{max} and TW_{max} trends normalized by $\overline{T}$ trends.

attention in the literature: the Amazon rain forest, the Maritime Continent, the Indian peninsula and the Sahel. The projected T_{max} warming has large spread among models, which is especially prominent in the Amazon rain forest, consistent with earlier analysis[5]. However, for regional TW_{max}, all 22 climate models project a close to 1/1 ratio with the tropical mean warming. Using the annual maximum of 3-hourly TW does not change this result (Supplementary Fig. 2). Intriguingly, the model spread of T_{max} tends to grow with the amplitude of the projected warming (pronounced for the Amazon rain forest and the Maritime Continent), whereas the model spread of TW_{max} does not show evident growth within the range of simulated warming (roughly 4 °C). That the intermodel spread is much less for TW_{max} projections than for T_{max} is also true for other tropical land regions (Supplementary Fig. 3).

To summarize, global climate models predict that TW_{max} will increase roughly uniformly in the tropics by about 1 °C for each 1 °C of tropical mean warming. Models show wide spread on regional T_{max} projections but agree very well upon regional TW_{max}.

Theoretical support

For a theoretical projection of TW_{max}, we argue that tropical atmospheric dynamics exert a strong, tropics-wide control on local TW_{max}. This control is through the functional relationship between TW and moist static energy (MSE; Supplementary Fig. 4), which is a variable regulated by atmospheric dynamics. In the tropics, the free-tropospheric temperature is roughly uniform in the horizontal as a result of the weak effect of the Earth's rotation. This horizontally uniform temperature, which is determined by the near-surface MSE in regions of deep convection, sets the upper bound for MSE at all locations. Indeed, the maximum near-surface MSE is roughly uniform within 20° S–20° N (even more uniform than the time-mean MSE; Supplementary Fig. 5a,b), and the spatial pattern of TW_{max} closely follows the uniformity of the maximum MSE (Supplementary Fig. 5c). As this upper bound for near-surface MSE and, equivalently, for TW is a common one over land or over ocean[21], we expect that changes in TW_{max} should also be roughly equal over land and over ocean under global warming:

$$\Delta TW_{max,Land} \approx \Delta TW_{max,Ocean} \quad (1)$$

Equation (1) thus provides a handle on TW_{max} over land which is challenging to predict due to various land types and land processes, as a theoretical projection for TW_{max} over ocean can be made relatively easily. Near the ocean surface, air is close to saturation and TW changes are approximately equal to temperature changes (exactly equal when air is saturated); $\Delta TW_{max,Ocean}$ is thus approximately equal to the change in the warmest sea surface temperatures (SSTs). Therefore, 1 °C of $\Delta TW_{max,Land}$ is accompanied by 1 °C of warming of the warmest SSTs according to Eq. (1). Furthermore, the area dominance of the ocean and the relatively constant shape of SST histogram under global warming (Supplementary Fig. 6) together result in a 1/1 correspondence between warming of the warmest SSTs and the tropical mean temperature. (While there is potential for differences between changes in these relatively warm SSTs and the tropical mean SST[23–25], we find these differences to be small enough that they do not undermine the theoretical considerations here.) We thus expect $\Delta TW_{max,Land}$ roughly equals the tropical mean warming.

Global climate models shown in Figs. 1 and 2 are consistent with the preceding theoretical considerations. For each 1 °C of tropical mean warming, models on average give 1.05 °C of $\Delta TW_{max,Land}$, 0.93 °C of $\Delta TW_{max,Ocean}$ and 0.91 °C of the warmest-quartile-mean SST increase, all close to 1 °C.

The non-local control of TW_{max} by the warmest SSTs seems to be at odds with the perception that these extreme events are driven by rare local meteorology, and this controversy deserves some clarification. While TW_{max} events are driven by local processes, the potential magnitude of TW_{max} is largely set by the uniform free-tropospheric temperature. The effectiveness of this non-local control is evident in the uniformity of TW_{max} increases in Fig. 1e and the good agreement across models in Fig. 2, neither of which can be explained by the heterogeneity of local processes. Moreover, the existence of such a non-local control within the tropics also explains why the tropics are consistently warm and humid, but the highest TW and WBGT are observed in the subtropics[13,26,27]. These considerations thus support the picture that the magnitude of ΔTW_{max} across tropical land regions is set by the warmest SSTs and not by local processes or the spatial pattern of SST.

Observational evidence

From 1979 to 2018, the tropical (20° S–20° N) land-mean T_{max} trend has a 95% confidence interval of 0.24–0.31 °C per decade, which is almost three times the tropical mean warming of 0.08–0.12 °C per decade on the basis of the European Centre for Medium-Range Weather Forecasts Reanalysis Interim (ERA-Interim)[28] (Fig. 3a). TW_{max} has a trend of 0.05–0.10 °C per decade, very similar to the tropical mean warming, and the interannual variabilities of the two are highly correlated, with a correlation coefficient of 0.85 (Fig. 3a). Using the annual-maximum 3-hourly TW from ERA-Interim yields

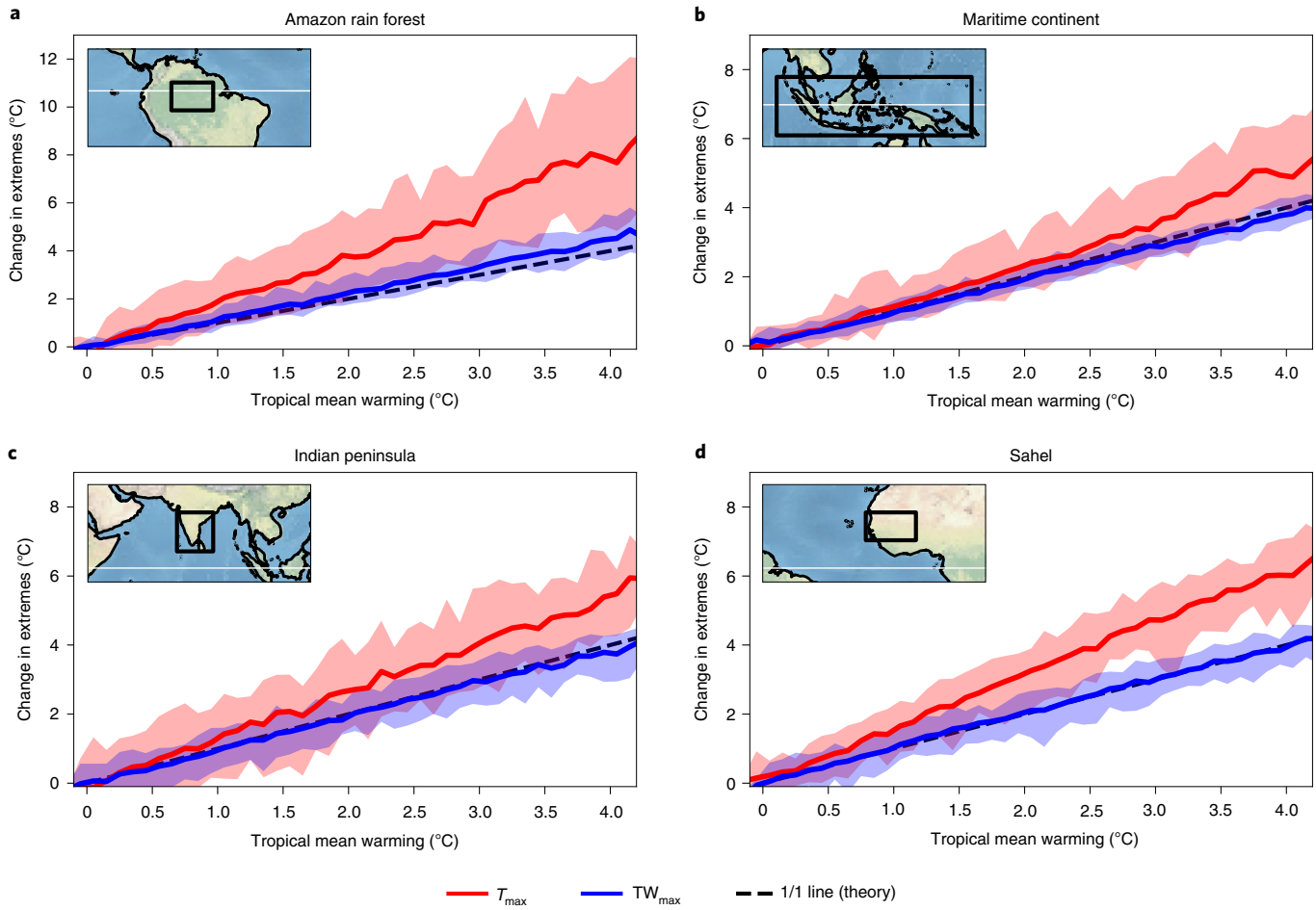


Fig. 2 | Model agreement on regional TW_{max} projections. a–d, Multimodel means (lines) and spreads (2.5–97.5th percentiles; shading) for regional T_{max} (red) and TW_{max} (blue) as a function of the tropical mean warming are shown for four regions: Amazon rain forest (**a**), Maritime Continent (**b**), Indian peninsula (**c**) and Sahel (**d**). Only land data within the black frames on the maps are sampled. The dashed black lines indicate the 1/1 ratio.

very similar anomalies, although the long-term trend is smaller (Supplementary Fig. 7). Furthermore, station measurements of TW provided by HadISD[29] (Methods and Supplementary Fig. 8) show that TW_{max} averaged over tropical stations is highly correlated with that from ERA-Interim and has a similar trend of 0.05–0.10 °C per decade (Fig. 3a). The consistency of reanalysis data with station observations and the theory lends support to the quality of the reanalysis data over tropical land.

The warmest-quartile-mean SST (the average of the top 25% of monthly SST at all grid points within each year) from HadISST[30] is highly correlated with land-mean TW_{max} and has a similar trend of 0.08–0.12 °C per decade (Fig. 3a). Satellite SST observations and station TW observations are largely independent, and the very good consistency in their extreme values lends strong support to the aforementioned argument that TW_{max} over land is coupled to the warmest SSTs. Strong El Niño events have the potential of warming the warmest SSTs and, as a result, affect TW_{max} over land (for example, 1998 in Fig. 3a).

Location-specific evaluation of long-term TW_{max} trends for the observations suffers from the smallness of the warming signal, but interannual variability of SST provides room for testing the 1/1 relationship with TW_{max}. Regression slopes of TW_{max} (ERA-Interim) onto the tropical mean temperature (linear trends removed) is relatively uniform over most of the land regions within 20° S–20° N (Fig. 3b) with a mode value very close to 1 (Fig. 3c). This relationship loosens in the subtropics (indicated by the hatching in Fig. 3b), consistent with the latitudinal range where the theory works[21]. That the Andes and the southern edge of the Sahara have much higher TW_{max} sensitivity does not violate the proposed theory, as climatological TW_{max} in those regions is too low to trigger convection and thus not constrained by the aforementioned mechanism. The standard deviation of these slopes in the reanalysis is larger than that for the global warming simulations shown in Fig. 1e (Fig. 3c). A likely explanation is that the spatial pattern of TW_{max} can change in the interannual variability, and such a spatial rearrangement can cause a spread in the regression slopes but does not affect the tropical averages shown in Fig. 3a. Indeed, global climate models also show a similar spread of TW_{max} trends under historical radiative forcing, and the removal of long-term trends in the global warming simulations for the same set of models also results in a similar spread (Fig. 3c). Therefore, regional TW_{max} trends diagnosed from reanalysis data over the past 40 years are consistent with global climate models. For similar reasons, we do not expect every station to give the same TW_{max} trend.

While we do not attempt to formulate an attribution statement for the TW_{max} trend over land seen in Fig. 3a, we note that the tight relationship in the overall trend as well as higher frequency variability strongly suggests that any attribution statements for the tropical mean temperature or SST can also be applied to TW_{max}.

Implications for the future climate

Consistency of model results with the theory and observations lends strong support to the capability of global climate models in properly simulating regional TW_{max} increases. In a 1.5 °C warmer

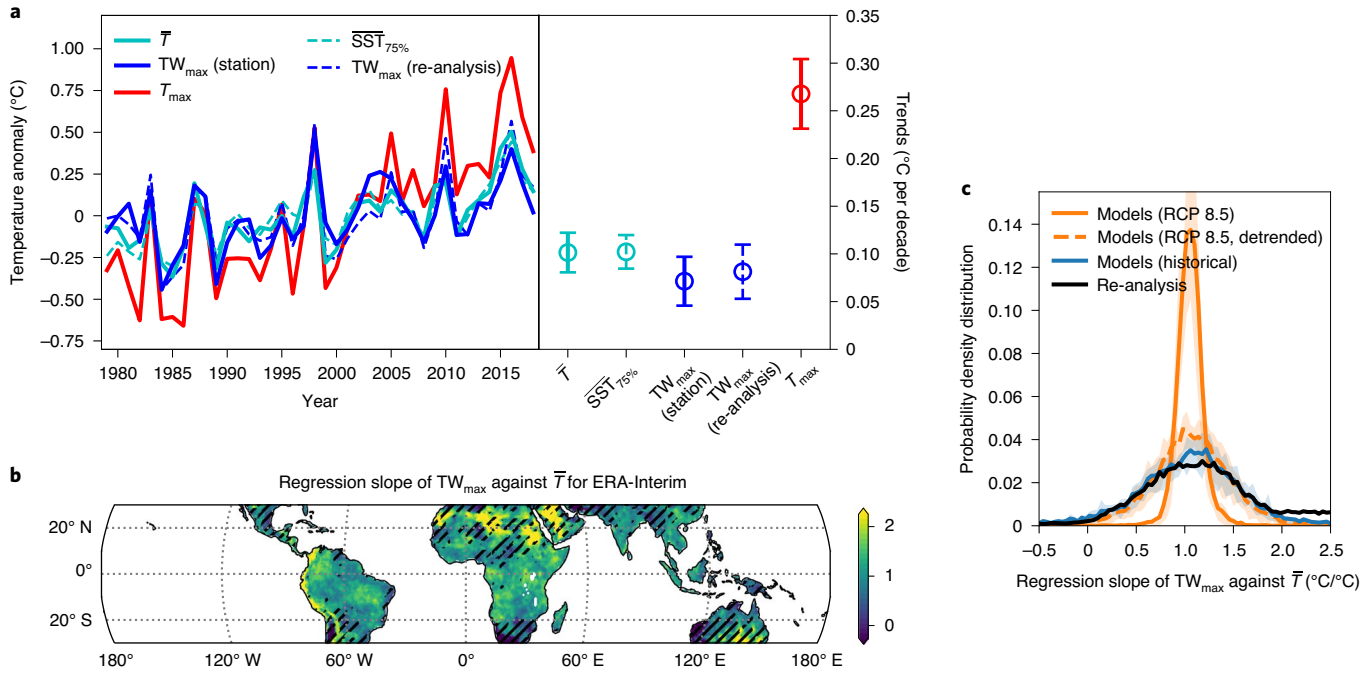


Fig. 3 | TW$_{max}$ in observations and reanalysis data. a, Time series and corresponding linear trends of tropical mean temperature ($\overline{T}$; solid cyan), land-mean T_{max} (red), land-mean TW$_{max}$ from stations (solid blue) and ERA-Interim (dashed blue), and the warmest-quartile-mean SST from HadISST (dashed cyan) for 1979–2018 (20° S–20° N). The confidence intervals for the linear trends represent 95% significance assuming that the detrended annual data points are independent. **b**, Linear regression slopes of local TW$_{max}$ onto $\overline{T}$ in the interannual variabilities (linear trends removed) from ERA-Interim for 1979–2018. Regions where TW$_{max}$ and $\overline{T}$ are not correlated on a 95% significance level are hatched. **c**, Histograms of regression slopes of local TW$_{max}$ onto $\overline{T}$ (linear trends removed) for 1979–2005 in ERA-Interim (black solid) and models (blue solid) and for the global warming simulations in models (orange dashed). The same histogram for non-detrended global warming simulations (Fig. 1e) is also shown (orange solid). Shading indicates the 25–75th percentiles of models.

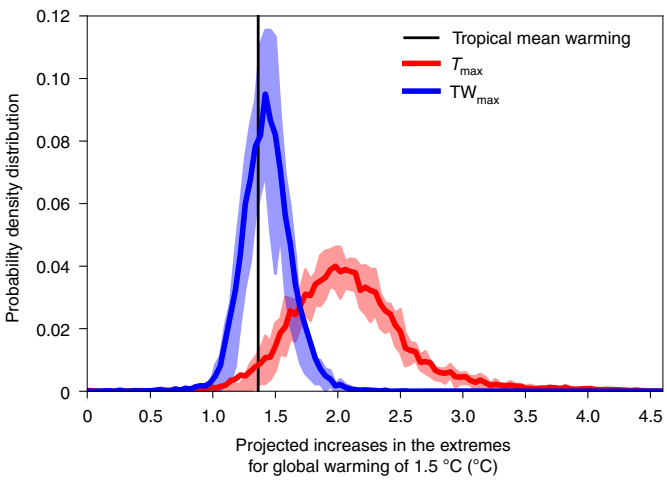


Fig. 4 | Uncertainty of T_{max} and TW$_{max}$ projection in a 1.5 °C warmer world (land between 20° S and 20° N). Distributions of model-projected TW$_{max}$ increases (blue) and T_{max} increases (red) under RCP 8.5 at 1.5 °C of global mean warming are shown. The distributions are constructed by linearly regressing local T_{max} and TW$_{max}$ increases onto global mean warming and taking the regression values at 1.5 °C of global mean warming. Solid lines show the average distribution of all models, and the shading indicates the 25–75th percentiles across models.

world, the projected 66% confidence interval (equivalent to the Intergovernmental Panel on Climate Change's 'likely range') for TW$_{max}$ increases across all tropical land regions (20° S–20° N) is 1.33–1.49 °C, consistent with the simulated tropical mean warming of ~1.4 °C in a 1.5 °C warmer climate (Fig. 4). However, projected T_{max} increases have a wider distribution, the absolute (relative) standard deviation of which is 3.7 (1.8) times that of TW$_{max}$ increases. The reduction in uncertainty is more pronounced for regions where T_{max} projections are most uncertain. For example, in the Amazon rain forest and the Maritime Continent (Fig. 2), the absolute (relative) uncertainty of T_{max} increases is around 4 (2.5) times that of TW$_{max}$ increases.

Our results imply that curtailing global mean warming will have a proportional effect on regional TW$_{max}$ in the tropics. The maximum 3-hourly TW (ERA-Interim) ever experienced in the past 40 years by 99.98% of the land area within 20° S–20° N is below 33 °C. Therefore, a 1.5 °C or 2 °C warmer world will likely exempt the majority of the tropical area from reaching the survival limit of 35 °C. However, there exists little knowledge on safety thresholds for TW besides the survival limit[11], and 1 °C of TW increase could have adverse health impact equivalent to that of several degrees of temperature increase. TW will thus have to be better calibrated to health impact before wider societal implementation. Nonetheless, the confidence in TW$_{max}$ projection provided in this work still raises the confidence in the projections of other calibrated heat stress metrics that account for TW, such as the WBGT.

Online content

Any methods, additional references, Nature Research reporting summaries, source data, extended data, supplementary information, acknowledgements, peer review information; details of author contributions and competing interests; and statements of data and code availability are available at https://doi.org/10.1038/s41561-021-00695-3.

Received: 29 January 2020; Accepted: 19 January 2021;
Published online: 8 March 2021

References

1. Mahlstein, I., Knutti, S., Solomon, S. & Portmann, R. W. Early onset of significant local warming in low latitude countries. *Environ. Res. Lett.* **6**, 034009 (2011).
2. Coumou, D., Robinson, A. & Rahmstorf, S. Global increase in record-breaking monthly-mean temperatures. *Clim. Change* **118**, 771–782 (2013).
3. Hoegh-Guldberg, O. et al. in *Special Report on Global Warming of 1.5 °C* (eds Masson-Delmotte, V. et al.) Ch. 3 (IPCC, 2018).
4. *World Population Prospects 2019: Highlights* ST/ESA/SER.A/423 (United Nations, Department of Economic and Social Affairs, Population Division, 2019).
5. Vogel, M. et al. Regional amplification of projected changes in extreme temperatures strongly controlled by soil moisture–temperature feedbacks. *Geophys. Res. Lett.* **44**, 1511–1519 (2017).
6. Kovats, R. S. & Hajat, S. Heat stress and public health: a critical review. *Annu. Rev. Public Health* **29**, 41–55 (2008).
7. Mitchell, D. et al. Attributing human mortality during extreme heat waves to anthropogenic climate change. *Environ. Res. Lett.* **11**, 074006 (2016).
8. Hardy, J. D., Du Bois, E. F. & Soderstrom, G. F. Basal metabolism, radiation, convection and vaporization at temperatures of 22 to 35 °C. *J. Nutr.* **15**, 477–497 (1938).
9. Hardy, J. D. & Stolwijk, J. A. Partitional calorimetric studies of man during exposures to thermal transients. *J. Appl. Physiol.* **21**, 1799–1806 (1966).
10. Mora, C. et al. Global risk of deadly heat. *Nat. Clim. Change* **7**, 501–505 (2017).
11. Sherwood, S. C. How important is humidity in heat stress? *J. Geophys. Res. Atmos.* **123**, 808–810 (2018).
12. Delworth, T. L., Mahlman, J. D. & Knutson, T. R. Changes in heat index associated with CO_2-induced global warming. *Clim. Change* **43**, 369–386 (1999).
13. Willett, K. M. & Sherwood, S. Exceedance of heat index thresholds for 15 regions under a warming climate using the wet-bulb globe temperature. *Int. J. Climatol.* **32**, 161–177 (2012).
14. Fischer, E. M. & Knutti, R. Robust projections of combined humidity and temperature extremes. *Nat. Clim. Change* **3**, 126–130 (2013).
15. Coffel, E. D., Horton, R. M., Winter, J. M. & Mankin, J. S. Nonlinear increases in extreme temperatures paradoxically dampen increases in extreme humid-heat. *Environ. Res. Lett.* **14**, 084003 (2019).
16. Sherwood, S. C. & Huber, M. An adaptability limit to climate change due to heat stress. *Proc. Natl Acad. Sci. USA* **107**, 9552–9555 (2010).
17. *Ergonomics of the Thermal Environment—Assessment of Heat Stress Using the WBGT (Wet Bulb Globe Temperature) Index* ISO Standard No. 7243:2017 (International Organization for Standardization, 2017); https://www.iso.org/standard/67188.html
18. Byrne, M. P. & O'Gorman, P. A. Land–ocean warming contrast over a wide range of climates: convective quasi-equilibrium theory and idealized simulations. *J. Clim.* **26**, 4000–4016 (2013).
19. Byrne, M. P. & O'Gorman, P. A. Link between land–ocean warming contrast and surface relative humidities in simulations with coupled climate models. *Geophys. Res. Lett.* **40**, 5223–5227 (2013).
20. Byrne, M. P. & O'Gorman, P. A. Trends in continental temperature and humidity directly linked to ocean warming. *Proc. Natl Acad. Sci. USA* **115**, 4863–4868 (2018).
21. Zhang, Y. & Fueglistaler, S. How tropical convection couples high moist static energy over land and ocean. *Geophys. Res. Lett.* **47**, e2019GL086387 (2020).
22. Taylor, K. E., Stouffer, R. J. & Meehl, G. A. An overview of CMIP5 and the experiment design. *Bull. Am. Meteorol. Soc.* **93**, 485–498 (2012).
23. Sobel, A. H., Held, I. M. & Bretherton, C. S. The ENSO signal in tropical tropospheric temperature. *J. Clim.* **15**, 2702–2706 (2002).
24. Flannaghan, T. J. et al. Tropical temperature trends in Atmospheric General Circulation Model simulations and the impact of uncertainties in observed SSTs. *J. Geophys. Res.* **119**, 327–337 (2014).
25. Fueglistaler, S. Observational evidence for two modes of coupling between sea surface temperatures, tropospheric temperature profile and shortwave cloud radiative effect in the tropics. *Geophys. Res. Lett.* **46**, 9890–9898 (2019).
26. Pal, J. S. & Eltahir, E. A. B. Future temperature in southwest Asia projected to exceed a threshold for human adaptability. *Nat. Clim. Change* **6**, 197–200 (2016).
27. Im, E., Pal, J. S. & Eltahir, E. A. B. Deadly heat waves projected in the densely populated agricultural regions of South Asia. *Sci. Adv.* **3**, e1603322 (2017).
28. Dee, D. P. et al. The ERA-Interim reanalysis: configuration and performance of the data assimilation system. *Q. J. R. Meteorol. Soc.* **137**, 553–597 (2011).
29. Dunn, R. J. H., Willett, K. M., Parker, D. E. & Mitchell, L. Expanding HadISD: quality-controlled, sub-daily station data from 1931. *Geosci. Instrum. Methods Data Syst.* **5**, 473–491 (2016).
30. Rayner, N. A. et al. Global analyses of sea surface temperature, sea ice, and night marine air temperature since the late nineteenth century. *J. Geophys. Res. Atmos.* **108**, 4407 (2003).

Publisher's note Springer Nature remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.

© The Author(s), under exclusive licence to Springer Nature Limited 2021

Methods

Wet-bulb temperature. TW is thermodynamically defined as the temperature that an air parcel would have if cooled adiabatically to saturation at constant pressure by evaporation of water into it, all latent heat being supplied by the parcel. This process is enthalpy conserving; therefore, $c_pT+Lq=c_p\mathrm{TW}+Lq_{sat}(\mathrm{TW})$, where T and q are the temperature and the specific humidity of an environmental air parcel[31]. TW is empirically defined as the temperature read from the wet-bulb thermometer, which is a balance between diffusion of sensible heat from the environment to the saturated surface and the latent heat the other way around. Here we adopt the second definition because it is more relevant for the process of evaporative cooling of sweat. The two definitions give the same result due to the coincidence that the diffusivities of sensible and latent heat are the same. TW is calculated by solving the following equation using Newton's iteration: $c_pT+Lq=c_p\mathrm{TW}+\epsilon Le_{sat}(\mathrm{TW})/p_s$, where T, q and p_s are temperature, specific humidity and pressure of the surface air, ϵ is the molecular mass ratio of water vapour and air, e_{sat} is the saturation vapour pressure and L is the latent heat of condensation.

Wet-bulb globe temperature. WBGT evaluates the heat stress to which a person is exposed. It is used by workers, athletes and military. It is defined as $\mathrm{WBGT}=0.7\mathrm{TW}+0.3T_d$ (or $\mathrm{WBGT}=0.7\mathrm{TW}+0.2T_g+0.1T_d$ to take solar insolation into account), where TW is the wet-bulb temperature, T_g is the globe thermometer temperature and T_d is the dry-bulb temperature (or actual air temperature).

Station data. Station data from HadISD are selected on the basis of the following procedure. For each station, we first scan though TW measurements for each day and take only the daily averages of those days containing at least four measurements. Then, for the years containing more than 300 daily mean TWs, the annual-maximum TW is taken. In the end, stations with at least 20 valid annual-maximum TW values are included in this paper, which ends up to be 293 stations (Supplementary Fig. 8). For those stations, the average TW is subtracted within each station, then the anomalies are averaged among all stations as shown in Fig. 3.

Daily mean and 3-hourly TW from CMIP5 models. CMIP5 models provide surface air temperature and specific humidity on daily and 3-hourly frequency but not surface pressure. Therefore, we interpolate monthly surface pressure in a piece-wise manner to daily frequency for daily TW calculation and ignore the diurnal cycle in surface pressure for 3-hourly TW calculation. The error thus induced in TW is estimated to be less than 0.3 °C.

Data availability

CMIP5 model data provided by the World Climate Research Programme's Working Group on Coupled Modelling, and climate modelling groups can be accessed at https://esgf-node.llnl.gov/projects/cmip5. ERA-Interim data provided by European Centre for Medium-Range Weather Forecast (ECMWF) can be accessed at http://go.nature.com/3piVLPO. HadISD global sub-daily station dataset (v3.0.1.201909p) provided by Met Office Hadley Centre can be accessed at https://www.metoffice.gov.uk/hadobs/hadisd. HadISST data provided by the Met Office Hadley Centre can be accessed at https://www.metoffice.gov.uk/hadobs/hadisst.

Code availability

The computer code used in this paper is available from the corresponding author.

References

31. Iribarne, J. V. & Godson, W. L. in *Atmospheric Thermodynamics* Ch. 6 (Springer, 1973).

Acknowledgements

Y.Z. thanks J. Lin and G. Vecchi for suggestions on the manuscript. Y.Z. acknowledges support under award NA18OAR4320123 from the National Oceanic and Atmospheric Administration, US Department of Commerce (the statements, findings, conclusions, and recommendations are those of the author and do not necessarily reflect the views of the National Oceanic and Atmospheric Administration or the US Department of Commerce). S.F. acknowledges support from National Science Foundation under award AGS-1733818.

Author contributions

Y.Z. conceived the theory, performed the data analysis and wrote the manuscript. I.H. suggested the examination of observations/reanalysis. S.F. interpreted the widening of TW_{max} trend distribution in reanalysis (Fig. 3c). All authors discussed the results and edited the manuscript.

Competing interests

The authors declare no competing interests.

Additional information

Supplementary information The online version contains supplementary material available at https://doi.org/10.1038/s41561-021-00695-3.

Correspondence and requests for materials should be addressed to Y.Z.

Peer review information *Nature Geoscience* thanks the anonymous reviewers for their contribution to the peer review of this work. Primary Handling Editors: Tamara Goldin, Heike Langenberg, Tom Richardson.

Reprints and permissions information is available at www.nature.com/reprints.

nature climate change

Article

https://doi.org/10.1038/s41558-023-01831-0

Using a human rights lens to understand and address loss and damage

Received: 7 November 2022

Accepted: 6 September 2023

Published online: 2 November 2023

Check for updates

Karen E. McNamara[1], Rachel Clissold[1,2], Ross Westoby[3], Stephanie Stephens[4,5], George Koran[4,6], Willy Missack[4,7] & Christopher Y. Bartlett[8]

The Vanuatu government is seeking an advisory opinion from the International Court of Justice on the legal responsibility of countries to act on climate change. This will provide clarity on loss and damage finance and could catalyse powerful legal tools that hold polluters accountable. Human rights can be a valuable framing for calling attention to and addressing loss and damage, but there remains limited scholarship so far. Here we explore how climate change is impinging on the rights of Ni-Vanuatu and what can be done in response. Our findings show that loss and damage to fundamental rights is already occurring and will worsen, undermining the right to a life of dignity. The future loss and damage fund, and other initiatives, should integrate a human rights restoration package that includes recording and safeguarding Indigenous knowledge, promoting cultural continuity, restoring the socio-ecological system, building back better and investing in education.

Climate change has been labelled 'the human rights challenge of the twenty-first century'[1]. Since the 2005 Inuit petition put before the Inter-American Commission on Human Rights, the links between climate change and human rights have increasingly received attention, highlighting the importance of the Universal Declaration of Human Rights, among others, in responding to the climate crisis. All countries have ratified at least one of the nine core international human rights treaties, and most have ratified several, implying an international obligation to prevent the foreseeable adverse effects of climate change and ensure that those affected by it have access to appropriate remedies and means of adaptation[2]. Bringing a human rights lens to climate change is new in that it seeks to shift the focus and attention onto the individual experiences of those suffering its impacts[3]. Such a lens provides 'a compelling reason why each of us should bear our fair share of the costs of mitigation and adaptation—namely, if we don't, we will be contributing to the violation of someone's human rights'[3].

A human rights lens is particularly valuable in framing, calling attention to, and addressing loss and damage, despite limited scholarship in this field so far (see an exception in ref. 1) and limited application thus far in addressing loss and damage[4]. Although not a silver bullet, international law, especially human rights law, can provide a strong normative framework to guide policymakers and implementers in loss and damage actions, refocus the political narrative on the fundamental rights of individuals that must be protected through climate action, and amplify the voices and interests of those who are often sidelined[1,5–7]. Bridging the loss and damage regime with international law helps emphasize how climate change and loss and damage policy do not exist in isolation from the obligations that countries already have under existing international and regional human rights treaties[8]. It can also provide judicial recourse, and its basic principles and guidelines can provide the relevant normative foundations for liability and compensation mechanisms under the climate regime[1,9], shifting the burden of addressing loss and damage, which was historically placed disproportionately on developing countries that have contributed little to climate change[4]. At the national level, human rights impact assessments can inform national and sectoral

[1]School of the Environment, The University of Queensland, Brisbane, Queensland, Australia. [2]International Centre for Environmental Management, Hanoi, Vietnam. [3]Climate Action Beacon and Griffith Institute for Tourism, Griffith University, Brisbane, Queensland, Australia. [4]Vanuatu Climate Action Network, Port Vila, Vanuatu. [5]Food and Agriculture Organisation of the United Nations, Port Vila, Vanuatu. [6]Oxfam Vanuatu, Port Vila, Vanuatu. [7]Learn to Serve Vanuatu, Port Vila, Vanuatu. [8]Department of Climate Change, Vanuatu Government, Port Vila, Vanuatu. e-mail: karen.mcnamara@uq.edu.au

policy planning and budgeting, ensuring that climate policies align with affected peoples' needs and rights, and that effective redress is established with transparency and accountability[1].

This dialogue is particularly relevant now after the historic decision at the 2022 United Nations Climate Change Conference (COP27) to establish and operationalize a global loss and damage fund. A dedicated funding structure and fund will be established, with a transitional committee set up in March 2023 to develop institutional arrangements and governance, define the funding arrangements and sources of funding, and ensure coordination with existing funding arrangements[10]. This follows multiple proposals since 1991 by Vanuatu as founding chair of the Alliance of Small Island States for similar types of funding arrangements, which have been repeatedly rejected[11]. Human rights law can provide a normative framework to assist the transitional committee in its work and for countries to design funding arrangements and long-term plans to avert, minimize, and address loss and damage in ways that protect the rights of individuals.

The COP27 decision on establishing the fund complements and offers support to the case raised by Vanuatu for consideration by the International Court of Justice (ICJ), the principal legal organ of the United Nations (UN). Over the last 4 years, the government of Vanuatu (a nation with good claim to be one of the most at-risk nations globally to environmental hazards[12–14]) has built a global coalition of more than 132 countries seeking an advisory opinion from the ICJ on how climate change affects the rights of individuals from present and future generations, and what the legal responsibilities of countries are to protect against harm, loss and damage[15]. In late March 2023, the UN adopted the landmark resolution by the Vanuatu government for the ICJ advisory opinion and the court process is underway to deliver an opinion on climate change and the legal consequences countries face. This 'could set a legal precedent that may be used in any court—a potentially powerful tool for the growing number of plaintiffs using legal levers to try and hold big polluters (and big countries) to account'[16]. It is critical that, in this process, frontline communities, such as those in the Pacific Islands region, are not portrayed as 'victims' or 'proof' of climate change but 'as real people with dignity and dreams for the future'[6]. In this way, we acknowledge the rich, varied and extensive practices and knowledge of Pacific Islanders that have been used to face variability for centuries, which is critical for ongoing adaptive capacity and resilience[17–19].

In support of the Vanuatu government's ICJ strategic litigation process and to support the work of the transitional committee in the design of the loss and damage fund, we present the findings of research undertaken from June to October 2022 with 118 participants across Vanuatu (Methods). The study aimed to explore how climate change is affecting people's fundamental human rights and identify tangible ways to address the loss and damage to these rights.

Climate change is impinging on people's human rights

Participants shared their personal experiences with a changing climate, which ranged from slow-onset changes, such as sea level rise, saltwater intrusion, longer dry periods and increasing temperatures, to extreme weather events, such as more intense cyclones, heavy downpours and flooding. The extent to which climate change impacts have affected everyday lives over the last year yielded a mean of 3.94 (using a scale of 1 (meaning not at all) to 5 (meaning very high)). The majority of participants selected 'high' (39.8%) or 'very high' (30.6%), with 23.5% selecting 'medium', only 5.1% selecting 'little' and 1% selecting 'not at all'.

Loss and damage to human rights from these changes in slow-onset processes and extreme events have had, and will continue to have, interrelated and diverse effects on people's everyday lives. Impacts are affecting the availability of food and water, health, individual property and communal infrastructure (for example, roads in particular), income sources and, in some cases as an option of last resort, the ability to remain on homelands. One participant explained how 'the future is just unpredictable… I think the future will be like this, just unexpected' (participant number 11). Direct and indirect impacts related to these changes and events are impinging on people's right to lives of dignity.

To gain a deeper understanding of how climate change impinges on and causes loss and damage to people's human rights, key human rights declarations and covenants were analysed and articles with relevance for climate change were identified and grouped. From this, nine thematic groupings were created, and participants considered 'how much' (using a scale of 1 (for not at all) to 5 (for very high)) and 'how' each of these groupings have been affected by the impacts of climate change (Fig. 1).

The most severe impacts are on Ni-Vanuatu's rights to a healthy environment and ability to own, use, develop and control lands, followed closely by high impacts on rights to property and communal assets, standard of living, and family and social cohesion. As participants expressed: 'Our low-lying areas are always flooded during heavy rains—our land is not fertile any more due to topsoil wash down by heavy rain' (participant number 60), and 'I am more concerned about sea level rise which is washing away our land, which our forefathers have inherited over many generations and with it being washed away, it means our family's access to equitable land for gardening is limited' (participant number 48). Pacific Islanders have deep connections to land, which is the foundation of culture, livelihoods and identity[20], and it is this foundation that is considered to be the most severely affected human right due to the impacts of climate change.

The impingements of climate change on people's human rights are having cascading implications on numerous other interconnected human rights and can transcend across generations. Examples of such implications include climate-induced losses of traditional medicines that impact on ways of being, health, human life and well-being. Flooding of low-lying areas not only impacts infrastructure and precious cultural heritage such as gravesites but also causes salinization of freshwater tables that then impinge on potable water—another critical human need or right. Furthermore, increases in ocean temperatures and ocean acidification induces reef degradation, increased coral bleaching and outbreaks of crown-of-thorns starfish (all interconnected); these effects cascade into fishing resources being diminished and marine wildlife losses. This then presents challenges to ways of being, traditional and cultural food sources, and people's diet, negatively impacting human health.

One poignant example, worth exploring at length here, is of cascading impacts caused by the destruction of the yam, a traditional root crop and staple food widely used in Vanuatu and elsewhere in the Pacific Islands region. One participant from Ambrym explained how yam is the 'main commodity of value for exchange' and that the 'rituals, rites, and customs of the yam… are the main social fabric that holds our kinship, tribe and communities, and society, together' (participant number 61). The deterioration and physical loss of the yam due to increased climate variability and extreme weather has impinged on human rights on multiple fronts, violating Vanuatu's social fabric, culture and traditions, agency, identities and food security:

> The yams are significant in our culture. Its harvest is marked by special cultural rituals and ceremonies, but the climate had affected the harvest sessions which resulted in a big delay in harvest and that makes people lose their normal cultural rhythm and ritual… The cultural ways of planting are not adaptive to these fast changes caused by the climate which is now leading to a loss of cultural practices and knowledge. This is a cultural right that can never be recovered and re-built if we lose it due to climate change. No financial means can recover those non-economic losses, which are our heritage and dignity. And climate change is taking these rights away from us. (participant number 59)

https://doi.org/10.1038/s41558-023-01831-0



Fig. 1 | An infographic summarising how climate change impinges on human rights. The relevant Articles of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)[29], Universal Declaration of Human Rights (UDHR)[30], International Covenant on Civil and Political Rights (ICCPR)[31] and International Covenant on Economic, Social and Cultural Rights (ICESCR)[32] are listed for each thematic grouping. Design credit: Sarah K. Jones.

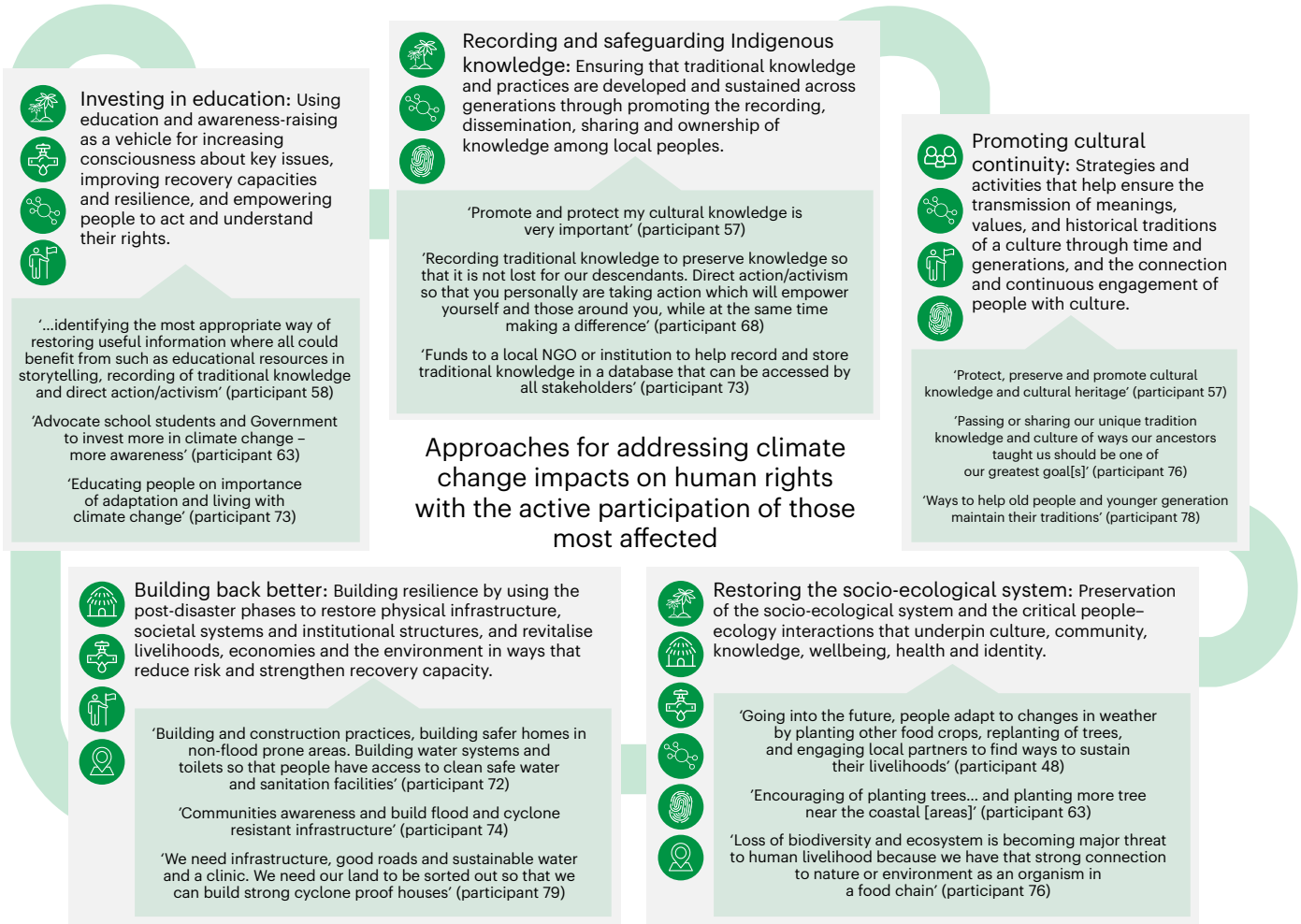


Fig. 2 | Five key approaches for addressing the impacts of climate change on people's human rights. These five key approaches address the impacts of climate change on people's human rights. NGO, non-governmental organization.

The centrality of yam to identity, social cohesion, culture, tradition and food security illustrates the impacts of climate change on Vanuatu's 'biocultural heritage' and the complex, cascading human rights impingements from the loss of one singularly important crop species[21]. The loss of identity is associated with a substantial rupture of one's sense of self and the agency to control how one can identify themselves with respect to the world around them[22].

Responding to the loss and damage of people's human rights

Loss and damage to fundamental human rights is already occurring and will only increase over time, necessitating effective and appropriate ways of responding. Here we show a series of locally developed solutions that participants described as the most appropriate and useful ways of mitigating and restoring human rights that have been affected by the impacts of climate change. These solutions have been categorized into five key approaches that complement each other and should be funded and implemented as part of a human rights restoration package (Fig. 2).

A key approach for restoring the climate-induced loss and damage on people's human rights involves promoting mechanisms to safeguard Indigenous knowledge and cultural practices and restore the socio-ecological system, which is foundational for Pacific ways of living. To protect lives and livelihoods, support from the Global North to build back better after extreme weather events (induced by climate change) in the Pacific Islands was also strongly suggested as a means of restoring human rights loss and damage. Participants also emphasized the responsibility of national and provincial governments in efficiently providing loss and damage finance, including the provision of emergency funding for families 'to re-establish themselves' (participant number 82) after disaster events. Participants noted that investments in these approaches should be considered holistically and in the context of, and in support for, ongoing investment in mitigation and adaptation. By bringing the focus to those most affected at an individual scale, it can be seen how the human rights lens helps address a central deficiency of the ongoing climate debate—the abstract, state-centric terms in which loss and damage has been framed[7]. Underpinning any human rights restoration packages should be the effective and active participation of those most directly affected by loss and damage through institutionalized cooperation[23].

Beyond investment in specific approaches, participants made it clear that compensation is also an appropriate and justice-based financial response to climate-induced human rights violations and must be considered as part of the funding arrangements to be proposed by the transitional committee. In the context of human rights, the compensation for some loss and damage is more difficult than others. As one participant explained: 'Compensation will be challenging as we cannot compensate for the loss of a culture... But for economic compensation, climate finance must be given, and a justice process must be given to countries that cause more of these losses due to their GHG emissions' (participant number 59).

At the centre of Ni-Vanuatu participant concerns and experiences with loss and damage is the importance of land and rights to an

adequate environment, including biodiversity and ecosystem services. The right to an adequate environment protects interests of paramount importance, such as life, health and welfare[24]. Extreme weather events and gradual processes place substantial pressures on local environmental resources that have cascading effects on livelihoods, health, food and water security, culture, way of life, knowledge systems, community and kinship[25–27]. Therefore, climate change impacts affect an interconnected and complex system that is centred on the critical relationships between Pacific Islanders and their environments. Greater attention must be given to the interdependencies between losses, including the nature of some losses as risk multipliers (for example, loss of important crops, such as yam)[28]. This reinforces the importance of restoring the socio-ecological system as a critical resilience-building response to climate change that can mitigate impingements on human rights, especially through nature-based solutions and biodiversity and ecosystem conservation. Preserving critical people–ecology interactions and the socio-ecological system that underpins culture, community, knowledge, well-being, health and identity are paramount.

Key takeaway messages

When considering these findings, a few conclusions can be made. The first is that the Ni-Vanuatu people are already experiencing loss and damage to their fundamental human rights, and this will worsen over time. The second is that the most severe loss and damage now undermining Ni-Vanuatu's rights are related to the right to a healthy environment and ability to own, use, develop and control lands, and to the high impacts on rights to property and communal assets, standard of living and family and social cohesion. The third point is that loss and damage to Ni-Vanuatu's human rights are having cascading impingements on many other interconnected human rights and can transcend across generations (for example, interconnected human rights to custom, Indigenous knowledge, family, agency and identity). Loss and damage to one human right is rarely in isolation, and cascading impacts and risks are unfortunate but inevitable[28], the acknowledgement of which should motivate the transitional committee of the loss and damage fund to recommend long-term, nationally determined and programmatic funding approaches to address these compounding, cascading and intensifying climate impacts. Finally, the loss and damage fund must finance locally developed and led initiatives to address human rights loss and damage, including investing in recording and safeguarding of Indigenous knowledge, promoting cultural continuity, restoring the socio-ecological system, building back better and investing in education. Compensation is also an appropriate and justice-based financial response to climate-induced human rights violations and must be included as part of the funding arrangements to be proposed by the transitional committee.

This study demonstrates how a human rights lens to loss and damage can provide a useful normative framework and basis for holistically assessing and understanding climate change impacts, loss and damage. It helps to refocus the narrative on the fundamental rights of individuals that must be protected through, and when taking, climate action, and illustrates how climate policy generally, and the UN Framework Convention on Climate Change and its Paris Agreement, cannot operate in a vacuum, disconnected from other obligations in relevant treaties and customary international law. The detailed findings on experiences of and the nature of loss and damage should inform climate policy, guiding international and national activities on what should be funded and targeted for effective redress and adaptation. Although a human rights lens cannot tell us all we need to know about the morality of climate change, it emphasizes the moral seriousness of the problem and can be a driving force for meaningful international action[3].

Online content

Any methods, additional references, Nature Portfolio reporting summaries, source data, extended data, supplementary information, acknowledgements, peer review information; details of author contributions and competing interests; and statements of data and code availability are available at https://doi.org/10.1038/s41558-023-01831-0.

References

1. Toussaint, P. & Blanco, A. M. A human rights-based approach to loss and damage under the climate change regime. *Clim. Policy* **20**, 743–757 (2020).
2. *Understanding Human Rights and Climate Change*. Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change (OHCHR, 2015).
3. Bell, D. Climate change and human rights. *Wiley Interdiscip. Rev. Clim. Change* **4**, 159–170 (2013).
4. Simlinger, F. & Mayer, B. in *Loss and Damage from Climate Change. Climate Risk Management, Policy and Governance* (eds Mechler, R., Bouwer, L., Schinko, T., Surminski, S. & Linnerooth-Bayer, J.) 179–203 (Springer, 2019).
5. Bodansky, D. Introduction: Climate change and human rights: unpacking the issues. *Ga. J. Int. Compar. Law* **38**, 511–524 (2010).
6. Dreher, T. & Voyer, M. Climate refugees or migrants? Contesting media frames on climate justice in the Pacific. *Environ. Commun.* **9**, 58–76 (2015).
7. Toussaint, P. Loss and damage and climate litigation: the case for greater interlinkage. *Rev. Eur. Comp. Int. Environ. Law* **30**, 16–33 (2020).
8. Burkett, M. Climate reparations. *Melb. J. Int. Law* **10**, 509–542 (2009).
9. *Human Rights as a Compass for Operationalizing the Loss and Damage Fund*. Brief submitted to the UNFCCC for the 2nd Glasgow Dialogue (Amnesty International and Centre for International Environmental Law (CIEL), 2023); https://www.amnesty.org/en/documents/ior40/6463/2023/en/
10. Transitional committee https://unfccc.int/topics/adaptation-and-resilience/groups-committees/transitional-committee (UNFCCC, 2023).
11. Vanhala, L. & Hestbaek, C. Framing climate change loss and damage in UNFCCC negotiations. *Glob. Environ. Polit.* **16**, 111–129 (2016).
12. Behlert, B. et al. *World Risk Report 2020* (Bündnis Entwicklung Hilft and Ruhr University Bochum—Institute for International Law of Peace and Armed Conflict, 2020).
13. Aleksandrova, M. et al. *World Risk Report 2021: Social Protection* (Bündnis Entwicklung Hilft and Ruhr University Bochum—Institute for International Law of Peace and Armed Conflict, 2021).
14. Atwii, F. et al. *World Risk Report 2022: Digitization* (Bündnis Entwicklung Hilft and Ruhr University Bochum—Institute for International Law of Peace and Armed Conflict, 2022).
15. Vanuatu Government Vanuatu ICJ Initiative https://www.vanuatuicj.com/home (2022).
16. Loy, I. Q&A: Behind the push to bring the climate crisis to court. *The New Humanitarian* https://www.thenewhumanitarian.org/interview/2022/10/10/Vanuatu-ICJ-climate-change-advisory-opinion-International-Court-of-Justice (2022).
17. McMillen, H. et al. Small islands, valuable insights: systems of customary resource use and resilience to climate change in the Pacific. *Ecol. Soc.* **19**, 44–61 (2014).
18. Granderson, A. The role of traditional knowledge in building adaptive capacity for climate change: perspectives from Vanuatu. *Weather Clim. Soc.* **9**, 545–561 (2017).
19. Dacks, R. et al. Developing biocultural indicators for resource management. *Conserv. Sci. Pract.* **1**, e38 (2019).
20. Kelman, I. et al. A review of mental health and wellbeing under climate change in small island developing states (SIDS). *Environ. Res. Lett.* **16**, 033007 (2021).
21. Cámara-Leret, R. et al. Climate change threatens New Guinea's biocultural heritage. *Sci. Adv.* **5**, eaaz1455 (2019).

22. Tschakert, P. et al. Climate change and loss, as if people mattered: values, places, and experiences. *Wiley Interdiscip. Rev. Clim. Change* **8**, 476–505 (2017).
23. Broberg, M. & Sano, H. Strengths and weaknesses in a human rights-based approach to international development—an analysis of a rights-based approach to development assistance based on practical experiences. *Int. J. Hum. Rights* **22**, 664–680 (2018).
24. Nickel, J. W. The human right to a safe environment: philosophical perspectives on its scope and justification. *Yale J. Int. Law* **18**, 281–295 (1993).
25. Fisher, P. B. Climate change and human security in Tuvalu. *Glob. Change Peace Secur.* **23**, 293–313 (2011).
26. Charan, D., Kaur, M. & Singh, P. in *Climate Change Adaptation in Pacific Countries. Climate Change Management* (ed. Leal Filho, W.) 19–33 (Springer, 2018).
27. Piggott-McKellar, A. E., McNamara, K. E., Nunn, P. D. & Sekinin, S. T. Moving people in a changing climate: lessons from two case studies in Fiji. *Soc. Sci.* **8**, 133–150 (2019).
28. Westoby, R., Clissold, R., McNamara, K. E., Latai-Niusulu, A. & Chandra, A. Cascading loss and loss risk multipliers amid a changing climate in the Pacific Islands. *Ambio* **51**, 1–8 (2021).
29. *United Nations Declaration on the Rights of Indigenous Peoples* (United Nations, 2007); https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html
30. *Universal Declaration of Human Rights* (United Nations, 1948); https://www.un.org/en/about-us/universal-declaration-of-human-rights
31. *International Covenant on Civil and Political Rights* (United Nations, 1966); https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights
32. *International Covenant on Economic, Social and Cultural Rights* (United Nations, 1966); https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights

Publisher's note Springer Nature remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.

Springer Nature or its licensor (e.g. a society or other partner) holds exclusive rights to this article under a publishing agreement with the author(s) or other rightsholder(s); author self-archiving of the accepted manuscript version of this article is solely governed by the terms of such publishing agreement and applicable law.

© The Author(s), under exclusive licence to Springer Nature Limited 2023

Methods

This study set out to explore how Ni-Vanuatu people experience human rights loss and damage due to the impacts of climate change. These experiences and perspectives were ascertained through an online survey that was carried out between 18 June and 6 October 2022 (see Supplementary Information for the survey template used). We chose to use a survey for its speed, ease, cost-effectiveness, ability to reach geographically dispersed populations in Vanuatu and ability to gather qualitative data[33]. Although effective in ascertaining the views of a geographically dispersed population, we also note the limitations of surveys. These limitations include being weak on 'why' questions and the inherent assumptions that attitudes and beliefs can be numerically measured, but we have resolved some of these issues by making most questions open ended. These open-ended questions allowed participants to recount their experiences and perspectives in their own way and own words[34].

To design the survey, we first reviewed key human rights declarations and covenants including the Universal Declaration of Human Rights[30], International Covenant on Civil and Political Rights[31], International Covenant on Economic, Social and Cultural Rights[32] and the UN Declaration on the Rights of Indigenous Peoples[29]. Each of the four declarations and covenants were carefully analysed, and articles with relevance for climate change were identified. We had a shortlist of 22 human rights as a result of this process. Two of the authors then collaborated to thematically group the human rights together and arrive at a final list of nine generally representative human rights 'groupings'. These nine overarching thematic areas included cultural life, traditions, customs and traditional knowledge; family and social cohesion; freedom, peace and security; identity; local environment; property and communal assets; sense of place and home; standard of living; and self-determination and agency.

Guided by the identified groupings, 24 questions were developed for the survey, with the majority of questions being open ended (yielding substantive qualitative data) and the remaining being closed answers. The survey started with questions related to participants' backgrounds, including age, birthplace, formal education, local or Indigenous knowledge and sources of income. In-depth questioning about the impacts of climate change on everyday lives followed, and participants were prompted to include personal examples and stories, where possible, to elucidate these experiences over the last year. We acknowledge, however, that it is probable that participants recollected experiences from the last 5–10 years.

For each of the nine thematic areas, a five-point Likert scale was used to understand how much these human rights groupings have been affected by the impacts of climate change. This was followed by a series of in-depth questions around what has been affected, how and why. Questions were also asked about the experiences of vulnerable groups, along with the most appropriate and useful ways of responding to the impacts of climate change on people's human rights and restoring losses and damages (for example, fair, just and equal compensation).

The survey was reviewed by staff in the Climate Diplomacy Taskforce of the Vanuatu Government and members of the Vanuatu Climate Action Network to check that questions were clear, appropriate and easy to complete. The survey was then administered online through the programs Checkbox and Kobo, and participants could complete the survey in Bislama, English or French.

The online survey was circulated on the email lists of the Climate Diplomacy Taskforce and Vanuatu Climate Action Network. Members of the Vanuatu Climate Action Network living in outer islands collaborated with their local community members to complete the survey using Kobo, which does not require an internet connection. Although this ensured that some views and experiences of people living in the outer islands was included, the majority of respondents were living in the most populous province (Shefa), where the nation's capital (Port Vila) is located. An additional sample bias was the high number of 'professional' participants with a bachelor's degree.

Potential participants were assured of the confidentiality and anonymity of their responses and, before undertaking the survey, were asked to consent to participating. This followed ethical protocols as part of the approval from the University of Queensland (approval number 2020000640). Quantitative data were analysed using the Statistical Package for the Social Sciences (SPSS v.27) and qualitative data were analysed manually through content analysis to help capture core themes and storylines.

Overall there were 118 participants in the study. Participants included 65 women, 49 men and 4 participants who preferred to self-identify. The age range for participants was 18–76 years old (mean age of 36.4 years old). Participants were predominately born in the Shefa province (39.6%), followed by Tafea (21.6%), Sanma (13.5%), Penama (12.6%), Malampa (9%) and Torba (3.6%). These proportions differ from where participants currently live, which was concentrated in the Shefa province (72.8%, which includes Port Vila, the country's capital), followed by Sanma (12.3%), Tafea (9.6%), Malampa (3.5%), Penama (0.9%) and Torba (0.9%). A bachelor's degree was the highest level of formal education for most participants (38.8%), followed by a master's degree (20.7%), high school certificate (18.1%), technical training (18.1%), elementary school certification (2.6%) or a PhD (1.7%). Most participants also indicated that they are holders of substantial Indigenous knowledge, particularly in relation to crops (75% of participants), plants and animals (50%), weather (49.1%), forests (41.7%), medicine (42.6%), fishing (35.2%), weaving (28.7%) and marine life (27.8%).

Reporting summary

Further information on research design is available in the Nature Portfolio Reporting Summary linked to this article.

Data availability

The data that support the findings of this study are not publicly available due to them containing information that would compromise research participant confidentiality and anonymity.

References

33. Overton, J. & van Diermen, P. in *Development Fieldwork: A Practical Guide* 4th edn (ed. Scheyvens, R.) 39–58 (SAGE, 2014).
34. McGuirk, P. M. & O'Neill, P. in *Qualitative Research Methods in Human Geography*, 4th edn (ed. Hay, I.) 246–273 (Oxford Univ. Press, 2016).

Acknowledgements

We thank the participants for providing such valuable and important insights in this study. Without you, this study would not have been possible. This research was funded through an Australian Research Council Future Fellowship grant (grant number FT190100114) and by the Ministry of Foreign Affairs, International Cooperation and External Trade, Republic of Vanuatu.

Author contributions

K.E.M., R.C., R.W. and C.Y.B. conceived and designed the research. K.E.M., R.C., R.W., S.S., G.K. and W.M. collected data. K.E.M., R.C. and R.W. analysed data. K.E.M., R.C., R.W. and C.Y.B. wrote the article.

Competing interests

The authors declare no competing interests.

Additional information

Supplementary information The online version contains supplementary material available at https://doi.org/10.1038/s41558-023-01831-0.

Correspondence and requests for materials should be addressed to Karen E. McNamara.

Peer review information *Nature Climate Change* thanks Ma. Laurice Jamero, Beate M. W. Ratter, Tony Weir and the other, anonymous, reviewer(s) for their contribution to the peer review of this work.

Reprints and permissions information is available at www.nature.com/reprints.

nature portfolio

Corresponding author(s): DBPR NCLIM-22112186

Last updated by author(s): Feb 2, 2023

Reporting Summary

Nature Portfolio wishes to improve the reproducibility of the work that we publish. This form provides structure for consistency and transparency in reporting. For further information on Nature Portfolio policies, see our Editorial Policies and the Editorial Policy Checklist.

Statistics

For all statistical analyses, confirm that the following items are present in the figure legend, table legend, main text, or Methods section.

n/a	Confirmed	
☒	☐	The exact sample size (*n*) for each experimental group/condition, given as a discrete number and unit of measurement
☒	☐	A statement on whether measurements were taken from distinct samples or whether the same sample was measured repeatedly
☒	☐	The statistical test(s) used AND whether they are one- or two-sided *Only common tests should be described solely by name; describe more complex techniques in the Methods section.*
☒	☐	A description of all covariates tested
☒	☐	A description of any assumptions or corrections, such as tests of normality and adjustment for multiple comparisons
☒	☐	A full description of the statistical parameters including central tendency (e.g. means) or other basic estimates (e.g. regression coefficient) AND variation (e.g. standard deviation) or associated estimates of uncertainty (e.g. confidence intervals)
☒	☐	For null hypothesis testing, the test statistic (e.g. *F*, *t*, *r*) with confidence intervals, effect sizes, degrees of freedom and *P* value noted *Give P values as exact values whenever suitable.*
☒	☐	For Bayesian analysis, information on the choice of priors and Markov chain Monte Carlo settings
☒	☐	For hierarchical and complex designs, identification of the appropriate level for tests and full reporting of outcomes
☒	☐	Estimates of effect sizes (e.g. Cohen's *d*, Pearson's *r*), indicating how they were calculated

Our web collection on statistics for biologists contains articles on many of the points above.

Software and code

Policy information about availability of computer code

Data collection	Primary, qualitative and quantitative data was collected as part of a survey distributed across Vanuatu.
Data analysis	SPSS version 27 was used to code and analyze the quantitative data and qualitative data was coded preliminarily in Excel to create themes and analyzed manually.

For manuscripts utilizing custom algorithms or software that are central to the research but not yet described in published literature, software must be made available to editors and reviewers. We strongly encourage code deposition in a community repository (e.g. GitHub). See the Nature Portfolio guidelines for submitting code & software for further information.

Data

Policy information about availability of data

All manuscripts must include a data availability statement. This statement should provide the following information, where applicable:

- Accession codes, unique identifiers, or web links for publicly available datasets
- A description of any restrictions on data availability
- For clinical datasets or third party data, please ensure that the statement adheres to our policy

The raw data is confidential and not publicly available.

Human research participants

Policy information about studies involving human research participants and Sex and Gender in Research.

Reporting on sex and gender	Participants included 65 females, 49 males and four who preferred to self-identify.
Population characteristics	See below ("Research sample").
Recruitment	See below ("Sampling strategy").
Ethics oversight	As a study involving human participants, ethical approval was provided by the University of Queensland (approval number: 2020000640). All participants gave informed consent to participate in this voluntary study.

Note that full information on the approval of the study protocol must also be provided in the manuscript.

Field-specific reporting

Please select the one below that is the best fit for your research. If you are not sure, read the appropriate sections before making your selection.

☐ Life sciences ☒ Behavioural & social sciences ☐ Ecological, evolutionary & environmental sciences

For a reference copy of the document with all sections, see nature.com/documents/nr-reporting-summary-flat.pdf

Behavioural & social sciences study design

All studies must disclose on these points even when the disclosure is negative.

Study description	The aim of this study was to explore how locals in Vanuatu experience the impacts of climate change and how these impacts can impinge on their human rights.
Research sample	Participants included 65 females, 49 males and four who preferred to self-identify. The age range for participants was from 18 to 76 years old, with a mean age of 36.4 years old. Participants were predominately born in Shefa province (39.6%), followed by Tafea (21.6%), Sanma (13.5%), Penama (12.6%), Malampa (9%), and Torba (3.6%). This was slightly different to where participants currently live, which was largely Shefa province (72.8%), followed by Sanma (12.3%), Tafea (9.6%), Malampa (3.5%), Penama (0.9%), and Torba (0.9%). As for highest level of formal education or training, most participants indicated that they hold a bachelor's degree (38.8%), followed by a master's degree (20.7%), high school certificate (18.1%), technical training (18.1%), elementary school certification (2.6%), or a PhD (1.7%). Participants, who could select more than one option, are holders of vast local and Indigenous knowledge related to crops (75% of participants), plants and animals (50%), weather (49.1%), forests (41.7%), medicine (42.6%), fishing (35.2%), weaving (28.7%), marine life (27.8%), rivers (16.7%), pest and disease on crops and animals (14.8%), 'other' (14.8%), and carving (8.3%). Examples of 'other' included: custom ceremonies, architecture, cultural stories, local cooking, governance and leadership, and teaching. Participants predominately earned an income through government work (31.9% of respondents), 'other' activities such as volunteering or working for NGOs (25.9%), being a private business employee (15.5%), through farming (12.9%), being a private business owner (7.8%), having money sent from others (2.6%), through handicrafts or fishing (both 0.9%) or had no income (1.7%).
Sampling strategy	The local partner organization, the Vanuatu Climate Action Network (VCAN), undertook extensive promotion of the project and survey through its network (via its email list and social media sites). Participants were encouraged to share the survey link with other local Vanuatu community members to complete. As mentioned below, local VCAN members also undertook the survey with local community members in very remote parts of the country. In this way, our sampling strategy was largely based on expediency and access. A limitation of this study was the lack of targeting towards groups of different ability, ethnicity and religion, among other factors, and we acknowledge that viewpoints from these groups may remain underrepresented.
Data collection	Data collection involved an online survey with both qualitative and quantitative questions. Using a survey method is useful in terms of its ease, cost-effectiveness, and ability to reach geographically dispersed populations in Vanuatu. We used Checkbox and Kobo to administer the survey. Checkbox was available through an online link that was circulated to, and through, several networks and relevant organisations across the country. Kobo was used by local members of VCAN, the local partner organization, to complete in-field surveys in remote parts of Vanuatu not requiring an Internet connection, that could later be uploaded. The survey had a logical structure: introductions and participant consent (landing page), followed by questions about participant's backgrounds, experiences of climate change impacts, links between human rights and climate change, and appropriate and useful responses. The survey was provided in English, Bislama, and French.
Timing	The overall study was conducted between June and October 2022.
Data exclusions	No data were excluded from the analysis.
Non-participation	No participants dropped out or declined participation.

Randomization	Participants were not allocated into experimental groups.	317

Reporting for specific materials, systems and methods

We require information from authors about some types of materials, experimental systems and methods used in many studies. Here, indicate whether each material, system or method listed is relevant to your study. If you are not sure if a list item applies to your research, read the appropriate section before selecting a response.

Materials & experimental systems

n/a	Involved in the study
☒	☐ Antibodies
☒	☐ Eukaryotic cell lines
☒	☐ Palaeontology and archaeology
☒	☐ Animals and other organisms
☒	☐ Clinical data
☒	☐ Dual use research of concern

Methods

n/a	Involved in the study
☒	☐ ChIP-seq
☒	☐ Flow cytometry
☒	☐ MRI-based neuroimaging

Exhibit ZD

HEINONLINE

318

DATE DOWNLOADED: Fri Mar 15 20:29:46 2024
SOURCE: Content Downloaded from HeinOnline

Citations:
Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Bluebook 21st ed.
The Aaland Islands Question, 2 LEAGUE oF NATIONS O. J. 64 (1921).

ALWD 7th ed.
, The Aaland Islands Question, 2 League of Nations O. J. 64 (1921).

APA 7th ed.
(1921). The aaland islands question. League of Nations Official Journal, 2(1), 64-79.

Chicago 17th ed.
"The Aaland Islands Question," League of Nations Official Journal 2, no. 1 (January-February 1921): 64-79

McGill Guide 9th ed.
"The Aaland Islands Question" (1921) 2:1 League of Nations O J 64.

AGLC 4th ed.
'The Aaland Islands Question' (1921) 2(1) League of Nations Official Journal 64

MLA 9th ed.
"The Aaland Islands Question." League of Nations Official Journal, vol. 2, no. 1, January-February 1921, pp. 64-79. HeinOnline.

OSCOLA 4th ed.
'The Aaland Islands Question' (1921) 2 League of Nations O J 64
Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at https://heinonline.org/HOL/License
-- The search text of this PDF is generated from uncorrected OCR text.

The Aaland Islands Question.

I.

LETTER ADDRESSED TO THE FINNISH MINISTER IN PARIS BY THE SECRETARY-GENERAL OF THE LEAGUE.

[*Translation.*]

GENEVA, February 17th, 1921.

Your Excellency

In accordance with the desire expressed in your letter of February 10th, I have the honour to inform you that I have ordered the publication, in No. 9 of the League of Nations *Official Journal*, of the second part of your letter of January 7th, with regard to some errors in translation which you observed in certain documents issued by the Secretariat.

Your criticism on this point appears to me to be fully justified.

I have the honour to be, etc.,

(Signed) ERIC DRUMMOND,
Secretary-General.

His Excellency
The Minister for Finland,
22, Rue de la Paix,
PARIS.

II.

EXTRACT FROM A LETTER FROM THE FINNISH MINISTER IN PARIS CONCERNING THE PUBLICITY OF SOME OF HIS STATEMENTS

[*Translation.*]

FINNISH LEGATION
22, Rue de la Paix.
No. 24.

PARIS, January 7th, 1921.

...I would beg you to be so good as to insert in the Official Organ of the League of Nations the correction of the following mistakes, which might convey to the reader a wrong impression of the events in question.

1) *Journal officiel.* Supplément spécial n° 1, aout 1920, p. 13. — La note du représentant du Gouvernement Finlandais du 9 juillet porte que « le dissentiment... n'a pas le caractère d'un différend d'ordre international, mais celui d'une crise d'ordre interne », tandis que la teneur de la traduction anglaise affaiblit le sens de cette déclaration « the difference of opinion... is *not so much* a crisis of an international, as of a domestic nature ». Cette même traduction se retrouve dans la publication officielle du Gouvernement Anglais, *Reference to the League of Nations of the question of the Aaland Islands, Miscellaneous* n° 12 (1920), document 4.

2) *Procès-verbal de la septième session du Conseil de la Société des Nations tenue à Londres du 9 au 12 juillet* 1920, Annexe 68 *h*, p. 59. — Le rapporteur du Conseil, dans la question des îles d'Aland, M. Balfour, a ainsi formule, dans sa déclaration faite en anglais, la principale revendication présentée par le représentant de la Suède

« That the Aaland Islands population shall be allowed to determine immediately by plebiscite whether the Archipelago shall remain *under Finnish sovereignty* or be incorporated with the Kingdom of Sweden », ce qui est la traduction exacte de la formule française employée d'abord dans la lettre du Gouvernement Suédois au Conseil en date du 2 juillet 1920, et répétée dans la lettre du 9 juillet, du représentant de la Suède à M. le Secrétaire Général *(Procès-verbal,* annexe 68 *e*, pp. 50 et 51)

« Il sera permis à la population alandaise de décider immédiatement par plébiscite si l'Archipel alandais doit rester *sous la souveraineté finlandaise,* etc. »

Cette formule se retrouve aussi dans le mémorandum présenté au Conseil par M. le Secrétaire Géneral (ibid. Annexe 68 *f*, p. 52).

Mais la traduction française que le Secrétariat a exécutée du texte original de la déclaration précitée de M. Balfour, porte

« Si l'archipel resterait sous la *domination* finnoise ou serait incorporé au Royaume de Suède », traduction qui constitue une grave altération d'un fait de toute première importance.

3) Le rapport sur les travaux du Conseil de la Société des Nations présenté à la première session de l'Assemblée est, en anglais, ainsi conçu

« The Council at the same time noted the special interest taken by Russia in the destiny of the Aaland Islands, and stated that it [c'est-à-dire le Conseil] would naturally desire to hear the views of Russia on the subject, when she had emerged from the exceptional position in which she found herself. »

Or, le texte français est ainsi conçu

« Le Conseil, en même temps, a reconnu l'intérêt particulier que la Russie attache au sort des Iles d'Aland et il fait observer qu'elle (c'est-à-dire la Russie) desirera évidemment faire entendre à ce sujet sa voix, lorsqu'elle sera sortie de l'état exceptionnel où elle se trouve aujourd'hui. »

De ces deux textes, le second seul est exact, puisqu'il est la traduction correcte du rapport de M. Fisher, ainsi conçu *(Procès-Verbal de la neuvième session du Conseil,* etc., p. 75)

« No one can deny the interest felt by Russia in the fate of these Islands, nor can it be doubted that when Russia, sooner or later, emerges from her present abnormal conditions, she will certainly wish to make her voice heard with regard to them. »

(Il y a là encore une inexactitude qu'il conviendrait de faire disparaître.)

Veuillez agréer, Monsieur le Secrétaire Général, les assurances de ma haute considération.

(Signé) ENCKELL.

(1) *Official Journal.*—Special Supplement No. 1. August, 1920, page 13. The Note from the Finnish Government, dated July 9th states that "le dissentiment... n'a pas le caractère d'un différend d'ordre international, mais celui d'une crise d'ordre interne," while the text of the English translation weakens the sense of this declaration "the difference of opinion... is *not so much* a crisis of an international as of a domestic nature." This same translation occurs again in the official publication of the British Government *Reference to the League of Nations of the question of the Aaland Islands, Miscellaneous* No. 12 (1920). Document No. 4.

(2) *Minutes of the Seventh Meeting of the Council of the League of Nations, held in London from July 9th to 12th, 1920.* Annex 68 *h*, page 59. The Council's Rapporteur for the Aaland Islands question, Mr. Balfour, in his statement, made in English, formulated the principal claim presented by the Swedish Representative as follows -

"That the Aaland Islands population shall be allowed to determine immediately by plebiscite whether the Archipelago shall remain *under Finnish sovereignty* or be incorporated with the Kingdom of Sweden," which is the exact translation of the French formula, used first in the letter, dated July 2nd, 1920, from the Swedish Government to the Council, and repeated in the letter, dated July 9th, from the Swedish Representative to the Secretary-General (*Minutes*, Annex 68*e*, pages 50 and 51)

"Il sera permis a la population alandaise de décider immédiatement par plébiscite si l'Archipel alandais doit rester *sous la souveraneté finlandaise, etc.*"

This formula also occurs in the Memorandum submitted to the Council by the Secretary-General (in the same place Annex 68 *f*, page 52).

But the French translation which was made from the original text of the above-mentioned statement of Mr. Balfour reads

"Si l'Archipel resterait sous la *domination* finnoise ou serait incorporé au Royaume de Suède," a translation which constitutes a serious misstatement of a fact of capital importance.

(3) The Report on the work of the Council of the League of Nations which was submitted to the Assembly at its first meeting reads in English as follows

"The Council at the same time noted the special interest taken by Russia in the destiny of the Aaland Islands, and stated that it [that is to say, the Council] would naturally desire to hear the views of Russia on the subject, when she had emerged from the exceptional position in which she found herself."

The French text, however, reads as follows

"Le Conseil, en même temps, a reconnu l'interêt particulier que la Russie attache au sort des Iles d'Aland et il fait observer qu'elle [that is to say Russia] désirera évidemment faire entendre a ce sujet sa voix, lorsqu'elle sera sortie de l'état exceptionnel où elle se trouve aujourd'hui."

Of these two texts the second only is accurate, since it is the correct translation from Mr. Fisher's Report, which reads as follows (*Minutes of the Ninth Meeting of the Council, etc.*, page 75)

"No one can deny the interest felt by Russia in the fate of these Islands, nor can it be doubted that when Russia, sooner or later, emerges from her present abnormal conditions, she will certainly wish to make her voice heard with regard to them."

(There is an inaccuracy here also which should be removed.)

I have the honour to be, etc.,

(Signed) ENCKELL.

III

OBSERVATIONS PRÉLIMINAIRES DU MINISTRE DE FINLANDE SUR LE RAPPORT DE LA COMMISSION DES JURISTES[1]

16 septembre 1920.

I

La Commission constate de la manière la plus nette et la plus ferme que le Droit international positif ne reconnaît pas à des fractions de peuples, comme telles, le droit de se séparer par un simple acte de volonté de l'Etat dont elles font partie, pas plus qu'il ne reconnaît à d'autres Etats le droit de réclamer une telle séparation. D'une manière générale, il appartient exclusivement à la souveraineté de tout Etat, définitivement constitué, d'accorder ou de refuser à une fraction de sa population le droit de déterminer son propre sort politique par la voie d'un plébiscite ou autrement. Ceci posé, la Commission cherche à démontrer que la Finlande n'est pas un Etat définitivement constitué et que, dès lors, la règle de droit positif qui laisse l'Etat souverain seul maître de décider du sort des populations incluses dans son territoire ne trouve pas ici d'application.

Sans examiner si les jurisconsultes expriment le Droit international positif, en distinguant entre l'Etat constitué definitivement et celui qui ne serait pas encore définitivement constitué, nous croyons devoir faire observer qu'un certain nombre d'erreurs matérielles s'introduisent ici dans l'application à la Finlande de la règle juridique par eux posée.

Leur première erreur tient à la position même de la question.

La question serait aussitôt resolue que posée, d'après le principe ci-dessus rappelé, si les jurisconsultes lui avaient laissé ses véritables termes. Prié par le Président du Conseil de la Société des Nations de donner par écrit au Conseil les conclusions, qu'au nom du Gouvernement Suédois, il avait à formuler, quant à la question alandaise, maintenant devant le Conseil, M. Branting s'exprimait ainsi

« Me conformant à ce désir, j'ai l'honneur de vous soumettre les conclusions suivantes

« Il sera permis à la population alandaise de décider immediatement par plébiscite si l'Archipel alandais doit rester sous la *souveraineté* finlandaise ou être réintégré au Royaume de Suède. »

Ainsi, d'après le Gouvernement Suédois, l'archipel d'Aland se trouvait, à la date du 9 juillet 1920, sous la *souveraineté* finlandaise. La seule question était de déterminer si, étant sous cette *souveraineté*, il devait y rester.

Une pareille position de la question conduisait, d'apres le principe formulé par les juristes, à cette conséquence nécessaire l'archipel d'Aland étant sous la souveraineté de la Finlande, le Droit positif international ne permettait pas à la Suède d'enlever à celle-ci le droit de disposer librement d'une partie de son territoire et de sa population.

Les jurisconsultes n'ont pu raisonner comme ils l'ont fait qu'à la suite d'une modification de la question posée le 9 juillet 1920 par M. Branting. Dans cette question, le mot « souveraineté », qui ne permettait pas de doute, a été remplacé par le mot « domination ». A la page 5 du texte français du mémoire des juristes, on lit ceci

« De son côté, la Suède peut-elle réclamer qu'un plébiscite ait lieu pour permettre à la population des Iles de se prononcer sur leur rattachement à la Suède, ou le maintien de la « domination » finlandaise ?

Il ne nous appartient pas de rechercher à quel moment s'est produite une altération aussi fondamentale dans la position de la question mais nous tenons à déclarer de la manière la plus

[1] Cf. *Journal Officiel*, Supplément Spécial N° 3, octobre 1920.

III.

PRELIMINARY OBSERVATIONS BY THE FINNISH MINISTER ON THE REPORT OF THE COMMITTEE OF JURISTS[1]

[*Translation.*]

September 16th, 1920.

I.

The Committee points out as clearly and categorically that positive International Law does not recognise the right of fractions of peoples, as such, to separate themselves, by a simple act of will, from the State of which they form part, any more that it recognises the right of other States to demand such a separation. Generally speaking, it pertains exclusively to the sovereignty of any definitely constituted State to grant to, or withhold from, a fraction of its population the right of deciding its own political destiny by means of a plebiscite, or in any other way. This principle being admitted, the Committee endeavours to show that Finland is not a definitely constituted State, and that hence the rule of positive law, which recognises that a sovereign State is alone entitled to decide the future status of the populations comprised within its territory cannot here be applied.

Without discussing whether the Jurists, in referring to positive International Law, distinguish between a State which is definitely constituted and one which is not yet so constituted, we feel bound to point out that the application to Finland of the legal ruling laid down by them gives rise to a certain number of material errors.

Their first error is connected with the very form in which the question is part.

According to the principle mentioned above, the question would be no sooner put than answered, if the Jurists had not altered its original terms. M. Branting, when asked by the President of the Council of the League of Nations to submit in writing to the Council such observations as he had to put forward on behalf of the Swedish Government with regard to the Aaland question, which is at present being dealt with by the Council, expressed himself as follows

"In accordance with your wishes, I have the honour to submit to you the following observations..

"'The Aaland population will be allowed to decide immediately by means of a Plebiscite whether the Aaland Archipelago is to remain under Finnish *sovereignty* or to be restored to the Kingdom of Sweden."

Hence, according to the Swedish Government, the Aaland Archipelago was on July 9th, 1920, under Finnish *sovereignty*. The only question was to decide whether, being under this *sovereignty*, it should remain there.

According to the principle laid down by the Jurists, the fact that the problem was stated in this way led to the inevitable conclusion that, since the Aaland Archipelago was under the Sovereignty of Finland, positive International Law did not allow Sweden to deprive Finland of the right to dispose freely of a part of its territory and of its population.

It was only owing to an alteration in the wording of the statement made by M. Branting on July 9th, 1920, that the Jurists were able to argue in this way. In this statement the word "sovereignty," which allowed of no misunderstanding, has been replaced by the word "domination." On page 5 of the French text of the Jurist's memorandum the following passage occurs —

"Can Sweden for her part, demand that a Plebiscite should be held in order to allow the population of the Islands to state whether they prefer to be restored to Sweden or to remain under Finnish *domination* ?"

It is not for us to try to discover when so fundamental a change in the wording of the question was introduced but we would state most emphatically that the Council promised us that it would

[1] See *Official Journal*: Special Supplement No. 3, October 1920.

nette que le Conseil n'a souscrit devant nous qu'à la position du problème, dans les termes mêmes où il a été présenté par M. Branting que c'est dans ces termes mêmes qu'il devait être soumis aux juristes et qu'enfin, dans la manière dont la question était officiellement posée par le Président du Conseil de Suède, se trouvait à tout le moins, avant que la controverse juridique se fût exercée sur ce point, la véritable pensée spontanée et sincère de la Suède sur la nature du lien qui présentement lie l'archipel d'Aland à la Finlande c'est le lien de la souveraineté. Ce n'est pas seulement nous qui l'affirmons, c'est la Suède qui l'a solennellement reconnu le 9 juillet. Et les jurisconsultes n'ont pu décider que la question n'était pas de celles que le Droit international laisse à la compétence exclusive de la Finlande, que parce que dans la position du problème le mot précis, juridique, de souveraineté a été ultérieurement remplacé par le mot, sans valeur juridique, mais tout de fait, de domination.

Cette simple constatation nous permettrait de ne pas insister davantage. Il nous suffit de faire remarquer que la question posée par M. Branting était celle-ci *l'Archipel doit-il rester sous la souveraineté finlandaise* ? qu'à cette question a été substituée, par une altération à peine croyable de texte, celle-ci *l'Archipel alandais doit-il rester sous la domination finlandaise* ? pour que toute autorité soit manifestement déniée à l'avis du Comité consultatif.

Du principe posé par les juristes, à savoir que la souveraineté d'un Etat ne permet pas à tout autre qu'à lui de décider du sort des peuples situés sur son territoire, il résulte, si l'archipel alandais est sous la souveraineté finlandaise en juillet 1920, que la question de savoir s'il doit être réuni à un autre Etat, n'est pas une question qui dépend d'une autre décision même de la Finlande, c'est-à-dire une question qui relève exclusivement de sa juridiction.

II

Bien que nous puissions arrêter à ce point nos observations, supposons cependant que la question posée n'est pas expressément ni même implicitement supposée, et que l'Archipel alandais est, actuellement, sous la souveraineté de la Finlande.

Suivons dès lors les juristes dans un raisonnement où, sans l'altération du texte qui constitue le vice fondamental de leurs discussions, ils n'auraient même pas eu la simple possibilité d'entrer.

Quel est ce raisonnement ?

S'il appartient, disent-ils (page 7), exclusivement à la souveraineté de tout Etat définitivement constitué, d'accorder ou de refuser à une fraction de la population des droits de déterminer son propre sort politique, par la voie d'un plébiscite ou autrement, il n'en est pas de même, lorsqu'il s'agit d'un Etat qui n'est pas définitivement constitué

« Au point de vue aussi bien du droit interne que du droit international (page 8), la formation, la transformation et le démembrement d'Etats par suite de révolutions et de guerres, créent des situations de fait qui échappent en grande partie aux règles normales du droit positif. » Cela revient à dire que, lorsque le fondement essentiel de ces règles, à savoir la souveraineté territoriale, fait défaut, soit parce que l'Etat n'a pas encore pris complètement naissance, soit qu'il se trouve dans une période de transformation ou de dissolution, il existe, quant au droit, une situation douteuse, incertaine, qui ne prend fin que du moment où le développement s'est achevé et qu'une nouvelle situation, définitivement normale quant à la souveraineté territoriale s'est établie.

A moins qu'un droit international nouveau ne doive naître de la décision même des jurisconsultes, il est impossible de donner à ces idées générales un autre sens que celui-ci lorsqu'un Etat nouveau se crée, par cession ou séparation d'un autre Etat, il existe, entre sa proclamation d'indépendance et sa reconnaissance, tant par l'Etat dont il s'est séparé, que par les autres, une période d'incertitude, où l'on ne sait encore, si triomphant des obstacles nés de sa formation, le nouvel organisme politique parviendra à se constituer. A ce moment l'on peut dire que la souveraineté territoriale de l'Etat n'est pas établie d'une manière définitive. Aussi les droits de l'Etat ne sont-ils reconnus à l'organisme nouveau que dans la mesure nécessaire pour arriver, par la guerre, à ses fins, c'est-à-dire à la manifestation de son indépendance. De là, la théorie de la reconnaissance comme belligérants, née dans le droit politique du commencement du XIX^me^ siècle, est aussi, par

only accept the statement of this problem in the same terms as it was put by M. Branting; that it was in these same terms that it was to be submitted to the Jurists; and that finally the form in which the question was officially put by the Swedish Prime Minister contained, before the legal controversy began to rage upon this point, the true, spontaneous and genuine feeling of Sweden as to the nature of the ties which at the present time bind the Aaland Archipelago to Finland, *i. e.*, the ties of sovereignty. It is not only we who make this affirmation, it was formally admitted by Sweden herself on July 9th. And the Jurists have only been able to decide that the question was not one of those which International Law leaves to the exclusive competence of Finland because in the posing of the question the legal, and at the same time precise, word "sovereignty" was subsequently replaced by the word "domination," which has no legal, but a merely practical, significance.

This simple observation would make it unnecessary for us to insist further. If we point out that the question as put by Mr. Branting was as follows *Must the Archipelago remain under the sovereignty of Finland* ? and that this question, by an almost incredible alteration in the text, was subsequently altered to the following *Must the Aaland Archipelago remain under the domination of Finland* ? it will be enough to show that the opinion of the Advisory Committee is manifestly lacking in all authority.

According to the principle laid down by the Jurists, namely that the sovereignty of a State does not allow any other State to decide the future of populations dwelling on its territory it follows that, if the Aaland Archipelago was under the sovereignty of Finland in July, 1920, the question as to whether it is to be joined to another State is one which only depends on the decision of Finland itself—that is to say it is a question which comes exclusively under the jurisdiction of Finland.

II.

Although we might conclude our remarks at this point, let us nevertheless suppose that the question raised is neither explicitly nor implicitly raised, and that the Aaland Archipelago is now under the sovereignty of Finland.

Let us now follow the Jurists in a line of argument which, without the change in the text wherein lies the fundamental unsoundness of their reasoning, it would be absolutely impossible for them to pursue.

What is this line of argument ?

If it is the exclusive privilege of the sovereignty of every definitely constituted State, they argue (see page 7), to grant to or withhold from a fraction of the population the right to decide its own political future by means of a plebiscite or by any other means, this does not hold good in the case of a State which is not definitely constituted.

"From the point of view of both domestic and international law (page 8) the formation, transformation, and dismemberment of States as a result of revolutions or wars create situations of fact which, to a large extent, cannot be met by the application of the normal rules of positive law." This is equivalent to saying that when the essential basis of these rules—namely, territorial sovereignty—is lacking either because the State is not yet completely constituted or because it is undergoing a period of transformation or dissolution, a doubtful and uncertain situation is created from the legal point of view which only ceases to exist when the State development is completed and a new situation which is normal as far as territorial sovereignty is concerned has been established."

Unless a new international law is to be called into existence merely owing to this decision of the Jurists, it is impossible to discern any other meaning in these general ideas that the following When a new State is created, either through being ceded by or separated from another State, there occurs between the time of its proclamation of independence and its recognition both by the State from which it is separated and by other States — a period of instability, during which it is impossible to know whether the new political organisation, triumphing over the obstacles accompanying its formation, will succeed in establishing itself. At that moment it may be said that the territorial sovereignty of the State is not definitely constituted. Moreover the new organisation is only recognised as possessing State rights if it has been able to attain its ends through war — that is to say, if it has been able to assert or prove its independence. Hence the theory

un développement recent, dans la guerre de 1914-18, la théorie de la reconnaissance comme nation. Mais, dès qu'un Etat est reconnu, soit par celui dont il se sépare, soit, sans même attendre cette reconnaissance, souvent très longue à venir (reconnaissance de la Belgique, 1831 par les Puissances, 1839 par la Hollande) par les autres Etats, la situation de l'Etat nouveau est une situation définitive. *Sa souveraineté territoriale est fixée.* Sans doute, ses frontières peuvent ne pas être encore, sur tous les points, notamment déterminées: des constitutions de frontières se sont poursuivies et quelques-unes se poursuivent encore entre les Etats de l'Amerique latine entre le XIX^{e} siècle et le commencement du XX^{e}, sans qu'on puisse dire que la situation de ces Etats n'est pas une situation définitive et normale. La période de formation d'un Etat, telle qu'elle est reconnue, comme douteuse, incertaine, suivant les termes des Juristes, se limite à la periode anterieure aux reconnaissances et, cette période, la Finlande l'a franchie.

Dès l'instant que les reconnaissances sont intervenues, la souveraineté de l'Etat est formee, le peuple est définitivement constitué. Jusqu'à présent, le droit international n'a jamais admis qu'il pût en être autrement, et l'on comprend, à lire l'avis des Jurisconsultes, qu'aucune citation n'a été faite par eux, ni des précédents historiques, ni des auteurs, ni de la jurisprudence internationale ce silence s'explique parce qu'il serait difficile de trouver dans le droit antérieur une règle semblable à celle qu'ils ont cru pouvoir poser.

Mais, supposons que la règle de droit international, formulee par eux, pour la première fois, et qui ne sera certainement pas sans rencontrer, dans le monde juridique, d'immediates contradictions, soit acceptee, comme une règle incontestable, incontestée, et qu'il n'y ait plus qu'à en faire l'application à la Finlande. D'après l'affirmation des Jurisconsultes (page 16) « la formation d'un Etat finlandais indépendant en 1917 et 1918, quel qu'ait éte précédemment le statut juridique de la Finlande dans l'Empire de Russie, doit être envisagée, au moins sous plusieurs rapports, comme un evénement politique nouveau, et non comme la continuation pure et simple d'une existence politique antérieure ».

On comprend le but d'une telle affirmation. S'il était demontre que la Finlande, anterieurement à sa reconnaissance, a eu, dans l'Empire russe, de 1809 a 1917, un statut politique détermine, en vertu duquel l'archipel d'Aland n'eût été qu'une partie dans l'unité politique finlandaise, il s'ensuivrait que la reconnaissance s'applique à cette Finlande, telle qu'elle était déjà déterminée, dans ses frontières particulières, par rapport a la Russie, à laquelle elle s'unissait dans l'Empire, sans cependant se confondre avec elle. Si la Finlande avait un statut territorial nettement fixé dans l'Empire Russe, c'est a ce statut territorial que naturellement devaient s'appliquer les reconnaissances des Puissances. Pour prétendre qu'en 1917, la Finlande se forme sans un essai territorial déterminé, les Jurisconsultes étaient donc conduits à dénier à la Finlande, antérieurement à 1917, ce même essai. Cette négation forme l'une des parties capitales de leur avis. Elle est catégorique « La Finlande a été traitée, en fait, par le Gouvernement Russe, depuis 1899, comme une simple province. »

Il n'est pas un juriste qui ne s'étonne, en presence de ces termes, de voir des Jurisconsultes, dans l'examen d'une question de droit, passer du droit qui, d'après eux, — ils ne le contestent pas — faisait de la Finlande, a l'interieur, un Etat, au fait, qui depuis 1899, l'aurait ramenée, sous l'influence d'une politique de russification, au régime de simple province. Parmi les Jurisconsultes qui, dans tous les pays de l'Europe, et notamment dans celui de deux des Membres au moins de la Commission des Juristes (la France et la Hollande) ont énergiquement soutenu et clairement démontré, d'une manière qui reste acquise à la science politique, que la Finlande, en vertu du Pacte de Borgo, « nation libre à l'intérieur », suivant la parole même de l'Empereur Alexandre 1er, avait sa constitution propre, il n'en est pas un qui, à l'heure actuelle, ne soit certainement prêt à protester contre cette si singulière manière de faire état dans une discussion juridique de la violation par la Russie de ce qu'ils ont considere comme l'inviolable droit de la Finlande, en vertu des principes du droit public universel. Mais il y a plus. Le Gouvernement Russe, alors même qu'il agissait contrairement à la constitution finlandaise, n'a jamais prétendu traiter la Finlande comme une simple province. Or, la nationalite finlandaise a toujours été distincte de la nationalité russe. L'une des questions les plus discutees à la fin de l'ancien régime était precisément de savoir quels seraient les droits des Russes en Finlande, ce qui montre bien que la nationalité finlandaise était une nationalité séparée. Sans doute, le Gouverneur Général de Finlande, Président du Sénat de Finlande, c'est-à-dire du Conseil des Ministres de Finlande, pouvait avoir la nationalité russe, en raison du fait que la Finlande, bien que nation à l'intérieur, était, à l'extérieur, dans les relations internationales, representée par l'Empire russe,

of the recognition of a State or a belligerent, which grew up in international law at the beginning of the 19th century, has also, by a recent development during the war of 1914-18, come to be the theory of its recognition as a nation. But as soon as a State has been recognised either by the State from which it has been separated or, even without waiting for this recognition — which is often withheld for a long time (*cf.* the recognition of Belgium in 1831 by the Powers and in 1839 by Holland) by other States — the status of a new State is a definite status. *Its territorial sovereignty is determined.* No doubt its frontiers are perhaps not yet fixed at every point between the 19th and the beginning of the 20th centuries the frontiers of some South American States were still being fixed (and in some cases this process is still going on), but this does not prevent the constitution of these States from being normal and well established. The period during which the formation of a State is, in the words of the Jurists, recognised as being doubtful or uncertain, is limited to the period preceding the recognition of the State, and in the case of Finland this period has been passed.

As soon as a State has been recognised, its sovereignty is established and the nation is definitely constituted. Hitherto international law has never admitted any other point of view, and on reading the opinion of the Jurists we can understand why they have made no allusion to historical precedence and no quotations from authors or from the text-books of international jurisprudence, their silence is explained by the fact that it would be difficult to find in the annals of Law any principle such as that which they have seen fit to bring forward.

But let us suppose that the principle of International Law formulated by them for the first time, and which is certain to meet with immediate contradiction on the part of legal authorities, is accepted as an incontestable and uncontested principle, and that nothing remains but to apply it to the case of Finland. According to the declaration of the Jurists (page 16) "The formation of an independent State of Finland in 1917 and 1918, whatever may have been the legal status of Finland formerly under the Russian Empire, must be considered, at any rate in several aspects, as a new political phenomenon and not as a mere continuation of a previously existing political entity"

The object of this affirmation can be understood. If it were shown that Finland before her recognition as a State possessed, within the Russian Empire of 1809 to 1917, a definite political status, by virtue of which the Aaland Archipelago would have been only one part of the Finnish political unity, it would follow that the recognition applies to Finland within her own frontiers, fixed as they already were in relation to Russia, she being united to the Russian Empire without, however, being absorbed in it. If Finland had a definite territorial status within the Russian Empire the enquiry of the Powers should naturally have had relation to this territorial status. In order to maintain that, in 1917, Finland was formed without a definite territorial outline (?) the Jurists were forced to deny to Finland the possession of this same outline prior to 1917. This denial is one of the integral parts of their conclusions. It is a categorical denial "Finland has in fact been treated by the Russian Government since 1899 as a simple province."

No Jurist can help feeling astonishment in regard to these terms when he sees Jurists, in considering a question of law, turn from the *de jure* position, which, as they admit, constituted Finland in domestic affairs as a State, to the mere *de facto* position which, since 1899, under the influence of a Russianising policy, would have reduced it to the status of a simple province. Amongst the Jurists who, in all the countries of Europe and in particular in those of at least two members of the Committee of Jurists (France and Holland), have firmly maintained and clearly shown, in a manner which is now an accepted principle in political science, that Finland, which was by virtue of the Treaty of Borgo "a free nation in domestic matters," according to the actual words of the Emperor Alexander I, and possessed its own Constitution, there is not one who at the present moment would not certainly be ready to protest against this unusual method of relying for support in a political argument on the violation by Russia of what they consider as the inviolable right of Finland, by virtue of the principles of universal justice. But that is not all. The Russian Government, at the very time when it was acting contrary to the Finnish Constitution, never pretended to treat Finland as a simple province. Finnish nationality has always been distinct from Russian nationality. One of the questions most discussed at the end of the old regime was precisely what should be the rights of Russians in Finland this clearly shows that Finnish nationality was a separate nationality No doubt, the Governor-General of Finland, who was President of the Finnish Senate— that is to say the Finnish Prime Minister—might be of Russian

dont elle formait une partie intégrante, mais les autres membres du Sénat de Finlande devaient tous avoir la nationalité finlandaise et même au pire moment de la russification, la plupart d'entre eux était encore de nationalité finlandaise. Jamais on n'a vu de simples provinces avoir ainsi une nationalité propre. Jamais, par conséquent, le Gouvernement Russe n'a traité la Finlande comme une simple province. L erreur des Jurisconsultes est, sur ce point, une erreur matérielle.

Il est vraiment regrettable que la documentation qui a été mise à leur disposition ne leur ait pas permis de pénétrer dans toutes les phases d'une évolution, assurément compliquée, mais d'où les principes surgissent cependant assez facilement reconnaissables, de la question finlandaise de 1899 à 1917 C'est avec peine qu'on constate à la page 12 que les Jurisconsultes croient que depuis 1899 les atteintes a la liberté finlandaise ont toujours été maintenues par le Gouvernement Russe, alors qu'en 1905, ces atteintes ont été suspendues et, pendant un certain temps, la constitution respectée.

D'autre part, les Jurisconsultes ne semblent pas avoir aperçu qu'en 1917 après la grande révolution, le Gouvernement du Prince Lvow a remis en vigueur la constitution, et celui de Kerensky a même, dans une notable mesure au delà des termes de la constitution, augmenté les libertés de la nation finlandaise.

Dire que le Gouvernement Russe a toujours traite la Finlande de la même manière depuis 1899 jusqu'en 1917 c'est une erreur, une erreur de fait.

Autre erreur les Jurisconsultes considèrent la nomination des Gouverneurs généraux de Finlande comme la preuve que le Gouvernement Russe comptait même après la grande révolution, la Finlande comme une province, puisqu'il continuait d'y nommer des Gouverneurs généraux. Mais la nomination des Gouverneurs généraux représentant l'Empire russe en Finlande, n'était pas un fait nouveau. L'institution existait sans interruption depuis 1809 et ceci même prouve qu'elle n'était pas contraire à la notion de l'indépendance intérieure de la nation finlandaise.

Ainsi les erreurs s'accumulent. Ce n'est pas sur une construction juridique composée sur des matériaux aussi insuffisants que peut se baser, avec l'autorité qu'elle mérite, devant le monde, une décision du Conseil de la Société des Nations.

Vainement les juristes essaient-ils de nier que la Finlande soit dans l'Empire Russe une unite politique distincte. La vérité est que la Finlande est entrée dans l'Empire Russe en 1809 comme un Grand-Duché particulier et avec ses limites spéciales, que dans ces limites se trouvaient les Iles d'Aland, et qu'au moment où l'indépendance finlandaise a été reconnue, tant par la Russie que par les Puissances, elle l'a été non pas avec un statut territorial incertain, mais avec une base territoriale, déterminee par les limites constantes de 1809 à 1917 (En y ajoutant les territoires qui, déjà cédés à la Russie antérieurement à 1809 par les Traites de 1721 et de 1743 ont été réincorporés à la Finlande par ukase du Tzar du 23 décembre 1811).

III

Par un raisonnement des plus hardis, pour ne pas dire plus, les juristes se sont efforcés de demontrer que l'Archipel d'Aland, quelle qu'eût éte sa situation juridique, sous la souveraineté suedoise où ils faisaient partie du district finlandais d'Abo, puis dans l'Etat de Finlande pendant que celui-ci faisait partie de l'Empire de Russie, n'en avait pas moins, tant en 1809, au moment de la separation de la Finlande d'avec la Suède, qu'en 1917 au moment de la séparation de la Suède d'avec la Russie, disjoint son sort de celui de la Finlande. en 1809, en restant incorporé à la Suède plus longtemps que la Finlande, en 1917 en procedant, par rapport à la Russie, à une séparation antérieure a celle de la Finlande elle-même.

Ce sont là, pour la décision des juristes, des constatations de faits d'une importance capitale. L'une et l'autre sont manifestement inexactes.

En ce qui concerne la première information, ou les Jurisconsultes sont formels (page 17) « La réunion des îles ne se fit pas de la même manière, disent-ils, que celle de la Finlande continentale », les faits protestent manifestement contre leur assertion. « La population des Iles d'Aland, disent les Jurisconsultes, refusa de se détacher de la Suède elle fit de grands efforts pour chasser les troupes russes des îles elle réussit même à les tenir éloignees assez longtemps et elle ne se résigna au changement de patrie et de souverain qu'après la cession de son territoire par son Roi dans le Traite du 17 septembre... La Finlande faisait déjà partie de l'Empire Russe avant que les îles d'Aland y fussent rattachees. »

nationality owing to the fact that Finland, although in domestic affairs a nation, was in foreign affairs represented abroad by the Russian Empire, of which it formed an integral part. But the other members of the Finnish Senate were all supposed to be of Finnish nationality, and even at the worst moment of the Russianisation the majority of them were still of Finnish nationality. Mere provinces have never therefore treated Finland as a mere province. The mistake of the Jurists in this matter is an important one.

It is much to be regretted that the evidence placed at their disposal does not permit them to enter into all the phases of the evolution of the Finnish question from 1899 to 1917. This is admittedly a complicated matter, but out of it rise principles which may be fairly clearly recognised. It is with regret that we note on page 12 that the Jurists believe that the attacks upon Finnish liberty have been constantly maintained by the Russian Government since 1899, whereas in 1905 these attacks were suspended, and for some time the Constitution was respected.

On the other hand, the Jurists do not seem to have noticed that in 1917, after the Great Revolution, the Government of Prince Lvow re-established the Constitution, and Kerensky's Government even extended the freedom of the Finnish nation in a remarkable provision which went beyond the terms of the Constitution.

To state that the Russian Government always treated Finland in the same manner from 1899 to 1917 is an error, and an error of fact.

Another error the Jurists are of opinion that the nomination of Governors-General of Finland is a proof that the Russian Government, even after the Great Revolution, regarded Finland as a province since it continued to appoint Governors-General. But the appointment of Governors-General, representing the Russian Empire in Finland, was not a new thing. Such a practice had continued without interruption since 1809, this also proves that it was not contrary to the idea of the domestic independence of the Finnish nation.

Errors are thus piled upon errors. It is not possible for a decision of the Council of the League of Nations, with all the authority which it should possess in the eyes of the world, to be based on a legal interpretation made up of such insufficient material.

In vain do the Jurists endeavour to deny that Finland is a distinct political unit within the Russian Empire. The truth is that Finland entered the Russian Empire in 1809 as an independent Grand-Duchy with its own frontiers, that within these frontiers were included the Aaland Islands, and that as soon as Finnish independence was recognised both by Russia and by the Powers, it was recognised not with any uncertain territorial status, but with frontiers fixed by the boundaries which remained unchanged from 1809 to 1917. (Adding thereto the territory which had already been ceded to Russia prior to 1809, by the Treaties of 1721 and 1743, and was restored to Finland by Ukase of the Czar on December 23rd, 1811).

III.

By an argument which is, to say the least of it, extremely bold, the Jurists have attempted to prove that the Aaland Archipelago — whatever its legal status may have been under Swedish sovereignty when it formed part of the Finnish district of Abo and later in the State of Finland, when the latter formed part of the Russian Empire — had, none the less, separated itself from Finland both in 1809, at the moment of the separation of Finland and Sweden, and in 1917 at the moment of the separation of Finland and Russia, in 1809, by remaining incorporated with Sweden longer than Finland did in 1917 by proceeding, in its relations with Russia, to a separation which took place before that of Finland itself.

These statements of facts are of the first importance so far as the legal position is concerned. Both of them are manifestly inaccurate.

With regard to the first statement, where the Jurists are explicit (page 17) "The Union of the Aaland Islands was not carried out in the same way as that of Continental Finland." The facts are clearly at variance with their assertion. "The population of the Aaland Islands" say the Jurists "refused to be separated from Sweden, they made great efforts to drive the Russian troops from the Islands they even succeeded in keeping them at a distance for a considerable time, and they only resigned themselves to the change of sovereign and nationality after the territory had been ceded by their King in the Treaty of the September 17th. Finland was already part of the Russian Empire before the Aaland Islands were annexed to it."

Ces constatations sont matériellement inexactes. L'acceptation par la Finlande de l'Empereur Alexandre 1er comme Grand Duc à la Diète de Borgo, à la suite du détrônement du Roi de Suède à Stockholm, le 13 mars, et de l'armistice suédo-russe du 21 mars, est du 29 mars 1809. A cette date l'archipel, où des insurrections de paysans avaient en effet éclate contre les troupes russes en mai 1808, avait été définitivement repris, du 10 au 13 mars 1809 par l'armée russe qui y était entree sans résistance. Quand la Finlande, à la Diète de Borgo, reconnut avant tout traite de paix, le Tsar comme Grand-Duc, l'autorité russe était aussi fortement assise sur Aland qu'elle pouvait l'être sur n'importe quelle autre partie du territoire finlandais. Ce n'est pas, comme les juristes le disent, après la Diète de Borgo que la population des Iles Aland s'efforça de chasser les troupes russes des Îles et reussit même à les tenir éloignées c'était un an auparavant. Les Jurisconsultes continuent en affirmant que la population ne se resigna à ce changement de patrie et de souverain « qu'après la cession de son territoire par son Roi dans le Traite du 17 septembre ». Il n'y eut pas de cession du territoire d'Aland distincte de la cession du territoire finlandais. L'archipel d'Aland avait, avant le traité du 17 septembre, accepté le sort de la Finlande, en élisant un député, dont les pleins pouvoirs sont datés du 3 mai 1809 et arrivèrent à la Diète de Borgo le 17 mai suivant (la clôture de la Diète n'eut lieu que le 19 juillet suivant). Si, d'ailleurs, ces pouvoirs sont datés du 3 mai et sont arrivés le 17 c'est que du mois de mars au mois de mai, les communications entre les Îles et la Finlande deviennent extrêmement difficiles pour cette raison qu'on ne peut pas, comme pendant l'hiver, passer sur la glace et qu'on ne peut pas encore, comme pendant l'été, naviguer.

L absence de brise-glaces ne permettait pas alors la navigation comme ils le permettent aujourd'hui. Ainsi cette différence de date, d'ailleurs très légère, s'explique par des circonstances materielles, nullement par la volonté de la population d'Aland exprimée d'une manière distincte du reste de la Finlande. Il est bien vrai que la Suède renonçait plus difficilement à la perte des Iles d'Aland qu'à celle du reste de la Finlande. C'est la raison pour laquelle, bien que les Jurisconsultes n'en parlent pas (mais nous ne voulons pas laisser ce fait sous silence) un prêtre alandais, Hambraeus, fut, par une decision spéciale du Régent, appele à prendre part aux travaux du Riksdag suédois. Mais ce prêtre alandais dont le départ des îles tenait précisément à ce que son attitude était desavouée par la population, ne devait sa désignation qu'à l'autorisation spéciale du Régent Le procès-verbal de l'Assemblée du Clergé du Riksdag suédois du 4 mai 1809, paragraphe 10, annonçant la nomination (et non l'élection) de M. Hambraeus déclare que la population de l'archipel était dans l'impossibilité de se faire représenter au Riksdag. Nous ne pouvons comprendre, en présence de ces faits qui appartiennent à l'Histoire, comment on peut écrire que « la Finlande faisait déjà partie de l'Empire russe avant que les îles d'Aland y fussent rattachées » (page 18).

Pas davantage il ne saurait être question d'admettre, comme les juristes l'ont cependant soutenu, que la population des Iles d'Aland ait fait entendre son désir d'être séparée de la Russie d'une manière indépendante de la Finlande et avant même la separation de la Finlande d'avec la Russie.

Le 20 aout 1917, disent les juristes (page 21), des délégués des Communes des Îles se réunirent à Finström et résolurent de porter à la connaissance du Gouvernement et du parlement Suédois que, pour des raisons spéciales, la population alandaise désirait vivement la réincorporation des Îles au Royaume de Suède. Mais, en transcrivant ici, purement et simplement, l'annexe 4 du mémoire suédois du 2 juillet 1920 dans la question d'Aland, les juristes ont négligé, comme d'ailleurs le memoire suédois, le paragraphe premier de ce texte qui meritait d'être rappelé. Si l'on reconstitue ce document dans son integrité, on s'aperçoit que les communes dont il est ainsi question ne représentaient que 8 paroisses sur 16. Si, d'autre part, on étend le champ des investigations, on s'aperçoit que la question de la réunion des Iles à la Suède ne figure même pas à l'ordre du jour, et que la decision resta sans publicité, même dans l'archipel d'Aland, jusqu'au jour où, brusquement, à la fin de novembre 1917, la presse suedoise en fit, avant même la presse alandaise, la révélation « Il est assez bizarre, constate le Bulletin confidentiel français du Ministère de la Guerre et des Affaires Etrangères, à la date du 17 janvier 1918, dans son dépouillement de la presse scandinave, que les journaux suédois aient attendu trois mois pour en saisir l'opinion de leur pays. »

Ce défaut de publicité contraste avec l'attitude nette, ouverte, qui toujours est celle des populations, qui, mécontentes de leur sort, désirent un changement de souveraineté. D'ailleurs, en exprimant ce désir d'un rattachement à la Suède, les Alandais prennent position contre la Finlande

These statements are essentially inaccurate. The Emperor Alexander I was accepted as Grand Duke by Finland at the Diet of Borgo, on March 29th, 1809, as a result of the dethronement of the King of Sweden at Stockholm on March 13th and of the Swedish-Russian Armistice on March 21st. At this date, the Archipelago, in which peasant risings had broken out against the Russian troops in May 1808, had been finally recaptured between March 10th and 13th, 1809, by the Russian Army which had entered it without resistance. When Finland, at the Diet of Borgo, recognised the Tzar as Grand Duke, before any Peace Treaty, Russian authority was as strongly established in the Aaland Islands as it could be in any other part of Finnish territory. It was not, as the Jurists say after the Diet of Borgo that the population of the Aaland Islands endeavoured to drive out the Russian troops from the Islands and even managed to keep them at a distance it was a year previously The Jurists go on to assert that the population only resigned itself to this change of country and of Sovereign "after the cession of its territory by its King in the Treaty of September 17th." There was no cession of Aaland territory as distinct from the cession of Finnish territory The Aaland Archipelago, before the Treaty of September 17th, had accepted the fate of Finland, by electing a Deputy, whose credentials are dated May 3rd, 1809, and were presented at the Diet of Borgo on May 17th following (the Diet was only dissolved on July 19th following). It is true that these credentials are dated May 3rd and were presented on the 17th the reason is that from the month of March to the month of May communications between the Islands and Finland become extremely difficult, because one cannot, as in winter, travel across the ice, and it is impossible to go by water, as in summer.

The absence of ice-breakers did not then permit of navigation, which has now become possible. Thus this difference in date, which is very slight, is due to material circumstances, and not at all to the expression of any desire on the part of the population of the Aaland Islands, as distinct from the rest of Finland. It is quite true that Sweden gave up possession of the Aaland Islands with greater reluctance than the rest of Finland. For this reason, though the Jurists do not mention it — and we cannot allow this fact to be passed over in silence — an Aaland pastor named Hambraeus was, by special decision of the Regent, summoned to take part in the deliberations of the Swedish Riksdag. This pastor, however, whose departure from the Islands was prompted by the fact that his attitude was disavowed by the population, owed his appointment only to a special authority from the Regent. The Minutes of the Assembly of Clergy of the Swedish Riksdag for May 4th, 1809, paragraph 10, in which the appointment (not election) of the Rev Hambraeus was announced, state that it was impossible for the population of the Archipelago to be represented in the Riksdag. We fail to understand how, in face of these facts, which belong to history, it has been found possible to write that "Finland already formed part of the Russian Empire before the Aaland Isles were joined to it." (Page 18.)

Nor can it be admitted, though the Jurists have maintained it, that the population of the Aaland Islands had expressed their desire to be separated from Russia, independently of Finland, and even before the actual separation of Finland from Russia.

On August 20th, 1917, according to the Jurists (page 21), delegates from the Communes of the Islands met at Finström and resolved to inform the Government and Parliament of Sweden that, for special reasons, the population of the Aaland Islands earnestly desired to be once more joined to the Kingdom of Sweden. The Jurists, however, in simply copying the text of Annex No. 4 of the Swedish Note of July 2nd, 1920, concerning the Aaland question, have neglected — as also does the Swedish Note — the first paragraph of this text, which ought to have been referred to. If this document be completely reproduced, it will be seen that the Communes in question only represented 8 out of 16 parishes. If, on the other hand, the scope of the investigation be extended, it will be seen that the question of the reunion of the Islands to Sweden was not even included on the agenda, and that the decision was not made public even in the Aaland Archipelago until the Swedish Press, before the Aaland Island Press, revealed it quite suddenly, at the end of November, 1917. The Confidential French Bulletin of the Ministry of War and Foreign Affairs, in its summary of the Scandinavian Press, on January 17th, 1918, remarks "It is somewhat strange that the Swedish papers have waited three months before making an announcement to the general public of their country."

This lack of publicity is in sharp contrast to the frank and open attitude always adopted by populations which are discontented with their lot and anxious for a change of sovereignty Further, the Aaland Islanders, by this expression of a desire to be united to Sweden, adopt a line

non contre la Russie, et lorsque la Suède, prenant leur cause en main, entend les soutenir, ce n'est pas à la Russie, c'est à la Finlande qu'elle s'adresse pour faire statuer sur le régime des Iles d'Aland. En tout cas, on chercherait vainement, le 27 décembre, la pièce à laquelle les juristes font allusion quand ils disent que la résolution prise le 20 aout par les délégués des Assemblées communales des Iles aurait éte, à cette date, transmise au Gouvernement Suédois. Les juristes continuent. « Au moment où la Finlande se déclarait indépendante, les Alandais préparaient un plébiscite en faveur de leur rattachement à la Suède. Ce plébiscite eut lieu le 31 décembre, plus de 7.000 Alandais exprimèrent le desir de voir les Iles d'Aland réunies au royaume de Suède. » Mais ce plébiscite s'est fait, et les jurisconsultes omettent de s expliquer sur ce point, dans des conditions de fait sans précedent dans l'histoire des plébiscites. Des signatures furent recueillies à domicile, l'annexe 3 du mémoire suédois du 2 juillet 1920 le constate toute personne majeure devait être mise en demeure d'apposer sa signature sur un registre « *la cueillette des signatures* s'est étendue aux Iles principales d'Aland ». On eut aimé connaître le sentiment des jurisconsultes sur la valeur, comme expression du droit des suffrages, *d'une cueillette des signatures à domicile.* Que dirait-on d'élections intérieures, au parlement par exemple, qui se poursuivraient dans ces circonstances, et comment pourrait-on, d'apres un tel critérium, dégager l'expression de la volonté populaire, dans la circonstance plus importante encore du choix d'une patrie ?

Nous ne saurions trop énergiquement protester contre l'affirmation des jurisconsultes, d'après lesquels la population des Iles d'Aland aurait manifesté, dès le début de la révolution russe, la volonté de se rattacher à la Suede, suivant ce qu'on peut regarder « comme un vœu *unanime, sincère et constant* ».

Il n'y a pas de vœu unanime d'une consultation de huit paroisses sur seize. Il n'y a pas de vœu sincère d'une cueillette de signatures. Enfin, il n'y a pas de vœu constant si l'on observe que les Iles d'Aland n'ont pas hésité à prendre part aux élections qui ont eu lieu en 1917, en vue de constituer la Diète qui devait proclamer l'indépendance de la Finlande, ainsi que la Diète suivante (mars 1919). Le nombre des Alandais qui participèrent aux premières élections législatives des 1er et 2 octobre 1917 était de 67,7 % du nombre total des inscrits.

Le nombre des participants aux élections finlandaises des 1er et 2 mars 1919 était de 48 % pour l'archipel mais, vu le grand nombre d'électeurs absents des îles, ainsi qu'en témoigne le mémoire suédois du 2 juillet 1920 (page 11), la participation correspondait environ aux deux tiers de la population.

Un nom doit être ici prononce, celui de M. Sundblom. M. Sundblom avait été charge, le 20 aout 1917, par l'Assemblee de Finström, de porter à la Suède le désir de l'archipel d'Aland de lui être réunie, vu la position de l'archipel entre la Finlande et la Suède et son importance stratégique. Or, M. Sundblom a participe, en 1917 et en 1918, aux travaux de la Diète. Vainement a-t-il tente de soutenir qu'il n'y penétrait qu'avec la pensée de faire reconnaître par la Finlande la lib erté des îles et leur droit, en vertu des principes du Président Wilson, de se rattacher à la Suède. Même a supposer que telle fût sa veritable pensée, il en résulterait que, pour lui, ce n'était pas de la Russie, mais de la Finlande, contrairement à l'affirmation des juristes, que se détachaient les Iles d'Aland.

Le mouvement des Iles d'Aland n'est pas, quoi qu'en prétendent les jurisconsultes, un mouvement d'autonomie qui se manifeste au regard de la Russie parallèlement à l'émancipation de la Finlande de cette même Russie, mais un sous-mouvement d'indépendance qui, à l'intérieur de la Finlande, vient se manifester, après que la Finlande, dans son ensemble (Aland compris), s'est séparée de la Russie.

Cette simple constatation du sentiment alandais suffirait à remer ici toute la thèse des jurisconsultes. Mais, indépendamment de cette constatation, nous tenons à en faire une autre qui montrera que le sentiment de la population alandaise était, de 1917 à 1918, un sentiment très net de patriotisme finlandais. Pour ne prendre qu'un exemple, le 25 mai 1918, M. Sundblom, à la Diète, s'exprimait ainsi « Pour moi, qui peux me considérer au nombre minime des navigateurs et des armateurs finlandais, j'estime qu'il est de mon droit et de mon devoir de donner mon avis dans la question du drapeau commercial de la Finlande. Présentant un télégramme des armateurs d'Abo, ainsi qu'un télégramme de l'Association des armateurs alandais, relativement aux couleurs du nouveau pavillon, il s'écriait « Il s'agit de choisir pour toujours les couleurs du drapeau de la libre Finlande... Il faut se souvenir que nos couleurs historiques étaient le rouge et le

of action directed against Finland and not against Russia, and when Sweden, taking up their cause, undertakes to support them, it is to Finland, and not to Russia, that she would apply for the purpose of obtaining a decision with regard to the Aaland Islands question. In any case, it will be useless to search under date December 27th for the document referred to by the Jurists when they state that the Resolution adopted on August 20th by the delegates of the Communal Assemblies of the Islands, had been transmitted to the Swedish Government of this date. The Jurists go on to say that, when Finland declared her independence, the Aaland Islanders were preparing a plebiscite in favour of reunion with Sweden. This plebiscite took place on December 31st; more than 7,000 Islanders expressed the wish that the Islands should be reunited to the Kingdom of Sweden. This plebiscite, however, took place under conditions quite without precedent in the history of plebiscites, and the Jurists omit to refer to this point. Signatures were collected by house-to-house visits; Annex 3 of the Swedish Note of July 2nd, 1920, admits this "every adult was to be given the opportunity of placing his signature upon a register, *the system of collection of signatures* was used in the principal Islands." One would be glad to know the opinion of the Jurists with regard to the value of a *house-to-house collection of signatures* as an expression of the right to vote. What would be thought of elections — parliamentary elections for instance — held on these lines, how can a text of this kind elicit an expression of popular opinion on the still more important question of the choice of the country to which one wishes to belong?

We cannot protest too strongly against the statement of the Jurists that the population of the Aaland Islands had from the commencement of the Russian revolution shown a desire to be united to Sweden—"a desire that may be regarded as *unanimous, sincere and constant.*"

A consultation of 8 parishes out of 16 cannot be considered as constituting a unanimous opinion. A collection of signatures does not express a sincere desire. Lastly, the constancy of the desire is refuted by the fact that the Aaland Islands did not hesitate to take part in the elections which took place in 1917 for the purpose of forming the Diet which was to proclaim Finnish independence, and also the following Diet (March, 1919). The number of Islanders who took part in the first legislative elections of October 1st and 2nd, 1917, amounted to 67.7 % of the total number on the register.

The number who took part in the Finnish elections of March 1st and 2nd, 1919, amounted to 48 % for the Archipelago but, considering the large number of electors who were absent from the islands — as is borne out by the Swedish Note of July 2nd, 1920 (page 11) — this percentage corresponded to about two-thirds of the population.

And here we must mention the name of M. Sundblom. M. Sundblom was, on August 20th, 1917 entrusted by the Finström Assembly with the task of informing Sweden of the wish of the Aaland Archipelago to be reunited to her on account of the position of the Archipelago between Sweden and Finland, and also of its strategic importance. M. Sundblom also took part in the deliberations of the Diet in 1917 and 1918. He has vainly tried to prove that he only attended the Diet with the intention of making Finland recognise the freedom of the Islands, and their right, in accordance with President Wilson's principles, to be united to Sweden. Even supposing that such was his real intention, it would follow that, in his opinion, it was not Russia, but Finland — in contrast to the Jurists' statement — from which the Aaland Islands were to be separated.

The movement in the Aaland Islands is not — whatever the Jurists may hold — a movement towards autonomy the attitude of which towards Russia is similar to that of Finland in her emancipation from Russia but a part only of the movement towards independence which appeared within Finland, after Finland as a whole (including the Aaland Islands) had been separated from Russia.

This simple indication as to the true feelings of the Aaland Islanders would suffice to refute the entire thesis of the Jurists. But, in addition, we would place on record another fact which will show that the population of the Aaland Islands was, from 1917 to 1918, strongly pro-Finnish in sentiment. To take only one example, on May 25th, 1918, M. Sundblom expressed himself in the Diet as follows "In my capacity as one of the few Finnish shipowners, I consider it my duty and my right to state my views on the question of Finland's commercial flag." Producing a telegram from the shipowners of Abo, and another from the Association of Aaland shipowners with regard to the colours of the new flag, he cried "We have to choose for all time colours for the flag of a free Finland... We must remember that our historic colours were red and yellow, because these colours figure on our arms, and are associated with traditions far more ancient than those attaching to the blue and white." Author of several draft laws relating to education and economic questions,

jaune, car ces couleurs se trouvent dans les armes de la Finlande et ont des traditions beaucoup plus anciennes que le bleu et le blanc ». Auteur de plusieurs projets de lois concernant l'instruction publique, les questions économiques, l'élu de l'archipel d'Aland ne faisait donc nullement — les paroles précitées le prouvent — figure de protestataire à la Diète finlandaise. Après avoir rendu visite le 9 novembre 1918 au Président du Conseil (et non pas, comme il l'affirme dans le document présenté le 10 août 1920 à la Commission des juristes, au mois de décembre), il demeura à la Diète jusqu'au 17 septembre 1918, encore que, d'après lui, cette visite au Président lui eût montré qu'il n'y a pas à attendre de la Finlande l'émancipation spontanée des Iles d'Aland. Mais, quand il quitta la Diète le 17 décembre 1918, il ne le fit pas en évoquant publiquement le désir des Iles d'Aland de se séparer de la Finlande ce fut sans aucune espèce de protestation, en demandant simplement l'autorisation de s'absenter, et en produisant à l'appui un certificat médical du 28 décembre 1918, constatant qu'il était, pour six semaines, inapte à tout travail intellectuel, certificat que nous tenons à la disposition du Conseil.

Est-ce ainsi que se manifestent dans l'histoire des désirs de séparation, lorsqu'ils sont, comme l'affirment les jurisconsultes, en sortant ici du cadre de la question posée, l'expression « d'un vœu unanime, sincère et constant » ? Et, puisque certains rapprochements ont été faits, puisqu'on a, du côté suédois, parlé d'une Alsace-Lorraine alandaise, peut-on comparer l'attitude de M. Sundblom, chef de l'activité suédoise d'Aland à la Diète finlandaise, à l'attitude si nette, si catégorique, si franchement déclarée des députés protestataires de l'Alsace et de la Lorraine au Reichstag allemand ?

En droit comme en fait, c'est à tort, et manifestement à tort, que les jurisconsultes ont cru pouvoir affirmer

1° Qu'en 1809, l'Archipel d'Aland s'est détaché de la Finlande plus tard que le reste de la Finlande

2° Qu'en 1917 le désir d'indépendance de l'Archipel d'Aland se manifestait d'une manière séparée, exclusive, avant même que ne se manifestât le sentiment de l'indépendance de la Finlande vis-à-vis de la Russie.

Enfin, c'est à tort, manifestement à tort, que les juristes, en recherchant la volonté des Alandais, ont déclaré que leur vœu de se réunir à la Suède était unanimement sincère et constant, de 1917 à 1918, alors qu'ils élisaient à la Diète finlandaise un député qui, bien qu'agitateur suédois dans les Iles, se présentait à la Diète comme un partisan déclaré de la patrie finlandaise, un défenseur du drapeau finlandais, et, pour prendre sa qualité de patriote finlandais, s'appuyait sur un télégramme de l'Assemblée des armateurs alandais.

IV

Après ces constatations, il semble bien inutile de suivre l'avis consultatif en ce qui concerne les événements militaires. On se demande comment des jurisconsultes ont pu considérer que, par le fait des interventions militaires diverses, russe, suédoise, allemande, qui se sont succédées sur le territoire de l'Archipel après l'indépendance de la Finlande, de véritables *carences de souveraineté* (page 26) aient pu se produire sur ces îles. L'occupation militaire, à quelque titre qu'elle ait eu lieu, n'a jamais entraîné de déplacement de souveraineté.

Tant que le pouvoir civil garde son autorité sur le territoire, il n'y a même pas, en fait, carence de pouvoirs. A plus forte raison puisque la souveraineté est une notion de droit, et que l'occupation même ne suffit pas à suspendre, il n'y avait pas de carence de souveraineté.

Les jurisconsultes n'ont jamais contesté que le pouvoir civil de la Finlande se soit continuellement et normalement exercé. Même pendant qu'il y avait encore des troupes suédoises dans l'Ile, le Préfet, nommé spécialement pour Aland (jusqu'alors réuni à la circonscription territoriale d'Abo), procéda à l'expulsion d'un journaliste suédois ce qui est la marque la plus manifeste d'un maintien de souveraineté.

V

En ce qui concerne les rapports de la Finlande et de la Russie, les jurisconsultes conviennent que le Gouvernement des Soviets n'a mis aucune condition à la reconnaissance de la Finlande.

the elected representative of the Aaland Archipelago did not, however, appear in the Finnish Diet as a protesting deputy, as is proved by the words just quoted. After having paid a visit to the Prime Minister on November 9th, 1918 (and not, as he asserted in the document submitted, on August 10th, 1920, to the Committee of Jurists in December) he remained in the Diet until September 17th, 1918, although, on his own admission, his visit to the Prime Minister had shown him that it was useless to hope that Finland would of her own accord grant independence to the Aaland Islands. Moreover, when, on December 17th, 1918, he left the Diet, he did not couple this action with a public reference to the desire of the Aaland Islands to be separated from Finland, but went without uttering any protest, and only asked for permission to absent himself, producing a medical certificate, dated December 28th, 1918, stating that he would be unfit for any intellectual work for six weeks. This certificate we hold at the disposal of the Council.

Desires for separation, when, in the word of the Jurists (who here go beyond the scope of their enquiry), they are the expression of "an unanimous, sincere and constant prayer," were not shown in this way in the past nor, in view of certain reproaches which have been made, and since on the Swedish side reference has been made to an Aaland Alsace-Lorraine, can the attitude of M. Sundblom, the leader in the Diet of the Swedish faction in Aaland, be compared to the clear, categorical, and openly-expressed attitude of the protesting deputies of Alsace-Lorraine in the Reichstag.

Legally, as well as actually, the Jurists are clearly wrong when they attempt to show

(1) That in 1809 the Aaland Archipelago was separated from Finland later than the rest of Finland.

(2) That in 1917 the desire for independence on the part of the Aaland Archipelago was shown in a special and exclusive way even before Finland showed signs of her desire to claim her independence from Russia.

Finally the Jurists are clearly wrong again when, in endeavouring to discover the wishes of the Aalanders, they declare that their desire to be united with Sweden was, from 1917 to 1918, unanimous, sincere and constant, in spite of the fact that they elected to the Finnish Diet a Deputy who, although a Swedish agitator in the islands, appeared in the Diet as an avowed partisan of the mother-country, Finland, and a defender of the Finnish flag, and who in, order to prove himself a Finnish patriot, appealed to a telegram sent by an Assembly of Finnish shipowners.

IV

It is thus useless to follow the Jurists' opinion with regard to military events. It seems incredible that Jurists should have thought that the fact that various military interventions — Russian, Swedish, German — have successively taken place on the territory of the Archipelago since the declaration of Finnish independence should have given rise to actual *abeyance of sovereignty* (page 26) over these islands. Military occupation, carried out under no matter what pretext, has never entailed a displacement of sovereignty.

So long as the civil power retains its authority over the territory, there is, in actual fact, not even an abeyance of authority. Still more then — since sovereignty is a legal conception, and since it cannot be suspended even through the occupation of the country by another Power — there was no abeyance of sovereignty.

The jurists have never disputed the fact that the civil power in Finland has been carried on continuously and normally. Even while there were still Swedish troops in the island, the Prefect who had been specially appointed for Aaland (which had hitherto been joined to the territorial district of Abo) proceeded to expel a Swedish journalist, this is a signal proof of the maintenance of sovereignty.

V

With regard to the relations of Finland and Russia, the Jurists agree that the Soviet Government imposed no conditions with regard to the recognition of Finland.

Dans ces conditions, c'est la Finlande tout entière, telle qu'elle se comportait dans l'Empire russe de 1899 à 1917 qui se trouvait, par rapport au Gouvernement des Soviets, former l'Etat nouveau de Finlande.

Les deux radios du 3 octobre 1919 et du 1er juillet 1920, motivés par les prétentions de la Suède, sur les Iles d'Aland, ne signifient nullement (il suffit de les lire) qu'après avoir reconnu dans son intégrité territoriale ancienne l'Etat nouveau de la Finlande, le Gouvernement soviétique ne le reconnaît plus qu'abstraction faite de l'Archipel d'Aland ils signifient simplement que si la Finlande n est pas en état de retenir, en dehors de la souveraineté suédoise, l'Archipel d'Aland, la Russie réserve tous droits sur elle. Les jurisconsultes (page 29) l'ont expressément déclaré « Le Gouvernement des Soviets, en reconnaissant la Finlande, a abdiqué tous les droits de la Russie sur cette partie de l'ancien Empire. »

Dans ces conditions, on ne peut, d'une déclaration soviétique, rien deduire en contradiction des droits de souveraineté actuels de la Finlande sur l'Archipel d'Aland. L'exposé de la délégation suédoise devant le Conseil Suprême, le 4 avril 1919 (annexe 17 du mémoire suédois du 2 juillet 1920) dit, en toutes lettres

> « Le Gouvernement de l'Amiral Koltchak qui, de fait, a reconnu l'independance de la Finlande, peut difficilement revendiquer la souveraineté sur les Iles d'Aland, lesquelles, une fois la Finlande indépendante, n'ont aucun rapport direct avec l'Empire russe. »

VI

Les déclarations de M. Clemenceau à la Chambre française, lors de la discussion du Traité de Paix, dont les jurisconsultes ont cru devoir faire état (page 14) n'ont, dans la question à eux posée par le Conseil, aucune valeur. Car, si M. Clemenceau déclare que la France « est prête à rendre service a la Suède, » sans d'ailleurs s'expliquer sur la manière dont ce service pourrait être rendu, il ne nie nullement (ce qui est la seule question à résoudre par les jurisconsultes) que la Finlande avait, au moment même où il parlait, la souveraineté des Iles d'Aland. Quant à prétendre interpréter la reconnaissance française, du 4 janvier 1918, comme s'appliquant à la Finlande, sans y comprendre les Iles d'Aland, ainsi que le soutiennent les jurisconsultes, c'est une interprétation manifestement inexacte de la pensee française.

Contre cette allegation des jurisconsultes, le représentant de la Finlande élève le plus formel démenti. Emu de l'interprétation grossissante que la presse suédoise avait, au lendemain de la declaration de M. Clemenceau, donnée aux paroles du Président du Conseil français, le Ministre de Finlande à Paris, qui est aujourd'hui le représentant de la Finlande dans l'affaire des Iles d'Aland, s'est rendu, d'ordre de son Gouvernemnet, au Quai d'Orsay pour demander si les paroles de M. Clemenceau devaient être considérées, ainsi que la presse suédoise le prétendait, comme une volonté d'attribution des Iles d'Aland à la Suède.

Tant au Secrétariat Général de la Conférence qu'auprès de la Direction politique, unanimes a déclarer que la presse suedoise avait mal interprété la pensée de M. Clemenceau, il fut répondu au Ministre de Finlande que les paroles de M. Clemenceau ne pouvaient exprimer, en leurs termes d'ailleurs vagues, qu'une opinion personnelle qui n'était capable, à aucun degre, d'engager la Conférence à un règlement à venir. A plus forte raison ne pouvait-elle restreindre, quant à la souveraineté actuelle de la Finlande, les termes de la reconnaissance intervenue, sans condition ni réserve, le 4 janvier 1918.

Les jurisconsultes, tout en faisant allusion à cette déclaration, n'en reproduisent pas les termes ils se bornent a dire que le Président du Conseil a publiquement déclaré le 29 septembre (lisez 25 septembre 1918) qu'il considérait la question des Iles d'Aland comme rentrant dans la sphère d'activite de la Conférence de la Paix. Quoi qu'on puisse penser de son bien-fondé, lorsqu'il s'agit d'étendre a des neutres une compétence qui normalement ne s'applique qu'à des belligérants, et toute réserve expressement faite sur une telle extension, cette déclaration serait, en tout cas, sans valeur pour la solution de la question qui nous occupe les travaux de la Conférence démontrent qu'une question, qui soulève à propos du passage d'un territoire d'une souveraineté nettement établie à une autre souveraineté, rentre dans la sphère d'activité de la Conférence de

In these circumstances it was the whole of Finland, as it existed in the Russian Empire from 1899 to 1917 which, by agreement with the Soviet Government, formed the new State of Finland.

The two radiograms of October 3rd, 1919, and July 1st, 1920, which originated by reason of Sweden's claim to the Aaland Islands, in no way imply (it is only necessary to read them for this to become evident) that, after having recognised the new State of Finland in its territorial integrity, the Soviet Government now only recognises it *minus* the Aaland Archipelago, they simply mean that, should Finland not be in a position to keep the Aaland Archipelago free from Swedish sovereignty Russia will reserve all her rights over the Archipelago. The Jurists expressly stated (page 29) "The Soviet Government, by recognising Finland, renounced all Russian claims to this part of the former Empire."

In these circumstances nothing can be inferred from any declaration on the part of the Soviets denying the existing Finnish rights of sovereignty over the Aaland Archipelago. The statement which the Swedish Delegation made to the Supreme Council on April 4th, 1919 (Annex 17 of the Swedish Memorandum of July 2nd, 1920), says

> "The Government of Admiral Koltchak, which recognised the *de facto* independence of Finland, can hardly claim sovereignty over the Aaland Islands, which, once Finland has become independent, cease to be directly connected with the Russian Empire."

VI.

The declarations which M. Clemenceau made in the French Chamber at the time of the discussion of the Treaty of Peace, and which the Jurists have seen fit to cite (page 14), are of no value in connection with the question put to them by the Council. For, if M. Clemenceau declares that France "is prepared to offer her services to Sweden," but without explaining in what way he in no way denies (and this is the only question which the Jurists have to settle) that Finland, at the moment when he was speaking, possessed sovereignty over the Aaland Islands. As for attempting to interpret the French recognition of January 4th, 1918, as applying to Finland exclusive of the Aaland Islands — which is what the Jurists maintain — that is an obviously inaccurate interpretation of the French intention.

This allegation on the part of the Jurists has been explicitly denied by the representative of Finland. Aroused by the exaggerated interpretation, which, after M. Clemenceau's statement, had been placed by the Swedish Press on the words of the President of the French Council, the Finnish Minister in Paris, who is now the Finnish representative in the Aaland Islands question, visited the Quai d'Orsay at the instance of his Government, to ask whether, as was claimed by the Swedish Press, M. Clemenceau's words were to be understood as expressing a desire to allocate the Aaland Islands to Sweden.

The Secretariat-General of the Conference and the Political Section were unanimous in declaring that the Swedish Press had wrongly interpreted M. Clemenceau's intention, and the reply given to the Swedish Minister was that M. Clemenceau's words, which in any case were vague, were merely the expression of a personal opinion and could in no may commit the Conference as regards any future settlement. They were even less able to limit the terms of the recognition of the present sovereignty of Finland, which was entered into unconditionally and unreservedly on January 4th, 1918.

The Jurists, while referring to this declaration, do not quote its terms; they confine themselves to saying that the French Premier publicly declared on September 29th (read September 25th, 1918) that he considered the question of the Aaland Islands as coming within the scope of the Peace Conference. Whatever view may be held as to the validity of this statement, when it is a question of extending to neutrals powers which are normally only allowed to belligerents, and due reservation being made as to such an extension, a declaration of this kind would in any case be valueless from the point of view of the solution of the question with which we are dealing, the work of the Conference has shown that a question which arises with regard to the transference of territory from one clearly-established sovereignty to another sovereignty comes within the scope of the Peace Conference it has often happened that it has detached territories from a sovereignty to which in

la Paix il lui est arrivé à maintes reprises de détacher des territoires à laquelle en droit positif ils appartiennent inévitablement. On ne saurait en induire que, pour le Gouvernement français, l'Archipel d'Aland n'était pas compris dans l'Etat finlandais, reconnu par la France.

VII

L avis consultatif présente d'une manière manifestement inexacte l'attitude de la Grande-Bretagne dans la question de la reconnaissance de la Finlande (pages 14 et 15).

« Le Gouvernement de la Grande-Bretagne, lui, n'a reconnu l'Etat finlandais que beaucoup plus tard, le 6 mai 1919. Il accompagnait, le lendemain, cette reconnaissance d'une note exprimant l'espoir que la Finlande ne refuserait en aucun cas d'accepter les décisions de la Conférence de la Paix, relatives a ces frontières. Et c'est seulement le 21 janvier 1920 qu'il a déclaré que sa reconnaissance était faite sans aucune réserve. »

Ce passage appelle les observations suivantes

1° La déclaration du 21 janvier 1920 ne constitue pas une reconnaissance nouvelle, plus complète que la première, mais une interprétation authentique du sens exact de la première reconnaissance donnée par le Foreign Office au Ministre de Finlande à Londres, M. Donner, sur la demande expresse qu'il lui en avait adressée, afin de couper court à des rumeurs tendancieuses.

2° Si, le 7 mai 1919, la Grande-Bretagne exprimait « l'espoir que la Finlande ne refuserait en aucun cas d'accepter les décisions de la Conférence de la Paix, relatives à ses frontières », ce n'était pas la limitation de la reconnaissance du 6 mai 1919, mais simplement une suggestion accompagnée d'un vœu.

3° Mais il y a plus, et c'est ici que l'erreur de l'avis consultatif est particulièrement lourde, en exprimant l'espoir que la Finlande ne refuserait pas d'accepter les décisions de la Conférence relatives à ses frontières. La Grande-Bretagne ne pensait pas à d'autres frontières que celles que la Finlande pouvait, un jour, se proposer de demander, par extension de ses anciennes frontières historiques, en revendiquant sur la Russie les territoires de Petchenga et de la Carélie orientale, mais la Grande-Bretagne n'entend nullement demander à la Finlande de vouloir se soumettre à quelques décisions que ce fussent, en ce qui concerne une restriction de son territoire historique, par une modification, non pas au regard de la Russie, mais au regard de la Suède. Cette disposition ne pouvait, dans ces conditions, trouver d'application à l'Archipel d'Aland. Pour éviter à cet égard toute équivoque et faire éclater sur ce point une indiscutable clarté, le Ministre de Finlande à Londres posa expressément au Foreign Office la question de savoir quel était le sens exact qu'il devait attribuer à cette formule. La réponse du Foreign Office, donnée sur cette démarche, par Lord Hardinge, fut qu'il ne s'agissait pas ici d'une restriction des frontières historiques de la Finlande et que, dès lors, rien dans cette espérance de voir la Finlande accepter la décision des Puissances ne s'applique à l'archipel d'Aland.

VIII

D'ailleurs, à quoi bon insister ? Ce ne sont pas seulement les Alandais qui, coopérant à la vie publique finlandaise, ont d'eux-mêmes reconnu que la Finlande exerçait la souveraineté dans leur territoire c'est le Gouvernement suédois lui-même qui en a fait l'aveu en demandant le 9 juillet 1920 au Conseil qu'il soit permis à la population alandaise de décider immédiatement, par plébiscite, si l'archipel d'Aland doit rester sous la souveraineté finlandaise ou être réintégré au Royaume de Suède, M. Branting a reconnu que l'archipel alandais est présentement sous la souveraineté finlandaise. Dès lors, et d'après les principes mêmes que les juristes ont posés au début de leur avis consultatif, la question de savoir s'il doit rester sous cette souveraineté dépend de la juridiction exclusive de la Finlande.

Les réflexions faites sont celles d'un premier examen hâtif et incomplet et suggèrent au représentant de la Finlande le devoir de rappeler au Conseil les conditions générales dans lesquelles les juristes ont statué.

positive law they obviously belong. It could not be inferred from this that, in the view of the French Government, the Aaland Archipelago is not included in the Finnish State, which has been recognised by France.

VII.

The advisory opinion gives an inaccurate description of the attitude of Great Britain on the question of the recognition of Finland (pages 14 and 15).

"The Government of Great Britain only recognised Finland as a State much later — May 6th, 1919. On the following day it added to this recognition a Note expressing the hope that Finland would not refuse under any circumstances, to accept the decisions of the Peace Conference with reference to her frontiers. It was only on January 21st, 1920, that the British Government stated that its recognition was given without any representations whatever."

This passage calls for the following remarks —

(1) The Declaration of January 21st, 1920, does not constitute a new recognition, more complete than the first, but is an authentic interpretation of the exact meaning of the first recognition granted by the Foreign Office to the Finnish Minister in London, M. Donner, at the request expressly made by him in order to put an end to dangerous rumours.

(2) The fact that on May 7th, 1919, Great Britain expressed the hope "that Finland would, under no circumstances, refuse to accept the decisions of the Peace Conference, with regard to its frontiers," did not imply a limitation of the recognition of May 6th, 1919, but was simply a suggestion accompanied by a recommendation.

(3) Furthermore — and this is where the error in the Jurists' Report is particularly serious — when expressing a hope that Finland would not refuse to accept the decisions of the Conference with regard to its frontiers, Great Britain only had in mind those frontiers which Finland might, at some future date, decide to demand, as an extension of her old historic frontier, by claiming from Russia the territories of Petchenga and Eastern Karelia. Great Britain, however, had no intention of requiring that Finland should submit to any decisions whatsoever with regard to a restriction of her historic territory involving any change, not with regard to Russia, but with regard to Sweden. This provision could not, under these circumstances, be applied to the Aaland Archipelago. In order to avoid any confusion in this matter, and to clear up this point beyond dispute, the Finnish Minister in London expressly asked the Foreign Office to inform him what was the exact meaning that he should attribute to this text. The reply of the Foreign Office as made by Lord Hardinge was that there was no question here of a restriction of the historic frontiers of Finland, and that therefore the hope expressed that Finland would accept the decisions of the Powers did not apply to the Aaland Archipelago.

VIII.

But, indeed, why elaborate this matter further? Not only have the Aaland Islanders, by co-operating in Finnish public life, themselves recognised that Finland exercised the sovereignty in their territory; the Swedish Government itself has admitted it when M. Branting asked the Council on July 9th, 1920, that the Aaland population should be permitted to decide immediately by plebiscite, whether the Aaland Archipelago should remain under Finnish sovereignty or be reunited with the Kingdom of Sweden, he acknowledged that the Aaland Archipelago is at this moment under Finnish sovereignty. It follows, therefore, from the above, and from the principles that the Jurists laid down at the beginning of their advisory Report, that the question as to whether it should remain under this sovereignty comes within the domestic jurisdiction of Finland.

The above observations were made after a preliminary, hasty, and incomplete examination and suggest to the Finnish Representative that it is necessary to remind the Council of the general conditions under which the Jurists gave their opinion.

Les jurisconsultes n'ont pas procédé comme des arbitres devant lesquels les parties présentent contradictoirement leur demande et leur défense ils n ont pas communiqué notamment au représentant de la Finlande les declarations orales ni même les mémoires écrits, de son contradicteur suédois même il a constate que c'est seulement le 6 septembre, au moment où la decision des jurisconsultes arrivait à Londres que le Secrétaire du Comite des Juristes a remis au représentant de la Finlande, à Paris, deux memoires que le représentant de la Suède avait, le 10 et le 11 août, fait parvenir a la Commission des Juristes Communication véritablement tardive puisqu'elle s'opère au moment même ou, la décision rendue, il était impossible à la Finlande de présenter des observations qui eussent pu redresser l'avis à intervenir. Enfin, ce qui est plus grave, par la lecture de ces mémoires, le représentant de la Finlande a pu se convaincre qu'un document (la lettre du 22 juillet presentée a la Société des Nations par les Alandais, qui se trouvait — le mémoire du 11 août en fait foi — entre les mains du représentant de la Suède) n'avait jamais éte communiqué a celui de la Finlande.

Le représentant de la Suède dit, dans cette lettre du 11 aout, à la Commission des Juristes

« Vous trouverez des renseignements plus amples, a ce sujet, dans la lettre du 22 juillet dernier, adressee par les délegues alandais à Sir Eric Drummond, et dont vous n'avez certainement pas manque de prendre connaissance.

« Si, contrairement a ce que je suppose, cette lettre ne vous a pas été transmise, je vous prie de m'en avertir et je vous en procurerai immediatement une copie. Cette lettre, me semble-t-il, offre beaucoup d'interêt pour la solution de la question ».

Ces observations devraient être présentees parce qu'elles seraient de nature, à elles seules, à infirmer la valeur de l'avis consultatif et qu'elles expliquent comment des erreurs aussi nombreuses et aussi graves que celles qui ont éte relevées dans ce développement ont pu s'y glisser.

IV

DÉCLARATIONS SUPPLÉMENTAIRES FAITES AU CONSEIL DE LA SOCIÉTÉ PAR LE MINISTRE DE FINLANDE, LE 18 SEPTEMBRE 1920.

La formule officiellement donnée par M. Branting le 9 juillet 1920 à la demande du Président du Conseil de la Société des Nations pour préciser la question pendante devant le Conseil, était la suivante

« Il sera permis à la population alandaise de décider immédiatement par plébiscite si l'Archipel alandais doit rester sous la souveraineté finlandaise ou être réintégré au Royaume de Suède. »

Pour échapper à l'argumentation produite par le Représentant de la Finlande dans ses observations orales du 16 septembre, M. Branting répond que le mot de souveraineté ne doit pas être pris dans le sens d'un pouvoir de droit, mais d'un simple pouvoir de fait.

Une telle explication n'est pas recevable.

Le mot « souveraineté » a toujours eu, dans toutes les langues, un sens rigoureusement défini c'est un pouvoir qui n'est pas seulement un pouvoir de fait, mais un pouvoir de droit.

Il en est ainsi dans le droit interne. Quand la Déclaration Des droits de l'Homme du 26 août 1789, art. 3, déclare « Le principe de toute *souveraineté* réside essentiellement dans la nation », quand la Constitution, du 3 septembre 1791, déclare « La souveraineté est une, indivisible, inaliénable, imprescriptible », le mot de souveraineté indique manifestement, non pas un pouvoir de fait, mais un pouvoir de droit. Il en est de même dans la constitution du 4 novembre 1848 « La souveraineté reside dans l'universalite des citoyens français ». Qu'on essaie de remplacer, dans chacune de ces formules, l'expression souveraineté par l'expression domination, on verra au changement de ton, d'accent, d'expression, que les deux mots ne sont pas synonymes.

The Jurists did not act as arbitrators before whom the Parties respectively presented, as in cross-examination, their plea and their defence in particular they did not communicate to the Finnish Representative the verbal Declarations, nor even the written memorandum of his Swedish adversary he has even pointed out that it was only on September 6th, when the decision of the Jurists arrived in London that the Secretary of the Committee of Jurists transmitted to the Finnish Representative in Paris two memoranda which the Representative of Sweden had communicated to the Committee of Jurists on August 10th and 11th. This communication was made far too late, since it only occurred at the moment when the decision had been made, and it was impossible for Finland to bring forward observations which might have affected the conclusions to be arrived at. Finally and more serious still, by reading these memoranda, the Finnish representative has convinced himself that one document (the letter of July 22nd, addressed to the League of Nations by the Aaland Islanders, which was — the Memo. of August 11th proves this— in the possession of the Swedish Representative) was never communicated to the Finnish Representative.

The Swedish Representative says, in this letter of August 11th, to the Committee of Jurists

"You will find fuller information on this subject in the letter of July 22nd last, addressed by the Aaland Delegates to Sir Eric Drummond, and with which you are sure to be acquainted.

"If, contrary to what I suppose, this letter has not been transmitted to you, I beg you to let me know and I will procure you a copy immediately This letter, it appears to me, contains much that will be useful in the solution of the question."

It was felt that these observations should be submitted, because they are, by themselves, calculated to detract seriously from the value of the advisory Report, and explain why such a large number of serious errors as those mentioned in this memorandum have crept into the advisory Report.

IV

SUPPLEMENTARY STATEMENTS MADE TO THE COUNCIL OF THE LEAGUE BY THE FINNISH MINISTER, SEPTEMBER 18th, 1920.

The formula officially given by M. Branting on July 9th, 1920, on the request of the President of the Council of the League of Nations that the question pending before the Council should be exactly defined, was the following —

"The inhabitants of the Aaland Islands shall be permitted to decide immediately by plebiscite whether the Aaland Archipelago shall remain under Finnish sovereignty or be reunited with the Swedish Kingdom."

To refute the argument submitted by the Representative of Finland in his verbal remarks of September 16th, M. Branting replies that the word "sovereignty" should not be taken to mean *de jure*, but merely *de facto* power.

Such an interpretation is inadmissible.

The word "sovereignty" has always, and in every language, had a strictly defined meaning — it is not only a *de facto*, but also a *de jure* power.

This is so in national law. When the Declaration of the Rights of Man of August 26th, 1789, Article 3, declares, "The principle of all *sovereignty* is essentially vested in the nation", when the Constitution of September 3rd, 1791, declares, "Sovereignty is one, indivisible, inalienable, unreciprocal," the word "sovereignty" obviously means not a *de facto*, but a *de jure* power. The same is true of the Constitution of November 4th, 1848— "Sovereignty is vested in the whole body of French citizens." If in each of these formulas the term "sovereignty" is replaced by the term "domination," it will at once be seen by the change of tone, of accent and of expression, that the two words do not mean the same thing.

Dans le droit international, comme dans le droit public interne, tous les auteurs sont unanimes à prendre la souveraineté comme une *qualité juridique* de l'Etat. Pour ne citer ici qu'une seule opinion, celle d'une autorité française du droit public interne et du droit international « La plupart des theses sur la souveraineté ont pour but d'arriver à démontrer l'une ou l'autre des idées suivantes. que la souveraineté consiste dans le *pouvoir juridique* pour le souverain d'agir sans contrôle, que la souveraineté ainsi conçue comme le *droit de commander* appartient légitimement à un titulaire déterminé, roi, assemblee, ou peuple entier » (Le Fur· *La Souveraineté et le Droit, Revue de Droit Public*, 1908, page 389). Ou pour citer un auteur italien (Gaetano, Arangio-Ruiz. *Istituzioni di Diritto Costituzionale Italiano*, Turin, 1913, page 17) « In sostanza, la sovranità (o potestà d'impero, come con diversità di parole oggi vuol dirsi) è la originaria esplicazione della personalità dello Stato nella sua capacità di comandare autocraticamente entro un dato territorio ».

Le mot de souveraineté a commencé par désigner le caractère suprême d'une Puissance pleinement indépendante puis l'assemblée des pouvoirs compris dans la puissance d'Etat, enfin la position qu'occupe dans l'Etat le titulaire suprême de la puissance étatique. Mais, quelle que soit l'acception dans laquelle soit prise le mot souveraineté, toujours il désigne un pouvoir de fait élevé à une telle hauteur qu'il s'impose comme pouvoir de droit. On ne peut pas concevoir une souveraineté qui ne consisterait qu'en un titre nu sans pouvoir de fait, pas davantage on ne peut concevoir une souveraineté qui consisterait en un pouvoir de fait, sans titre de droit « L'existence de l'Etat souverain est un fait, indépendant du droit. L'Etat peut s'être formé injustement par trahison, par violence. Sa formation n'en est pas moins un fait accompli et ce fait accompli prevaudra et restera définitivement si l'Etat nouveau réussit à se maintenir... Le fait accompli a, dans la vie des nations et en droit des gens, une importance capitale, prépondérante il est générateur du droit ». Ainsi s'exprime une haute autorité du droit des gens, une autorité reconnue, Rivier (Suisse), dans ses *Principes du Droit des Gens*, Paris 1896, Tome 1er page 55. Les deux notions de droit et de fait sont tellement étroitement unies dans celle de souveraineté que l'on ne peut pas plus comprendre l'expression de souveraineté de droit que l'expression de souveraineté de fait, car dans la souveraineté, qui est la plus haute puissance, le fait et le droit coincident. D'autre part, cette haute puissance suppose un certain degré de stabilité là où il y a souveraineté, il y a un Etat definitivement constitué, et non pas un Etat en voie de formation d'un mouvement séparatiste, on ne peut pas dire qu'il ait la souveraineté, mais lorsque la reconnaissance est intervenue, la souveraineté se trouve être par cela même admise dans les limites où le titulaire du pouvoir de fait a réussi à la stabiliser.

Pour éviter à cet égard tout doute, et sans entrer dans une de ces controverses où risquent toujours de s'obscurcir les idées les plus claires et les plus simples, nous nous bornerons à constater qu'en cas d'occupation militaire, par exemple, au cours d'une guerre, bien que l'occupant ait exercé pendant un temps souvent très long l'autorite de fait et qu'il y ait une véritable domination, cependant il n'y a pas de deplacement de souveraineté parce que le pouvoir de fait qui se substitue à l'ancien ne prétend pas et ne peut pas, d'après les règles du droit des gens, se prétendre un pouvoir de droit, un pouvoir définitif et stable. C'est la raison pour laquelle, dans la Convention de La Haye de 1899, confirmée et revisee en 1907 sur les lois et coutumes de la guerre sur terre, il n'est jamais parlé d'une souveraineté de fait de l'occupant sur le territoire occupé, mais quels que soient ses droits, d'une *autorité* « *L autorité d'un pouvoir legal*, dit l'article 43 du Règlement de La Haye sur les lois et coutumes de la guerre sur terre, « ayant passé de fait entre les mains de l'occupant, celui-ci prendra toujours les mesures qui dependent de lui en vue de rétablir et d'assurer autant qu'il est possible, l'ordre et la vie publique en respectant, sauf empêchement absolu, les lois en vigueur dans le pays ». *L'autorité du pouvoir legal*, ainsi parle l'article 43 il ne dit pas « la souveraineté ayant passé de fait entre les mains de l'occupant ». C'est que la Convention de La Haye sait bien que s'il existe un pouvoir de fait, une autorité de fait, une domination de fait, il ne peut pas exister une souveraineté qui ne soit que de fait.

Il y a plus. Etant donne le libellé de la formule arrêtée par M. Branting, « Si l'archipel alandais doit *rester* sous la souveraineté finlandaise », il sera à l'avenir sous une souveraineté finlandaise qui ne sera pas seulement de fait, mais de droit. Si le mot souveraineté a, dans la formule, ce sens en se référant à l'avenir, comment en aurait-il un autre en se référant au passé ? Il est impossible de lire ce texte « doit rester sous la souveraineté finlandaise » dans ce sens « doit passer de la souveraineté de fait de la Finlande sous la souveraineté de fait et de droit de cette même Finlande ». Ce serait une fois de plus changer les textes qu'on n'a, dans la circonstance, jusqu'ici que trop altéres.

In international law as in domestic public law, all authors are unanimous in taking sovereignty to be a legal attribute of the State. To quote only one opinion, that of a French authority on national and international law — "The object of the majority of theses on sovereignty is to succeed in proving one or other of the following ideas — that sovereignty consists in the *legal power* of the sovereign to act without check that sovereignty, thus conceived as the right to command, legally belongs to a definite possessor, king, assembly or whole people." (Le Fur: *La Souveraineté et le Droit*, Revue de Droit Public, 1908, page 389). Or to quote an Italian author (Gaetano, Arangio-Ruiz, *Istituzioni di Diritto Costituzionale Italiano*, Turin, 1913, page 17) "In substance, sovereignty (or the power to rule, as it is styled to-day) is the original definition of the legal personality of the State in its capacity to rule autocratically over given territory."

Sovereignty originally meant the supreme characteristic of a fully independent Power then it meant the assemblage of powers included in the authority of the State, and eventually the position occupied in the State by the supreme possessor of the power of the State. But whatever be the acceptation in which the word "sovereignty" is interpreted, it always means a *de facto* power rising to such a position as to be able to impose itself as a legal power. It is impossible to conceive of a sovereignty merely consisting of a title without actual power, neither can a sovereignty be imagined consisting of a *de facto* power without legal title. "The existence of the sovereign State is a fact, independent of law The State may have been formed unjustly, by treason or violence. Its formation is none the less a *fait accompli*, and this *fait accompli* will prevail and remain permanently if the new State succeeds in maintaining its existence. The *fait accompli* is a supreme and predominant influence in the lives of peoples and in international law. It originates law." These are the the words of a high authority on international law — a recognised authority (Rivier [Swiss], in his *Principles of International Law*, Paris, 1896, Vol. 1, page 55). The two ideas of right and of fact are so closely bound up with that of sovereignty that one can no more understand the expression *de jure* sovereignty than the expression *de facto* sovereignty for in sovereignty which is the supreme power, *de facto* and *de jure* coincide. On the other hand, supreme power presupposes a certain degree of stability. Where there is sovereignty there is a definitely establishment State, and not a State in process of formation. One cannot say that a separatist movement possesses sovereignty, but, when recognition has been obtained, sovereignty is admitted by that very fact, in so far as the holder of *de facto* power has succeeded in establishing it.

To avoid any confusion on this point, and without entering into one of those controversies where even the clearest and simplest issues incur the risk of being obscure, we will confine ourselves to noting that in the case of military occupation, as for example during the war, although the occupying force has for a considerable time exercised a *de facto* authority and though there has been a real domination, nevertheless there has been no change of sovereignty, since the *de facto* power, which takes the place of the former one, does not claim to be a *de jure* power of a fixed and stable nature, and indeed cannot claim to be so according to the rules of International Law. This is the reason why the Hague Convention of 1899, with regard to the Laws and Customs of War by Land, confirmed and revised in 1907, never speaks of the *de facto* sovereignty, but of the "authority" of an occupier of occupied territory, whatever his rights may be. "*The authority of a legal power*" says Article 43 of the Hague Convention on the Laws and Customs of War by Land, "having passed *de facto* into the hands of the occupier, the latter shall invariably take such measures as may be necessary for him to re-establish and ensure, so far as possible, the ordered life of the community, while respecting, unless absolutely impossible, the laws in force in the country" *The authority of the legal power* — such are the words of Article 43, it does not say "sovereignty having passed *de facto* into the hands of the occupier." The reason of this is that the Hague Convention fully realises that, although there may exist a *de facto* power, a *de facto* authority a *de facto* domination, there cannot exist a sovereignty which is only *de facto*.

Furthermore, in view of the wording of the statement drawn up by M. Branting, "If the Aaland Archipelago is to *remain* under Finnish sovereignty," this must mean that it will be in future under a Finnish sovereignty which shall not only be *de facto*, but *de jure*. If the word "sovereignty" has, in this sentence, this meaning when it refers to the future, how can it have another meaning when referring to the past? It is impossible to make the words "is to remain under Finnish sovereignty" to mean "shall be transferred from the *de facto* sovereignty of Finland to the *de facto* and *de jure* sovereignty of that same Finland." This would be yet another change in texts which, under the circumstances, have been up to the present far too much altered already

Puisque la question se trouve portee sur ce terrain, ajoutons que l'on ne peut pas concevoir en droit international qu'il y ait une portion de territoire ayant appartenu un jour à un Etat civilisé qui puisse cesser d'être sous la souveraineté d'un Etat. Il n'est pas possible qu'une population se trouve à un moment donné sans souveraineté qui s'exerce sur elle pas plus qu'un individu ne doit rester sans patrie, une population ne peut rester sans Gouvernement dont elle depende et qui en soit internationalement responsable. Or, si la Finlande n est pas à l'heure actuelle souveraine de l'Archipel d'Aland, comme d'autre part l'Archipel d'Aland lui-même ne se prétend pas souverain et qu'incontestablement la Suède, avant tout plébiscite, ne saurait en aucun cas réclamer la souveraineté de ce même archipel, et d'ailleurs ne la reclame pas, il en resulte qu'aucune contradiction à la souveraineté de la Finlande ne s'étant élevée sur l'archipel d'Aland, c'est elle seule qui s'applique à cet archipel tant que par un acte exprès de sa volonté elle n'y a pas renonce. Sinon, il y aurait sur un point déterminé carence de souveraineté, ce qui est absolument contraire à tous les principes du droit public moderne, carence d'autant plus inexplicable que M. Branting ne conteste pas qu'en fait la souveraineté de la Finlande s exerce. Comment, si elle s'exerce en fait, ne s'exercerait-elle pas en droit, puisqu'elle n'est présentement contredite par aucune autre en ce qui concerne le passe, mais seulement en ce qui concerne l'avenir.

De la Convention du 30 decembre 1918, entre la Suède, l'Allemagne et la Finlande, il résulte que la Finlande est souveraine des Iles Aland au regard de la Suède au même titre qu'au regard de l'Allemagne. Car

1° — Tandis que l'élément militaire ouvrier suédois et allemand ne peut dépasser le chiffre de 150 hommes pour la Suède et l'Allemagne, il n est pas limité pour la Finlande or, c'est le propre du souverain de fixer librement le chiffre de ses troupes, et, par suite, de ses ouvriers militaires, sur son territoire

2° — C'est avec l'autorité finlandaise que la Suède et l'Allemagne doivent s'entendre pour les conditions d'achat des vivres nécessaires aux mains-d'œuvre suédoise et allemande, or, si la Finlande n'avait pas plus de droit que les deux autres, il n'y aurait plus qu'à recourir à une Commission mixte, et, si la Finlande a plus de droit que les autres, n'est-ce pas une reconnaissance de sa souveraineté ?

3° — Le droit de convocation à Mariehamn par la Commission de Contrôle Militaire appartient à la Finlande c est la preuve même de sa souveraineté.

Dans cet ordre d'idées, deux autres marques de la souveraineté de la Finlande sont à relever

1° — La Finlande a retire l'exequatur à un vice-consul suédois or le retrait d'exequatur est un acte de souveraineté.

2° — La Finlande a procédé à l'expulsion des Iles d'Aland d'un journaliste suédois or l'expulsion est un acte de souveraineté.

Dans ces deux cas, la Suède n'a pas proteste, ainsi elle n'a pas dénié à la Finlande, à ce moment la souveraineté de l'Archipel d'Aland. Elle se réservait de lui contester le droit de la garder à l'avenir, malgré le vœu de la population, en vertu du droit naturel international elle ne la lui dénait pas jusqu'au plébiscite, en vertu du droit positif.

Lorsqu'une souveraineté s'affirme, et la Finlande affirme la sienne sur Aland, il faut pour la faire tomber, qu'elle soit au moins contredite or, à l'affirmation de souveraineté de la Finlande sur l'Archipel, ne s'élevait de la part d'aucun autre Etat, même la Suede, aucune espece de contradiction.

Telles sont les observations verbales que l'on peut, dès maintenant, présenter sous réserve de toute autre qu'il y aurait lieu d'ajouter.

Since this aspect of the question has arisen it may be added that it is impossible in international law to conceive of a piece of territory which, having once belonged to a civilised state, can then cease to be under the sovereignty of a State. It is impossible that a population should, at any given moment, be under no sovereignty. Just as an individual cannot remain without a country so a population cannot remain without a Government to which it is subject, and which is internationally responsible for it. Now, if Finland does not at this moment possess sovereignty over the Aaland Islands, and as, moreover, the Aaland Islands do not claim sovereignty for themselves, while Sweden, before any plebiscite has been held, could not possibly in any case claim, and indeed does not claim, sovereignty over these islands, it follows that, as no counter-claim against the sovereignty of Finland over the Aaland Islands has been preferred, it is Finland's sovereignty alone which is supreme over these islands, until she shall have renounced such sovereignty by a direct expression of her will. Were this not so, there would be an absence of sovereignty in a certain contingency which is absolutely contrary to all the principles of modern public law an absence which is all the more inexplicable in that M. Branting does not dispute the fact that Finnish sovereignty is at present operative *de facto*. Now if it exists *de facto*, should it not exist *de jure*, since at the present moment it is not disputed by any other Power so far as the past is concerned, but only with regard to the future?

Under the terms of the Convention of December 30th, 1918, between Sweden, Germany, and Finland, Finland has sovereignty over the Aaland Islands as far as both Sweden and Germany are concerned

(1) While the number of Swedish and German military workers is not allowed to exceed 150 men for Sweden and Germany it is not limited in the case of Finland. Now it is the attribute of the sovereign to be free to fix the number of his troops, and in consequence that of the military workers on his territory

(2) Sweden and Germany have to come to an agreement with the Finnish authorities with regard to the conditions governing the purchase of food supplies for Swedish and German workmen now if Finland had no more rights than the other two Powers, it would be necessary to set up a mixed Commission and is not the fact that Finland has more rights than the others a recognition of her sovereignty?

(3) The right of summons to Mariehamn by the Commission of Military Control belongs to Finland. This is in itself a proof of her sovereignty.

In the same connection two other marks of Finnish sovereignty should be noted —

(1) Finland has withdrawn the exequatur granted to a Swedish Vice-Consul, and the withdrawal of an exequatur is an act of sovereignty.

(2) Finland has expelled a Swedish journalist from the Aaland Islands, and expulsion is an act of sovereignty.

In these two cases Sweden did not protest, hence she did not deny at that moment Finland's sovereignty over the Aaland Archipelago. She reserved the right, by virtue of "natural" international law, to contest Finland's title to keep it in the future in spite of the wishes of the population but Sweden did not contest it till the time of the plebiscite, by virtue of positive law.

When sovereignty is claimed — and Finland claims her sovereignty over Aaland — it must be contested before it can be abolished, now Finland's claim to sovereignty over the Archipelago was not disputed by any other State, even by Sweden.

Such are the verbal remarks which I am able to make at the moment, reservation being made as to anything else that it may be necessary to add.

V

COMMUNICATION DU GOUVERNEMENT FINLANDAIS

En date du 29 septembre. 1920

Apres avoir examiné les documents relatifs a la décision du Conseil de la Société des Nations dans l'Affaire d'Aland, le Gouvernement finlandais, animé des sentiments de justice et de paix qui sont à la base du Pacte de la Société des Nations, et également pénétré du sentiment du devoir que lui cree l'importance politique de l'archipel d'Aland dans la constitution independante de l'Etat souverain de Finlande, confirme les réserves, faites par M. Enckell, à Paris, le 20 septembre 1920, du droit de souveraineté de la Finlande sur les îles d'Aland. En consequence, le Gouvernement finlandais affirme ne pouvoir examiner, à quelque moment que ce soit, une recommandation du Conseil de la Société des Nations dont la consequence, directe ou indirecte, serait de priver la Finlande de son droit de souveraineté sur les îles d'Aland. Il proteste egalement comme le fit M. Enckell, contre les graves erreurs qui sont à la base de l'avis des jurisconsultes, au vu duquel le Conseil s'est declaré compétent. Le Gouvernement finlandais, tout pénétré de l'esprit de publicité du Pacte de la Société des Nations, n'a pas de plus vif désir que de voir, à la suite de la publication des documents de cette affaire, le bien-fonde de ses graves et catégoriques objections à l'avis des jurisconsultes déféré à la libre critique des historiens et des juristes. Le respect du droit est la première des garanties de la paix. Et le Gouvernement finlandais ne peut croire que la Société des Nations puisse asseoir ses decisions sur un déni de justice.

V

COMMUNICATION FROM THE FINNISH GOVERNEMENT

September 29th, 1920:

After considering the documents relating to the decision of the Council of the League of Nations in the question of Aaland, the Finnish Government, actuated by the sentiments of justice and peace on which the Covenant of the League of Nations is based, and by a sense of duty arising from the political importance of the Aaland archipelago in the independent constitution of the sovereign State of Finland, confirms the reservations of the right of sovereignty possessed by Finland over the Aaland Islands, which were voiced by M. Enckell at Paris, on September 20th, 1920. The Finnish Government declares, therefore, that it is unable to consider at any time whatsoever a recommendation of the Council of the League of Nations, the direct or indirect result of which would be to deprive Finland of its right of sovereignty over the Aaland Islands.

It also protests, as did M. Enckell, against the serious errors on which the opinion of the jurists is founded, in view of which opinion the Council declared itself competent. The Finnish Government, animated by that spirit of publicity which the Covenant of the League of Nations enjoins, has no keener desire than to see the justice of its serious and categorical objections to the opinion of the jurists submitted to the free criticism of historians and jurists after the documents of this case have been published. Respect for right is the first guarantee of peace. The Finnish Government cannot believe that the League of Nations will allow its decisions to rest on a denial of justice.

La Question Arménienne

I

TÉLÉGRAMME DU SECRÉTAIRE D'ÉTAT DES ETATS-UNIS A M. HYMANS

[*Traduction*]

16 décembre 1920.

A Son Excellence M. Paul HYMANS,
Président du Conseil de la Société des Nations, Genève.

Le Président m'a chargé de vous faire savoir qu'il a désigne comme envoyé personnel, M. Henry Morgenthau, qui est prêt à se mettre en route, dès que possible, pour donner suite à son offre de bons offices et de mediation personnelle dans la question arménienne. Cependant, le Président attend encore les indications du Conseil de la Société des Nations, pour savoir par quelle voie son offre devra être transmise et quelles sont les parties avec qui son représentant devra entrer en relations. Il attend également l'assurance de l'appui diplomatique et moral des Principales Puissances représentées au Conseil de la Société des Nations.

(Signé) NORMAN DAVIS,
faisant fonctions de Secrétaire d'Etat.

II

TÉLÉGRAMME, EN DATE DU 18 DÉCEMBRE, ADRESSÉ AU PRÉSIDENT DU CONSEIL PAR LE PREMIER MINISTRE DE GRANDE-BRETAGNE

[*Traduction*]

A Monsieur HYMANS, Conseil de la Société des Nations, Genève, de Monsieur LLOYD GEORGE.
No. 39.

Comme suite à votre télégramme du 2 decembre, et après avoir consulté les représentants britanniques à Constantinople et à Tiflis, il semble que la meilleure marche à suivre serait que le Président Wilson télégraphiât directement ses instructions au Haut Commissaire américain à Constantinople, qui se concerterait avec ses collègues à ce sujet. La nouvelle est maintenant parvenue qu'un traite de paix a été conclu entre le Gouvernement armenien et les nationalistes. Le Conseil sait, sans doute, que l'Arménie est signalée comme étant, pour l'instant, soumise à l'autorité de la Russie des Soviets et du parti avancé Dachnac.

CURZON.

INTERNATIONAL HUMAN RIGHTS LAW

Fourth Edition

EDITED BY

DANIEL MOECKLI
University of Zurich

SANGEETA SHAH
University of Nottingham

SANDESH SIVAKUMARAN
University of Cambridge

CONSULTANT EDITOR:

DAVID HARRIS
Professor Emeritus, University of Nottingham

OXFORD
UNIVERSITY PRESS

QUESTIONS FOR REFLECTION

1. What steps might be necessary to ensure that temporary special measures, aimed at accelerating women's equal enjoyment of a particular human right, promote women's empowerment rather than reinforce their secondary status?
2. How should 'the family' be understood in international human rights law?
3. Is women's sexual freedom protected by international human rights law?
4. How has gender mainstreaming been taken up domestically, in your jurisdiction?
5. Do you think that CEDAW could or should be interpreted to cover all forms of gender (identity) discrimination rather than only discrimination against women?

17

CHILDREN'S RIGHTS

Aoife Nolan

SUMMARY

The last 30 years have seen the emergence of children as a discrete–and increasing–focus of international human rights law attention. Centring on the Convention on the Rights of the Child (CRC) and the work of its treaty-monitoring body, the UN Committee on the Rights of the Child, this chapter addresses the key sources, developments, standards, and debates regarding international children's rights law. In tackling questions related to CRC rights, obligations, duty-bearers, jurisdiction, and limitations, the chapter makes clear the strengths and weaknesses of both the CRC and the enforcement mechanisms associated with that treaty. The chapter provides an in-depth discussion of the past record and future prospects of the CRC in terms of responding meaningfully to the diverse challenges faced by children.

1 INTRODUCTION

The last 30 years have seen the emergence of children as a discrete—and increasing—focus of international human rights law attention. Much of this is attributable to the growing influence of the UN Convention on the Rights of the Child 1989, the most widely ratified of all human rights treaties.[1] However, it is also consistent with a broader trend within international human rights law to focus on the rights of particular groups of persons, both in terms of the development of group-specific treaties[2] as well as in the work of 'general' treaty bodies.

The CRC was adopted on 20 November 1989 and came into force the following September. It emerged from a ten-year drafting process,[3] initiated as part of the

[1] At the time of writing, only the US had not ratified the CRC, having signed it in 1995.

[2] At the international level, see eg the UN Convention on the Rights of Persons with Disabilities (2006). At the regional level, see eg the Protocols to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003) and of Older Persons in Africa (2016).

[3] See Detrick, *The United Nations Convention on the Rights of the Child: A Guide to the 'Travaux Préparatoires'* (Martinus Nijhoff, 1992); OHCHR, *Legislative History of the Convention on the Rights of the Child* (2007).

The CRC is monitored by the 18-member expert CRC Committee, which is mandated to examine the progress made by states parties in achieving the realization of obligations undertaken in the CRC. This is primarily achieved through the state reporting process.[33]

In 2014, the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (CRC-OP3) came into force, which adds to the tools available to the Committee. It sets out a complaints system that allows communications to be submitted by or on behalf of a child or group of children, within the jurisdiction of a state party, claiming to be victims of a violation by that state party of any of the rights set forth in the CRC or one of its substantive Optional Protocols.[34] The CRC-OP3 also provides for inter-state communications[35] and an inquiry procedure for systematic violations.[36] The Committee's work under the CRC-OP3 is still nascent: as of November 2021, only 22 sets of views have been adopted, with many of these addressing the rights of migrant and asylum-seeking children. Twenty-eight complaints have been declared inadmissible on a range of grounds. One inquiry—focused on residential care in Chile—has been carried out at the time of writing.[37]

Despite being a child-specific instrument, the CRC-OP3 is very strongly based on the 'general' complaints mechanisms pertaining to other UN treaty bodies. It is particularly similar to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR-OP), the adoption of which was a crucial step towards a complaints mechanism under the CRC, given that the ICESCR-OP made clear that economic, social, and cultural rights could be rendered justiciable under international law.[38] Despite the commitment of the CRC to child participation, there was no child involvement in the drafting process of the CRC-OP3.

The CRC-OP3 does have some features that are child-specific. For example, it provides that the rules of procedure for using the complaints mechanism must be child-sensitive and include safeguards to prevent manipulation of children and that the Committee may decline to examine communications that are not in the child's best interests.[39] However, there is no scope for collective complaints, which would arguably be particularly important given the challenges (including capacity, knowledge, and resources) faced by children in terms of engaging themselves with international legal processes.

It is in the Committee's working methods and rules of procedure that the child-specific nature of the monitoring and enforcement mechanisms has been honed. For instance, the Committee has adopted working methods for child participation in both its reporting process and its days of general discussion in 2014 and 2018, respectively. In setting out a range of measures to be taken to ensure that CRC-OP3 processes are both child-friendly and child rights-consistent, the Committee made clear that:

> [i]n fulfilling all functions conferred on it by the [CRC-OP3], the Committee shall be guided by the principle of the best interests of the child(ren). It shall also have regard for the rights and views of the child(ren), the views of the child(ren) being given due weight in accordance with her/his/their age and maturity.[40]

[33] See Chapter 19. [34] CRC-OP3, Art 5(1).

[35] CRC-OP3, Art 12. [36] CRC-OP3, Arts 13–14.

[37] Espejo Yaksic, 'Report of the investigation in Chile under article 13 of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure', CRC/C/CHL/INQ/1, Leiden Children's Rights Observatory, <https://www.childrensrightsobservatory.nl/case-notes/casenote2018-2>.

[38] See Egan, 'The New Complaints Mechanism for the Convention on the Rights of the Child: A Mini Step Forward for Children' (2014) 22 *Int J of Children's Rights* 205.

[39] CRC-OP3, Art 3.

[40] Rules of procedure under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, CRC/C/62/3 (8 April 2013) Rule 1.

Therefore, although the international enforcement and monitoring systems associated with the CRC were missing a strong child-centric perspective, the Committee has taken crucial steps to address this important oversight.

6 RIGHTS AND PRINCIPLES UNDER THE CRC

The CRC was the first multilateral UN treaty to include both civil and political rights, as well as economic, social, and cultural rights. Its Part I sets out the rights of children, as well as delineating specific state obligations.

6.1 BRINGING ECONOMIC, CIVIL, SOCIAL, POLITICAL, AND CULTURAL RIGHTS TOGETHER

Historically, there has been a tendency on the part of different commentators to divide rights up into different categories. A particularly pervasive typology in children's rights has been that of protection, provision, and participation rights (sometimes reconfigured as protection, participation, provision, and prevention). Such typologies are useful in terms of identifying themes within the CRC as well as providing for 'an easy understanding of the Convention'.[41] However, there are strong arguments against the use of the '3 Ps' to frame analysis of CRC rights—not least the fact that any suggestion that all of the rights fit neatly into one or the other discrete category is incorrect. This typology will not therefore be used in this chapter.

Perhaps the key division for the purposes of the CRC is that between civil and political rights and economic, social, and cultural rights. While the CRC does not specify which rights are which, its Article 4—the umbrella obligations provision under the Convention—makes a distinction for the purposes of states duties:

> States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. *With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.*[42]

If Article 4 CRC is to be applied properly, it is necessary to identify which rights qualify as civil and political and which as economic, social, and cultural. Any such categorization will, of course, be imperfect and there are some rights which could fall under either heading: for instance, the right to non-discrimination (Article 2), the right to protection from all forms of exploitation prejudicial to the child's welfare (Article 36), the right to education (Article 28), and the right to physical and psychological recovery and social reintegration of child victims (Article 39).

The categorization of rights for the purposes of this chapter is based, first, on the inclusion of corresponding rights protections in the ICESCR and the International Covenant on Civil and Political Rights (ICCPR). Where equivalent provisions do not appear in those instruments, the chapter considers whether the relevant CRC rights are preponderantly civil and political or economic, social, and cultural in nature, in the light of how they have been interpreted and applied by the CRC Committee.

[41] Hammarberg, 'The UN Convention on the Rights of the Child—and How to Make It Work' (1990) 12 *HRQ* 97, 99.

[42] Emphasis added.

Article 2 covers multiple and intersectional discrimination.[48] By referring to the status of parents and legal guardians, the CRC recognizes that children may be the subject of discrimination due to their association with, or membership of, a particular social group.[49] Notably, there is no explicit prohibition on age discrimination: that is, discrimination against children on the basis of their age vis-à-vis other children or adults. However, a growing number of commentators argue that Article 2 should be read as covering this, drawing on understandings of the particular political, social, and economic position of children within societies as well as growing research around the phenomenon of childism (frequently understood as prejudice and negative attitudes towards or stereotyping of children).[50]

Drawing on the work of the Human Rights Committee and other treaty bodies, the CRC Committee has been clear that Article 2 CRC is not focused on identical treatment: there may be a call for special measures to diminish or eliminate conditions that cause discrimination with regard to particular groups of children.[51] Differential treatment must 'be lawful and proportionate, in pursuit of a legitimate aim and in line with the child's best interests and international human rights norms and standards' to be in conformity with Article 2.[52]

6.2.2 Best interests of the child (Article 3(1))

While the CRC Committee sometimes cites Article 3 CRC as a whole as a general principle, its practice makes clear that it is the first paragraph of that provision that is of primary importance when it comes to its operationalization. Article 3(1) provides:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

In contrast to more demanding domestic provisions,[53] the child's best interests are described as a *primary* rather than a *paramount* consideration. As such, the child's best interests are neither always determinative nor do they always trump other considerations. The term 'all actions concerning children' has been interpreted very broadly by the Committee to cover a wide range of actions and inactions that directly or indirectly affect children (including decisions, acts, conduct, proposals, services, procedures and other measures, inaction, and omissions).[54]

The Committee has described the child's best interests as a 'threefold concept'. First, it is a 'substantive right' of the child 'to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general'.[55]

[48] General Comment 22, para 23.

[49] See further CRC, Art 2(2) which requires states to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

[50] For more on childism, see Young-Bruehl, *Childism: Confronting Prejudice Against Children* (Yale UP, 2012).

[51] CRC Committee, General Comment 5, CRC/GC/2003/5 (27 November 2003) para 12.

[52] General Comment 22, para 22.

[53] eg Section 28(2) of the Constitution of the Republic of South Africa 1996. See also CRC, Art 21, which refers to best interests as a 'paramount consideration' in the context of adoption.

[54] CRC Committee, General Comment 14, CRC/C/GC/14 (29 May 2013) paras 17, 18.

[55] General Comment 14, para 6.

The CRC sets out a series of civil and political rights of children, including the rights to life (Article 6(1)), to birth registration (Article 7), to respect for the views of the child (Article 12), to freedom of expression (Article 13), to freedom of thought, conscience, and religion (Article 14), to association and peaceful assembly (Article 15), to protection from interference with privacy, family, home, or correspondence (Article 16), to information (Article 17), to protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, and maltreatment or exploitation (Article 19), and to a fair trial (Article 40).

Children's economic, social, and cultural rights include the rights to the highest attainable standard of health (Article 24), to benefit from social security (Article 26), to a standard of living adequate for their development (Article 27), and to rest, leisure, and play (Article 31).

Finally, the CRC contains provisions focused on specific groups of children, which include both civil and political and economic, social, and cultural elements. Such groups include refugee children (Article 22), disabled children (Article 23), and minority or indigenous children (Article 30).

6.2 GENERAL PRINCIPLES

In its work, the CRC Committee has identified four so-called 'general principles' (sometimes referred to by it as 'overarching principles'),[43] which it has treated as being of central importance to state efforts to implement the CRC as a whole. These are usefully thought of as lens(es) through which states should conceptualize their efforts to implement children's rights in all contexts, and which the Committee will use when interpreting and applying the CRC. The provisions identified by the Committee as general principles are Articles 2 (non-discrimination), 3(1) (best interests of the child), 6 (right to life, survival, and development), and 12 (right to respect for the views of the child).

The CRC Committee's singling out of Articles 2, 3, 6, and 12 CRC has not been without controversy. Some authors have argued, for instance, that Article 5 is more suited as a general principle than Article 6, given the former's cross-cutting nature and its formulation in direct relation to other rights in the Convention. The inconsistent and sometimes unsatisfactory way in which the Committee makes use of the general principles has also been rightly criticized.[44] That said, the Committee's emphasis on these provisions has meant that a good understanding of them is of particular importance.

6.2.1 Non-discrimination (Article 2)

Article 2(1) CRC prohibits discrimination 'of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status'. The use of 'or other status' makes clear that this list of grounds is not exhaustive. According to the CRC Committee, 'other status' includes grounds such as migration status,[45] health status,[46] and sexual orientation or gender identity.[47] The Committee has been explicit that

[43] eg CRC Committee, General Comment 22, CRC/C/GC/22 (16 November 2017) para 19.

[44] Hanson and Lundy, 'Does Exactly What it Says on the Tin? A Critical Analysis and Alternative Conceptualisation of the So-called "General Principles" of the Convention on the Rights of the Child' (2017) 25 *Int J of Children's Rights* 285–306, 300–1.

[45] General Comment 22, para 9.

[46] CRC Committee, General Comment 3, CRC/GC/2003/3 (17 March 2003) paras 7–9.

[47] See Peleg, 'International Rights of the Child: General Principles' in Kilkelly and Liefaard (eds), *International Human Rights of Children* (Springer, 2019) 135–57.

Article 2 covers multiple and intersectional discrimination.[48] By referring to the status of parents and legal guardians, the CRC recognizes that children may be the subject of discrimination due to their association with, or membership of, a particular social group.[49] Notably, there is no explicit prohibition on age discrimination: that is, discrimination against children on the basis of their age vis-à-vis other children or adults. However, a growing number of commentators argue that Article 2 should be read as covering this, drawing on understandings of the particular political, social, and economic position of children within societies as well as growing research around the phenomenon of childism (frequently understood as prejudice and negative attitudes towards or stereotyping of children).[50]

Drawing on the work of the Human Rights Committee and other treaty bodies, the CRC Committee has been clear that Article 2 CRC is not focused on identical treatment: there may be a call for special measures to diminish or eliminate conditions that cause discrimination with regard to particular groups of children.[51] Differential treatment must 'be lawful and proportionate, in pursuit of a legitimate aim and in line with the child's best interests and international human rights norms and standards' to be in conformity with Article 2.[52]

6.2.2 Best interests of the child (Article 3(1))

While the CRC Committee sometimes cites Article 3 CRC as a whole as a general principle, its practice makes clear that it is the first paragraph of that provision that is of primary importance when it comes to its operationalization. Article 3(1) provides:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

In contrast to more demanding domestic provisions,[53] the child's best interests are described as a *primary* rather than a *paramount* consideration. As such, the child's best interests are neither always determinative nor do they always trump other considerations. The term 'all actions concerning children' has been interpreted very broadly by the Committee to cover a wide range of actions and inactions that directly or indirectly affect children (including decisions, acts, conduct, proposals, services, procedures and other measures, inaction, and omissions).[54]

The Committee has described the child's best interests as a 'threefold concept'. First, it is a 'substantive right' of the child 'to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general'.[55]

[48] General Comment 22, para 23.

[49] See further CRC, Art 2(2) which requires states to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

[50] For more on childism, see Young-Bruehl, *Childism: Confronting Prejudice Against Children* (Yale UP, 2012).

[51] CRC Committee, General Comment 5, CRC/GC/2003/5 (27 November 2003) para 12.

[52] General Comment 22, para 22.

[53] eg Section 28(2) of the Constitution of the Republic of South Africa 1996. See also CRC, Art 21, which refers to best interests as a 'paramount consideration' in the context of adoption.

[54] CRC Committee, General Comment 14, CRC/C/GC/14 (29 May 2013) paras 17, 18.

[55] General Comment 14, para 6.

Transnational Environmental Law, 5:2 (2016), pp. 285–303 © 2016 Cambridge University Press
doi:10.1017/S2047102516000212

ANNIVERSARY ISSUE ARTICLE

'Dynamic Differentiation': The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement

Christina Voigt* and Felipe Ferreira**

Abstract
The Paris Agreement has struck a careful balance between the need for ambitious and effective climate action and for fair effort sharing among parties based on differentiation. This article provides an overview of the negotiation history of differentiation and analyzes the 'dynamic differentiation' as built into the architecture of the Agreement. While being set against the normative background of the United Nations Framework Convention on Climate Change (UNFCCC), the Paris Agreement adopts a more diversified way of differential treatment among parties, approaching it in three complementary ways: firstly, on a principled basis, reflecting common but differentiated responsibilities and respective capabilities (CBDR-RC), in the light of different national circumstances; secondly, in the content of its articles, in particular on mitigation, finance and transparency; and thirdly, on the basis of the principles of progression and highest possible ambition, which represent new and dynamic aspects of differentiation. The authors argue that 'highest possible ambition' is reflective of a duty of care that states now need to exercise. It implies a due diligence standard, which requires each government to act in proportion to the risk at stake and to take all appropriate and adequate climate measures according to its responsibility and its best capabilities. By expecting parties to apply this standard at each successive preparation of nationally determined contributions (NDCs), and to progress beyond previous ones, the Paris Agreement has set up reiterative processes, an 'international normative pull' and a collective learning environment. This, in turn, creates a reflexive approach to parties' determination of effort, promoting the evolution of voluntary cooperative behaviour.

Keywords: Highest possible ambition, Progression, Differentiation, Equity, Effort sharing, Common but differentiated responsibilities and respective capabilities (CBDR-RC)

* University of Oslo, Department of Public and International Law, and Center of Excellence 'PluriCourts', Oslo (Norway).
Email: christina.voigt@jus.uio.no.

** Ministry of Foreign Affairs, Division of Climate and Ozone, Brasilia (Brazil).
Email: felipergferreira@gmail.com.
Both authors have been involved in the negotiations under the UNFCCC as part of the Norwegian and Brazilian delegation, respectively. During the negotiations that led to the adoption of the Paris Agreement, Christina Voigt was principal legal adviser to the Norwegian delegation and Felipe Ferreira was mitigation negotiator for the Brazilian delegation. The views expressed in this article are personal and the sole responsibility of the authors. They do not necessarily reflect the views of the Norwegian or the Brazilian government.
This article draws upon and expands on C. Voigt & F. Ferreira, 'Differentiation in the Paris Agreement' (2016) 6(1–2) *Climate Law*, pp. 58–74. *Climate Law* has kindly agreed to the inclusion of Figure 1 in this article.

https://doi.org/10.1017/S2047102516000212 Published online by Cambridge University Press

1. INTRODUCTION

Traditionally, international law is defined by the sovereign equality of states, which aims to guarantee that all states have equal rights and obligations.[1] Yet, states differ significantly. Based on the concepts of cooperation, effectiveness and solidarity,[2] those differences must be taken into account in order to create a fair international legal order.[3] Differential treatment – or differentiation between states – has therefore become an important feature of international law.[4] The idea is to bring about practical, rather than formal, equality among *de facto* unequal states and to increase participation in and the effectiveness of international agreements.[5]

In international environmental law, differentiation has assumed pivotal, almost defining characteristics, placing heavier burdens on developed countries while providing for differential (and preferential) treatment of developing countries. This has been expressed – for example, in Principle 7 of the 1992 Rio Declaration – as 'common but differentiated responsibilities', which establishes an obligation on all states to cooperate towards environmental integrity, while acknowledging that developed countries have a greater responsibility as a result of the pressure their societies have placed on the global environment and of their assumed greater economic and technological capabilities.[6] In this sense, differentiation is expected to bridge the gap between the formal equality of states under international law and the deep inequalities in wealth, power and responsibility that divide them.[7]

These factors have led to procedurally more demanding and substantively stronger obligations on developed countries, with developing countries having more flexible or

---

1 M. Koskenniemi, *The Politics of International Law* (Bloomsbury, 2011); J. Crawford, 'Sovereignty as a Legal Value', in J. Crawford & M. Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2012), pp. 117–33, at 117.

2 L. Rajamani, *Differential Treatment in International Environmental Law* (Oxford University Press, 2006).

3 A.-M. Slaughter, *A New World Order* (Princeton University Press, 2004); D. Held & A. Kaya, *Global Inequality: Patterns and Explanations* (Oxford University Press, 2007); D. Held, *Cosmopolitanism: Ideals and Realities* (Polity Press, 2010).

4 Examples of differentiation in international law abound: it can be reflected as special decision-making rights (e.g., the veto power for permanent members of the United Nations (UN) Security Council; or for the 'consultative parties' of the Antarctic Treaty); as specific obligations according to different country categories (e.g., the distinction between 'nuclear weapon countries' and 'non-nuclear weapon countries' in the Nuclear Non-Proliferation Treaty); or as preferential rights (such as the 'special and differential treatment' provisions of the World Trade Organization (WTO) agreements).

5 C. Voigt, 'Equity in the 2015 Climate Agreement: Lessons from Differential Treatment in Multilateral Environmental Agreements' (2014) 4(1–2) *Climate Law*, pp. 50–69.

6 'States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command': Rio Declaration on Environment and Development, adopted by the UN Conference on Environment and Development, Rio de Janeiro (Brazil), 3–14 June 1992, UN Doc. A/CONF.151/26 (Vol. I), 12 Aug. 1992, Principle 7, available at: http://www.unep.org/documents.multilingual/default.asp?documentid=78&articleid=1163.

7 J. Viñuales (ed.), *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press, 2015).

https://doi.org/10.1017/S2047102516000212 Published online by Cambridge University Press

fewer obligations. They have also led to obligations of developed countries to provide implementation assistance, finance, technology and know-how to developing countries. In this way, 'positive discrimination' in favour of developing countries has led to asymmetric environmental obligations coupled with arrangements and mechanisms which institutionalize this categorization.

As a growing number of developing countries become industrialized and increase their pressure on the global environment along with their capabilities, the expectation grows that they also assume greater responsibilities in international environmental law. The question is thus how to design legal instruments that can reflect the different 'situations' of states in an equitable and dynamic fashion, as they develop over time. The experience from 1992 to 2016 tells us that such differentiation cannot be static; it needs to allow the structure and content of international agreements to evolve dynamically.[8]

2. CLIMATE CHANGE AS A GLOBAL COMMONS PROBLEM

In order to understand the complexity of differentiation in the climate context, it is important to recall that climate change has the characteristics of a 'global commons problem'. Greenhouse gases (GHGs) accumulate over time and mix globally in the atmosphere. Emissions by any state contribute to the problem and can affect all other states. No individual state has the capacity to single-handedly achieve effective mitigation; nor does it have incentives to act unless other states also take action – otherwise it would bear a larger relative cost. As in a 'prisoner's dilemma' involving 197 prisoners, therefore, participation of all states is necessary for effective and fair cooperation.

Furthermore, climate change results from the stock of accumulated concentrations of GHGs in the atmosphere. The largest contribution to observed warming and positive radiative forcing is caused by the increase in the atmospheric concentration of GHGs, in particular carbon dioxide (CO_2), since 1750.[9] CO_2 emissions can remain in the atmosphere for hundreds or even thousands of years and have a cumulative effect on temperature increase. However, the past and future contributions of countries to the accumulation of GHGs in the atmosphere are different; countries also face varying challenges and circumstances, and have different capacities to address mitigation and adaptation. Climate change therefore raises issues of equity, justice and fairness on a global scale.[10]

As with any commons problem, the solution lies in collective action.[11] Effective international cooperation relies on workable notions of equitable burden and

[8] G. Ulfstein & C. Voigt, 'Rethinking the Legal Form and Architecture of a New Climate Agreement', in C. Todd, J. Hovi & D. McEvoy (eds), *Toward a New Climate Agreement: Conflict, Resolution and Governance* (Routledge, 2014), pp. 183–98, at 191.

[9] Intergovernmental Panel on Climate Change (IPCC), 'Summary for Policymakers', in T. Stocker et al. (eds), *Climate Change 2013: The Physical Science Basis – Contribution of Working Group I to the Fifth Assessment Report of the IPCC* (Cambridge University Press, 2013), pp. 3–29, at 15.

[10] IPCC, 'Summary for Policymakers', in O. Edenhofer et al., *Climate Change 2014: Mitigation of Climate Change – Contribution of Working Group III to the Fifth Assessment Report of the IPCC* (Cambridge University Press, 2014), pp. 1–30, at 5.

[11] E. Ostrøm, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, 1990); see also E. Ostrøm, 'Polycentric Systems for Coping with Collective Action and Global Environmental Change (2010) 20(4) *Global Environmental Change*, pp. 550–7.

https://doi.org/10.1017/S2047102516000212 Published online by Cambridge University Press

effort sharing. In the context of climate change, these notions are even more important given that states are not equal, and significant asymmetries and inequalities exist. The Intergovernmental Panel on Climate Change (IPCC) identifies four categories of inequality: (i) asymmetry in contribution to climate change (past and present); (ii) vulnerability to the impacts of climate change; (iii) capacity to mitigate the problem; and (iv) power to decide on solutions.[12] Scholarship suggests that outcomes seen as equitable can lead to more effective cooperation.[13] With respect to climate change, it has long been noted that a regime that many members find inequitable or unfair will face severe challenges to its adoption or be vulnerable to festering tensions that jeopardize its effectiveness.[14]

Different principles could come into play to address these issues.[15] Some of them relate to theoretical notions of distributive justice, such as causal and moral responsibility. The former refers to the responsibility for contributing to climate change via emissions of GHGs, the latter to the responsibility for solving the problem – noting that these two aspects are not always connected. Other principles invoke compensatory justice, such as the polluter-pays principle, the community-pays principle or the beneficiary-pays principle; and a third set involves procedural justice based on the way in which outcomes are brought about. Applied ethics hold persons (or states) responsible for harm or risks they knowingly impose or could have reasonably foreseen and, in certain cases, regardless of whether they could have been foreseen. However, there is no scientific or ethical foundation for prioritizing one equity principle over another.[16]

What can be concluded from all this is that, while effectiveness depends on participation, participation in turn depends on states' *own* perception of fairness and equity with regard to other states' contributions towards addressing the problem – and therein lies the fundamental importance of finding a workable solution for differentiation in the climate regime.

3. DIFFERENTIATION IN THE UNFCCC AND THE KYOTO PROTOCOL

In the United Nations Framework Convention on Climate Change (UNFCCC),[17] differentiation between the parties is based on the principle of 'common but

12 M. Fleurbaey & S. Kartha, 'Sustainable Development and Equity', in Edenhofer et al., n. 10 above, Ch. 4, pp. 283–350, at 295.

13 With regard to effective climate mitigation action, Young has identified three general conditions for equitable burden sharing under which the successful formation and eventual effectiveness of a collective action regime may hinge: (i) the absence of actors who are powerful enough to coercively impose their preferred burden-sharing arrangements; (ii) the inapplicability of standard utilitarian methods of calculating costs and benefits; and (iii) the fact that regime effectiveness depends on a long-term commitment of members to implement its terms: O. Young, 'Does Fairness Matter in International Environmental Governance? Creating an Effective and Equitable Climate Regime', in Todd, Hovi & McEvoy, n. 8 above, pp. 16–28.

14 Fleurbaey & Kartha, n. 12 above, p. 295.

15 For an overview see C. Kolstad & K. Urama, 'Social, Economic, and Ethical Concepts and Methods', in Edenhofer et al., n. 10 above, pp. 207–82, at 215–9.

16 Fleurbaey & Kartha, n. 12 above, pp. 318–9.

17 New York, NY (US), 9 May 1992, in force 21 Mar. 1994, available at: https://unfccc.int.

https://doi.org/10.1017/S2047102516000212 Published online by Cambridge University Press

differentiated responsibilities and respective capabilities' (CBDR-RC), along with an acknowledgement that developed countries should take the lead in the joint effort to combat climate change and its adverse effects.[18] Based on the premise that climate change is a common concern of humankind which requires the widest possible cooperation by all countries, the UNFCCC recognizes different contributions to environmental harm ('causality'), as well as different capacities to take mitigation measures ('capability'). Accordingly, the UNFCCC has addressed differentiation not only by enshrining CBDR-RC in its principles, but also by establishing more demanding and substantively stronger obligations for those parties explicitly listed in its Annexes.[19]

All parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, have the common obligation under Article 4.1 UNFCCC to, inter alia, take measures to address GHG emissions and facilitate adaptation, conserve sinks and reservoirs, as well as prepare and update national GHG inventories. Article 4.2 commits parties included in Annex I (developed country parties and those with economies in transition) to adopt policies and measures to *limit* emissions and protect and enhance sinks and reservoirs. It is further understood that these policies and measures will demonstrate that developed countries are taking the lead in modifying emissions trends consistent with the objective of the UNFCCC. In a similar manner, Article 12 further elaborates on the reporting obligations assumed by all parties and establishes more specific and detailed obligations for developed countries, as well as additional time for developing countries' initial national communication.

Under Article 4.3 UNFCCC, those developed countries listed in Annex II have further assumed the obligation to provide finance and technology to developing countries. This is complemented by Article 4.7, which establishes a relationship between the fulfilment of developing countries' commitments and the obligations of developed countries to provide finance and technology. Several parties have narrowly interpreted this relationship as a conditionality (developing countries would take action only if provided with means of implementation), whereas other parties understand 'the extent to which' as creating a degree of effectiveness (developing countries would be able to be more effective in the context of support).

Throughout the implementation of the Convention, this 'positive discrimination' in favour of developing countries has led to what has been referred to as 'bifurcated' obligations and processes, coupled with several institutional arrangements for capacity building, transfer of financial resources and technology, and assistance to developing countries.[20]

---

18 Art. 3.1 UNFCCC, ibid.: 'The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof'.

19 L. Rajamani, 'The Doctrinal Basis for and Boundaries of Differential Treatment in International Environmental Law', in Rajamani, n. 2 above, pp. 129–75.

20 There are other forms of category-based differentiation under the UNFCCC, such as the flexibility given to 'economies in transition' under Art. 4.2, and the 9 types of developing country that have specific needs listed in Art. 4.8.

https://doi.org/10.1017/S2047102516000212 Published online by Cambridge University Press

The Kyoto Protocol to the UNFCCC[21] took this approach even further. Based on an interpretation of the UNFCCC that relied almost exclusively on the historical and then (in 1997) current responsibility of developed countries,[22] the Berlin Mandate for negotiating the Kyoto Protocol stated explicitly that the instrument would 'not introduce any new commitments for Parties not included in Annex I'. Its priority would be to 'strengthen the commitments' of Annex I Parties.[23] Accordingly, the Kyoto Protocol established quantified emissions limitation and reduction obligations only for those Annex I Parties listed in its Annex B.[24] It created a strict 'binary'[25] differentiation system, where only developed country parties and countries with economies in transition assumed legally binding, quantified, absolute economy-wide mitigation commitments, while developing country parties were exempted from doing so. In this sense, the Kyoto Protocol is mainly and foremost an operationalization of Article 4.2 UNFCCC. Its focus is the establishment of individual quantified obligations of result (QELROs) *only* for those parties who, under the UNFCCC, had an obligation to limit their emissions, that is, Annex I Parties.

Between 2007 and 2012, the decisions adopted under the Ad-Hoc Working Group for Long-Term Cooperative Action (AWG-LCA) significantly raised the level of climate action. In parallel with the Kyoto Protocol, the AWG-LCA offered a political space for developing countries and non-Kyoto parties to negotiate their participation in the global response to climate change. This process generated several developments in the implementation of the UNFCCC and its institutional framework – most notably the creation of the Green Climate Fund.[26] The approach to differentiation under the AWG-LCA, nevertheless, followed strictly the approach under the UNFCCC and its Annexes.

4. DIFFERENTIATION IN THE NEGOTIATION HISTORY OF THE PARIS AGREEMENT

The negotiating mandate for the Paris Agreement[27] was to 'develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention

21 Kyoto (Japan), 11 Dec. 1997, in force 16 Feb. 2005, available at: http://unfccc.int/resource/docs/convkp/kpeng.pdf.

22 P. Pauw et al., 'Different Perspectives on Differentiated Responsibilities', Deutsches Institut für Entwicklungspolitik, Discussion Paper 6/2014, available at: https://www.die-gdi.de/uploads/media/DP_6.2014..pdf.

23 Decision 1/CP.1, 'The Berlin Mandate: Review of the Adequacy of Art. 4, paras 2(a) and (b), including Proposals related to a Protocol and Decisions on Follow-up', UN Doc. FCCC/CP/1995/7/Add.1, 6 June 1995, paras 2(a) and (b). The Berlin Mandate was the outcome of the review referred to in Art. 4.2(d) UNFCCC.

24 Kyoto Protocol, n. 21 above, Art. 3 in conjunction with Annex B.

25 The authors note that 'bifurcated' and 'binary' have been widely used as synonyms in the negotiations for the Paris Agreement (n. 27 below). For the sake of precision and recognizing that developing countries also have obligations under the UNFCCC, it is useful to distinguish these terms. This article refers to 'binary' as a differentiation approach that sets an obligation or process for a category of countries and exempts the other category (like '1' and '0' in a binary system); while 'bifurcated' refers to differentiation that sets different obligations or processes for each category.

26 Decision 1/CP.16, 'The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention', UN Doc. FCCC/CP/2010/7/Add.1, 15 Mar. 2011, para. 102.

27 Paris Agreement, Paris (France), 13 Dec. 2015, not yet in force (in UNFCCC Secretariat, Report of the Conference of the Parties on its Twenty-First Session, Addendum, UN Doc. FCCC/CP/2015/10/Add.1, 29 Jan. 2016).

https://doi.org/10.1017/S2047102516000212 Published online by Cambridge University Press

applicable to all Parties'.[28] While the Durban mandate of the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP) itself did not contain any references to developed or developing countries, the phrase 'under the Convention' made clear that the new agreement had to be seen in the context and against the normative background of the UNFCCC, including its basis for differentiation: the CBDR-RC principle. At the same time, the phrase 'applicable to all' indicated the need to increase the collective level of ambition and ensure the highest possible mitigation efforts by *all* parties.[29]

'Bifurcated' or 'binary' differentiation, however, proved to be a contentious issue in the negotiations for the Paris Agreement. On the one hand, there was a general understanding that the immense climate challenges can be tackled only by global, cooperative large-scale remedial action to include key agents, most notably the United States (US) and China. The former was not a party to the Kyoto Protocol; the latter did not have mitigation obligations under the Protocol. The characteristic of climate change as a global commons problem necessarily requires the participation of key actors in the global response in order to ensure participation by other relevant states.

On the other hand, the responsibilities of states, their development stages and factual circumstances differ considerably. Country categories such as 'developed' and 'developing' are no longer homogeneous, but marked by stark internal differences as well as dynamic changes.

By the time parties started negotiating under the ADP mandate, the strict antagonistic dividing line between developed and developing countries had, in effect, resulted in a stalemate that prevented meaningful mitigation action. Developing countries invoked CBDR-RC as a 'firewall', while developed countries demanded that developing countries assume mitigation targets as a precondition to further mitigation actions of their own.[30]

To resolve this challenge, differentiation in the context of the Paris Agreement needed not only to build on the existing approach, but also to reform by adopting a more nuanced, diversified way of differential treatment.[31] The Paris Agreement, therefore, had to strike a very careful balance between raising ambition and ensuring universal participation on the one hand, and equitable differentiation on the other.[32] It had to address the tension of being guided by the principles of the UNFCCC, while reflecting those very principles in a constructive and dynamic fashion that not only leads to broader but also to deeper participation (that is, higher ambition).

The tension between 'under the Convention' and 'applicable to all' remained unresolved until the very end of the negotiations. It manifested itself mainly as two

---

28 Decision 1/CP.17, 'Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action', UN Doc. FCCC/CP/2011/9/Add.1, 15 Mar. 2012, para 2.

29 Ibid., paras 6 and 7.

30 The negotiations during the second commitment period of the Kyoto Protocol, the Bali Action Plan (Decision 1/CP.13, UN Doc. FCCC/CP/2007/6/Add.1, 14 Mar. 2008) and the conditionalities expressed in the Copenhagen pledges clearly illustrate this point.

31 Voigt, n. 5 above, p. 50; and Ulfstein & Voigt, n. 8 above, p. 191.

32 H. Winkler & L. Rajamani, 'CBDR&RC in a Regime Applicable to All' (2013) 14(1) *Climate Policy*, pp. 102–21, at 103.

https://doi.org/10.1017/S2047102516000212 Published online by Cambridge University Press

distinct and antagonistic positions: those who argued for a diverse 'spectrum' of 'self-differentiated' commitments, and those who defended strict abidance with the principles, provisions and the structure (the Annexes) of the UNFCCC.

It is possible to point to some specific moments that marked the evolution of the differentiation debate in the ADP. The nationally determined contributions (NDCs) approach that was agreed at the 19th Conference of the Parties (COP-19) in Warsaw (Poland) in 2013, as a result of the 'self-determined' approach already initiated by the Copenhagen pledges,[33] established that parties would choose their level of effort, providing comfort that no country would be required to do more than it was ready to do. However, this failed to address the matter of equitable effort sharing. Several parties feared that other countries could backtrack from previously assumed commitments, while others were concerned that the overall level of ambition would be neither adequate nor fair. In the light of the ascendance of a bottom-up approach to international cooperation through NDCs and the increased fluidity of commitments, differentiation was therefore seen as a vital corrective concept to ensure that distributive fairness remained part of the international climate change agenda.

In the run-up to COP-20 in Lima (Peru) in 2014, differentiation became a central issue of the negotiations. Brazil was one of the most vocal countries in this debate, eventually making a submission based on the so-called 'concentric circles' approach to differentiation.[34] The proposal called for a set of more stringent obligations for developed countries, particularly by assuming economy-wide, absolute mitigation targets, while ensuring that developing country parties also move in the same direction over time and with flexibility. Brazil was neither the only nor the first country to call for different types of mitigation commitment for developed and developing countries; it had already been a practice under the AWG-LCA.[35]

The Brazilian proposal, however, had at least two innovative aspects. It associated the *type* of target in the NDCs with the idea of progression at each regular review of the Agreement. This added a dynamic aspect to differentiation. More importantly, while building on the categories of 'developed' and 'developing' countries that characterize the climate change regime, the proposal provided a visual image of differentiation that moved away from a bifurcated or binary approach and could eventually lead to common types of mitigation efforts for all parties.[36]

---

33 D. Bodansky, 'Reflections on the Paris Conference', *Opinio Juris*, 15 Dec. 2015, available at: http://opiniojuris.org/2015/12/15/reflections-on-the-paris-conference.

34 Brazil was not the only country to propose specific concepts to address differentiation. Other proposals included New Zealand's 'bounded flexibility' and Switzerland's 'circumstance-based' proposal: see the submissions available at: http:// unfccc.int/documentation/submissions_from_parties/items/5900.php.

35 The Copenhagen Accord established 'targets' for Annex I Parties and 'actions' for developing countries, while the Cancun Agreements further elaborated this by requesting developed countries to raise the ambition of their 'quantified economy-wide emission reduction targets', and developing countries to put forward their 'nationally appropriate mitigation actions' (NAMAs).

36 The image of the concentric circles may also have originated through some subconscious process – the COP-20 logo consisted of several concentric circles, the seats at the main plenary in Bonn (the former German Parliament) are also roughly arranged in circles, causing ADP co-chair Kishan Kumarsingh to joke that 'we are now seeing circles everywhere!'.

https://doi.org/10.1017/S2047102516000212 Published online by Cambridge University Press

Decision 1/CP.20, adopted in Lima (Peru) in December 2014,[37] is key to understanding how differentiation came to be treated in the Paris Agreement. Its paragraph 3 underscored the parties' 'commitment to reaching an ambitious agreement in 2015 that reflects the principle of CBDR-RC, in light of different national circumstances'. The language drew from the US–China joint announcement of November 2014, which represented an unprecedented approximation between the world's top two emitters.[38] It was the first time that a decision under the ADP mentioned CBDR-RC. The qualifier 'in light of different national circumstances', which was the way that the principle would be reflected in the Paris Agreement, had broad implications, including a change of course from a strict, explicit differentiation expressed in annexes.

In Lima, another relevant development in respect of differentiation emerged in the context of finance. Less recalled, but almost equally important, is the last sentence of paragraph 4 of Decision 1/CP.20, recognizing 'complementary support by other Parties' – that is, those that are not developed countries. It indicated then that developing countries could have a role to play in the provision of support and mobilization of climate finance.

The negotiation meetings that preceded COP-21 in Paris (France), in 2015, slowly consolidated the notion that differentiation would be addressed in a context-specific manner appropriate to each element of the Agreement, rather than by a dichotomy that cuts across all sections.[39] The understanding evolved that certain differentiating parameters (or 'modulators', as they were referred to by negotiators) could inform the implementation of the provisions of the Agreement.[40] Finally, during the second week of COP-21, when parties assembled no longer under the ADP but as the Comité de Paris, the Agreement took form under the authority and diplomatic craftsmanship of the French presidency after week-long minister-led informal consultations.

5. THE PARIS AGREEMENT

5.1. *Reflecting the Principle of CBDR-RC in the Light of Different National Circumstances*

The Paris Agreement clearly recognizes the normative legacy of the UNFCCC. It is guided by principles of the Convention, including equity and CBDR-RC,[41] and will reflect them throughout its implementation in the light of different national

[37] Decision 1/CP.20, 'Lima Call for Climate Action', UN Doc. FCCC/CP/2014/10/Add.1, 2 Feb. 2015.

[38] White House, Office of the Press Secretary, 'U.S.-China Joint Announcement on Climate Change', Beijing (China), 12 Nov. 2014, available at: https://www.whitehouse.gov/the-press-office/2014/11/11/us-china-joint-announcement-climate-change.

[39] 'Practical application of differentiation will vary depending on the element of the agreement (mitigation, adaptation, support, transparency)': First Informal Ministerial Consultations to Prepare COP21, Paris (France), 20–21 July 2015: Aide-Mémoire Produced by France and Peru, Paris (France), 31 July 2015, available at: http://www.actu-environnement.com/media/pdf/news-25145-note-france-perou.pdf.

[40] See the handout by the facilitator of the informal meeting on 'differentiation' for the facilitated group on mitigation: Annex I of ADP 2.10 Working Document (version of 8 Sept. 2015 at 18:00h), available at: http://unfccc.int/files/bodies/awg/application/pdf/adp2-10_8sep2015t1500_cwd.pdf.

[41] Paris Agreement, n. 27 above, Annex, Preamble, para. 3.

https://doi.org/10.1017/S2047102516000212 Published online by Cambridge University Press

circumstances.[42] The approach to differentiation under the Paris Agreement is far more diversified than it is under the UNFCCC. While categories of countries, such as 'developed' and 'developing', are still relevant, these categories are nowhere defined; nor does the Agreement make any reference to the Annexes of the UNFCCC. This is a big shift. The Paris Agreement aims to reflect the responsibilities, capacities, and circumstances of all parties.[43] As will be shown, differentiation is operationalized in several ways, some explicit, some more implicit, balancing different considerations for each element of the Agreement.

From the outset, Article 2.2 restated the Lima language that the Agreement 'will be implemented to reflect equity and the principle of CBDR-RC, in the light of different national circumstances'.[44] The overall approach to differentiation, therefore, is not premised on 'causality' alone, but on an amalgamation of country-specific responsibilities, capabilities and circumstances – and serving the purpose of the Agreement to keep temperature increases well below 2 degrees Celsius (2ºC).

The qualifier 'in the light of different national circumstances' introduces a dynamic and flexible element to interpreting both responsibilities and capabilities, broadening the parameters for differentiation.[45] It allows for a much more complex approach, taking into account not only a wider array of criteria – such as past and current, as well as projected, future emissions – but also financial and technical capabilities, human capacity, population size and other demographic criteria, abatement costs, opportunity costs, skills, etc.[46]

In this way, the principled-based approach to differentiation in the Paris Agreement is more nuanced, while building upon the UNFCCC.[47] The Agreement allows for the creation of an evolutionary 'policy space' under the Convention in various ways. Firstly, the references to the principle of CBDR-RC are general in character and are not explicitly linked to any article of the UNFCCC, nor its Annexes. The references in the Preamble and Articles 2.2 and 4.3 signal that the CBDR-RC principle of the UNFCCC applies in a manner that is not static, but open to change. The general, principled character is a means to adjust and adapt the parties' obligations to be responsive to an evolutionary understanding of accountability for temperature increases and also to changing political, social and economic

42 Ibid., Annex, Art. 2.2.

43 It is worth noting that the category 'economies in transition' is not referred to in any provision of the Agreement or the accompanying decision. This is clearly an example of how differentiation can evolve in response to changing circumstances – countries that formerly belonged to the Soviet Republic are now either part of the European Union or identify themselves as developing countries, with the exception of the Russian Federation, of course, which stands in a category of its own.

44 Paris Agreement, n. 27 above, Annex, Art. 2.2.

45 L. Rajamani, 'Differentiation in a 2015 Climate Agreement', *Center for Climate and Energy Solutions (C2ES) Papers*, June 2015, p. 2, available at: http://www.c2es.org/docUploads/differentiation-brief-06-2015.pdf.

46 H. Winkler et al., 'What Factors Influence Mitigation Capacity' (2007) 35(1) *Energy Policy*, pp. 692–703.

47 The Agreement serves to '*enhance* the implementation of the Convention' (Art. 2.1), which allows for the interpretation that the terms of the UNFCCC are not 'set in stone', but that the UNFCCC is a living document; it is not 'static' in its content but is rather, by further implementation of the Paris Agreement, evolutionary.

https://doi.org/10.1017/S2047102516000212 Published online by Cambridge University Press

circumstances.[48] Because responsibilities, capabilities and national circumstances not only differ significantly but are in a flux, they will have to be taken into account in a dynamic fashion.

There is, arguably, another important implication. While Article 3.1 UNFCCC expands on CBDR-RC by stating that '[a]ccordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof', to 'take the lead' now relates specifically to the type of mitigation target (that is, economy-wide and absolute, in Article 4.4 of the Paris Agreement) and to the commitment of developed countries to mobilize finance (Article 9.3 of the Paris Agreement).

Secondly, the Paris Agreement does not operate with a single, across-the-board approach to differentiation based on explicit pre-set categories of countries. Many of the obligations which will become legally binding once the Agreement enters into force will apply to *all* parties.[49] Where references to 'developed' and 'developing' countries occur, they do not lead to a static placement of countries. Rather, the absence of annexes and of definitions of 'developed' and 'developing' allow countries to move towards greater ambition over time without the need to 'graduate' from one category to the other.

This allows for a further observation. The Kyoto Protocol operated on a stringent type of differentiation where only developed country parties included in Annex I of the UNFCCC had quantified emissions limitation and reduction commitments. The Paris Agreement leaves this track of strict, 'binary' differentiation on mitigation commitments and builds differentiation on the more open, principled-based approach of the UNFCCC. If the Kyoto Protocol can be seen as the operationalization of Article 4.2 UNFCCC, as argued above, the Paris Agreement, at least in part, could be seen to build on Article 4.1 of the Convention, which includes commitments by all parties.

5.2. *The Principles of Highest Possible Ambition and Progression as Means to Differentiate over Time*

The Paris Agreement also contains two new principles, *highest possible ambition* and *progression* to inform the level of ambition of the parties' efforts and, implicitly, the differentiated placement of countries in the overall heterogenic and diverse picture. The balance between sheer self-determination of effort and equitable effort sharing is, inter alia, struck by having each party commit to undertaking *ambitious* efforts, as defined in the provisions of the Agreement. With respect to mitigation, this is expanded to having an NDC which reflects its 'highest possible ambition, reflecting CBDR-RC, in the light of different national circumstances' (Article 4.3).

While this language seems unassuming at first glance, it is, in fact, a potent and powerful tool. This provision reflects an expectation that all parties will deploy their best efforts in setting their national mitigation targets and in pursuing domestic

[48] See also T. Deleuil, 'The Common but Differentiated Responsibilities Principles: Changes in Continuity after the Durban Conference of the Parties' (2012) 3(21) *Review of European Community and International Environmental Law*, pp. 271–81.

[49] Legally binding obligations for all parties are contained in Paris Agreement, n. 27 above, Arts 4.2, 4.3, 4.8, 4.9, 4.13, 7.1, 13.7.

https://doi.org/10.1017/S2047102516000212 Published online by Cambridge University Press

measures to achieve them. Article 4.3 is reflective of a standard of care that states now need to exercise: to strive for their highest possible ambition in a manner that their efforts reflect their common responsibilities, respective capabilities and national circumstances.[50] It is reminiscent of a due diligence standard in international law which requires governments to act in proportion to the risk at stake and to the extent of the capacity they employ.[51] With that, each and every party (once the Agreement enters into force) has committed to take all appropriate and adequate climate measures according to its responsibility and its best capabilities in order to progressively achieve the objective of the Agreement – to keep the increase in global temperature well below 2ºC in order to avoid dangerous anthropogenic interference with the climate system. *Highest possible ambition* is responsive to states' differing responsibilities, capabilities and circumstances, while at the same time striving to match ambition with the overall aim. It thereby combines effectiveness and fairness.

This concept represents both a formal departure from the strict and equal treatment of states, and a departure from the strict two-fold differentiation model contained in the UNFCCC and its Kyoto Protocol. Importantly, the concept is a flexible and dynamic means of differentiation which allows for the determination of what constitutes an equitable and proportionate contribution in any given case and at any given point of time.

What constitutes an equitable and proportionate effort is a (yet to be settled) debate under the UNFCCC. It is, however, worth noting that the 'nationally determined' approach of the Paris Agreement has already led to a research agenda and several tools developed by civil society to assess, assist and/or to inform countries' NDCs with regard to fairness and ambition.[52] The locus of this debate has potentially moved to the national level, during the preparation of each successive contribution. At the international level, this nationally informed understanding of 'highest possible ambition' may provide relevant inputs to the consideration of the collective level of ambition through the global stocktake which will take place every five years.

Articles 3, 4.3 and 4.4 of the Paris Agreement further establish a requirement that the efforts of all parties will represent a progression over time, meaning that every new effort will go beyond previous efforts. This is connected with another central aspect of the Agreement: the logic of regularly preparing *successive* contributions, informed by the outcomes of a collective assessment of progress towards the goal of the Agreement – the global stocktake defined in Article 14.

---

[50] See, e.g., C. Voigt, 'The Paris Agreement: What is the Standard of Conduct for Parties?', *Questions of International Law*, 24 Mar. 2016, available at: http://www.qil-qdi.org/paris-agreement-standard-conduct-parties; and C. Voigt, 'The Potential Roles of the ICJ in Climate Change-related Claims', in D. Farber & M. Peeters (eds), *Climate Change Law* (Edward Elgar, 2016), pp. 152–66, at 159–61.

[51] See, e.g., the first report of the International Law Association (ILA) Study Group on Due Diligence: D. French (Chair) & T. Stephens (Rapporteur), 'Due Diligence in International Law', 7 Mar. 2014; available at: http://www.ila-hq.org/en/committees/study_groups.cfm/cid/1045.

[52] See, e.g., the CAIT Equity Explorer, by the World Resources Institute (WRI), available at: http://cait.wri.org/equity; and the methodology of the Climate Action Tracker, by Ecofys and Climate Analytics, available at: http://climateactiontracker.org/methodology/85/Comparability-of-effort.html.

https://doi.org/10.1017/S2047102516000212 Published online by Cambridge University Press

Inherent in these parameters is the understanding that both ambition and progression are reflective of and responsive to the parties' national responsibilities, capabilities and circumstances, allowing for a more diversified way of differentiation over time. This makes the due diligence-based standard of care referred to above a *continuum*. Parties will be required, on a regular basis through iterative processes, to revisit their actions and support and to assess their levels of ambition in accordance with their CBDR-RC, in the light of different national circumstances. This encourages an unprecedented dynamism in differentiation, which preserves the commitments of developed countries, while allowing for developing countries to assume more responsibilities – without the need to 'graduate' to another category.

5.3. *Differentiation as Reflected in the Elements of the Paris Agreement*

Mitigation

The nuanced approach to differentiation is most evident in the mitigation provisions. Article 4 of the Paris Agreement sets common, general provisions and specifies parameters to guide developed and developing countries in their implementation, allowing more flexibility to the latter and, within these, additional flexibility to least developed countries and small island developing states.

For instance, Article 4.1 defines the global trajectory: all parties have committed to contribute to the global peaking of GHG emissions as soon as possible, reducing emissions rapidly thereafter, and achieving a balance of emissions and removals in the second half of this century. While this global trajectory applies to all parties in a joint effort, it recognizes that developing countries will take longer to peak their emissions.

Similarly, the legally binding obligation to 'prepare, communicate and maintain successive NDCs', in Article 4.2, applies to all parties. Yet, it is followed by several modulators that allow for differentiation in the content (level of ambition) and form (type of target) of NDCs. The self-determined aspect of the parties' level of effort is accompanied by obligations of conduct in Article 4, paragraphs 3 and 4.[53] All parties' NDCs will reflect their 'highest possible ambition', but such level of ambition should also reflect their respective responsibilities, capabilities and circumstances, as well as represent a progression in relation to the previous contribution. In terms of *types* of mitigation target, Article 4.4 stipulates that developed countries should continue to take the lead by undertaking economy-wide absolute targets. Developing countries should enhance their efforts and are expected to assume economy-wide targets when

[53] Cf. the language in Art. 4.3 and 4.4 with para. 20 of the 'Geneva Negotiating Text' (UN Doc. FCCC/ADP/2015/1, 25 Feb. 2015), proposed by Norway in ADP 2.8, Geneva (Switzerland), 8–13 Feb. 2015; paras 8 and 11 of the 20th BASIC Ministerial Meeting on Climate Change Joint Statement (New York, NY (US), 27–28 June 2015, available at: http://www.itamaraty.gov.br/index.php?option=com_content&view=article&id=12378:20th-basic-ministerial-meeting-on-climate-change-new-york-27-28-june-2015-joint-statement&catid=578&lang=en&Itemid=718); as well as para. 5 of the China–France Joint Presidential Statement on Climate Change (Beijing (China), 2 Nov. 2015, available at: http://www.diplomatie.gouv.fr/en/french-foreign-policy/climate/2015-paris-climate-conference-cop21/article/china-and-france-joint-presidential-statement-on-climate-change-beijing-02-11).

https://doi.org/10.1017/S2047102516000212 Published online by Cambridge University Press

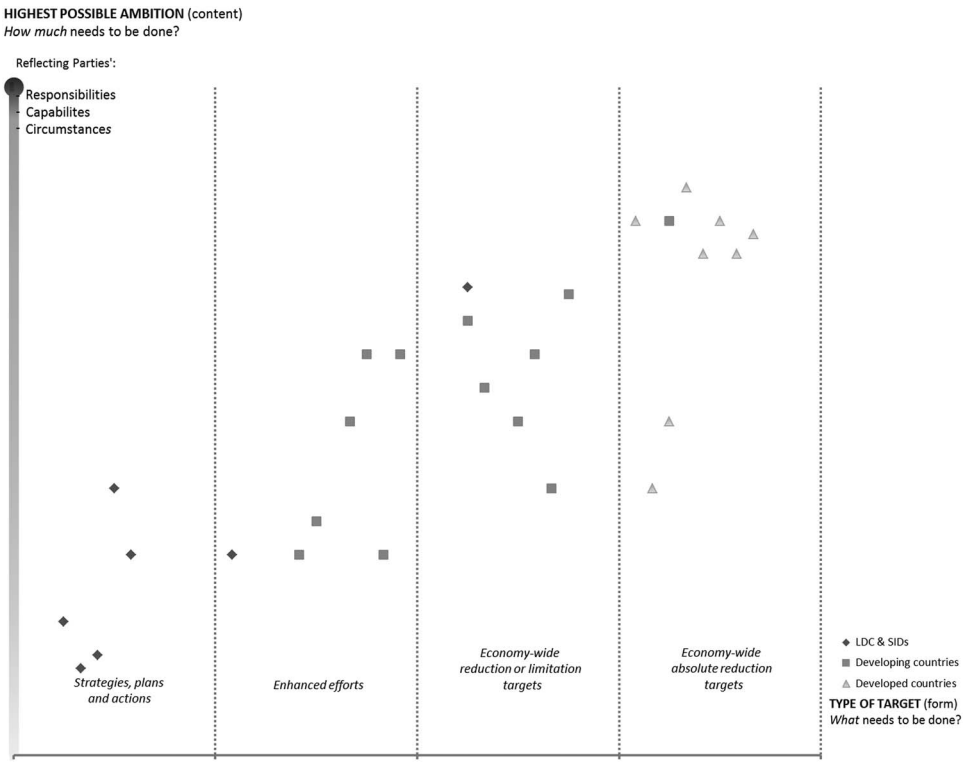


Figure 1 Differentiation in Mitigation Efforts
Note: Each party's NDC will reflect its highest possible ambition, in light of its responsibility, capability and circumstances (y-axis) and correspond with one of diverse types of target (x-axis). Developed countries should start at the upper right side of the diagram. Each time a successive NDC is communicated, it will progress beyond previous versions. Such a parameter-based determination of mitigation efforts leads to more diversified and dynamic differentiation.

their circumstances allow. This is a significant evolution from the UNFCCC, which did not contain prescriptive guidance for the type of mitigation effort on the part of developing countries.

In fact, only when Article 4, paragraphs 3 and 4, are seen in conjunction, does a comprehensive picture of differentiation in the context of mitigation commitments emerge. Differentiation applies both to the content ('how much') and the form ('what') of the parties' level of effort. These two elements can be represented as axes in a Cartesian coordinate system which allows for the equitable determination of each party's contribution at any point in time (see Figure 1). Together, they provide the flexibility and fluidity necessary to capture the parties' diverse and changing realities, while aiming for an effective response to the climate challenge.

The basis for differentiation in the mitigation provisions, therefore, is a complex balance between the parties' responsibilities, capabilities and circumstances rather than any particular definition of 'developed' or 'developing' country. Consequently, this approach is fully consistent with the agreed global mitigation trajectory: all parties

https://doi.org/10.1017/S2047102516000212 Published online by Cambridge University Press

have an obligation to continuously contribute to achieving the temperature goal, but they should do so with their highest possible ambition, in a diversified and equitable manner, and reflecting their responsibilities, capabilities and circumstances.

Adaptation

Adaptation provisions under Article 7, on the other hand, have more general, common characteristics; there is actually no specific obligation for, or even an explicit reference to 'developed countries' in this article.[54] Nonetheless, Article 7 gives preferential treatment to developing countries and, within this group, to the most vulnerable. It establishes that the implementation of the Agreement should take into account the needs of developing countries that are particularly vulnerable (Article 7.2); provide recognition and assistance to the adaptation efforts of developing countries (Articles 7.3, 7.7 and 7.13), while avoiding the creation of additional reporting burdens on developing countries (Article 7.10). The basis for differentiation under Article 7 relies mostly on parties' vulnerabilities and capabilities. The Agreement, however, does not specify which developing countries are particularly vulnerable. As any attempt to list them under the Paris Agreement has proven unfruitful, one can only assume, by way of reference, the types listed in Article 4.8 UNFCCC.

Finance

The provisions on financial support are arguably how the Paris Agreement addresses differentiation between developed and developing countries most directly and explicitly. Article 3 recognizes the need to support developing countries for the effective implementation of the Agreement. Articles 4.5 and 7.13 state that 'support shall be provided' to developing countries for their mitigation and adaptation actions, respectively. On the receiving end, therefore, the Paris Agreement clearly entitles developing countries to support. It does not, however, condition developing countries' actions on support. Rather, as Article 4.5 makes clear, enhanced support for developing countries will allow for higher ambition in their actions. Read in conjunction, Articles 3, 4.5 and 7.13 establish a strong link between support and the degree of effectiveness and ambition in the actions of developing countries. Yet, this does not exempt them from fulfilling their obligations under the Agreement.

On the giving end, Article 9 offers the most clear-cut, bifurcated version of differentiation in the Paris Agreement. Article 9.1 reaffirms developed countries' legally binding commitments under the Convention to provide financial resources to developing countries. Support from other parties is voluntary, as per Article 9.2. Proposals to commit those developing countries 'in a position to do so' or even 'willing to do so' to provide finance were flatly rejected. This, nevertheless, represents a considerable increment to previous practice under the Convention, in which

[54] Art. 7.13, nevertheless, contains an indirect reference to developed countries, in the context of support.

https://doi.org/10.1017/S2047102516000212 Published online by Cambridge University Press

developing countries simply had no formal role in climate finance or in supporting other countries; nor did they receive any recognition for doing so.

Mobilization of climate finance – a concept that is considerably broader than the provision of financial resources and includes 'a wide variety of sources, instruments and channels' – is described in Article 9.3 as a 'global effort'. It can therefore be interpreted as a common commitment of all parties. In this effort, however, developed countries should continue to take the lead.

Article 9, therefore, differentiates financial obligations under the Paris Agreement in distinctive ways. It is quite explicit and strict with regard to the provision of support, attributing a strong normative weight to developed countries' obligations, while other parties are encouraged to provide support on a voluntary basis only. However, Article 9 approaches the mobilization of climate finance in a more nuanced way, mirroring to some extent the approach used for mitigation: a provision applicable to all, accompanied by an obligation of conduct for developed countries to continue taking the lead.

Transparency

If finance is where differentiation is expressed more explicitly, transparency provisions under Article 13 are arguably where provisions for developed and developing countries converge most significantly. Since the purpose of transparency provisions is to increase trust and confidence among countries, it is arguably harder to legitimize any partner being entitled to less stringent obligations. Differentiated mitigation and financial commitments based on considerations of equity and responsibilities, capacities and circumstances may be perfectly justifiable, but all parties should report on these commitments as transparently and comprehensively as possible.

Accordingly, the 'enhanced transparency framework for action and support' established in Article 13 of the Paris Agreement sets parties' capacities as the basis for differentiation. Different types of commitment and obligation under the other provisions of the Agreement have distinct transparency requirements – for instance, as a reflection of Article 9, developed countries have mandatory reporting obligations with regard to the provision of support, while other parties only 'should' do the same (see Article 13.9). Accordingly, the technical expert review as well as the multilateral consideration of progress with respect to providing support is compulsory only for developed countries (Article 9.11). Over time, however, these remaining elements of differentiation in the transparency framework will become less pronounced as all parties will be subject to common modalities, procedures and guidelines, as stated in Article 13.13.

In what promises to be one of the most difficult negotiations prior to the entry into force of the Agreement, these yet to be agreed common rules will express differentiation mainly by providing flexibility to those developing countries that need it in the light of their capacities.[55] An interesting feature of this particular

[55] To this end, Decision 1/CP.21 establishes a 'capacity-building initiative for transparency' to support developing countries in meeting enhanced transparency requirements: Decision 1/CP.21, 'Adoption of the Paris Agreement', UN Doc. FCCC/CP/2015/10/Add.1, 29 Jan. 2016, paras 85–89.

https://doi.org/10.1017/S2047102516000212 Published online by Cambridge University Press

approach is that it recognizes a preferential treatment of developing countries, but at the same time softens the strict categorization by limiting flexibility only to those developing countries that lack the capacity to implement common modalities on reporting, including those regarding the scope, frequency and level of detail.[56] In doing so, the Agreement recognizes that *within* the group of developing countries differences exist that lend themselves to a more heterogeneous (internal) treatment of developing countries in accordance with their capacities.

Other Provisions

The references above do not exhaust the examples of how the Paris Agreement differentiates among parties.

Differentiation can also be found in the context of the legal implications of the Agreement. For example, the mandate of the compliance and implementation committee (Article 15) states that the committee 'shall pay particular attention to the respective national capabilities and circumstances of Parties'.

The Agreement further allows implicit differentiation by using norms which accommodate a large degree of discretion. Such norms may, for example, permit the consideration of criteria, characteristics or circumstances that differ from country to country. Implicit differentiation can occur where the Agreement permits flexibility and/or discretion in the implementation, when using terms such as 'as far as possible', 'highest possible', 'best possible', 'as soon as possible' or 'where/as appropriate'. Of importance in this context is that 'appropriateness' or 'possibility' or 'flexibility' are in constant flux and allow both dynamic as well as temporary differentiation.

6. SUMMARY AND REFLECTIONS

This article provides an analysis of the careful balance struck in the Paris Agreement between differentiation among parties and the need to raise collective ambition. This balance is reflected in five *systemically interconnected* features of the Agreement.

Firstly, the Paris Agreement adopts a *more diversified way of differential treatment*, allowing a wider array of parameters to be taken into account when parties determine their national contributions, while being set against the normative background of the UNFCCC. The Agreement does not define differentiation in a singular way. Rather, it approaches it in at least three complementary ways:

1. It builds upon the principled approach to differentiation as contained in the CBDR-RC principle of the UNFCCC in a more nuanced and dynamic fashion by recognizing that the (application of the) principle is responsive to differing national circumstances – that is, not tied to the Annexes.
2. Each article of the Agreement reflects differentiation in context-specific ways, ranging from universal, non-differentiated obligations, to provisions that provide

[56] Decision 1/CP.21, ibid., para. 90.

https://doi.org/10.1017/S2047102516000212 Published online by Cambridge University Press

for implicit differentiation through norms the application of which permits consideration of characteristics that vary from country to country, to starkly contrasted and explicit differentiation between developed and developing countries.

3. The Agreement sets out parameters that will inform parties' choices of ambition of both action and support, including the principles of progression and highest possible ambition, which consequentially also contribute to determining the differentiated commitments of parties.

Secondly, the principle of highest possible ambition establishes the standard of care now to be exercised in climate affairs. It implies a *due diligence standard* which requires each government to act in proportion to the risk at stake, and reflects its common but differentiated responsibilities and capabilities. Each single party has committed to taking all appropriate and adequate climate measures in order to progressively achieve the objective of the Agreement: to keep global temperature increases well below 2°C in order to avoid dangerous anthropogenic interference with the climate system. 'Highest possible ambition' implies recognizing states' differing national circumstances while at the same time aiming to match ambition with the overall aim, thereby combining effectiveness and fairness. The principle represents both a formal departure from the strict and equal treatment of states, and a departure from the historical, binary or bifurcated differentiation model. Importantly, the concept offers a flexible and dynamic means of differentiation by allowing the determination of what constitutes a proportionate measure in any given case and at each successive cycle of NDCs.

Thirdly, the principled-based approach to differentiation is combined with *iterative processes* (those presenting a successive contribution every five years, after a global stock-take), and with the establishment of an enhanced transparency framework. This, in turn, is an important ingredient to establish mutual trust. Not only will parties' NDCs change over time the 'differentiated placement' of parties, but they will do so with *repetitiveness* and an *unprecedented degree of transparency and openness*.

Fourthly, the characteristics above enable the Paris Agreement to create a *collective learning environment*. Collective learning might be a way to overcome the 'prisoner's dilemma' that characterizes climate change as a collective action problem. In fact, iterative, cooperative and facilitative processes have been identified as a way to address the risk of 'free riding'.[57]

The Paris Agreement has set up an architecture that promotes the evolution of voluntary, cooperative behaviour. Conditions for such evolution include transparency, trust and credibility that parties actually do what they said they would ('pledge'). According to game theory, three elements are necessary to fulfil such conditions:

1. The pledging process needs to be broken down to a series of small steps. Such a succession of pledges will increase the acceptance by parties of cooperative strategies, as they can adjust the content of their pledges in subsequent rounds.

[57] R. Axelrod, *The Evolution of Cooperation* (Basic Books, 1984), pp. 135–47, and Ch. 9, pp. 169–91, at 177.

https://doi.org/10.1017/S2047102516000212 Published online by Cambridge University Press

2. Common timelines need to be established for parties to individually communicate new pledges, but also to assess collective progress towards the overall aim.
3. The international regime should have a long, perhaps indefinite, time horizon, creating the conditions to 'trust, but verify' the actions of other parties over time.[58]

The Paris Agreement meets all of these conditions. The pledging of an NDC every five years, informed by the outcome of the stocktake of collective progress, allows subsequent upward enhancement of ambition in a gradual manner. There is a robust transparency system consisting of reporting and review of actions and support, which adds credibility to parties' pledges.

Fifth and finally, the Agreement creates a *reflexive approach* to parties' determination of their climate action by establishing the duty of parties to revisit their actions and periodically assess whether their levels of ambition indeed correspond with their best possible effort, reflecting their responsibilities, capabilities and circumstances. This stimulates parties to improve their response to climate change by learning about their actions and the global effort, using this information to make appropriate changes. Perhaps in these aspects lies the greatest strength of the Agreement – enabling greater political relevance and durability, as well as fairness.

In sum, this article argued that differentiation under the Paris Agreement is much more diversified and less categorical than it is under the UNFCCC's Annexes and the Kyoto Protocol. References to 'developed' and 'developing' countries are still relevant, but in a context-specific manner, rather than a 'two fold' approach. While the Agreement echoes the principle of CBDR-RC, it adds that it will be reflected 'in the light of different national circumstances'. Along with the principles of *progression* and *highest possible ambition*, this allows a dynamic upward adjustment of parties' efforts in a manner that is recognizant of the unique and changing responsibilities, capacities and circumstances of 197 diverse states at each successive cycle of NDCs. The articulation of the principles of CBDR-RC, progression and highest possible ambition at each successive NDC provides an innovative, comprehensive and dynamic way to match ambition with the overall aim of the Agreement, in a practical framework for combining effectiveness and fairness.

Differentiation under the Paris Agreement has the potential to function as a catalyst for a race to the top on climate action, rather than merely a burden-sharing concept. It must lend itself to strengthening collective action to hold temperature increases to well below 2°C. This requires ambitious mitigation action by all parties, as well as due consideration of the issues of equity, justice and fairness that arise from the global response to climate change. Given the important role that differentiation has to play, it can be stated safely that the Paris Agreement has succeeded in using differentiation as a means for enhancing ambition, as opposed to stalemating it. Rather than setting countries apart, differentiation could become a tool for bringing countries closer together in serving the purpose of the Agreement.

[58] Ibid.

https://doi.org/10.1017/S2047102516000212 Published online by Cambridge University Press

Oxford Public International Law

7 Paris Agreement

From: International Climate Change Law
Daniel Bodansky, Jutta Brunnée, Lavanya Rajamani

Content type: Book content
Product: Oxford Scholarly Authorities on International Law [OSAIL]
Published in print: 25 May 2017
ISBN: 9780199664290

Subject(s):

Climate change — Environmental disputes

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

4.1, which is neutral as between carbon dioxide and other GHGs and as between reduced emissions and enhanced removals.

These global mitigation goals are to be achieved 'on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty'.[164] As noted before, these terms are framed differently in the Paris Agreement than in the FCCC.[165] The Paris Agreement also recommends that parties 'strive to formulate and implement' long-term low GHG emission development strategies.[166] These are likely to play a critical role in shifting development trajectories and investment patterns toward meeting the long-term temperature goal. In a regime that permits countries to choose the nature, form and stringency of their contributions, this provision provides a mechanism for catalyzing national strategic thinking to ensure short-term actions are in line with long-term goals, and for aggregating the efforts of the parties.[167]

In order to address all of the elements of the Durban Platform in a balanced manner, the Paris Agreement also defines aims for adaptation and finance, albeit in general, qualitative terms (rather than in quantitative terms, as proposed by the African Group). For adaptation, Article 2 expresses the aim of increasing adaptive capacity, fostering climate resilience, and reducing vulnerability—aims reiterated in Article 7, which deals specifically with adaptation. The finance aim—namely, to make 'finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development'—addresses private as well as public flows, and provides support for efforts to phase out climate-unfriendly investments.

(p. 231) V. Mitigation (Article 4)

A. Obligations in relation to nationally determined contributions (NDCs)

The most significant legal obligations in the Paris Agreement are to be found in its mitigation article. In order to meet the long-term temperature goal, parties are subject to binding obligations of conduct in relation to their nationally determined mitigation contributions.[168] The most significant of these are contained in Article 4.2, which reads:

> Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.

There are many drafting treasures to be mined in this carefully negotiated text. First, unlike the majority of provisions in the Paris Agreement that apply to 'Parties',[169] the first sentence of this provision applies to 'each Party', thus creating individual obligations. Second, this provision, like selective provisions in the Paris Agreement, uses the imperative 'shall' both in relation to preparing, communicating and maintaining national contributions, as well as pursuing domestic mitigation measures. Third, while these are binding obligations, they are obligations of conduct rather than result. The term 'intends to achieve' in the first sentence establishes a good faith expectation that each party intends to achieve its NDC, but stops short of requiring it to do so. The second clause in the second sentence performs a similar function. It requires parties to pursue measures 'with the aim of achieving the objectives of [their] contributions'.[170]

Parties thus have binding obligations of conduct to prepare, communicate and maintain contributions, as well as to pursue domestic measures. There is also a good faith expectation that parties intend to and will aim to achieve the objectives of their contributions. In the lead up to Paris, many parties, including the EU, South Africa, and the small island states, had argued that parties should be required to achieve their NDCs, thus imposing an obligation of result. This was strenuously opposed by the US, China, and India, among others, who did not wish to subject themselves to legally binding obligations of

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

result. The Paris Agreement deferred to the latter in this respect. However, to help ensure that parties act in good faith, the agreement requires each party to provide the information necessary to track (p. 232) progress in implementing and achieving its nationally determined contribution,[171] and subjects parties to a 'facilitative, multilateral consideration of progress' with respect to such implementation and achievement.[172]

The NDCs parties have submitted are formulated in a variety of ways. Some are quantitative (such as absolute emission reduction targets)[173] and others are qualitative (such as goals to adopt climate friendly paths);[174] some are conditional (as for instance on the provision of international support)[175] while others are unconditional.[176] In the circumstances, an obligation of result, if one had been created, may not have lent itself to enforcement.

In addition to the binding obligation to prepare, communicate and maintain contributions as well as to take domestic measures, parties are subject to further procedural obligations. Each party is required to communicate a contribution every five years.[177] When communicating their NDCs, parties are required to provide the information necessary for clarity, transparency, and understanding.[178] These provisions are phrased in mandatory terms ('shall'), and thus constitute binding obligations for parties. Some also oblige parties to act in accordance with 'relevant decisions' to be taken by the Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement (CMA), thus effectively giving the CMA authority to adopt legally binding decisions.[179] It is worth noting, however, that the 'relevant decisions' may provide parties with discretion. For instance, decision 1/CP.21 provides that parties '*may* include, as appropriate, inter alia' several listed pieces of information, but does not require them to do so.[180]

The Paris Agreement also requires parties to account for their NDCs in accordance with 'guidance' adopted by the CMA.[181] Although this provision is phrased in mandatory terms ('shall'), the use of the word 'guidance' could be interpreted (p. 233) as implying that a CMA decision containing accounting guidance would not bind parties. Alternatively, it could be interpreted as meaning that CMA decisions on accounting should provide general guidance rather than impose detailed rules. Given this ambiguity, the way in which the accounting decision is drafted may provide clues as to whether the parties regard it as binding—for example, whether it is drafted in mandatory or discretionary terms.[182]

The strength of these provisions, as well as the transparency framework, discussed below, can be attributed to the concerted efforts of an informal group of key negotiators from developed and developing countries, including the EU, Australia, New Zealand, South Africa, Switzerland, the US, and others, as well as the Singaporean diplomat who facilitated the formal negotiations. This informal group, which came to be called 'friends of rules', formed after Lima when its members realized that the rules of the game, of profound importance to the integrity of the agreement, were getting short shrift in a process focused primarily on the headline political issues.

B. Registering NDCs

The NDCs referred to in Article 4.2 are to be recorded in a public registry maintained by the secretariat.[183] The US, Canada, and New Zealand, among others, favored this approach, arguing that housing contributions outside the treaty would enable their speedy and seamless updating. Others were concerned that if contributions were housed outside the agreement, parties would enjoy excessive discretion in revising their contributions, potentially even downwards. To address this concern, the Paris Agreement permits parties to adjust their contributions only with a view to enhancing the level of ambition and subject to CMA guidance.[184] The Paris decision also calls on the CMA to adopt modalities and procedures for the operation and use of the public registry,[185] which could potentially circumscribe the discretion parties have. In any case, notwithstanding the fact that

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

[158] See T. Jayaraman and Tejal Kanitkar, 'The Paris Agreement: Deepening the Climate Crisis', *Economic and Political Weekly*, 51/3 (2016): 10.

[159] Paris Agreement, Art 4.1.

[160] See ADP, Draft agreement and draft decision on workstreams 1 and 2 of the Ad Hoc Working Group on the Durban Platform for Enhanced Action, Work of the ADP contact group (6 November 2015, reissued on 10 November 2015) ADP.2015.11.InformalNote, Art 3.

[161] See Kelly Levin, Jennifer Morgan, and Jiawei Song, 'Insider: Understanding the Paris Agreement's Long-term Goal to Limit Global Warming' (World Resources Institute, 15 December 2015) <http://www.wri.org/blog/2015/12/insider-understanding-paris-agreement%E2%80%99s-long-term-goal-limit-global-warming> accessed 20 January 2017.

[162] IPCC, *Climate Change 2014: Synthesis Report* (Cambridge University Press, 2014) Summary for Policy Makers, 20.

[163] G-7 Leaders' Declaration (Schloss Elmau, Germany, 8 June 2015) <https://www.whitehouse.gov/the-press-office/2015/06/08/g-7-leaders-declaration> accessed 20 January 2017. See Chapter 8, Section IV.E.2 for a discussion of 'G clubs'.

[164] Paris Agreement, Art 4.1.

[165] See nn 83–90 above and accompanying text.

[166] Paris Agreement, Art 4.19.

[167] For examples of such strategies, see the Deep Decarbonization Pathways Project, *Synthesis Reports* <http://deepdecarbonization.org/ddpp-reports/> accessed 20 January 2017.

[168] See contra, Richard Falk, ' "Voluntary" International Law and the Paris Agreement' (16 January 2016) <https://richardfalk.wordpress.com/2016/01/16/voluntary-international-law-and-the-paris-agreement/> accessed 20 January 2017.

[169] Paris Agreement, Arts 3, 4.1, 4.2, 4.8, 4.13, 4.15, 4.16, 4.19, 5.1, 5.2, 6.1, 6.3, 6.8, 7.2, 7.4, 7.5, 7.6, 7.7, 8.1, 8.3, 9.2, 10.1, 10.2, 11.4, 12, and 14.3.

[170] The comma ensures that the final clause modifies parties who 'pursue' those measures rather than the measures themselves. Thus the 'with' functions not as a preposition qualifying 'measures' but as a conjunction qualifying 'pursue'.

[171] Paris Agreement, Art 13.7(b).

[172] Ibid, Art 13.11.

[173] See eg United States' Intended Nationally Determined Contribution (31 March 2015) <http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx> accessed 20 January 2017.

[174] India's Intended Nationally Determined Contribution (1 October 2015) <http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx> accessed 20 January 2017. In addition to quantitative emissions intensity targets, India's INDC identifies qualitative objectives such as to 'propagate a healthy and sustainable way of living based on traditions and values of conservation and moderation'.

[175] Arguably India's. See India's INDC, ibid.

[176] See eg Brazil, Intended Nationally Determined Contribution Towards Achieving the Objective of the United Nations Framework Convention on Climate Change (28 September 2015) <http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx> accessed 20 January 2017. It is worth noting that parties considered the possibility of requiring all contributions to be unconditional. No agreement proved possible on this in Paris, but the Ad hoc Working Group on the Paris Agreement (APA) has been tasked with

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

developing further guidance on ‘features’ of nationally determined contributions for consideration and adoption by the CMA. See Decision 1/CP.21 (n 19) para 26.

177 Paris Agreement, Art 4.9.

178 Ibid, Art 4.8.

179 These decisions are to be negotiated in the next few years and adopted by the CMA in 2018.

180 Decision 1/CP.21 (n 19) para 27 (emphasis added).

181 Paris Agreement, Art 4.13. See also Decision 1/CP.21 (n 19) paras 31 and 32. It is worth noting that the guidance on accounting applies only to second and subsequent contributions, although parties could choose to apply it before.

182 See Chapter 3, Section II.D.3 for a full discussion of the status of COP decisions.

183 Paris Agreement, Art 4.12.

184 Ibid, Art 4.11.

185 Decision 1/CP.21 (n 19) para 29.

186 Paris Agreement, Art 4.3.

187 The notion of progression first found reflection in the Lima decision. See Lima Call for Climate Action, para 10.

188 See Views of Brazil on the Elements of a New Agreement under the Convention Applicable to All Parties (6 November 2014) <http://www4.unfccc.int/submissions/Lists/OSPSubmissionUpload/73_99_130602104651393682-BRAZIL%20ADP%20Elements.pdf> accessed 20 January 2017.

189 Paris Agreement, Art 3.

190 Ibid, Art 4.2.

191 Ibid, Art 7.9.

192 Ibid, Art 9.1.

193 Ibid, Art 9.3.

194 See Synthesis Report on the aggregate effect of the INDCs (n 37).

195 Decision 1/CP.21 (n 19) para 20.

196 Ibid, paras 23 and 24.

197 Ibid, para 35.

198 Paris Agreement, Art 14.2.

199 Decision 1/CP.21 (n 19) para 25.

200 Paris Agreement, Art 4.10.

201 International Carbon Action Partnership (ICAP), *Emissions Trading Worldwide: International Carbon Action Partnership: Status Report 2016* (Berlin: ICAP, 2016) (64 INDCs said they planned to use markets, and 25 said they were considering using markets); Environmental Defense Fund and International Emissions Trading Association, ‘Carbon Pricing: the Paris Agreement’s Key Ingredient’ (April 2016) <http://www.ieta.org/resources/Resources/Reports/Carbon_Pricing_The_Paris_Agreements_Key_Ingredient.pdf> accessed 20 January 2017.

202 Paris Agreement, Art 6.8.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

Oxford Public International Law

Human Rights, Remedies

Dinah Shelton

Content type: Encyclopedia entries
Product: Max Planck Encyclopedias of International Law [MPIL]
Module: Max Planck Encyclopedia of Public International Law [MPEPIL]
Article last updated: July 2006

Subject(s):

Human rights remedies — Economic, social, and cultural rights — Gender — Indigenous peoples — Right to life — Conduct of hostilities — International organizations, practice and procedure

Published under the auspices of the Max Planck Institute for Comparative Public Law and International Law under the direction of Professor Anne Peters (2021–) and Professor Rüdiger Wolfrum (2004–2020).

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

A. Overview

1 A → *human rights* remedy has two aspects or dimensions. The term encompasses, first, the procedures and institutions that may be utilized to enforce a right and, second, the actions or measures taken to prevent, redress or compensate the violation of a right. The ancient adage *ubi ius, ibi remedium* (where there is a right there is a remedy) reflects the importance given in international human rights law to the existence of effective → *remedies*, which are seen as necessary in order to ensure the full enjoyment of other rights. The international attention to remedies reflects concern with upholding and ensuring the effective enjoyment of guaranteed rights.

2 Global and regional human rights instruments expressly guarantee the right to a remedy and oblige States Parties to provide a remedy when human rights are violated, whether or not State agents (→ *Representatives of States in International Relations*) are responsible for the violation. In addition, the UN General Assembly (→ *United Nations, General Assembly* ; see also → *United Nations [UN]*) has adopted two → *declaration [s]* on the right to a remedy, giving greater detail and precision to the obligations of States. International human rights tribunals reviewing complaints of human rights violations (→ *Human Rights, Individual Communications/Complaints*) have assessed State compliance with both aspects of remedies: the duty to provide access to justice and the adequacy of substantive measures taken to prevent or redress violations of rights, in the process condemning → *amnesties* and similar actions that grant impunity to violators (→ *Individual Criminal Responsibility*). Recently, human rights tribunals, recognizing that a State law or policy may give rise to a large number of similar cases, have indicated the general measures the State must take to prevent and redress the systemic problem, in addition to providing redress to the individual applicants. In this way, duplicative or repetitious international procedures may be avoided and similarly situated victims afforded more rapid redress.

3 International human rights law has established that the attributes of an effective remedy include the institutional independence of the remedial body from the authority responsible for the violation, ability to invoke the guaranteed right, procedural fairness, the capability of the remedial body of affording redress, and effectiveness in fact (see also → *Fair Trial, Right to, International Protection*). Some international agreements explicitly call for the development of judicial remedies for the rights they guarantee, although effective remedies also may be supplied by non-judicial bodies.

4 If a State which is a party to the relevant treaty fails to afford the necessary redress, an individual who has exhausted local remedies may apply to a global or regional human rights tribunal to hear the matter (→ *Local Remedies, Exhaustion of*). UN human rights treaties require a separate ratification or declaration accepting the competence of the treaty body to hear individual complaints, but this is not required by regional agreements, except with respect to the → *Inter-American Court of Human Rights (IACtHR)*. UN treaty bodies (→ *Human Rights, Treaty Bodies*) may express their views or recommend reparative actions when they find a State has violated the rights of the applicant. The mandate of regional courts to order States to pay → *compensation* or afford other redress to applicants varies according to the provisions of the different regional human rights conventions. A judicial decision on remedies is part of the binding judgment of the courts.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

B. The Right to a Remedy in Global Legal Instruments

5 Art. 8 → *Universal Declaration of Human Rights (1948)* ('UDHR') provides that '[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'. The → *International Covenant on Civil and Political Rights (1966)* ('ICCPR') contains three separate articles on remedies. The first, Art. 2 (3) ICCPR, obliges the States Parties to the covenant to afford an effective remedy to a victim notwithstanding that the violation has been committed by persons acting in an official capacity (→ *Victims' Rights*); to ensure that claims are heard by competent judicial, administrative or legislative authorities; and to ensure that the competent authorities shall enforce such remedies when granted. Arts 9 (5) and Arts 14 (6) ICCPR add that anyone unlawfully arrested, detained, or convicted shall have an enforceable right to compensation or be compensated according to law. The → *Human Rights Committee* has identified the kinds of remedies required, depending on the type of violation and the victim's condition. The committee has indicated that a State that has engaged in human rights violations, in addition to treating and compensating the victim financially, must undertake to investigate the facts (→ *Fact-Finding*), take appropriate action, and bring to justice those found responsible for the violations. The committee has recommended to States Parties: public investigation to establish the facts; bringing to justice the perpetrators; paying compensation; ensuring non-repetition of the violation; amending the offending law; providing → *restitution*; and providing medical care and treatment.

6 The → *International Covenant on Economic, Social and Cultural Rights (1966)* ('ICESCR') contains no right to a remedy, but General Comment No 3 (→ *General Comments/ Recommendations*) issued by the → *Committee on Economic, Social and Cultural Rights (CESCR)*, concerning the nature of State obligations pursuant to Art. 2 (1) ICESCR, proclaimed that appropriate measures to implement the covenant might include judicial remedies with respect to rights that may be considered justiciable (see also → *Human Rights, Domestic Implementation*). It specifically pointed to the non-discrimination requirement of the treaty and referenced the right to a remedy in the ICCPR. A number of other rights also were cited as 'capable of immediate application by judicial and other organs' (see also → *Self-Executing Treaty Provisions*).

7 Access to justice may require affording individuals recourse to tribunals to prevent a threatened violation (see also → *Individuals in International Law*). Art. 6 Convention on the Elimination of Racial Discrimination requires that States Parties assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination in violation of the convention (→ *Racial and Religious Discrimination*), as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination. The language of this provision anticipates the use of injunctive or other preventive measures against discrimination, as well as compensation or other remedies for consequential damages. A similar provision requiring effective protection of women from discrimination is found in Art. 2 (c) Convention on the Elimination of All Forms of Discrimination against Women (→ *Women, Rights of, International Protection*). The UDHR and several global and regional treaties similarly refer to the right to legal protection for attacks on privacy, family, home or correspondence, or attacks on honour and reputation.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

8 Several texts require compensation to be paid to victims. Art. 14 (1) UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (→ *Torture, Prohibition of*) specifies as follows: 'Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.' Among treaties adopted by the specialized agencies, the ILO Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries (→ *Indigenous Peoples*; → *International Labour Organization [ILO]*) also refers to 'fair compensation for damages' (Art. 15 (2)), to 'compensation in money' (Art. 16 (4)) and to full compensation for 'any loss or injury' (Art. 16 (5)).

9 The payment of money may not be the most appropriate form of redress for human rights violations, especially where there are underlying systemic problems, and some human rights bodies have suggested that non-monetary remedies, ie those that require a State to take specified actions rather than pay compensation, may be required to ensure adequate redress. Such actions can be useful not only in giving satisfaction to the victim, but in eliminating the cause of the violation and promoting respect for the human right that was violated. In General Recommendation No 5 (UN Committee for the Elimination of All Forms of Discrimination against Women, 'General Recommendation No 5' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' [4 March 1988] UN Doc HRI/GEN/1/Rev.6 at 232 [2003]) the Committee on the Elimination of All Forms of Discrimination against Women announced that States Parties should make more use of temporary special remedial measures such as positive action, preferential treatment, or quota systems to advance women's integration into education, the economy, politics, and employment. The Working Group on Involuntary or Enforced Disappearances (→ *Disappearances)* also made reference to non-monetary remedies in a commentary to Art. 19 UN Declaration on the Protection of All Persons from Enforced Disappearance. The working group noted that the declaration imposes a primary duty to establish the fate and whereabouts of disappeared persons as an important remedy for victims. The State should also provide measures of rehabilitation, including medical and psychological care, rehabilitation for any form of physical or mental damage, legal and social rehabilitation, guarantees of non-repetition, restoration of personal liberty, family life, citizenship, employment or property, return to the place of residence, and similar forms of restitution, satisfaction and reparation that may remove the consequences of the enforced disappearance.

10 The General Assembly has twice adopted general texts calling on States to provide remedies, in the first instance for victims of criminal conduct or 'abuse of power', and in the second for those who have suffered from → *gross and systematic human rights violations*. The first text, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, contains broad guarantees for those who suffer pecuniary losses, physical or mental harm, and 'substantial impairment of their fundamental rights' (at para. 18) through acts or omissions, including abuse of power. The declaration specifies that victims are entitled to redress and to be informed of their right to seek redress, including restitution from the State whose officials or agents are responsible for the harm inflicted. Abuse of power that is not criminal under national law but that violates internationally recognized norms relating to human rights should be sanctioned and remedies provided, including restitution and/or compensation, and all necessary material, medical, psychological, and social assistance and support. The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, which took place in 1990 in Havana, Cuba, recommended that States base national legislation upon the declaration. More recently, the UN General Assembly adopted by → *consensus* basic principles and guidelines on the right to remedy and reparation for victims of gross violations of

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

international human rights law and serious violations of → *international humanitarian law* (UNGA Res 60/147 [16 December 2005] UN Doc A/RES/60/147; *Humanitarian Law, International*). The text is a non-binding resolution (see also → *International Organizations or Institutions, Secondary Law*), but it expressly claims in its → *preamble* to restate existing law and not to create any new substantive international or domestic legal obligations. The report of the Chairperson-Rapporteur on the consultative meeting on the drafting noted that 'shall' was used where a binding international norm is in effect; otherwise the term 'should' was used (UN Commission on Human Rights 'Report of the Chairperson-Rapporteur on the consultative meeting on the draft 'basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law' [2002] UN Doc E/CN.4/2003/63). The various forms of reparation identified are restitution, rehabilitation, compensation, satisfaction, and guarantees of non-repetition. The General Assembly declarations, in drawing the attention of each Member State to obligations under human rights treaties to ensure access to justice and adequate redress for those whose rights the State has violated, reflect a renewed concern with combating impunity and promoting compliance with human rights obligations. The Declarations serve to identify mechanisms, modalities, procedures and methods for implementing existing legal obligations.

11 Humanitarian law also contains norms relating to remedies in case of a breach. Art. 3 Hague Convention Regarding the Laws and Customs of Land Warfare (see also → *Warfare, Methods and Means*) obliges contracting parties to indemnify for a violation of the regulations. Similarly, Art. 91 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I; → *Geneva Conventions Additional Protocol I [1977]*), states that any party to a conflict who violates the provisions of the Geneva Conventions or the Protocol 'shall … be liable to pay compensation'. Unlike human rights instruments, these treaties do not provide for individual rights and claims, but remain enforceable on the inter-State level (see also → *State Responsibility*).

12 States have often sought reparation for violations of international humanitarian law through post-conflict settlements. There is also an increasing trend in favour of enabling individual victims of violations of humanitarian law to seek reparation directly from the responsible State through the State's courts and, if that avenue is unsuccessful, through application to international human rights tribunals, most of which may apply humanitarian law norms. In addition, various bilateral agreements allow for individual claims. A unique procedure was mandated by the UN Security Council (→ *United Nations, Security Council*) following the 1991 Iraqi invasion of Kuwait (→ *Iraq-Kuwait War [1990–91]*). The → *United Nations Compensation Commission (UNCC)* that was created reviewed claims for compensation for direct loss and damage arising as a result of Iraq's invasion, including individual claims for violations of international humanitarian law. The → *Eritrea-Ethiopia Claims Commission*, established by the 2000 Peace Agreement between the two countries, also has the power to decide all claims for loss, damage or injury caused to nationals of one party by the government of the other. Finally, compensation in some cases has occurred through the unilateral political act of a State (→ *Unilateral Acts of States in International Law*).

C. The Right to a Remedy in Regional Human Rights Treaties

13 At the regional level, the → *European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)* ('ECHR') modelled its general remedial provision—Art. 13—on Art. 8 UDHR. The Committee of Ministers of the → *Council of Europe (COE)* reinforced Art. 13 ECHR with a recommendation adopted in 1984 that calls on all COE Member States to provide remedies for governmental wrongs. In addition to Art. 13 ECHR,

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

Art. 5 (5) ECHR requires compensation for breach of the right to be free from arrest in violation of the provisions of Art. 5 ECHR (see also → *Detention, Arbitrary*). When applicable, it requires a legally binding award of compensation (*Brogan v United Kingdom* [Series A No 145-B] and *Fox, Campbell and Hartley v United Kingdom* [Series A No 182]). The State may require proof of damage resulting from the breach and—the holdings in *Wassink v Netherlands* (Series A No 185-A) can be interpreted in this way—has a wide margin of appreciation in regard to the quantum (at para. 25 [3]).

14 The → *European Court of Human Rights (ECtHR)* has interpreted Art. 13 ECHR to guarantee an effective remedy 'to everyone who *claims* that his rights and freedoms under the convention have been violated' (*Klass v Germany* [Series A No 28], para. 64). In respect to a violation of Art. 2 ECHR, the remedies must be guaranteed for the benefit of the relatives of the victim (see also → *Life, Right to, International Protection*). Where those relatives have an arguable claim that the victim has been unlawfully killed by agents of the State, the notion of an effective remedy for the purposes of Art. 13 ECHR entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure. The ECtHR has also interpreted both Art. 2 ECHR, on the right to life, and Art. 3 ECHR, the prohibition of torture, to contain a positive obligation for the State to conduct an effective investigation when the circumstances under which someone has died or been abused potentially involve the responsibility of the State (*Oneryildiz v Turkey* [2004-XII 48938/99]).

15 The ECtHR has also begun to focus on restitution as a necessary remedy that the State must provide where it remains possible to restore the applicant's prior situation. In *Papamichalopoulos v Greece (Article 50)* (Series A No 330-B), the Court expressed its opinion that the ECHR imposes a duty on each State to do more than compensate the victim. A breach 'imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach' (at para. 34 [1] ECHR). Each State can choose the manner of execution of the judgment, but '[i]f the nature of the breach allows of *restiutio in integrum*, it is for the respondent State to effect it' (ibidpara. 34 [2] ECHR). In *Assanidze v Georgia*, the Court determined that securing the release of a wrongfully detained individual was by its very nature the only appropriate remedy and the State must therefore secure the applicant's release at the earliest possible date.

16 In the Inter-American system, Art. 17 American Declaration of Rights and Duties of Man (1948) → *American Declaration of the Rights and Duties of Man (1948)* guarantees every person the right to resort to the courts to ensure respect for legal rights and to obtain protection from acts of authority that violate any fundamental constitutional rights. The → *American Convention on Human Rights (1969)* ('ACHR') goes further, entitling, in Art. 25, American Convention on Human Rights (1969), everyone to effective recourse for protection against acts that violate the fundamental rights recognized by the constitution 'or laws of the state concerned or by the Convention', even where the act is committed by persons acting in the course of their official duties. The States Parties are to ensure that the competent authorities enforce the remedies granted and, indeed, are obliged to respect and ensure the free and full exercise of all rights guaranteed by the convention (Art. 1 (1) ACHR). These obligations are linked to the fair trial provisions of Art. 8 ACHR, which require the State to provide a fair hearing before a competent, independent and impartial tribunal. Art. 10 ACHR further provides that every person has the right to be compensated

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

in accordance with the law in the event that he has been sentenced by a final judgment through a miscarriage of justice.

17 The IACtHR has stated that under the convention, States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25 ACHR), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8 (1) ACHR), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the convention to all persons subject to their jurisdiction (Art. 1 ACHR; → *Velásquez Rodríguez v Honduras Case [Preliminary Objections]*, para. 91; *Las Palmeras Case [Judgment]* Inter-American Court of Human Rights Series C No 90 [6 December 2001], para. 60; *Case of 19 Merchants v Colombia [Judgment]* Inter-American Court of Human Rights Series C No 109 [5 July 2005], para. 194; *Case of Serrano-Cruz Sisters v El Salvador [Preliminary Objections]* Inter-American Court of Human Rights Series C No 118 [23 November 2004], para. 194; *Moiwana Village v Suriname*, para. 142). The Court has also concluded that the obligation of convention parties to ensure rights generally requires that remedies include due diligence on the part of the State to prevent, investigate, and punish any violation of the rights recognized by the convention (*Velásquez Rodríguez v Honduras Case [Merits]*, para. 166).

18 The → *African Charter on Human and Peoples' Rights (1981)* ('AChHPR'), has several provisions on remedies. Art. 1 (1) AChHPR guarantees every individual the right to have his cause heard, including 'the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force'. In addition, Art. 21 AChHPR refers to 'the right to adequate compensation' in regard to 'the spoliation of resources of a dispossessed people'. Art. 26 AChHPR imposes a duty on States Parties to the charter to guarantee the independence of the courts and allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of rights and freedoms guaranteed by the charter. The → *African Commission on Human and Peoples' Rights (ACommHPR)* emphasizes the need for independence of the judiciary and the guarantees of a fair trial, calling attacks on the judiciary 'especially invidious, because while it is a violation of human rights in itself, it permits other violations of rights to go unredressed' (*Civil Liberties Organization v Nigeria* [African Commission on Human and People's Rights, March 1995] Comm No 129/94 para. 14).

D. The Competence of International Tribunals to Afford Remedies

19 A State that breaches its human rights obligations has the primary duty to afford redress to the victim of the violation. The role of international tribunals is subsidiary. Their involvement only becomes necessary and possible when the State has failed to afford the required relief. None of the permanent UN treaty or internal bodies has legal competence to order compensation or other remedies but the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, and other bodies that review individual complaints may make recommendations or express views to the State concerned. The recommendations sometimes call on the State to pay compensation or afford other remedies, but they do not specify amounts that may be due or other forms of redress.

20 Regional human rights bodies have the power to designate remedies that the State must afford to the victims of human rights violations. If it finds a violation of the ECHR, the ECtHR renders judgments in which it may afford 'just satisfaction' to the injured party, including compensation for both pecuniary and non-pecuniary damages. The ECtHR has repeatedly stated that applicants are not entitled to an award of just satisfaction, rather the Court has discretion to grant a remedy based on equitable considerations and the facts of

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

each case. Art. 41 ECHR empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate (*Assanidze v Georgia*). The court has awarded one or more of the following remedies in application of the convention: a declaration that the State had violated the applicant's rights; compensation for pecuniary losses; compensation for non-pecuniary harm; and costs and expenses.

21 The ECtHR has held on various occasions that it has no jurisdiction to make 'consequential orders' in the form of directions or recommendations to the State to remedy violations. It rejected requests, for example, that the State be required to refrain from corporal punishment of children or to take steps to prevent similar breaches in the future (see also → *Children, International Protection*). It also refused to insist that a State judged to have wrongfully expelled an alien, allow the victim to rejoin his family (see also → *Aliens, Expulsion and Deportation*). The practice is evolving, however. In *Broniowski v Poland [GC]*, the Court concluded that the violation was not an isolated incident, but 'originated in a widespread problem which resulted from a malfunctioning of Polish legislation and administrative practice and which has affected and remains capable of affecting a large number of persons' (at para. 189 [1]). The court decided to indicate the general measures the State should take at the national level to execute the judgment and redress all remaining claims. Only one month prior to the judgment, the Committee of Ministers adopted a resolution calling on the Court to identify the causes of systematic violations and to indicate the necessary remedial measures (Counsel of Europe [Committee of Ministers] Resolution on judgments revealing an underlying systemic problem [COE Strasbourg 12 May 2004] Res [2004] 3). The *Broniowski* judgment was the first to give effect to the committee's direction.

22 The IACtHR has consistently made use of the broad powers granted it by Art. 63 (1) ACHR. Art. 63 (1) ACHR provides that if the Court finds that there has been a violation, it shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated; rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied; and award fair compensation to the injured party. The Court has held that Art. 63 (1) ACHR constitutes a rule of → *customary international law* that enshrines one of the fundamental principles of contemporary international law on State responsibility (*Moiwana Village v Suriname)*. Thus, when an illicit act is imputed to the State, there immediately arises State responsibility for the breach of the international norm involved, together with the subsequent duty to make reparations and put an end to the consequences of said violation. The reparation of harm caused by the violation requires, whenever possible, full restitution (*restitutio in integrum*), which consists in restoring the situation that existed before the violation occurred. When this is not possible, the Court's task is to order the adoption of a series of measures that, in addition to guaranteeing respect for the rights violated, will ensure that the damage resulting from the infractions is repaired, by way, inter alia, of payment of an indemnity as compensation for the harm caused. All aspects of reparations (scope, nature, modalities, and designation of beneficiaries) are governed by international law.

23 The IACtHR has regularly ordered the State before it to take specific action to remedy a breach of the convention, as well as to pay compensation. The Court has been innovative in controlling all aspects of the awards, including setting up trust funds, appointing experts, designing non-monetary remedies, and maintaining cases open until the awarded remedies have been fully carried out.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

E. Assessment

24 Given the widespread recognition of the right to a remedy in law and practice, many consider it to be a norm of customary international law. Where States fail to provide the necessary remedies for human rights violations, international institutions are the forum of last resort. The authority of human rights tribunals to afford remedies is uncontested. Judicial bodies have inherent power to remedy breaches of law in cases within their jurisdiction. In addition, human rights treaties sometimes confer explicit competence to afford redress on the organs they create to hear cases.

25 International human rights law and practice on remedies is evolving with the need to ensure the → *rule of law* and promote compliance by States with their human rights obligations. International tribunals are also increasingly concerned with reducing their growing caseloads by emphasizing remedies at the national level. There is thus a new emphasis on eliminating systemic violations through changes in domestic laws, in addition to compensating the individual applicant who brings a case to an international tribunal. International tribunals are promoting and using innovative and specific non-monetary remedies, including requirements that the government acknowledge its responsibility and issue an apology, create a memorial to the victims, establish development or scholarship funds, build and operate medical clinics and schools, and provide medical treatment or other forms of rehabilitation. The notion of 'aggravated violations' recognized in the IACtHR and European courts is also having an impact on the nature of remedies and the quantum of compensation. Each decision contributes to the growing jurisprudence that guides States and assists in providing individualized justice to victims of human rights violations.

Select Bibliography

GH Thune 'The Right to an Effective Remedy in Domestic Law: Art. 13 of the European Convention on Human Rights' in D Gomien (ed), *Broadening the Frontiers of Human Rights. Essays in Honor of Asbjørn Eide* (Scandinavian University Press Oslo 1993) 79–95.

HC Kruger 'Reflections on Some Aspects of Just Satisfaction under the European Convention on Human Rights' in G Cohen-Jonathan, J-F Flauss, and P Lambert (eds), *Liber Amicorum Marc-Andre Eissen* (Bruylant Bruxelles 1995) 255–69.

J Pasqualucci 'Victim Reparations in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure, (1996) 18 MichJIntlL 1–58.

J McBride 'Access to Justice and Human Rights Treaties' (1998) 17 CivJustQ 235–71.

C Tomuschat 'Just Satisfaction under Art. 50 of the European Court of Human Rights' in P Mahoney and others (eds), *Protecting Human Rights: The European Perspective. Studies in Memory of Rolf Ryssdal* (Heymanns Köln 2000) 1409–30.

D Shelton *Remedies in International Human Rights Law* (2nd ed OUP Oxford 2004).

Select Documents

African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (Banjul Charter).

American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.

Assanidze v Georgia (ECtHR) Reports 2004-II 221.

Broniowski v Poland (ECtHR) Reports 2004-V 1.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.
Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, in force 3 September 1981) 1249 UNTS 13.
Convention on the Elimination of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.
Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) CETS No 5.
Council of Europe (Committee of Ministers) 'Recommendation No R(84) 15 of the Committee of Ministers to Member States Relating to Public Liability' (18 September 1984) (27 November 2006).
Hague Convention Respecting the Laws and Customs of Land Warfare (opened for signature 18 October 1907, entered into force 26 January 1910) (1908) 2 AJIL Supplement 90.
ILO Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991) (1989) 28 ILM 1382.
International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.
Moiwana Village v Suriname (Merits) Inter-American Court of Human Rights Series C No 124 (15 June 2005).
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3.
UN Commission on Human Rights 'Question of the Human Rights of All Persons Subject to Any Form of Detention or Imprisonment: Question of Enforced or Involuntary Disappearances, Report of the Working Group on Enforced or Involuntary Disappearances' (12 January 1998) UN Doc E/CN.4/1998/43.
'UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power' UNGA Res 40/34 (29 November 1985) UN Doc A/RES/40/34.
'UN Declaration on the Protection of All Persons from Enforced Disappearance' UNGA Res 47/133 (18 December 1992) UN Doc A/RES/47/133.
UNGA Res A/60/147 (16 December 2005) UN Doc A/RES/60/147.
'Universal Declaration of Human Rights' UNGA Res 217 (III) (10 December 1948) UN Doc A/RES/217 (III).
Velásquez Rodríguez v Honduras Case (Preliminary Exceptions) Inter-American Court of Human Rights Series C No 1 (26 June 1987).
Velásquez Rodríguez v Honduras (Merits) Inter-American Court of Human Rights Series C No 4 (29 July 1988).

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

CAMBRIDGE
UNIVERSITY PRESS

British Institute of International and Comparative Law

AMBITION AND DIFFERENTIATION IN THE 2015 PARIS AGREEMENT: INTERPRETATIVE POSSIBILITIES AND UNDERLYING POLITICS

Author(s): Lavanya Rajamani
Source: *The International and Comparative Law Quarterly*, Vol. 65, No. 2 (APRIL 2016), pp. 493-514
Published by: Cambridge University Press on behalf of the British Institute of International and Comparative Law
Stable URL: https://www.jstor.org/stable/24762361
Accessed: 18-03-2024 03:28 +00:00

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at https://about.jstor.org/terms

JSTOR

British Institute of International and Comparative Law, Cambridge University Press are collaborating with JSTOR to digitize, preserve and extend access to *The International and Comparative Law Quarterly*

This content downloaded from 122.150.168.67 on Mon, 18 Mar 2024 03:28:33 +00:00
All use subject to https://about.jstor.org/terms

AMBITION AND DIFFERENTIATION IN THE 2015 PARIS AGREEMENT: INTERPRETATIVE POSSIBILITIES AND UNDERLYING POLITICS

LAVANYA RAJAMANI*

Abstract The 2015 Paris Agreement represents a historic achievement in multilateral diplomacy. After years of deeply discordant negotiations, Parties harnessed the political will necessary to arrive at a climate change agreement that strikes a careful balance between ambition and differentiation. The Paris Agreement contains aspirational goals, binding obligations of conduct in relation to mitigation, a rigorous system of oversight, and a nuanced form of differentiation between developed and developing countries. This article will explore the key building blocks of the Paris Agreement—ambition and differentiation—with an eye to mining the text of the Agreement for its interpretative possibilities and underlying politics.

Keywords: climate change regime, Framework Convention on Climate Change (FCCC), global stocktake, nationally determined contributions, obligations of conduct, Paris Agreement, transparency.

I. INTRODUCTION

UN Secretary General Ban Ki-moon characterized the 2015 Paris Agreement, adopted after years of deeply contentious multilateral negotiations, as a 'monumental triumph'.[1] Indeed, it is—but not because it decisively resolves the climate crisis, it does not, but because the Paris Agreement represents a historic achievement in multilateral diplomacy. Negotiations rife with fundamental and seemingly irresolvable disagreements wound their way to a successful conclusion in Paris on 12 December 2015. These negotiations, driven by unprecedented political will,[2] were expected to reach an agreement. However the fact

* Professor, Centre for Policy Research, New Delhi, lavanya.rajamani@cprindia.org. I am grateful to Jacob Werksman and Harald Winkler who over the years have fundamentally shaped both the climate regime and my thinking. I am also grateful to Andrew Higham, Jutta Brunnée and Michael Zammit Cutajar for valuable feedback; to Jonathan Gil Harris for his grammatical insights on curious commas, vexing verbs and 'stray relative referential constructions' in the Paris Agreement; and, to Shibani Ghosh for her eternal good cheer, keen eye for detail and excellent assistance. I formed a part of the UNFCCC Secretariat core drafting and advisory team at the Paris negotiations, but the views expressed in this article are personal.

[1] 'COP21: UN chief hails new climate change agreement as "monumental triumph"' (UN News Centre, 12 December 2015) <http://www.un.org/apps/news/story.asp?NewsID=52802#.Vrh45fl96Uk>.

[2] 150 Heads of State and Government attended the leaders event, see 'Leaders Event and High Level Segment' (Paris COP Information Hub) <http://newsroom.unfccc.int/cop21parisinformationhub/cop-21cmp-11-information-hub-leaders-and-high-level-segment/>.

[*ICLQ* vol 65, April 2016 pp 493–514] doi:10.1017/S0020589316000130

This content downloaded from 122.150.168.67 on Mon, 18 Mar 2024 03:28:33 +00:00
All use subject to https://about.jstor.org/terms

that they reached a finely balanced and highly ambitious agreement, despite the many criss-crossing red lines of Parties, is a testament to the powers of multilateral diplomacy.

In the years leading up to Paris, an understanding emerged on the critical relationship between the ambition of global efforts to lower greenhouse gas (GHG) emissions, differentiation between developed and developing countries, and mobilization of the financial resources needed to support climate change efforts. The greater the overall ambition, the greater the need for differentiation in efforts between developed and developing countries, as well as for increased financial resources to support these ambitious efforts. Developed countries—scarred by the Kyoto Protocol that obliged them alone to take on absolute emission reduction targets[3]—were fiercely resistant to another differentiated climate agreement. They were also reluctant, with their faltering economies, to finance global efforts to combat climate change. Developing countries, for their part, were loath to relinquish the differential treatment that had benefitted them thus far, and to assume a share of the financial burden for lowering emissions. Something had to give. Ambition, it was assumed.

The resulting Paris Agreement, however, is ambitious, containing aspirational goals, binding obligations of conduct in relation to mitigation, a rigorous system of oversight, and a nuanced form of differentiation between developed and developing countries. While it may not have satisfied those who sought to replicate the 1992 Framework Convention on Climate Change[4] or those who believed this agreement alone would halt global climate change, the Paris Agreement represents the most ambitious outcome possible in a deeply discordant political context. And, it became possible because it struck a fine balance between ambition and differentiation. This article will explore these key building blocks of the Paris Agreement—ambition and differentiation—with an eye to mining the text of the Agreement for its interpretative possibilities and underlying politics.

II. THE ROAD TO PARIS

The international climate change regime is comprised principally of the 1992 Framework Convention on Climate Change, the 1997 Kyoto Protocol and the decisions of Parties under these instruments. Although these instruments are important first steps towards addressing climate change and its impacts, they are widely regarded as inadequate, as well as inadequately implemented. At the Durban Conference in 2011, Parties launched a process, known as the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP), to negotiate a new climate agreement by 2015 that would come into effect from 2020.[5] This agreement would be expected to govern, regulate and incentivize the next generation of climate actions.

The Durban Platform provided limited guidance on the form and content of the 2015 Agreement.[6] Primarily, it should take the form of a 'Protocol, another legal instrument or

[3] Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 10 December 1997, entered into force 16 February 2005) FCCC/CP/1997/7/Add.1 (Kyoto Protocol) art 3.

[4] United Nations Framework Convention on Climate Change (adopted 29 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (FCCC).

[5] UNFCCC, 'Decision 1/CP.17 Establishment of an Ad Hoc Working Group on a Durban Platform for Enhanced Action, 2011' (15 March 2012) FCCC/CP/2011/9/Add.1 (Durban Platform).

[6] L Rajamani, 'The Durban Platform for Enhanced Action and the Future of the Climate Regime' (2012) 61(2) ICLQ 501; and see also, D Bodansky, 'The Durban Platform Negotiations:

This content downloaded from 122.150.168.67 on Mon, 18 Mar 2024 03:28:33 +00:00
All use subject to https://about.jstor.org/terms

agreed outcome with legal force',[7] be agreed 'under the Convention' and 'applicable to all'.[8] Each of these terms is a work of art and has been explored elsewhere.[9] Suffice it to say, disagreements emerged over these terms and the extent of their influence on the 2015 agreement. The Durban Platform also indicated the coverage of the 2015 agreement —'inter alia, mitigation, adaptation, finance, technology development and transfer, transparency of action and support, and capacity-building'.[10] These came to be characterized as the Durban 'pillars'.

At the Warsaw Conference in 2013, Parties were invited to prepare and submit 'intended nationally determined contributions' in 2015,[11] marking a key moment in the negotiations. Until then, an architectural battle had been raging between those favoring a Kyoto-style top-down prescriptive agreement and those favouring a Copenhagen-style bottom-up facilitative agreement. The Warsaw decision firmly posits the bottom-up approach as the starting point. The framing of national contributions—their scope, coverage, stringency, and whether they will be conditional —at least in the first instance, is left solely to the discretion of nations. At the Warsaw Conference, the ADP was also mandated to 'identify … the information that Parties will provide when putting forward their contributions'.[12] There was general agreement that these contributions would need to be accompanied by information sufficient to generate clarity about the nature, type and stringency of the contributions.

The Lima Conference in 2014, however, could only provide tentative guidance on the information that Parties were to put forward with their nationally determined contributions.[13] The Lima decision listed, in a non-prescriptive manner, the types of information to be provided by Parties while communicating their contributions. This included information relating to the base year, time frames, scope and coverage, assumptions and methodologies, and information on how a state considers its contribution to be 'fair and ambitious, in light of its national circumstances, and how it contributes towards achieving the objective of the Convention' in Article 2.[14] The Lima decision requested the FCCC Secretariat to prepare a 'synthesis report on the aggregate effect of the intended nationally determined contributions'.[15]

The Lima Conference also produced the 'elements of a draft negotiating text' for the 2015 agreement.[16] Parties built on this text and adopted the Geneva Negotiating Text in February 2015.[17] This text and a series of 'non-papers' prepared by the ADP Co-Chairs provided the basis for negotiations in 2015.[18] In addition, Parties began to submit their

Goals and Options' (Harvard Project on Climate Agreements, Massachusetts July 2012) <http://belfercenter.ksg.harvard.edu/files/bodansky_durban2_vp.pdf>.

[7] Durban Platform (n 5) para 2. [8] ibid.

[9] L Rajamani, 'The Devilish Details: Key Legal Issues in the 2015 Climate Negotiations' (2015) 78(5) MLR 826. [10] Durban Platform (n 5) para 5.

[11] UNFCCC, 'Decision 1/CP.19 Further Advancing the Durban Platform' (31 January 2014) FCCC/CP/2013/10/Add.1 (Warsaw Decision) para 2(b). [12] ibid, para 2(c).

[13] UNFCCC, 'Decision 1/CP.20 Lima Call for Climate Action' (2 February 2015) FCCC/CP/2014/10/Add.1 (Lima Call for Climate Action) para 11. [14] ibid, para 14.

[15] ibid, para 16. [16] ibid, Annex: 'Elements for a draft negotiating text'.

[17] UNFCCC, Ad Hoc Working Group on the Durban Platform for Enhanced Action, Second session, part eight, Geneva (8–13 February 2015) Agenda item 3: Implementation of all the elements of decision 1/CP.17 Negotiating text (25 February 2015) FCCC/ADP/2015/1 (Geneva Negotiating Text).

[18] See eg Ad Hoc Working Group on the Durban Platform for Enhanced Action, 'Non-paper: Note by the Co-Chairs' (5 October 2015) ADP.2015.8.InformalNote; and Ad Hoc Working Group

This content downloaded from 122.150.168.67 on Mon, 18 Mar 2024 03:28:33 +00:00
All use subject to https://about.jstor.org/terms

intended nationally determined contributions. A total of 119 contributions from 147 Parties covering 86 per cent of global emissions were submitted and considered in the Secretariat's Synthesis Report produced on 30 October 2015.[19] A further 14 contributions have been submitted since.

Parties arrived in Paris armed with a 54-page informal note covering the full breadth of issues and range of Parties' proposals.[20] Two weeks of late nights and frenetic negotiations later, and with skilled leadership from the French, Parties reached the historic 2015 Paris Agreement.

III. AMBITION: GOALS, OBLIGATIONS AND OVERSIGHT

The Paris Agreement is ambitious in several respects. It sets an ambitious 'direction of travel' for the climate regime and complements this with extensive obligations, including binding obligations of conduct in relation to mitigation contributions for Parties. It also establishes a rigorous and binding regime of oversight.

A. Ambitious Goals

The Paris Agreement resolves to hold the increase in global average temperature to 'well below 2°C' above pre-industrial levels, and to pursue efforts towards a 1.5°C temperature limit.[21] This was a key demand of the small island States and least developed countries—for them even a 'well below 2°C' temperature increase poses an existential threat. The world is not currently on a pathway to 1.5°C, far from it. Such a pathway would dramatically shrink the remaining carbon space, with troubling implications for countries like India that have yet to lift the vast majority of their citizens from the scourge of poverty.[22] Nevertheless, the 'well below 2°C' target and aspirational 1.5°C goal sets an ambitious direction of travel for the climate regime. It also signals solidarity with the small island States on the frontlines of climate impacts.

This ambitious long-term temperature goal is to be achieved, inter alia, through global peaking of GHG emissions as soon as possible, and rapid reductions thereafter 'so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of GHGs in the second half of the century'.[23] Although Parties had proposed quantitative global mitigation goals such as those identifying specific peaking dates or percentage reductions from 2010 levels,[24] in the end only this qualitative goal that built on FCCC

on the Durban Platform for Enhanced Action, 'Non-paper on elements for a draft negotiating text: Updated non-paper on Parties' views and proposals' (11 November 2014) ADP.2014.11.NonPaper.

[19] See UNFCCC, Synthesis report on the aggregate effect of the intended nationally determined contributions: Note by the secretariat (30 October 2015) FCCC/CP/2015/7. 'INDCs as communicated by Parties' <http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx>.

[20] Ad Hoc Working Group on the Durban Platform for Enhanced Action, Draft agreement and draft decision on workstreams 1 and 2 of the Ad Hoc Working Group on the Durban Platform for Enhanced Action Work of the ADP contact group (6 November 2015, reissued on 11 November 2015) ADP.2015.11. InformalNote.

[21] UNFCCC, 'Decision 1/CP.21 Adoption of the Paris Agreement' (29 January 2016) FCCC/CP/2015/10/Add.1, Annex (Paris Agreement) art 2(1).

[22] See G Ananthakrishnan, '1.5°C target is a tall order', *The Hindu*, 9 December 2015.

[23] Paris Agreement (n 21) art 4(1).

[24] See Informal note (n 20) art 3.

This content downloaded from 122.150.168.67 on Mon, 18 Mar 2024 03:28:33 +00:00
All use subject to https://about.jstor.org/terms

language and tipped a hat to the 'net zero' concept proved possible. The net zero GHG emissions concept requires anthropogenic GHG emissions to be reduced as far as possible with the remainder made up through enhanced removals of GHGs.[25] In addition, Parties are to 'strive to formulate and implement' long-term low GHG emission development strategies,[26] as these would play a critical role in shifting development trajectories and investment patterns towards meeting the long-term temperature goal.

The extent to which Parties are able to effectively embark on a pathway to meeting the long-term temperature goal will determine the extent of adaptation Parties will need to engage in. The Paris Agreement thus adopts a qualitative 'global goal on adaptation' to enhance adaptive capacity, strengthen resilience and reduce vulnerability to climate change.[27] The Africa Group had proposed a quantifiable goal that would assess adaptation impacts and costs flowing from the agreed temperature goal.[28] Although the notion of a quantifiable adaptation goal did not garner sufficient support, the Paris Agreement recognizes the critical interlinkages between the achievement of long-term goals, including in relation to temperature, and efforts related to mitigation, adaptation and means of implementation.[29]

B. Extensive Obligations

In order to meet the long-term temperature goal, Parties are subject to binding obligations of conduct in relation to national mitigation contributions.[30] The most significant of these is contained in Article 4(2), which reads: 'Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.'

There are many treasures to be mined in this carefully negotiated text. First, unlike the majority of provisions in the Paris Agreement that apply to 'Parties',[31] this provision applies to 'each Party', thus creating individual obligations for Parties. Second, this provision, like selective provisions in the Paris Agreement,[32] uses the imperative 'shall' both in relation to preparing, communicating and maintaining national contributions, as well as pursuing domestic measures. Third, while these are binding obligations, they are obligations of conduct rather than result. The term 'intends to

[25] See, K Levin, J Morgan and J Song, 'Insider: Understanding the Paris Agreement's Long-term Goal to Limit Global Warming' (World Resources Institution, 15 December 2015) <http://www.wri.org/blog/2015/12/insider-understanding-paris-agreement%E2%80%99s-long-term-goal-limit-global-warming>.

[26] Paris Agreement (n 21) art 4(19).

[27] ibid, art 7(1).

[28] See Submission by Swaziland on behalf of the African Group on adaptation in the 2015 Agreement (8 October 2013) <http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_african_group_workstream_1_adaptation_20131008.pdf>.

[29] Paris Agreement (n 21) art 14.

[30] See contra, R Falk, '"Voluntary" International Law and the Paris Agreement' (16 January 2016) <https://richardfalk.wordpress.com/2016/01/16/voluntary-international-law-and-the-paris-agreement/>.

[31] Paris Agreement (n 21) arts 3, 4(1), 4(2), 4(8), 4(13), 4(15), 4(16), 4(19) 5(1), 5(2), 6(1), 6(3), 6(8), 7(2), 7(4), 7(5), 7(6), 7(7), 8(1), 8(3), 9(2), 10(1), 10(2), 11(4), 12, and 14(4).

[32] ibid, arts 4(2), 4(5), 4(8), 4(9), 4(13), 4(15), 4(16), 4(17), 7(9), 7(13), 9(1), 9(7), 10(2), 10(6), 11(4), 12, 13(7), 13(9), 13(11), 13(13) and 13(14).

This content downloaded from 122.150.168.67 on Mon, 18 Mar 2024 03:28:33 +00:00
All use subject to https://about.jstor.org/terms

achieve' in the first sentence establishes a good faith expectation that Parties intend to achieve their contributions, but stops short of requiring them to do so. The second clause in the second sentence, 'with the aim of achieving the objectives of such contributions', performs a similar function. It requires Parties to aim at achieving the objectives of their contributions.[33]

Parties thus have binding obligations of conduct to prepare, communicate and maintain contributions, as well as pursue domestic measures. There is also a good faith expectation that Parties intend to and will aim to achieve the objectives of their contributions. In the lead-up to Paris many Parties, including the European Union (EU) and small island States, had argued that Parties should be required to implement and/or achieve their contributions, thus imposing an obligation of result on them. This was strenuously opposed by the US, China and India, among others, who did not wish to subject themselves to legally binding obligations of result. The Paris Agreement deferred to the latter in this respect, but ensured that Parties had binding obligations of conduct coupled with a good faith expectation of results. The good faith expectation of results is further underlined in provisions later in the Agreement that require each Party to provide the information necessary to track progress in implementing and achieving its nationally determined contribution,[34] and subject Parties to a 'facilitative, multilateral consideration of progress' with respect to such implementation and achievement.[35]

The term 'objectives' in this provision also merits scrutiny. The nationally determined contributions Parties have submitted thus far contain a range of objectives—some quantitative, such as absolute emission reduction targets,[36] and others qualitative, such as goals to adopt climate friendly paths.[37] Some contributions are conditional (as for instance on the provision of international support),[38] while others are unconditional.[39] In the circumstances, an obligation of result, had one existed, may not lend itself to enforcement.

The nationally determined contributions referred to in Article 4(2) are to be recorded in a public registry maintained by the Secretariat.[40] The US, Canada and New Zealand, among others, favoured this approach, arguing that housing contributions outside the treaty would enable speedy and seamless updating of contributions. Others were concerned that if contributions were housed outside the treaty, Parties would enjoy excessive discretion in revising their contributions, potentially even downwards. The

[33] The comma ensures that the final clause modifies Parties who 'pursue' those measures rather than the measures themselves. Thus the 'with' functions not as a preposition qualifying 'measures' but as a conjunction qualifying 'pursue'.

[34] Paris Agreement (n 21) art 13(7)(b).

[35] ibid, art 13 (11).

[36] eg United States' Intended Nationally Determined Contribution (31 March 2015), all INDCs at <http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx>.

[37] India's Intended Nationally Determined Contribution (2 October 2015) 28–9. In addition to quantitative emissions intensity targets, India's INDC identifies qualitative objectives such as to 'propagate a healthy and sustainable way of living based on traditions and values of conservation and moderation'.

[38] Arguably India's. See India's INDC, ibid.

[39] eg Brazil's Intended Nationally Determined Contribution (28 September 2015) 2. It is worth noting that Parties considered the possibility of requiring all contributions to be unconditional. No agreement proved possible on this in Paris, but the Ad Hoc Working Group on the Paris Agreement (APA) has been tasked with developing further guidance on 'features' of nationally determined contributions for consideration and adoption by the CMA. See Decision 1/CP.21 (n 21) para 26.

[40] ibid, art 4(12).

This content downloaded from 122.150.168.67 on Mon, 18 Mar 2024 03:28:33 +00:00
All use subject to https://about.jstor.org/terms

Paris Agreement, however, provides for the development of modalities and procedures for the operation and use of the public registry.[41] These modalities and procedures will presumably circumscribe the discretion Parties have. The Agreement also permits Parties to adjust their contributions, but only with a view to enhancing their level of ambition.[42] In any case, notwithstanding the fact that contributions are housed outside the instrument, Article 4(2) implicitly signals that national contributions are an integral part of the Paris Agreement.

In addition to the binding obligation to prepare, communicate and maintain contributions as well as to take domestic measures, Parties are subject to further obligations of conduct. Parties are required to communicate their contributions every five years.[43] While communicating their nationally determined contributions, Parties are required to provide the information necessary for clarity, transparency and understanding.[44] These provisions are phrased in mandatory terms ('shall'), and thus constitute binding obligations for Parties. These provisions also oblige Parties to comply with decisions to be taken by the supreme decision-making body for the new agreement, known as the Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement (CMA). The Paris Agreement requires Parties to communicate contributions every five years[45] and provide information necessary for their clarity, transparency and understanding[46] in accordance with decision 1/CP.21[47] and 'relevant decisions' of the CMA.[48] It could be argued that the Paris Agreement by incorporating these decisions makes them binding per se,[49] or it may be possible to read the Paris Agreement as having authorized the CMA to engage in binding law-making. In either case Parties are obliged to comply with the relevant decisions. It is worth noting that the 'relevant decisions' may provide Parties with discretion. In relation to information, for instance, decision 1/CP.21 agrees that Parties 'may include, as appropriate, inter alia' several listed pieces of information.[50]

The Paris Agreement also requires Parties to account for their nationally determined contributions in accordance with 'guidance' adopted by the CMA.[51] Although the Agreement requires Parties to do so in mandatory terms, the use of the word 'guidance' may militate against an argument that the decision containing the guidance is intended to bind Parties. Much will depend on the terms—mandatory or discretionary—in which the decision is drafted.

Multilateral environmental agreements do not typically permit their supreme bodies, often referred to as the Conference of Parties (COP) to make legally binding decisions.

[41] Decision 1/CP.21 (n 21) para 29.

[42] Paris Agreement (n 21) art 4(11). [43] ibid, art 4(9). [44] ibid, art 4(8).

[45] ibid, art 4(9). [46] ibid, art 4(8). [47] This is the decision accompanying the Paris Agreement.

[48] These decisions are to be negotiated in the next few years and adopted after the Paris Agreement enters into force.

[49] See eg for a similar provision, Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted on 4 August 1995, entered into force 11 December 2001) A/CONF.164/37, art 10(c).

[50] Decision 1/CP.21 (n 21) para 27.

[51] Paris Agreement (n 21) art 4(13). See also Decision 1/CP.21 (n 21) paras 31 and 32. It is worth noting that the guidance on accounting applies only to second and subsequent contributions, although Parties could choose to apply it before.

This content downloaded from 122.150.168.67 on Mon, 18 Mar 2024 03:28:33 +00:00
All use subject to https://about.jstor.org/terms

The legal status of COP decisions[52] depends on their enabling clause,[53] the language and content of the decisions, and Parties' behaviour and legal expectations. All of these are typically prone to varying interpretations. From a formal legal perspective COP decisions are not, absent explicit authorization in the treaty, legally binding.[54] Neither the FCCC nor the Kyoto Protocol explicitly authorize binding law-making by the COP. The FCCC requires Parties to use 'comparable methodologies' to be agreed upon by the COP.[55] The Kyoto Protocol requires Parties to use 'guidelines' to be adopted by the Meeting of the Parties.[56] Both these provisions could be read to provide implied authority to the COP to engage in binding law-making, and the decisions, should they be phrased in mandatory terms, could be binding.

The fact that the Paris Agreement provides for potentially binding law-making in relation to five-yearly communication, provision of information and accounting is reflective of the fact that these rules of the game are crucial elements of the Paris package for some Parties, in particular the EU. It was not possible, however, to finalize them in Paris. These provisions permit Parties to continue the law-making exercise. The strength of these provisions, as well as the transparency framework, discussed below, can be attributed to the concerted efforts of an informal group of key negotiators from developed and developing countries, including South Africa, the EU, the US, Switzerland, New Zealand, Australia and others, as well as the Singaporean diplomat who facilitated the formal negotiations. This informal group that came to be called 'Friends of Rules' formed after Lima when they realized that the rules of the game, of profound importance to the integrity of the agreement, were getting short shrift in a process focused primarily on the headline political issues.

In addition to this array of obligations, the Paris Agreement sets a firm expectation that for every five-year cycle Parties must put forward contributions more ambitious than their last. The relevant provision reads: '[e]ach Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution, and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in light of different national circumstances'.[57]

This provision applies to 'Each Party' not to 'Parties' in general. The use of the auxiliary verb 'will' signals a strong expectation, albeit not a mandatory obligation, that each Party will undertake more ambitious actions over time. This notion, that finds reflection in the Lima decision,[58] had come to be characterized in the

[52] COP decision may be considered as a 'subsequent agreement between the Parties regarding the interpretation of the treaty or the application of its provisions', Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31 (3)(a). See *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* (Judgment) [2014] ICJ Rep 226, 248 (para 46).

[53] The enabling clause in the relevant treaty may authorize a COP decision to be binding as in the case of Article 2(9), Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989) 1522 UNTS 3, or explicitly require further consent for it to be binding, as for example in the case of art 18, Kyoto Protocol, see J Brunnée, 'COPing with Consent: Law-Making under Multilateral Environmental Agreements' (2002) 15 LJIL 1, 24.

[54] See, Brunnée (n 52) 32.

[55] FCCC (n 4) art 4(1).

[56] Art 7(1) read with art 7(4), Kyoto Protocol, and Decision 15/CMP.1. UNFCCC, 'Decision 15/CMP 1 Guidelines for the preparation of the information required under Article 7 of the Kyoto Protocol' (30 March 2006) FCCC/KP/CMP/2005/8/Add.2.

[57] Paris Agreement (n 21) art 4(3).

[58] Lima Call for Climate Action (n 13) para 10.

This content downloaded from 122.150.168.67 on Mon, 18 Mar 2024 03:28:33 +00:00
All use subject to https://about.jstor.org/terms

negotiations as 'no-backsliding'. Many developing countries advocated it as a way to ensure that developed countries did not take on commitments less rigorous than their Kyoto commitments. It also formed the basis for Brazil's 'concentric differentiation' approach that envisioned gradual progression towards more ambitious type and scale of commitments over time for all Parties.[59]

It is worth noting that the provision still leaves to national determination what Parties contributions will be and how these will reflect their 'highest possible ambition' and 'common but differentiated responsibilities and respective capabilities, in light of different national circumstances'. Progression could be reflected in several ways. It could be demonstrated through more stringent numerical commitments of the same form, ie a decrease in emissions intensity from a base year over a previous intensity target, or an increase in absolute reductions over an earlier absolute reduction target. It could also be reflected in the form of commitments. For instance, Parties that have currently undertaken sectoral measures could be expected to take on economy-wide emissions intensity or business as usual (BAU) deviation targets, those that currently have economy-wide emissions intensity or BAU deviation targets could be expected to take on economy-wide absolute emissions reduction targets. The provision on progression is not prescriptive in relation to how progression (ie in form or rigour) is determined, and it is ambiguous on who determines progression, thus implicitly leaving progression to self-determination.

In addition to the requirement that Parties are to undertake more ambitious mitigation contributions over time, the Paris Agreement provides that '[t]he efforts of all Parties will represent a progression over time'.[60] This cross-cutting provision extends the progression requirement beyond mitigation to areas such as adaptation and support. This provision is distinct from the mitigation progression provision in two respects. First, it applies to 'all Parties' not 'each Party' indicating that it could be interpreted as a collective rather than individual requirement. Second, its uses the term 'efforts' rather than 'nationally determined contributions'. This is because the term 'efforts' captures a range of actions that includes mitigation contributions,[61] adaptation planning and implementation,[62] and provision of financial resources to developing countries.[63] Both these provisions, however, are similar in that they use the auxiliary verb 'will' and at a minimum set strong expectations of more ambitious actions over time. Indeed, given the negotiating context, the rigorous system of oversight and the expectation of good faith implementation, Parties will be constrained to comply with these provisions.

Whether they place collective or individual expectations on Parties, and even if progression is self-determined, together these provisions bear tremendous significance, as they are designed to ensure that the regime as a whole is moving towards ever more ambitious and rigorous actions from Parties—that there is a 'direction of travel' for the regime, as it were. These provisions are also designed to ensure there will be continuing differentiation in the near future, since developed and developing countries, given the current balance of responsibilities in the FCCC and Kyoto Protocol, are at different starting points.

[59] See 'Views of Brazil on the Elements of a New Agreement under the Convention Applicable to All Parties' (6 November 2014) <http://www4.unfccc.int/submissions/Lists/OSPSubmissionUpload/73_99_130602104651393682-BRAZIL%20ADP%20Elements.pdf>.

[60] Paris Agreement (n 21) art 3.

[61] ibid, art 4(2).

[62] ibid, art 7(9).

[63] ibid, art 9(1).

This content downloaded from 122.150.168.67 on Mon, 18 Mar 2024 03:28:33 +00:00
All use subject to https://about.jstor.org/terms

The Paris Agreement also places requirements on Parties in relation to adaptation, albeit softer ones peppered with phrases like 'as appropriate' that permit discretion. Parties are obliged to engage in adaptation planning and implementation of adaptation actions ('Each Party shall'), and nudged to ('Parties should') submit and update adaptation communications,[64] strengthen cooperation on adaptation,[65] and enhance understanding, action and support with respect to loss and damage.[66]

C. Rigorous Oversight

The Paris Agreement establishes a rigorous system of oversight to ensure effective implementation of the many requirements it places on Parties. This system of oversight is vital to the conceptual apparatus of the Agreement. In the lead- up to the Paris Conference, common ground emerged amongst Parties that the Paris Agreement, unlike the Kyoto Protocol, should reflect a hybrid architecture combining 'bottom up' nationally determined contributions with 'top down' elements such as rules on transparency. Battle lines were drawn, however, on how prescriptive the top-down elements should be. Although some Parties were keen to retain as much autonomy as possible, others fearing that boundless self-determination would be exercised in self-serving ways sought a more prescriptive regime. The more autonomy Parties enjoy, they believed, the less certain it is that the regime will meet its long-term temperature goal. The Paris Agreement strikes a balance between these competing demands—it preserves autonomy for States in the determination of their contributions but strengthens oversight of these contributions through a robust transparency system, a global stocktake process, and a compliance mechanism. In so doing, it circumscribes the self-serving nature of self-determination and generates normative expectations.

1. Transparency

The Paris Agreement creates a robust 'transparency framework for action and support' that places extensive informational demands on all Parties,[67] and subjects information on mitigation and finance to close scrutiny.[68] This transparency framework, unlike the existing arrangements,[69] is a framework applicable to all countries albeit with 'built-in flexibility' tailored to Parties' differing capacities.[70] In the lead-up to Paris, and until the end of the conference, many developing Parties, in particular the Like Minded Developing Countries (LMDCs),[71] argued for a bifurcated system that placed differing transparency requirements on developed and developing countries. The Umbrella Group and the EU eventually prevailed on the LMDCs, and the Paris Agreement contains a framework applicable to all.

[64] ibid, art 7(10) read with art 13(8). [65] ibid, art 7(7). [66] ibid, art 8(3).
[67] ibid, art 13. [68] ibid, art 13(11).
[69] Communication of Information under FCCC (n 4) Article 12, and UNFCCC, 'Decision 1/CP.16 The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention' (15 March 2011) FCCC/CP/2010/7/Add.1 (Cancun Agreements (LCA)) paras 40 and 44 (Annex I Parties) and paras 60 and 63 (non-Annex I Parties). [70] Paris Agreement (n 21) art 13(1) and 13(2).
[71] The LMDCs are a coalition of developing countries comprising Bolivia, China, Cuba, Dominica, Ecuador, Egypt, El Salvador, India, Iran, Iraq, Malaysia, Mali, Nicaragua, Philippines, Saudi Arabia, Sri Lanka, Sudan and Venezuela.

This content downloaded from 122.150.168.67 on Mon, 18 Mar 2024 03:28:33 +00:00
All use subject to https://about.jstor.org/terms

The purpose of the transparency framework is to ensure clarity and tracking of progress towards achieving Parties' nationally determined contributions and adaptation actions,[72] as well as to provide clarity on support provided and received by Parties.[73] Towards this end, all Parties are required biennially[74] to provide: a national inventory report of GHG emissions and removals;[75] information necessary to track progress in implementing and achieving mitigation contributions;[76] and information related to climate impacts and adaptation.[77] Further, developed countries are required to provide information on financial, technology and capacity building support they provide to developing countries,[78] and developing countries are to provide information on the support they need and receive.[79] It is worth noting that there is a hierarchy in the legal character of the informational requirements placed on Parties. Informational requirements in relation to mitigation are mandatory individual obligations applicable to all ('each Party shall'). Informational requirements in relation to finance are mandatory collective obligations for developed countries ('developed country Parties shall') and recommendations for developing countries ('developing country Parties should'). Informational requirements in relation to adaptation are recommendations ('each Party should'), and allow Parties discretion ('as appropriate').

The information submitted by all Parties in relation to mitigation and by developed country Parties in relation to the provision of support will be subject to a technical expert review.[80] This review will consider the support provided to Parties, the implementation of their contributions, and the consistency of the information they provide with common modalities, procedures and guidelines for transparency of action and support.[81] In addition each Party is expected to participate in a 'facilitative, multilateral consideration of progress' with respect to its efforts in relation to finance, and the implementation and achievement of its mitigation contributions.[82] Both expert reviews[83] and multilateral assessments[84] build on elements of the existing transparency arrangements. It is unclear at this point, however, how these processes will be conducted, who will conduct them, what its outputs will be, and how these outputs will feed into the global stocktake. The modalities, procedures and guidelines, elaborating on these processes that will supersede the existing arrangements, are to be developed by 2018 and applied after the Paris Agreement enters into force.[85]

2. *Global Stocktake*

The transparency framework is complemented by a 'global stocktake' every five years to assess collective progress towards long-term goals.[86] The global stocktake is crucial to the system of oversight. In its absence it would be impossible to gauge if national efforts add up to what is necessary to limit temperature increase to 2°C. It will also be difficult to

[72] Paris Agreement (n 21) art 13(5).
[73] ibid, art 13(6).
[74] Decision 1/CP.21 (n 21) para 90.
[75] Paris Agreement (n 21) art 13(7)(a).
[76] ibid, art 13(7)(b).
[77] ibid, art 13(8).
[78] ibid, art 13(9).
[79] ibid, art 13(10).
[80] ibid, art 13(11), read with Decision 1/CP.21 (n 21) paras 97 and 98.
[81] ibid, art 13(12).
[82] ibid, art 13(11).
[83] Kyoto Protocol (n 3) art 8.
[84] Cancun Agreements (LCA) (n 68) paras 44 and 63.
[85] Paris Agreement (n 21) art 13(12).
[86] ibid, art14.

This content downloaded from 122.150.168.67 on Mon, 18 Mar 2024 03:28:33 +00:00
All use subject to https://about.jstor.org/terms

assess if States are contributing as much as they should given their responsibilities and capabilities.

The Paris Agreement provides broad guidance on the nature, purpose, tasks for and outcome of the stocktake, and leaves the mechanics to be finalized by Parties before entry into force.[87] The Paris Agreement envisions the stocktake as a 'comprehensive and facilitative'[88] exercise—thus reinforcing the notion that the Paris Agreement addresses not just mitigation but also adaptation and support, and that it is a facilitative rather than a prescriptive instrument. Further, the Agreement is expressively silent on whether the stocktake extends only to the implementation of Parties' current contributions or also to the ambition of proposed contributions; arguably it covers both.

The purpose of the stocktake is to 'assess the collective progress towards achieving the purpose of this Agreement and its long term goals'.[89] The 'purpose' of the Agreement is in Article 2, which includes the long-term temperature goal, and the context for implementation.[90] It is unclear what the 'long term goals' are. While mitigation[91] and adaptation[92] (albeit qualitative) goals have been identified in the Agreement, there are no clearly identifiable goals in relation to finance, technology and capacity-building. This introduces an element of uncertainty into the assessment of progress. Moreover, the stocktake is only authorized to consider 'collective' progress, thus insulating individual nations from any assessments of adequacy in relation to their actions.[93]

The agreement sets various tasks for the stocktake, as for instance reviewing the overall progress made in achieving the global goal on adaptation.[94] It also identifies initial inputs to the stocktake, including information provided by Parties on finance,[95] available information on technology development and transfer[96] and information generated through the transparency framework.[97] Others inputs will be identified in the years to come.[98]

The global stocktake is required to assess collective progress 'in the light of equity and the best available science'.[99] The inclusion of 'equity' was a negotiating coup for several developing countries, in particular the Africa Group, that had long championed the need to consider Parties' historical responsibilities, current capabilities and development needs in setting expectations for nationally determined contributions.[100] It is unclear at this point how equity, yet to be defined in the climate regime, will be understood and incorporated in the global stocktake process. Nevertheless, the inclusion of equity in the global stocktake leaves the door open for a dialogue on equitable burden sharing. Finally, the outcome of the stocktake is required to inform Parties in updating and enhancing their actions and support 'in a nationally determined manner'.[101] This is a

[87] Decision 1/CP.21 (n 21) paras 99–101.
[88] Paris Agreement (n 21) art 14(1).
[89] ibid.
[90] Art 2 is identified as the 'purpose' of the Agreement by art 3, ibid.
[91] ibid, art 4(1).
[92] ibid, art 7(1).
[93] The transparency system does not assess adequacy either.
[94] Paris Agreement (n 21) art 7(14)(d).
[95] ibid, art 9(6).
[96] ibid, art 10(6).
[97] ibid, art 13(5) and 13(6).
[98] Decision 1/CP.21 (n 21) para 99 identifying sources of input 'including but not limited to'.
[99] Paris Agreement (n 21) art 14(1).
[100] See, Submission by Swaziland on behalf of the African Group Under Workstream I of the ADP (8 October 2013) <https://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_african_group_workstream_1_20131008.pdf>.
[101] Paris Agreement (n 21) art 14(3).

This content downloaded from 122.150.168.67 on Mon, 18 Mar 2024 03:28:33 +00:00
All use subject to https://about.jstor.org/terms

carefully balanced provision. On the one hand, it links the outcome of the stocktake with the process of updating Parties' contributions,[102] thus generating strong expectations that Parties will enhance the ambition of their actions in line with the findings of the stocktake. On the other hand, it underscores the 'nationally determined' nature of contributions, thus addressing concerns over external ratchets for enhanced actions and loss of autonomy.

The first stocktake is set to take place in 2023,[103] once the mechanics of the stocktake have been worked out, and the Agreement has entered into force. There was a felt need for an earlier stocktake to guide Parties, especially those with contributions set to five-year time frames, in updating and revising their contributions. Parties agreed therefore to convene a 'facilitative dialogue' in 2018 to take stock of the collective efforts of Parties in relation to the long-term mitigation goal identified in the Agreement, and for this stocktake to inform the preparation of their nationally determined contributions.[104]

The global stocktake is cleverly designed to ensure both that it subtly constrains national determination in service of the long-term goals, and that it is palatable to all. Even to the LMDCs, for whom any assessment process (as it would necessarily impinge on sovereign autonomy) was an anathema. The global stocktake is a facilitative process. It assesses collective not individual progress. It assesses collective progress on mitigation as well as on support. It will consider not just science but also equity in determining adequacy of collective progress. And, finally, ratcheting of contributions as a result of the stocktake, if any, will be left to national determination.

3. *Compliance*

The Paris Agreement establishes a mechanism to facilitate implementation of and promote compliance with its provisions. The skeletal provision establishing this mechanism provides only minimal guidance on the nature of the compliance mechanism, leaving the modalities and procedures to be negotiated in the years to follow.[105] The relevant provision requires the mechanism to address both implementation of and compliance with the Agreement. This mechanism is to consist of an expert-based facilitative committee that is to function in a transparent, non-adversarial and non-punitive manner.[106] This guidance addresses concerns of those who feared—across the developed–developing country divide—that the Paris Agreement would recreate a Kyoto-like compliance committee with an enforcement branch and severe compliance consequences.

IV. DIFFERENTIATION: ARTICULATION AND OPERATIONALIZATION

The ambitious goals, extensive obligations and rigorous oversight of the Paris Agreement, if applied uniformly, would act as a straitjacket for most developing countries. The Paris Agreement therefore is firmly anchored in the principle of common but differentiated responsibilities and respective capabilities, albeit in the

[102] See also ibid, art 4(9).
[103] ibid, art 14(2).
[104] Decision 1/CP.21 (n 21) para 20.
[105] Paris Agreement (n 21) art 15(3), and Decision 1/CP.21 (n 21) paras 102 and 103.
[106] Paris Agreement (n 21) art 15(2).

This content downloaded from 122.150.168.67 on Mon, 18 Mar 2024 03:28:33 +00:00
All use subject to https://about.jstor.org/terms

light of different national circumstance. It also captures a nuanced form of differentiation in favour of developing countries, and extends financial, technological and capacity-building support to developing countries. It is this compromise on differentiation and support that untied the proverbial Gordian knot and cleared the way for the Paris Agreement to be adopted.

Prior to the Paris Conference, Parties had locked horns on three interrelated issues: the relationship of the 1992 Framework Convention on Climate Change, a deeply differentiated instrument, to the Paris Agreement 'applicable to all';[107] the articulation of the principle of common but differentiated responsibility and respective capabilities, a much cited and beloved principle for some, in the Paris Agreement; and the operationalization of this principle across the Durban pillars.

A. Relationship of the 2015 Paris Agreement to the 1992 Framework Convention on Climate Change

The 1992 Framework Convention on Climate Change is unabashedly favourable to developing countries—from the recognition in its preamble that the share of emissions from developing countries will grow to meet their social and development needs[108] to annex-based differentiation that exempts developing countries from emission reduction obligations.[109] Developed countries ensured in Durban that the Paris Agreement would be 'applicable to all',[110] while developing countries ensured that the Paris agreement would be 'under the Convention'.[111] Developed and developing countries were pitched against each other in Paris. While the former envisioned the Paris Agreement as containing a distinct vision, representing a paradigm shift from the FCCC, the latter were keen to ensure that the Paris Agreement flows from the FCCC, and is guided by and interpreted in the light of it. This disagreement rippled through negotiations on the entire text, but was in evidence in particular in the negotiations on the chapeau to the purpose of the agreement, which reads: '[t]his Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty'.[112]

Parties disagreed on whether the Paris Agreement should enhance the implementation of the Convention, as most developing countries argued it should, or just the objective of the Convention,[113] as most developed countries favoured. The former would engage the entirety of the Convention, including its conceptual architecture of which differentiation is such an important part. The latter would only engage the GHG stabilization objective of the Convention, thus implicitly permitting a different set of arrangements, including on differentiation, in service of the objective of the Convention. The final resolution, excerpted above, a carefully balanced compromise between China and the Umbrella Group,[114] is cloaked in ambiguity. The phrase 'in enhancing the implementation of

[107] Durban Platform (n 5) para 5.
[108] FCCC (n 4) preambular recital 3.
[109] See ibid, art 4 read with Annex I and II.
[110] Durban Platform (n 5) para 5.
[111] ibid. It is worth noting that until the final days of the Paris negotiations, China continued to urge Parties to title the 2015 Agreement, the 'Paris Agreement under the UN Framework Convention on Climate Change'.
[112] Paris Agreement (n 21) art 2(1) chapeau.
[113] FCCC (n 4) art 2.
[114] The Umbrella Group usually includes Australia, Canada, Japan, New Zealand, Kazakhstan, Norway, the Russian Federation, Ukraine and the US.

This content downloaded from 122.150.168.67 on Mon, 18 Mar 2024 03:28:33 +00:00
All use subject to https://about.jstor.org/terms

the Convention, including its objective' could be read as an acceptance of the developing country position that this Agreement *will enhance* the implementation of the Convention. This would permit the entirety of the Convention to be engaged in interpreting the provisions of the Paris Agreement. The phrase could also be read as a statement of fact that the Agreement, such as it is, *enhances* the implementation of the Convention. Thus limiting, by implication, the engagement of the entirety of the Convention in interpreting the Paris Agreement. In this reading, the Convention is engaged only in so far as it is specifically referred to in the Paris Agreement.[115]

The Paris Agreement, adopted pursuant to the Durban Platform,[116] is an agreement 'under the Convention'. It is a related legal instrument, as is the Kyoto Protocol. Some provisions of the Convention explicitly apply to related legal instruments.[117] In addition, the negotiating history and context to the term 'under the Convention' in the Durban Platform decision suggests that the principles of the Convention, in particular the principle of common but differentiated responsibilities and respective capabilities, apply to the Paris Agreement. Further, specific provisions of the Convention are engaged when the Paris Agreement so provides.[118] Beyond this, there is a general legal imperative to interpret agreements in good faith in accordance with their ordinary meaning,[119] in context,[120] and harmoniously in relation to legal instruments covering the same subject matter.[121] The ambiguous nature of many provisions in both the Paris Agreement and the FCCC will make it easier to achieve harmonious construction between them, and to avoid normative conflicts.

B. Articulating the CBDRRC Principle in the Paris Agreement

The principle of common but differentiated responsibilities and respective capabilities—the CBDRRC principle—finds expression in the FCCC, and is the basis of the burden-sharing arrangements crafted under the FCCC and its Kyoto Protocol. As it is considered the ideological inspiration for the contentious annex-based differentiation, every instance of its articulation in the Paris Agreement is a product of careful negotiation.

The Durban Platform that launched the negotiating process towards the 2015 agreement, unusually so for the time, contained no reference to common but differentiated responsibilities and respective capabilities. Developed countries had argued that references to 'common but differentiated responsibilities' must be qualified with a statement that this principle must be interpreted in the light of contemporary economic realities. Many developing countries, argued in response that this would be tantamount to amending the FCCC. The text was thus drafted such that this new agreement was to be 'under the Convention'[122] thereby implicitly engaging its principles, including the CBDRRC principle. The Doha and Warsaw decisions in 2012 and 2013 contained a general reference to 'principles' of the

[115] See eg Paris Agreement (n 21) arts 1, 4(14), 5, 7(7), 9(1), 9(8) and 9(10).
[116] ibid, preambular recital 2.
[117] FCCC (n 4) arts 2, 7(2) and 14(2).
[118] For instance the financial mechanism of the Convention serves as the financial mechanism of the Agreement, Paris Agreement (n 21) art 9(8).
[119] VCLT (n 51) art 31(1).
[120] ibid, art 31.
[121] International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (13 April 2006) A/CN.4/L.682, 25 (noting 'a strong presumption against normative conflict' in international law and that 'treaty interpretation is diplomacy, and it is the business of diplomacy to avoid or mitigate conflict'.).
[122] Durban Platform (n 5) para 2.

This content downloaded from 122.150.168.67 on Mon, 18 Mar 2024 03:28:33 +00:00
All use subject to https://about.jstor.org/terms

Convention,[123] but no specific reference to the CBDRRC principle. The Lima Call for Climate Action of 2014 contains an explicit reference to the CBDRRC principle, but it is qualified by the clause 'in light of different national circumstances'.[124] This qualification—which represents a compromise arrived at between the US and China[125]—arguably shifts the interpretation of the CBDRRC principle. The qualification of the principle by a reference to 'national circumstances' introduces a dynamic element to the interpretation of the principle. As national circumstances evolve, so too will the common but differentiated responsibilities of States. It is this version of the principle of common but differentiated responsibilities with the qualifier 'in light of different national circumstances' that features in the Paris Agreement.

The Paris Agreement contains references to the CBDRRC principle in a preambular recital,[126] and in provisions relating to the purpose of the agreement,[127] progression[128] and long-term low greenhouse gas development strategies.[129] The most significant of these references is Article 2 that sets the long-term temperature goal and frames the implementation of the entire agreement. It reads: '[t]his Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances'.[130] It grew evident in the lead-up to Paris that any reference to CBDRRC would include the Lima qualifier 'in light of different national circumstances', however, the battle over the extent to which the Paris Agreement would mainstream this principle was still being waged in Paris. Most developing countries, in particular the LMDCs and the Africa group were keen that equity and CBDRRC should form the context for implementing the Paris Agreement. They proposed mandatory language to this end ('shall be implemented on the basis of').[131] The Umbrella group and the EU were reluctant to introduce equity and CBDRRC, with its unwieldy 'annex' baggage, into an operational paragraph of the agreement. They also argued that the meaning and implications of these terms are uncertain, and it would not be appropriate to introduce a note of uncertainty in the implementation of the agreement. They favoured language recognizing that the agreement 'reflects' equity and CBDRRC.[132] This, however, would have been problematic for developing countries, as it would have implied that the particular balance of responsibilities captured in the Paris Agreement would henceforth be synonymous with CBDRRC. Since their preferred interpretation of CBDDRC is in line with the expression of CBDDRC in the Kyoto Protocol rather than in the Paris Agreement, such a provision would have narrowed the range of interpretative possibilities of CBDDRC. The compromise eventually struck was to generate an expectation that the agreement will

[123] See UNFCCC, 'Decision 1/CP.18 Agreed outcome pursuant to the Bali Action Plan' (28 February 2013) FCCC/CP/2012/8/Add.1, recital to Part I; and Warsaw Decision (n 11) preambular recital 9.

[124] Lima Call for Climate Action (n 13) para 3.

[125] See the White House, US-China Joint Announcement on Climate Change, Beijing, China, 12 November 2014 (Office of the Press Secretary, 11 November 2014) para 2.

[126] Paris Agreement (n 21) preambular recital 3.

[127] ibid, art 2(2).

[128] ibid, art 4(3).

[129] ibid, art 4(19).

[130] ibid, art 2(2).

[131] As reflected in Ad Hoc Working Group on the Durban Platform for Enhanced Action, Draft Paris Outcome: Revised draft conclusions proposed by the Co-Chairs (5 December 2015) FCCC/ADP/2015/L.6/Rev.1 .

[132] As reflected in the Non-paper of 5 October 2015 (n 18).

This content downloaded from 122.150.168.67 on Mon, 18 Mar 2024 03:28:33 +00:00
All use subject to https://about.jstor.org/terms

reflect equity and CBDRRC ('will be implemented to reflect'). This preserves the range of interpretative possibilities of CBDDRC for developing countries yet stops short of prescribing equity and CBDRRC in the implementation of the agreement.

It is worth noting that the CBDRRC principle in Article 2 of the Paris Agreement could arguably be interpreted as distinct from the Convention's CBDRRC principle, both because of the inclusion of the Lima qualifier, 'in light of different national circumstances' as well as the nature of differentiation in the Paris Agreement. To the extent that the Paris Agreement reflects an operationalization of the principle different to that in the Convention, it is arguable that the Paris Agreement actually contains a distinct rather than derivative version of the principle.

In addition to the CBDRRC principle, the Paris Agreement contains reassuring references to the related notions of equity,[133] sustainable development,[134] equitable access to sustainable development,[135] poverty eradication[136] and climate justice.[137] While some of these notions feature in the FCCC and others in COP decisions, they have arguably acquired a distinct character in the Paris Agreement. For instance, the references in the FCCC to poverty eradication recognize it either as a 'legitimate priority need'[138] or an 'overriding priorit[y]',[139] whereas in the Paris Agreement it is recognized merely as part of the 'context' for action.[140]

C. Operationalizing the CBDRRC principle in the Paris Agreement

The FCCC and the Kyoto Protocol operationalize the CBDRRC principle by requiring developed countries (alone), identified in its Annexes, to assume ambitious GHG mitigation targets. This form of differentiation has proven deeply controversial over the years, and the troubled waters the Kyoto Protocol has navigated in the last decade stand testimony to this. The Paris Agreement represents a step change from the FCCC and Kyoto in relation to differentiation. The Paris Agreement operationalizes the CBDRRC principle not by tailoring commitments to categories of Parties as the FCCC and the Kyoto Protocol do, but by tailoring differentiation to the specificities of each of the Durban pillars—mitigation, adaptation, finance, technology, capacity-building and transparency. In effect this has resulted in different forms of differentiation in different areas. It has also resulted, arguably, in transitioning differentiation from an ideological to a pragmatic basis.

1. Differentiation in Mitigation

The mitigation provisions of the Paris Agreement embrace a bounded self-differentiation model. The Warsaw decision invited parties to submit 'intended nationally determined contributions' in the context of the 2015 agreement.[141] In submitting these contributions, Parties were able to determine the scope of their contributions, their form, their rigour,

[133] Paris Agreement (n 21) preambular recital 3, arts 2(2), 4(1) and 14(1).
[134] ibid, preambular recital 8, arts 2(1), 4(1), 6, 7(1), 8(1) and 10(5).
[135] ibid, preambular recital 8.
[136] ibid, preambular recital 8, arts 2(1), 4(1) and 6(8).
[137] ibid, preambular recital 13.
[138] FCCC (n 4) preambular recital 21.
[139] ibid, art 4(7).
[140] See eg Paris Agreement (n 21) arts 2(1), 4(1) and 6(8).
[141] See Warsaw Decision (n 11) para 2(b).

This content downloaded from 122.150.168.67 on Mon, 18 Mar 2024 03:28:33 +00:00
All use subject to https://about.jstor.org/terms

and the information that will accompany them. In so far as Parties chose their own contributions and tailored these to their national circumstances, capacities and constraints, they differentiated themselves from every other nation. This form of differentiation has come to be characterized as self-differentiation. And, it is the starting point for differentiation in the mitigation section of the Paris Agreement.

First, it is worth noting that many of the provisions in the mitigation section are undifferentiated, in particular key provisions prescribing individual binding obligations of conduct for Parties.[142] Second, the provisions that incorporate differentiation are couched either in recommendatory terms[143] or phrased to set expectations rather than bind.[144] Even these cede to sovereign autonomy. For instance, in relation to the requirement placed on Parties that every successive mitigation contribution will represent a progression beyond their current contribution, as discussed above,[145] it is for Parties to determine what constitutes progression, and reflects its highest possible ambition and its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances. In relation to the requirement that all Parties should strive to formulate and communicate long-term low greenhouse gas emission development strategies,[146] it is for Parties to determine what these are to be, taking into account their common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.

There are, however, normative expectations attached to the flexibility afforded to Parties, which may function to discipline self-differentiation. Article 4(4), which seemingly endorses a Conventional form of differentiation, reads: 'Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances.'[147]

The use of the terms 'developed country Parties' and 'developing country Parties' and the notion of leadership is reminiscent of the Convention. These terms evoke the burden-sharing arrangements of the Convention. And, this provision sets strong normative expectations on Parties. However, it is neither intended to nor does it create any new obligations for Parties. It urges developed countries to continue to undertake absolute emission reduction targets, which they had undertaken under the Cancun Agreements, and have pledged in their intended nationally determined contributions. It urges developing countries to continue to enhance their mitigation efforts, which they have done in leaps and bounds in the last decade. It further encourages them to move over time towards economy-wide targets in the light of different national circumstances. Since mitigation contributions are nationally determined, this is a normative expectation that Parties will exercise a particular choice, not a requirement that they do so.

Indeed it is precisely because this provision creates no new obligations that the US agreed to the Paris package. This provision was at the centre of the 'shall/should' controversy that

[142] See text accompanying nn 30–32.
[143] Paris Agreement (n 21) art 4(4) and 4(19).
[144] ibid, art 4(3).
[145] See text accompanying nn 56–66.
[146] Paris Agreement (n 21) art 4(19).
[147] ibid, art 4(4).

This content downloaded from 122.150.168.67 on Mon, 18 Mar 2024 03:28:33 +00:00
All use subject to https://about.jstor.org/terms

nearly unravelled the Paris deal in the final hours.[148] The 'take it or leave it' text presented by the French contained mandatory language ('shall') in relation to developed country targets, and recommendatory language ('should') in relation to developing country mitigation efforts. In addition to the lack of parallelism in the legal character of requirements placed on developed and developing countries, the use of mandatory language for developed countries' targets posed a problem for the US. In the light of long-standing and intractable resistance to climate treaties in the Senate, the US had been priming the Paris Agreement to ensure that it could be accepted as a Presidential-executive agreement. This would likely only be possible if the Paris Agreement is consistent with existing US domestic laws, and can be implemented through them.[149] Since the US does not currently have a domestic emissions target, it could not accept an international agreement obliging them to have one through a Presidential-executive agreement.[150] The 'shall' had to go if the US were to stay, but the prospect of changing such a critical word in a 'take it or leave it' text, endangered the entire deal. The LMDCs in particular threatened to revisit other compromises in the text if this word were to change. Eventually, after furious huddling in the room, and high-level negotiations outside it, the 'shall' was declared a typographical error and changed to a 'should' by the FCCC Secretariat.

Thus the mitigation section of the Paris Agreement operationalizes the CBDRRC principle through self-differentiation, but sets normative expectations in relation to the types of actions developed and developing country Parties should take, and in relation to progression through successive cycles of contributions. Thus arguably disciplining self-differentiation. Self-differentiation is the pragmatic choice for mitigation, the most contentious section of the Paris Agreement, because it provides flexibility, privileges sovereign autonomy and encourages broader participation. However, while it respects 'national circumstances' and 'respective capabilities', it leaves little room for tailoring commitments to differentiated responsibilities for environmental harm. In this it represents a departure from the FCCC and its Kyoto Protocol.

2. *Differentiation in transparency*

The transparency provisions of the Paris Agreement are premised on provision of flexibility to Parties based on their capacities. Parties rejected a bifurcated transparency system, on the table until the end, in favour of a framework applicable to all countries albeit with 'built-in flexibility' tailored to Parties' differing capacities.[151] These provisions place uniform informational requirements on Parties in relation to mitigation and adaptation,[152] but differentiated requirements in relation to support.[153] Since Parties have differentiated obligations in relation to support the informational requirements are accordingly differentiated. Developed countries report on support they provide, developing countries on the support they receive and need. Information provided by all Parties, developed and developing, on mitigation and support is

[148] J Vidal, 'How a 'typo' nearly derailed the Paris climate deal' (The Guardian, 16 December 2015) <http://www.theguardian.com/environment/blog/2015/dec/16/how-a-typo-nearly-derailed-the-paris-climate-deal>.

[149] D Bodansky, 'Legal Options for U.S. acceptance of a new Climate Change Agreement' (Centre for Climate and Energy Solutions, May 2015).

[150] ibid, 3–4.

[151] Paris Agreement (n 21) art 13(1) and (2).

[152] ibid, art 13(7) and (8).

[153] ibid, art 13(9) and 13(10), and text accompanying nn 77–78.

This content downloaded from 122.150.168.67 on Mon, 18 Mar 2024 03:28:33 +00:00
All use subject to https://about.jstor.org/terms

subject to a 'technical expert review' and 'facilitative, multilateral consideration of progress'. However, for those developing country Parties that need it, the review shall include assistance in identifying capacity-building needs.[154] Further, the review is tasked with paying particular attention to 'respective national capabilities and circumstances of developing country Parties'.[155] And, support is provided to developing countries for implementing transparency requirements,[156] and building transparency-related capacity.[157]

Differentiation in the transparency provisions is thus a pragmatic tailoring of informational demands to capacities. While distinct from self-differentiation in the mitigation provisions, this too represents a departure from the FCCC that places different informational burdens set to different time frames on developed and developing countries.[158]

3. *Differentiation in finance*

The finance provisions of the Paris Agreement are perhaps the most 'Conventional' in the form of differentiation they embody. Developed countries are required in mandatory terms ('shall') to provide financial resources to developing country Parties[159] 'in continuation of their existing obligations under the Convention'. It is the latter clause that permitted the US to accept this mandatory construction of their financial obligations. Developed countries are also required to continue to take the lead in mobilizing climate finance.[160] This obligation is given concrete content in the decision accompanying the Paris Agreement which captures an agreement to continue the collective developed countries' mobilization goal through 2025, and to set before 2025, a 'new collective quantified goal from a floor of USD 100 billion per year'.[161] Developing countries had negotiated to include such a goal in the Paris Agreement, however, in light of the strong financial obligations developed countries agreed to in the text, developing countries agreed to move this quantified goal to the accompanying decision. The Paris Agreement also obliges developed countries to biennially communicate 'indicative quantitative and qualitative information' in relation to provision and mobilization of finance.[162] This information will feed into the global stocktake of collective progress.[163]

Although the responsibility for provision and mobilization of financial resources is placed primarily on developed countries, in a departure from the FCCC,[164] the Paris Agreement expands the donor base to '[o]ther parties'.[165] Other Parties, presumably, developing country Parties, are 'encouraged' to provide such support 'voluntarily'.[166] And, they have correspondingly less demanding reporting requirements placed on them in relation to such support.[167] In the lead-up to Paris, various options were explored for expanding the donor base, regarding the Parties it would apply to (Parties in a 'position' or 'with capacity' to do so) and the expectations that would be placed on them ('shall' or 'should').[168] However such options were met with fierce resistance from

[154] ibid, art 13(11). [155] ibid, art 13(12). [156] ibid, art 13 (14).
[157] ibid, art 13(15).
[158] FCCC (n 4) art 12; and Cancun Agreements (LCA) (n 68) para 40 (Annex I Parties) and para 60 (non-Annex I Parties). [159] Paris Agreement (n 21) art 9(1). [160] ibid, art 9(3).
[161] Decision 1/CP.21 (n 21) para 53. [162] Paris Agreement (n 21) art 9(5). [163] ibid, art 9(6).
[164] See FCCC (n 4) art 4(3). [165] Paris Agreement (n 21) art 9(2). [166] ibid.
[167] ibid, art 9(5) and 9(7). [168] Informal note (n 20) art 6, option 1.

This content downloaded from 122.150.168.67 on Mon, 18 Mar 2024 03:28:33 +00:00
All use subject to https://about.jstor.org/terms

many developing countries who believed that this would open the door to assessments of which countries were in a 'position' or had the 'capacity' to provide support. These countries would then be leaned on to provide support. Parties finally compromised on 'other parties', which was suitably neutral, and language encouraging voluntary provision of support by these parties. It is because of this expanded donor base in the Paris Agreement, that provisions on support across the Agreement are phrased in passive voice ('support shall be provided')[169] that precludes the need to identify who is to provide such support. Nevertheless, it is remarkable that the provision of support to developing countries is a central cross-cutting feature of the Paris Agreement. The Paris Agreement also recognizes in operational paragraphs that enhanced support for developing countries will allow for higher ambition in their actions,[170] and that developing countries will need to be supported to ensure effective implementation of the Agreement.[171]

Needless to say the terms 'developed' and 'developing' countries have not been defined in the Paris Agreement. In Paris, countries with 'economies in transition' as well as those whose 'special circumstances are recognized' by the COP, viz, Turkey, sought to ensure that they would be included in the category of 'developing countries' and thus entitled to any benefits that might flow thereon.[172] This proved contentious until the end, but the term 'developing countries' was eventually left open and undefined. To many developed countries the use of these terms raises the spectre of the Convention's Annexes. It remains to be seen if some developing countries will seek to engage the embattled Annexes to provide concrete content to these terms.

Differentiation in the finance provisions is thus relatively close to the type of differentiation seen in the FCCC. Although there is a departure in that the donor base has been gently expanded, it is a less radical departure from the Convention than, for instance, the self-differentiation (albeit bounded) seen in the mitigation provisions.

VI. CONCLUSION

The Paris Agreement represents a landmark in the UN climate negotiations. Notwithstanding enduring and seemingly intractable differences, Parties harnessed the political will necessary to arrive at an agreement that strikes a careful balance between ambition and differentiation. The Paris Agreement contains ambitious goals, extensive obligations and rigorous oversight. Admittedly the goals are aspirational, the obligations largely of conduct, and much of the mechanics of the oversight mechanisms have yet to be fleshed out. Further, the Paris Agreement in a show of solidarity with developing countries is also firmly anchored in the CBDR principle, and contains nuanced differentiation tailored to the needs of each Durban pillar—mitigation, adaptation, finance, capacity building, technology and transparency.

[169] See eg Paris Agreement (n 21) art 4(5), 7(13), 10(6) and 13(14).

[170] ibid, art 4(5).

[171] ibid, art 3.

[172] Draft Text on COP 21 agenda item 4 (b) Durban Platform for Enhanced Action (decision 1/CP.17)

Adoption of a protocol, another legal instrument, or an agreed outcome with legal force under the Convention applicable to all Parties, Version 1 of 9 December 2015 at 15:00, Draft Paris Outcome, Proposal by the President <http://unfccc.int/resource/docs/2015/cop21/eng/da01.pdf> fn 7.

This content downloaded from 122.150.168.67 on Mon, 18 Mar 2024 03:28:33 +00:00
All use subject to https://about.jstor.org/terms

Admittedly, the nature of differentiation in the Paris Agreement is distinct from that in the FCCC and its Kyoto Protocol, beloved of developing countries, and differentiation once inspired by principle is now firmly in the realm of practical politics.

Nevertheless, its many tenuous compromises and infirmities aside, the Paris Agreement represents hard-fought agreement between 196 nations. Countries across the developed and developing country divide made significant concessions from long-held positions in the dying hours of the conference to make the final agreement possible. The remarkable political will on display if not the regime created by the Paris Agreement will over time overcome the climate challenge.

This content downloaded from 122.150.168.67 on Mon, 18 Mar 2024 03:28:33 +00:00
All use subject to https://about.jstor.org/terms

Exhibit ZJ
414
HEINONLINE

DATE DOWNLOADED: Mon Nov 13 20:19:26 2023
SOURCE: Content Downloaded from HeinOnline

Citations:
Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Bluebook 21st ed.
Louis B. Sohn, The Human Rights Law of the Charter, 12 TEX. INT'l L. J. 129 (1977).

ALWD 7th ed.
Louis B. Sohn, The Human Rights Law of the Charter, 12 Tex. Int'l L. J. 129 (1977).

APA 7th ed.
Sohn, L. B. (1977). The human rights law of the charter. Texas International Law Journal, 12(2-3), 129-140.

Chicago 17th ed.
Louis B. Sohn, "The Human Rights Law of the Charter," Texas International Law Journal 12, no. 2-3 (SpringSummer 1977): 129-140

McGill Guide 9th ed.
Louis B. Sohn, "The Human Rights Law of the Charter" (1977) 12:2-3 Tex Int'l L J 129.

AGLC 4th ed.
Louis B. Sohn, 'The Human Rights Law of the Charter' (1977) 12(2-3) Texas International Law Journal 129

MLA 9th ed.
Sohn, Louis B. "The Human Rights Law of the Charter." Texas International Law Journal, vol. 12, no. 2-3, SpringSummer 1977, pp. 129-140. HeinOnline.

OSCOLA 4th ed.
Louis B. Sohn, 'The Human Rights Law of the Charter' (1977) 12 Tex Int'l L J 129
Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at https://heinonline.org/HOL/License
-- The search text of this PDF is generated from uncorrected OCR text.
-- To obtain permission to use this article beyond the scope of your license, please use: Copyright Information

The Human Rights Law of the Charter

LOUIS B. SOHN*

I. THE CHARTER OF THE UNITED NATIONS

The Charter of the United Nations presents a radical departure from previous approaches to the international protection of human rights. For some 3,000 years the concern of the international community was restricted to the treatment of foreigners, and various procedures were devised for dealing with claims of a citizen of one country against another country for wrongs suffered in the territory of the second country, or due to violations of international law by its officials, citizens or inhabitants.[1] Only a hundred years ago, the international community expressed its interest in the fate of minorities in limited areas of Europe, and in the fate of people inhabiting certain parts of Africa.[2]

The League of Nations established special regimes for the protection of minorities in a few countries of Eastern and Southern Europe and the Middle East,[3] and for the promotion of the well-being of inhabitants of territories under mandate,[4] but suggestions to broaden the system to other countries received practically no support.[5] The climate changed completely during the Second World War, when totalitarian regimes not only grossly violated human rights both at home and in occupied territories but also practiced wholesale extermination of groups of people because of their race, nationality or religion.[6] Thus one of the basic goals of the United Nations became the preservation of "human rights and justice in their own lands as well as in other lands."[7]

While various drafts of an international bill of human rights were prepared during the war,[8] the San Francisco Conference did not find time to discuss

---

* Bemis Professor of International Law, Harvard Law School.

1. L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 23-96 (1973).

2. C. MACARTNEY, NATIONAL STATES AND NATIONAL MINORITIES 157-75 (1934); Q. WRIGHT, MANDATES UNDER THE LEAGUE OF NATIONS 15-23 (1930).

3. P. DE AZCÁRATE, LEAGUE OF NATIONS AND NATIONAL MINORITIES 92-136 (1945).

4. H. HALL, MANDATES, DEPENDENCIES AND TRUSTEESHIP 165-233 (1948).

5. R. CLAUDE, NATIONAL MINORITIES: AN INTERNATIONAL PROBLEM 31-50 (1955).

6. Sohn, *A Short History of United Nations Documents on Human Rights*, in COMMISSION TO STUDY THE ORGANIZATION OF PEACE, THE UNITED NATIONS AND HUMAN RIGHTS 37, 44-56 (1968).

7. Declaration by United Nations, Jan. 1, 1942 reproduced at U.S. DEPARTMENT OF STATE, 1 FOREIGN RELATIONS OF THE UNITED STATES, 1942 at 25-26 (1943).

8. *See, e.g.*, H. LAUTERPACHT, AN INTERNATIONAL BILL OF THE RIGHTS OF MAN 69-

such a bill.[9] Nevertheless, the Charter of the United Nations contains a variety of provisions on human rights. In the preamble to the Charter, the peoples of the United Nations have reaffirmed their "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small," and their determination "to promote social progress and better standards of life in larger freedom." Article 1 of the Charter lists among the main purposes of the United Nations the achievement of international cooperation "in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." Similarly, in accordance with article 55 of the Charter, the United Nations has the duty to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." In article 56, all Members of the United Nations "pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

The Charter of the United Nations also contains significant grants of power to various organs of the United Nations. Thus, under article 13, the General Assembly has the duty to initiate studies and make recommendations for the purpose of "assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Responsibility for the discharge of the functions set forth in chapter IX of the Charter (which includes articles 55 and 56 mentioned above) is vested by article 60 in the General Assembly and, "under the authority of the General Assembly, in the Economic and Social Council." In discharging this responsibility the Economic and Social Council may, according to article 62 (2), "make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all"; under article 68, the Council has an obligation to set up a commission "for the promotion of human rights," which is the only functional commission the establishment of which is expressly provided for by the Charter itself; and, under article 64, it may make arrangements with the Members of the United Nations to obtain reports on the steps which they have taken to give effect to the recommendations of the General Assembly and of the Council. Moreover, article 76 lists among the basic objectives of the United Nations trusteeship system the duty "to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion"; and article 87 provides for the supervision of the administration of trust territories through a system of reports, examination of petitions and periodic visits to these territories. Finally, in the declaration re-

74 (1945); H.G. WELLS, GUIDE TO THE NEW WORLD 48-54 (1941). For an early U.S. draft, *see* U.S. DEPARTMENT OF STATE, POSTWAR FOREIGN POLICY PREPARATION, 1939-1945, at 483-85 (1949).

9. R. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER 780 (1958).

garding other non-self-governing territories, which is embodied in article 73 of the Charter, the Administering States accept "as a sacred trust" the obligation to promote to the utmost "the well-being of the inhabitants of these territories," and to this end to ensure "their just treatment and their protection against abuses."

These provisions express clearly the obligations of all members and the powers of the organization in the field of human rights. While the provisions are general, nevertheless they have the force of positive international law and create basic duties which all members must fulfil in good faith. They must cooperate with the United Nations in promoting both universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. For this purpose, they have pledged themselves to take such joint and separate action as may be necessary. The General Assembly and, under the Assembly's authority, the Economic and Social Council are responsible, under article 60 of the Charter, for the discharge of the functions of the United Nations in this area, and for this purpose may initiate such studies and make such recommendations as they may deem necessary. Any refusal to participate in the United Nations program to promote the observance of human rights constitutes a violation of the Charter.[10] The General Assembly may recommend, under article 14 of the Charter, "measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations." As the obligation to promote and encourage respect for human rights is set forth in the statement of purposes in article 1 of the Charter, the broad powers of the General Assembly under article 14 clearly apply in case of a violation of the duty to cooperate with the United Nations in this area.

The Charter is the cornerstone of international *jus cogens*, and its provisions prevail over all other international and domestic legislative acts.[11]

10. In the advisory opinion relating to the legal consequences for states of the continued presence of South Africa in Namibia, the International Court of Justice declared that "to establish . . . and to enforce distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter." Advisory Opinion of the International Court of Justice, June 21, 1971, [1971] I.C.J. 16, 57.

11. The Charter expressly provides that the obligations under it prevail over "obligations under any other international agreement." (Art. 103.) Art. 27 of the Vienna Convention on the Law of Treaties of 1969 confirms the principle recognized by several international tribunals that a "party may not invoke the provisions of internal law as justification for its failure to perform a treaty." U.N. Conference on the Law of Treaties, Official Records, Documents of the Conference 293 (U.N. Publ. E.70.V.5). Art. 53 of the same convention defines *jus cogens* as a peremptory norm of international law "from which no derogation is permitted." *Id.* 296. Among the treaties considered by some members of the International Law Commission as conflicting with *jus*

Should a state conclude a treaty or issue a legislative act or regulation which constitutes a gross violation of human rights, such a treaty or act would be clearly invalid as contrary to a basic and overriding norm of the Charter, and any tribunal, international or domestic, which might be asked to apply such a treaty, act or regulation, should refuse to do so.[12] In addition, the provisions of the Charter and the continuous world wide debate about their implementation have brought a change in the moral and political climate, making it easier for public opinion to press for changes in old customs that are no longer consistent with the public policy enunciated in the Charter.[13] Not only the letter of the Charter but also the spirit of its human rights provisions have thus had a profound influence on the changes in the human rights field which have occurred in many parts of the world since 1945.[14]

II. UNIVERSAL DECLARATION OF HUMAN RIGHTS

It has been contended that the provisions of the Charter are too general and cannot be applied to concrete situations, and that before the Charter can have practical consequences the human rights and fundamental freedoms mentioned in the Charter must be more specifically defined through an International Bill of Human Rights.[15] The first step toward such a definition was taken when the General Assembly adopted in 1948 the Universal Declaration of Human Rights which provides an agreed upon list of such rights and freedoms. This list is a broad one, containing not only rights traditionally guaranteed by national constitutions but also such modern economic, social and cultural rights as the right to work and the right to education. Taking into account the realities of the situation and the variety of national circumstances, the Declaration did not impose a duty of immediate implementation but expressed the hope that this "common standard of achievement for all peoples and all nations" will be secured "by progressive measures, national and international."[16]

---

cogens were treaties violating human rights. *Id.* 68. *See also*, Kearney & Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495, 535-38 (1970); separate opinion of Judge Ammoun in the Barcelona Traction Case, [1970] I.C.J. 1, 304.

12. Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AM. J. INT'L L. 946, 950-51 (1967).

13. *See, e.g.*, Namba v. McCourt, 204 P.2d 569, 579 (Ore. 1949); *In re* Drummond Wren, 1945 Ont. 778, [1945] 4 D.L.R. 674; 1943-1945 ANN. DIG. PUB. INT'L L. CASES 178.

14. *See, e.g., Human Rights in the World Community: A Call for U.S. Leadership, Report of the Subcommittee on International Organizations and Movements of the Committee on Foreign Affairs, House of Representatives*, 93d Cong., 2d Sess. (1974); *see also*, T. BUERGENTHAL & J. TORNEY, INTERNATIONAL HUMAN RIGHTS AND INTERNATIONAL EDUCATION 86-101 (1976).

15. E. SCHWELB, HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY 31-32 (1964).

16. G.A. Res. 217A, U.N. Doc. A/810, at 71-77 (1948); L. SOHN & T. BUERGENTHAL, BASIC DOCUMENTS ON INTERNATIONAL PROTECTION OF HUMAN RIGHTS 30-34 (1973).

While there was at the beginning some disagreement on the legal effect of the Declaration,[17] twenty years later the International Conference on Human Rights, held at Teheran in 1968, was able to proclaim unanimously that the Declaration "states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for all members of the international community."[18] Today the Declaration not only constitutes an authoritative interpretation of the Charter obligations but also a binding instrument in its own right, representing the consensus of the international community on the human rights which each of its members must respect, promote and observe.

The practice of the United Nations confirms this conclusion.[19] Even states which originally expressed doubts about the legal force of the Declaration have not hesitated to invoke it and to accuse other states of having violated their obligations under the Declaration. The United States, for instance, invoked the Declaration in the so-called *Russian Wives Case* even before the ink on the Declaration was dry.[20] The General Assembly adopted a resolution on the subject, in which it declared that the Soviet measures preventing Russian wives from leaving the Soviet Union with their foreign husbands were "not in conformity with the Charter"; it cited articles 13 and 16 of the Declaration in support of this conclusion.[21]

The Soviet Union, on the other hand, has voted for most of the resolutions relating to southern Africa in which the Declaration was invoked by the General Assembly. To this group belong several resolutions relating to the treatment of people of Indian and Pakistani origin in South Africa,[22] the adminis-

17. Sohn, *supra* note 6, at 60-72.

18. Final Act of the International Conference on Human Rights 3, at 4, para. 2, U.N. Doc. A/CONF.32/41 (U.N. Pub. E.68.XIV.2) (1959). *See also* the statement of the unofficial Montreal Assembly for Human Rights, that the "Universal Declaration of Human Rights constitutes an authoritative interpretation of the Charter of the highest order, and has over the years become a part of customary international law." 9 J. INT'L COMM. JUR. (no. 1) 94, 95 (1968); the statement by the Secretary-General of the United Nations emphasizing the proclamation by the Teheran Conference that the Universal Declaration constitutes "an obligation for the members of the international community." 23 U.N. GAOR, Supp. (1A) 13, U.N. Doc. A/7201/Add.1 (1968).

In 1974, the General Assembly adopted by consensus a resolution relating to the International Court of Justice in which the Assembly recognized that "the development of international law may be reflected, *inter alia*, by declarations and resolutions of the General Assembly which may to that extent be taken into consideration by the International Court of Justice." G.A. Res. 3232, 29 U.N. GAOR, Supp. (31) 141-42, U.N. Doc. A/9631 (1974).

19. *See generally*, UNITED NATIONS ACTION IN THE FIELD OF HUMAN RIGHTS, 9-19, U.N. Doc. ST/HR/2 (U.N. Publ. E.74.XIV.2) (1974); van Asbeck, *Universal Declaration of Human Rights and Its Implementation in International Organizations*, in INTERNATIONAL SOCIETY IN SEARCH OF A TRANSNATIONAL LEGAL ORDER 554-75 (van Panhuys & van Leeuwen Boomkamp eds. 1976).

20. 3(1) U.N. GAOR, C.6 (137th mtg.) 735-39 (1948).

21. G.A. Res. 285, U.N. Doc. A/900, at 34-35 (1949).

22. *See, e.g.*, G.A. Res. 395, 5 U.N. GAOR, Supp. (20) 24, U.N. Doc. A/1775 (1950).

tration of South West Africa,[23] and the policies of apartheid in South Africa.[24] The Security Council requested South Africa "to cease forthwith its continued imposition of discriminatory and repressive measures which are contrary to the principles and purposes of the Charter and which are in violation of its obligations as a Member of the United Nations and of the provisions of the Universal Declaration of Human Rights."[25] In a more general fashion, the General Assembly condemned "all manifestations and practices of racial, religious and national hatred in the political, economic, social, educational and cultural spheres of the life of society as violations of the Charter of the United Nations and the Universal Declaration of Human Rights."[26]

The duty to "observe faithfully and strictly" not only the provisions of the Charter but also of the Universal Declaration was proclaimed by the General Assembly in the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples.[27] Similarly, the 1963 Declaration on the Elimination of All Forms of Racial Discrimination recognized that every state shall "fully and faithfully observe the provisions of . . . the Universal Declaration of Human Rights."[28] Both declarations were adopted unanimously.

As one of the chief framers of the Declaration, Charles Malik (Lebanon), pointed out on its twenty-fifth anniversary, many "United Nations resolutions—maybe hundreds of them—base their arguments jointly on the Charter and the Declaration, and mention the two in the same breath." He also noted that "when people anywhere search for any authoritative listing of human rights and fundamental freedoms that will serve as a 'standard of achievement' for themselves and their cultures, they can find nothing of the depth, the authoritativeness and comprehensiveness of the Universal Declaration."[29]

III. THE COVENANTS ON HUMAN RIGHTS

The two Covenants on Human Rights, dealing respectively with civil and political rights, and with economic, social and cultural rights, were long in

23. *See, e.g.*, G.A. Res. 1142B, 12 U.N. GAOR, Supp. (18) 25, U.N. Doc. A/3805 (1957).

24. *See, e.g.*, G.A. Res. 1598, 15 U.N. GAOR, Supp. (16A) 5, U.N. Doc. A/4684/Add.1 (1961).

25. S.C. Res. 182 of Dec. 4, 1963, U.N. SCOR, Supp. (Oct.-Dec. 1963) 103-105, U.N. Doc. S/5471 (1964).

26. G.A. Res. 1510, 15 U.N. GAOR, Supp. (16) 21-22, U.N. Doc. A/4684 (1960). *See also* G.A. Res. 1779-81, 17 U.N. GAOR, Supp. (17) 32-33, U.N. Doc. A/5217 (1962); U.N. OFFICE OF PUBLIC INFORMATION, THE UN AND HUMAN RIGHTS 13-15 (U.N. Publ. E.73.1.13).

27. G.A. Res. 1514, 15 U.N. GAOR, Supp. (16) 66-67, U.N. Doc. A/4684 (1960).

28. G.A. Res. 1904, art. 11, 18 U.N. GAOR, Supp. (15) 35-37, U.N. Doc. A/5515 (1963).

29. *Conference of Non-Governmental Organizations in Observance of the 25th Anniversary of the Universal Declaration of Human Rights, Report [of the] Human Rights Committee* 10 (1973).

preparation but were finally adopted by the General Assembly on December 16, 1966.[30] For the first time, the international community reached an agreement not only on a list of basic human rights, but also on the content of each right and on the most important limitations to such rights. The Covenants differ in several respects from the Declaration. In the first place, they are more precise, providing detailed guidelines for the conduct of governments, specific legal protection for individuals, and an enumeration of instances in which public safety, order, health, morals, etc., can be invoked to limit individual freedoms. Secondly, the Covenants contain various measures of implementation; though some of them are optional in character, they recognize the right of individuals to seek redress of their grievances on the international plane. Thirdly, while the Declaration was a cautious attempt, disparaged at the beginning, to exercise the quasi-legislative powers of the General Assembly, the Covenants constitute a mixture of old and new methods of international legislation. They were drafted by the General Assembly and its subsidiary bodies and were adopted without the benefit of a special diplomatic conference; at the same time, they were not proclaimed by the General Assembly as immediately applicable instruments, but were made subject to ratification and the further stipulation that they would enter into force only when ratified, or acceded to, by 35 states. Both Covenants entered into force in 1976.[31]

Though the Covenants resemble traditional international agreements which bind only those who ratify them, it seems clear that they partake of the creative force of the Declaration and constitute in a similar fashion an authoritative interpretation of the basic rules of international law on the subject of human rights which are embodied in the Charter of the United Nations. This conclusion is supported by the fact that the Covenants are even more universal in their origin than the Declaration. While the Declaration was adopted by less than fifty votes, with some important abstentions,[32] 105 states voted for the Covenants and only a few states (such as Portugal and South Africa) absented themselves at the time of the vote, not daring to interfere with the unanimous vote of the General Assembly.[33] Consequently, although the

30. G.A. Res. 2200, 21 U.N. GAOR, Supp. (16) 49-58, U.N. Doc. A/6316 (1966); L. SOHN & T. BUERGENTHAL, *supra* note 1, at 35-62.

31. The Covenant on Economic, Social and Cultural Rights entered into force on Jan. 3, 1976; the Covenant on Civil and Political Rights entered into force on Mar. 23, 1976. By Jan. 1, 1977, 42 states had ratified or acceded to the Covenant on Economic, Social and Cultural Rights, and 40 states had become parties to the Covenant on Civil and Political Rights. The Optional Protocol on communications by individuals, which required only ten acceptances to bring it into effect, was ratified by 15 states and entered into force on Mar. 23, 1976. For the list of states, *see* U.N. Doc. A/31/202 (1976) and U.N. Press Releases L/T/2021 (1976) and L/T/2083 (1977).

32. The Universal Declaration was adopted by 48 votes to none, with eight abstentions (Byelorussian SSR, Czechoslovakia, Poland, Saudi Arabia, South Africa, Ukrainian SSR, USSR, and Yugoslavia). El Salvador and Yemen were absent.

33. They may have also wished to avoid any implication of tacit consent.

Covenants apply directly to the states that have ratified them, they are of some importance, at the same time, with respect to the interpretation of the Charter obligations of the non-ratifying states.

It would not be surprising, therefore, if in further developing the procedure relating to reports on the implementation of the Declaration,[34] the General Assembly should someday ask states which are not parties to the Covenants to submit information similar to that to be presented under the Covenants. It is also possible that some states might agree voluntarily to submit Covenant-type reports even without such prodding by the General Assembly. The General Assembly might also devise other implementation procedures for non-parties to the Covenants that would parallel those under the Covenants, at least with respect to gross violations of human rights. The arrangements with respect to complaints relating to trade union freedoms, which were established by the United Nations for states which were not members of the International Labor Organization, might be followed on this occasion.[35]

IV. OTHER DECLARATIONS AND CONVENTIONS

It is not practicable to deal in this short survey with the many special declarations and conventions on human rights adopted by the General Assembly of the United Nations or by the specialized agencies of the United Nations,[36] nor is it practicable to discuss here the additional instruments which are in various stages of preparation (such as the draft Declaration on Religious Intolerance).[37] What is important is the relationship of these instruments to the Charter, the Covenants and the Universal Declaration.

The main function of these declarations and conventions is to spell out specific obligations with respect to particular human rights. There is of course a hierarchy of international obligations. The specialized instruments can only add precision to the obligations existing under the Charter, the Universal Declaration and the Covenants; they cannot subtract from these obligations.[38] In case of an irreconcilable divergence, the general instruments must prevail over the specific ones. The effect is thus cumulative, each new

34. On the present voluntary reporting system, instituted by the Economic and Social Council in 1956, *see* Humphrey, *Report of the International Committee on Human Rights* in INTERNATIONAL LAW ASSOCIATION, REPORT OF THE 53RD CONFERENCE 437, 440-42 (1968). *See also* Sohn, *supra* note 6, at 74-94.

35. E.S.C. Res. 277, 10 U.N. ESCOR, Supp. (1) 9-10, U.N. Doc. E/1661 (1950). For the Council's actions under this resolution, *see, e.g.*, Report of the Economic and Social Council, 1952-1953, 8 U.N. GAOR, Supp. (3) 98-100, U.N. Doc. A/2430 (1954); *id.*, 1966-1967, 22 U.N. GAOR, Supp. (3) 77, U.N. Doc. A/6703 (1968).

36. Most of these international instruments are published by the United Nations in HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS OF THE UNITED NATIONS, U.N. Doc. ST/HR/1 (1973, U.N. Publ. E.73.XIV.2).

37. For a history of the drafting of the religious intolerance instruments, *see* U.N. Doc. A/9690, at 97-100 (1974).

38. One could argue, perhaps, that in defining an obligation more exactly, a new

instrument adding depth and scope to the more general obligations previously contracted. On the other hand, the general instruments may not be used to circumscribe rights defined in the specific instruments. The Covenants provide expressly that there shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any state pursuant to other conventions, on the pretext that the particular Covenant "does not recognize such rights or that it recognizes them to a lesser extent."[39] In each case, the individual is entitled to benefit from the instrument which gives him better protection against interference with his rights. This most-favorable-to-individual clause should apply with respect to both conventions of a universal scope and regional ones. This interpretation is confirmed by the European Convention on Human Rights which provides expressly that nothing in that Convention "shall be construed as limiting or derogating from any of the human rights or fundamental freedoms which may be ensured" under any other international instrument.[40]

Consequently, if the more precise international instrument puts certain limits on the exercise of a particular right, and if in a specific situation such a limitation deprives an individual of protection under that instrument, the individual can resort to a more general instrument which does not embody that limitation.[41] Of course, the more general provisions of the latter instrument may not provide the same amount of protection as might have been available under the more detailed instrument if it were applicable, but they may provide at least some protection in a case in which the limitations em-

---

instrument may narrow down the obligation to some extent; *e.g.*, by making clearer certain exemptions and limitations. But in such a case it is usually considered that these exceptions or limitations were inherent or implied in the more general basic text.

39. Art. 5(2), International Covenant on Economic, Social and Cultural Rights, and art. 5(2), International Covenant on Civil and Political Rights.

40. Art. 60, European Convention for the Protection of Human Rights and Fundamental Freedoms, *signed at Rome* Nov. 4, 1950, *entered into force* Sept. 3, 1953, 213 U.N.T.S. 221; L. SOHN & T. BUERGENTHAL, *supra* note 14, at 138. On the relationship between regional and universal instruments, *see* Eissen, *The European Convention on Human Rights and the United Nations Covenant on Civil and Political Rights: Problems of Coexistence*, 22 BUFFALO L. REV. 181-216 (1972); HUMAN RIGHTS IN NATIONAL AND INTERNATIONAL LAW 72-96 (A. Robertson ed. 1968); Tardu, *Quelques questions relatives à la coexistence de procédures universelles et régionales de plainte individuelle dans le domaine des droits de l'homme*, 4 REVUE DES DROITS DE L'HOMME 589-613 (1971).

41. In a parallel case, the Permanent Court of International Justice declared that "the multiplicity of agreements concluded accepting the compulsory jurisdiction is evidence that the Contracting Parties intended to open up new ways of access to the Court rather than to close old ways or to allow them to cancel each other out with the ulitmate result that no jurisdiction would remain." The Court found, in particular, that the applicant State did not comply with certain conditions specified in the more detailed Treaty of conciliation, arbitration and judicial settlement of 1931, but that the Court had jurisdiction under the more general declarations of adherence to the Optional Clause of the Court's Statute. Electricity Company of Sofia and Bulgaria Case, [1939] P.C.I.J., ser. A/B, No. 77, at 76, 80, 83.

424

bodied in the more detailed instrument have cut down the protection available thereunder.

V. THE ROAD AHEAD

In looking ahead, it might be useful to recapitulate the progress already made. We must measure the accomplishments of the last thirty years not against utopian dreams but against the accomplishments of the last 3,000 years of recorded history. For most of that period, except for a minute elite, mankind lived in slavery and serfdom. The end of feudalism permitted some increase in the rights of the new merchant elite in the cities, but the rest of the world remained in serfdom. The industrial revolution permitted some serfs to escape into cities but they were soon enslaved there in the chains of a debilitative factory life. At the same time, colonial empires expanded over the face of the planet, putting most of the Afro-Asian world under the colonial yoke.

It is only a century ago that slavery and serfdom were formally abolished, though their repercussions have persisted until the present day. The relationships between industrial employers and their workers have graduated from semi-slavery only some fifty years ago, and colonialism has been drastically cut down less than two decades ago. Half of the countries of the world have not known freedom before the current generation was born, and their new nationhood is only precariously established, due to poverty, tribalism, and the paucity of an educated elite.

When a government's survival is at stake, in periods of revolution and counterrevolution, some violations of human rights are usually tolerated. As the world is not yet ready to guarantee the form of government existing in each state, the government's right of self-defense has to be accepted, as long as it does not result in a savage slaughter of innocent civilians. An attempt to expand the norms which regulate the conduct of states in civil war situations has only recently begun,[42] and is not likely to be successful as long as so many of the governments of the world have not been able to assure a minimum of order and stability to their peoples. We are living in a period of transition and, until it is over, one cannot expect the kind of protection of human rights which even stable and mature societies have difficulty achieving. It is not feasible to demand that all new states immediately provide human rights guarantees of the type which it took the Western world many generations, many revolutions and many sacrifices to evolve. Comparisons should not be between the Europe and the North America of today and the new states of Africa and Asia, but between those states and the states of

42. For reports on the first three sessions of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, *see* U.N. Docs. A/9669 (1974), A/10195 and Corr.1 and Add.1 (1975), and A/31/163 and Add.1 (1976).

Europe prior to 1800. If such comparisons were made, many new states would come off better than most European states of that period.

Given the speed of modern developments, the technological ability to provide all nations of the world with a minimum of social amenities, and the growth of managerial skills on the international level, a way may be found to distribute the world's goods more rationally and more equitably. The new nations would then be able to turn their attention to human rights sooner than many of their older brethren did and, having already accepted the United Nations Declaration formally, give it application in practice. It is not inconceivable that before the end of the twentieth century the level of international protection of human rights will greatly increase, unless such progress is stopped by a nuclear war or by a series of internecine struggles of international or domestic character. Human rights and peace are closely connected; neither can thrive in the absence of the other. War is the greatest destroyer of human rights; and it is quite common that those who do not respect the human rights of their own citizens do not respect the right of other nations to live in peace. But if the last quarter of this century proves to be one of relative peace, human rights should have a chance to blossom in a more congenial atmosphere.

Even in the present interlude between storms, progress is being made with respect to human rights. The two Covenants on Human Rights entered into force in 1976 and immediate steps were taken to implement them.[43] For the first time, the right of an individual to petition an international committee has been recognized on a global scale, though at this time only by fifteen states from Africa, Europe and the Americas.[44]

The momentum thus achieved should not be lost, and human rights proponents should concentrate their efforts on the main goal, the pivotal documents, the Covenants, on their wider ratification and meaningful implementation. In the countries which have not yet ratified them, the opposition to their ratification is not likely to be any greater than that encountered by the Genocide Convention, or that might be directed against the Convention on Racial Discrimination. But even if we should succeed in the smaller efforts, connected with special, limited conventions, and spend on them all our re-

43. The Economic and Social Council agreed on a procedure and time-table for its consideration of the reports of States parties and the specialized agencies on the measures which they have adopted and the progress made in achieving the observance of the rights recognized in the International Covenant on Economic, Social and Cultural Rights. E.S.C. Res. 1988, 60 U.N. ESCOR, U.N. Doc. E/RES/1988 (1976). The States parties to the International Covenant on Civil and Political Rights met on Sept. 20, 1976 and elected the eighteen members of the Human Rights Committee. U.N. Docs. CCPR/SP/SR.1 and 2 (1976).

44. These States are: Barbados, Canada, Colombia, Costa Rica, Denmark, Ecuador, Finland, Jamaica, Madagascar, Mauritius, Norway, Surinam, Sweden, Uruguay and Zaire. U.N. Doc. A/31/202 (1974); U.N. Press Releases L/T/2021 (1976) and L/T/2083 (1977).

sources, the accomplishments will be minimal, more psychological than practical. On the other hand, if we would focus our efforts on the Covenants, we may find that the opposition will not be much greater but the success will be so much more rewarding. As long as the coming into force of the Covenants was in the distant future, one could afford the luxury of dissipating our efforts on more restricted instruments. But now that they have entered into force, it is doubly important to get moving in the direction of this primary goal, especially in the United States.

Quick action needs to be taken to obtain the necessary domestic understanding which is a prerequisite to ratification. This process has hardly begun, and to some extent this delay is due to the preoccupation of the leading non-governmental organizations with other, less important issues. The whole climate of public opinion on the subject needs to be changed, and all human-rights-oriented organizations should be in the forefront of a major effort in this direction. If the United States and other countries could be persuaded to ratify the Covenants, we might discover some twenty years from now that international protection of human rights has become a matter of routine and that states have found it easier to comply with their obligations than to defend themselves constantly before the competent international bodies. That process took some fifty years in the International Labor Organization; perhaps it can also be accomplished in fifty years in the United Nations. While it is an axiom of international pessimists that if anything can go wrong it will, even a cursory glance at history shows that in practically every important period positive steps have been taken at crucial moments, allowing mankind to move forward and upward.

2

The Establishment of the Legal Right to Self-Determination[1]

I. HISTORICAL INTRODUCTION

Verzijl has remarked that 'seldom has there been advanced as a legal right a claim so obviously of a political nature and of such a sloganlike quality as the so-called "right of self-determination".'[2] Despite this phraseology self-determination has clearly proved to be a principle of the utmost importance in international relations since 1945.

The history of the principle can be traced to the French revolution at the close of the eighteenth century with its twin proclamations of human rights and popular sovereignty. Its peculiar blend of nationalism and democracy profoundly influenced the political development of Europe[3] and ultimately produced the concept of self-determination. This was interpreted as the capacity of the nation to decide for itself its own political structure, for nationalism appeared as a framework for the operation of the new theory of sovereignty called democracy.[4] Although this 'principle of nationalities', as it was sometimes known, was not recognized as an integral part of European law,[5] it has a profound effect, particularly upon the nations of central and eastern Europe.

However, the three constituent elements of this concept, i.e. people, the nation, and the State, did not always coalesce in the same fashion and the role of the democratic factor often fluctuated. In many instances in central Europe it re-emerged as a form of national determinism, whereby the fact of birth alone determined the issue and the idea of subjectivity was rejected as irrelevant. The individual could not operate in a manner inconsistent with the mystical concept of the nation.[6] On the other hand, western European liberal thought emphasized the subjective element and the element of choice over the pull of the nation.[7] But self-determination was in no sense thought of as legally binding.[8]

It was the events and views precipitated by the outbreak of the First

Title to Territory in Africa. Malcolm Shaw.
© Oxford University Press 1986. Published 1986 by Oxford University Press.

Downloaded from https://academic.oup.com/book/10272/chapter/157965946 by University of Melbourne user on 18 March 2024

World War[9] that thrust the principle on to the centre of the stage. President Wilson of the United States declared before Congress in 1916 that 'every people has a right to choose the sovereignty under which they shall live',[10] and this idea was developed in the following years. In 1918 he promised that 'all well-defined national aspirations shall be accorded the utmost satisfaction that can be accorded them without introducing new or perpetuating old demands of discord and antagonism'.[11]

In spite of such protestations, it was clear that the 1919 Peace Conference did not treat national self-determination as an overwhelmingly important principle. It did not appear in the final draft of the Covenant of the League of Nations,[12] and it was treated 'as a purely political factor and not as a legal principle applicable to all peoples whose fate has to be determined'.[13]

Nevertheless, its impact upon the legal constitution of the world community can be detected in the various provisions for minority protection,[14] which can be regarded as a restricted application of self-determination in its creation of protective norms for certain cultural and language groups. It was even conceivable that minority rights could rise to secession, but this was considered an 'altogether exceptional situation, a last resort where the State lacks the will or the power to enact and apply just and effective guarantees'.[15]

Self-determination also made its mark in the institution of the mandate system[16] which replaced the annexation of territories belonging to the defeated States outside Europe and was founded on the proposition that 'the well-being and development of such non-independent peoples form a sacred trust of civilisation'.[17]

In the inter-war years there was relatively little practice dealing with the application of self-determination.[18] In the leading discussion of its juridical character that did take place it was emphasized that 'the recognition of this principle in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations' and stated that international law 'does not recognise the right of national groups as such to separate themselves from the State of which they form part by the simple expression of a wish'.[19]

Verzijl regarded the decision in the Aaland Islands question as based upon the acceptance by the Commission of Jurists that positive international law did not know of the asserted 'right' of self-determination.[20] Although the idea of self-determination probably

Downloaded from https://academic.oup.com/book/10272/chapter/157965946 by University of Melbourne user on 18 March 2024

helped encourage the growing nationalist movements in the Arab and Asian worlds, Brownlie points out that this had 'no immediate counterpart on the legal plane'.[21]

The Second World War stimulated further consideration of this concept. The Atlantic Charter, 1941, declared 'the right of all peoples to choose the form of government under which they will live' and the desire to see no 'territorial changes that do not accord with the freely expressed wishes of the people concerned.'[22]

Self-determination was not mentioned in the Dumbarton Oaks proposals of 1944, but it came into prominence at the San Francisco Conference at the instigation of the Soviet Union[23] and was incorporated into Article 1(2) of the Charter of the United Nations. This noted that one of the purpose of the Organization was the development of friendly relations among nations 'based on respect for the principle of human rights and self-determination of peoples' and was echoed in Article 55.

Although widely accepted before 1945 as a political moral principle entailing no legal obligation,[24] its inclusion in the UN Charter raised questions as to its juridical character.[25] However, the Charter only refers to self-determination as a 'principle' and not a 'right' and this induced the Australian delegate to the Commission on Human Rights to point out that 'where the Charter laid down a principle, it did not necessarily signify a right, and it must be left to the authority responsible for the administration of a given dependent territory to determine the extent to which the principle of self-determination could be applied to it'.[26]

The view is reinforced by a consideration of the context in which the principle is proclaimed, that is, as a basis for friendly relations among States. Article 1(2) comes within the section dealing with the purposes of the UN and not the more important section concerned with the principles of the Organization and appears merely as a guidance framework for UN activities rather than prescribing legal norms.[27]

A further factor is the absence of definition or clarification of the concept in the Charter, and this leaves one to question its legal validity as proclaimed in the Charter.[28] This is reinforced by the coupling of self-determination of peoples with equal rights. Not every expression of a political concept in the Charter can be taken as creating legal obligations, notwithstanding the character of the Charter as a multilateral treaty, since the Charter is not only the constitution of the UN but a document of political faith.

Downloaded from https://academic.oup.com/book/10272/chapter/157965946 by University of Melbourne user on 18 March 2024

The majority of writers have taken the view that the combined effect of Articles 1(2) and 55 is not such as to create binding legal obligations upon States to grant self-determination to nonindependent peoples. Bentwich and Martin regard Article 1(2) merely as 'a declaration of goodwill towards peoples who have not yet achieved self-determination',[29] while Fawcett considers self-determination as formulated in the Charter as a 'directive principle' similar in essence to Part IV, Article 37 of the Indian Constitution which lays down principles fundamental to the government of the country but nevertheless unenforceable by the courts.[30] In other words, the Charter provisions could not provide the legal basis for claims to self-determination by non-independent peoples.[31]

Kelsen adopted a different approach and took self-determination as expressed in the Charter as simply emphasizing the concept of the sovereignty of States. Since 'self-determination of the people usually designated a principle of internal policy, the principle of democratic government' and Article 1(2) referred to relations among States, and since 'the terms "peoples" too . . . in connection with "equal rights" means probably States since only States have "equal rights" according to general international law . . . then the self-determination of peoples in Article 1(2) can mean only sovereignty of the States'.[32]

This conservative interpretation, strongly influenced by traditional positivist philosophy, can no longer be accepted today in view of the wealth of State practice relating to the development of rights under international law for persons other than States. The view that the combination of equal rights and self-determination amounted only to a reinforcement of the sovereign equality of States can only be regarded as a misunderstanding of the basic trends in international law, while the idea that self-determination refers only to internal political situations has been contradicted by the evolution of the principle. However, there is a strong current of irony involved here, since Kelsen's conclusion that self-determination reinforces State sovereignty is not far off the mark in the light of the subsequent interpretation of the principle, although his reasoning is flawed. If one takes self-determination to be the right of non-independent peoples to sovereignty within accepted territorial limits (usually those defined by the administering power) and that alone, then the sanctity of the territorial sovereign is enhanced, the principle of territorial integrity underlined, and the right of minorities to secede from independent States eliminated.

Quincy Wright, however, has argued that the Charter did introduce

Downloaded from https://academic.oup.com/book/10272/chapter/157965946 by University of Melbourne user on 18 March 2024

binding duties for member States with respect to self-determination. He bases this opinion upon the proviso in Article 56 whereby all members 'pledge themselves to take . . . action for the purposes set forth in Article 55'. By ratifying the Charter, States have, according to Wright, undertaken such legal obligations.[33] But the point has to be made that the purposes in Article 55 are many and various, and it is by no means sure that the principle of the self-determination of peoples could be included as such a purpose.

In addition it is not certain that the expression 'pledge' alone can convert the humanitarian aims set out into binding legal obligations. For example, it would be difficult to say that the aim of 'full employment' is a legal duty on the State, indeed that it could be, merely by virtue of this provision in the UN Charter.

Although the discussion as to the legal status of the principle in the Charter has revolved around Articles 1(2) and 55, Bowett has noted that it is permissible 'to regard the entirety of Chapters XI and XII of the . . . Charter as reflections of the basic idea of self-determination'.[34] Chapter XI deals with non-self-governing territories, while Chapter XII deals with the trusteeship system. In neither is the concept expressly referred to, but those administering non-self-governing territories have by Article 73(b) to 'develop self-government, to take due account of the political aspirations of the peoples and to assist them in the progressive development of their free political institutions', and among the basic objectives of the trusteeship system in Article 76 is 'progressive development towards self-government or independence'. The freely expressed wishes of the people concerned have to be taken into account in fulfilling these objectives.

Van Asbeck has written that Chapter XI being in the form of a declaration imposes international duties,[35] but this was decidedly a minority viewpoint.[36]

The question as to the establishment of a legal right to self-determination has to be answered rather in the light of developments subsequent to the UN Charter. Practice since 1945 reveals certain trends towards regarding self-determination as a rule of international law. Declarations and resolutions adopted by the United Nations relating to the concept both in general theoretical terms and in specific cases have been numerous and have manifested a definite approach to the problem. But the issue as to whether such expressions have been sufficient to establish self-determination as a legal right lies at the heart of the matter and must be disentangled from the political aspects of the question.

Downloaded from https://academic.oup.com/book/10272/chapter/157965946 by University of Melbourne user on 18 March 2024

It is generally accepted that its inclusion in the Charter did not *per se* transform it into a binding obligation as distinct from a non-legal guideline,[37] but the relevant provisons possessed considerable potential for development.[38]

The point should also be made that the fact that a particular purpose of the United Nations is not deemed to constitute a legally binding rule does not mean that it is devoid of effect within the sphere of law. It will be relevant as regards the interpretation of the Charter of the United Nations and may contribute towards the development of customary law.

There are basically two methods by which self-determination may have subsequently attained the status of law.[39]

The first derives from the character of the Charter as a multi-lateral treaty and the consequent capacity of the parties thereto to interpret its provisions. Could it be stated that subsequent practice has revealed the interpretation of the relevant Charter provisions in terms of self-determination as a legal right? The second manner in which State conduct could construe self-determination as a binding rule is by virtue of its development as a rule of customary law. Both methods utilize to some extent the same material, namely UN declarations and resolutions, but comprehend their role slightly differently.[40]

II. CHARTER INTERPRETATION

(a) General

The development of International legal rules through the medium of the United Nations has been one of the most striking and controversial aspects of post-1945 norm creation. The problem has already been considered at length,[41] but what we need to note here is a difficulty that has arisen as regards the relevance and application of the traditional sources of law to this phenomenon. The international community has recognized as law-creating mechanisms conventions, custom, and general principles of law recognized by civilized nations,[42] but it is clear that many of the activities connected with the UN Organization may be implicitly or explicitly creative of law in a manner which straddles the traditional classifications, and this is particularly so with regard to the political organs of the United Nations.[43] This has led Higgins to refer to the blurring in the United Nations of the historically separate sources of law and to emphasize the twilight zone between custom and treaty in the development of international law in the Charter and in the Organization as a whole.[44]

Downloaded from https://academic.oup.com/book/10272/chapter/157965946 by University of Melbourne user on 18 March 2024

This arises primarily because of the tremendous amount of State practice generated through the UN Organization and produced by virtually all the independent States of the international community in an ever-increasing variety of situations, ranging from debates on colonialism in plenary session to discussion in committees such as the Commission of Human Rights and the International Law Commission. This vast array of State behaviour pattern has inevitably led to an increased awareness and emphasis upon such practice as norm-creative in given circumstances. One result of this has been the faster emergence of rules of customary law, while another has been the enhanced potentialities of Charter interpretation by State practice.

However, since the Charter as a multilateral treaty may be amended or interpreted by treaty action (i.e. by following the prescribed methods of amendment stipulated by Chapter XVIII), by custom, and (it is suggested) by State practice not amounting to custom, it is hardly surprising that the precise boundaries between the different processes are frequently difficult to clarify. Similarly, it is often hard to pin-point the exact legal manner in which a rule has emerged in the United Nations, since it could conceivably arise by virtue of Charter interpretations or amendment or customary international law or even as a general principle of law. In addition, an emerging proposition may be a legal norm or a principle by reference to which existing rules are to be interpreted.

This apparent flexibility in the methods of international law creation in the framework of the international organization has contributed to the relative decline of the consent theory of law and the rise of the consensus approach,[45] and this has some bearing upon the issue of the emergence of self-determination as a legal right through the process of General Assembly resolutions and declarations. The blurring of the division between the sources of law has led to great confusion as to whether or not a particular proposition is or is not law and to greater difficulties in identifying the criteria of norm-creation. It has also meant the comparative neglect of Charter interpretation as a separate category distinct from customary law. A number of writers, in fact, have discussed the role of UN resolutions as interpretations of the Charter in terms of the development of customary law,[46] and this had led to insufficient attention being paid to this process in the development of legal rules.

The parties to a treaty may subsequently interpret its provisions and could possibly be legally bound by such interpretations.[47] This proposition is illustrative of the principles of consent and good faith and reflects an old-established concept of international law. Article 31 of the

Downloaded from https://academic.oup.com/book/10272/chapter/157965946 by University of Melbourne user on 18 March 2024

Vienna Convention on the Law of Treaties, 1969, notes that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purposes', while 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' should be taken into account (Article 31(3)b).

It is this concept of subsequent practice interpreting the treaty which marks, as it were, the frontier between treaty and custom in the emergence of new international legal norms. It may be valid as a straightforward act of treaty interpretation or it may constitute State practice evidencing or leading to a new customary rule.

By Article 5, the Vienna Convention is deemed applicable to any treaty which is the constituent instrument of an international organization.[48] Such multilateral treaties are clearly in a special category since they create international entities with defined powers and purposes and go beyond the bounds of ordinary treaties. They invariably operate on a higher level of complexity as they specify not only the rights and duties of the signatories but also the function and aspirations of the newly created organization, and the intended pattern of its relationships with the member States. Nevertheless, in form such instruments are treaties and as such as subject *mutatis mutandis* to the law of treaties.[49]

Such treaty-charters incorporate a dynamic element which increases the likelihood of interpretation by subsequent practice, since the operations of the organizations of which they are the constitutional instruments invariably provide evidence and examples of the understanding of their charters by the member States.[50] Invariably the activities of international organizations emphasize the role and importance of interpretation by subsequent practice even if this is not always expressly recognized.

Higgins has pointed out that the notion of subsequent practice is ambiguous since it may refer either to treaty interpretation or to developing custom, but she appears to adopt the prevalent attitude by stressing that 'it seems to me that the repeated practice here of the organ interpreting the treaty establishes a *practice* and ultimately *custom*'.[51]

The Charter of the United Nations is a multilateral treaty and has been subjected to over thirty-five years of discussion, interpretation, and judicial opinion. It is unique in its universality of membership and function, and the wide range of subsequent practice relating to its role and powers places it in a category of its own. The question of the

Downloaded from https://academic.oup.com/book/10272/chapter/157965946 by University of Melbourne user on 18 March 2024

interpretation of the UN Charter, therefore, must be prefaced with a few words illustrating the general approach adopted.

It appears clear that, in the light of the special nature of the treaty-charters, the ordinary rules of interpretation of treaties may not suffice. This is primarily because of the powers and purposes ascribed to the organization, which have the effect of altering the emphasis of interpretation from the intention of the original parties to the intention of member States on the contemporary plane as manifested by practice and in the light of a collective appreciation of the purposes of the organization. This point was clearly put by Judge De Visscher, who noted that 'one must bear in mind that in the interpretation of a great international constitutional instrument like the UN Charter, the individualistic concepts which are generally adequate in the interpretation of ordinary treaties do not suffice.'[52]

Thus, a shift in the time-frame of reference from the past, i.e. the date of the treaty, to the present, coupled with an added emphasis upon a consensus perception of the purposes of the organization, constitute the main differentiating factors regarding the interpretation of treaty-charters as distinct from ordinary treaties.[53]

The intentions of the original contracting parties remain important[54] but as the amount of subsequent practice increases and the membership grows, the need for a wider base for interpreting the Charter becomes more apparent.[55] This process inevitably emphasizes the teleological approach to treaty interpretation, by which the treaty is comprehended in the light of its aims and objects[56] as against the textual and 'founding fathers' methods.[57] This approach has found favour with most of the representatives in UN debates,[58] and been propounded by a number of Judges of the International Court.[59] Such an approach means that 'an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation'.[60] This phrase, together with the statement that the concepts embodied in Article 22 of the Covenant of the League of Nations were 'by definition evolutionary',[61] appeared to mark the demise of the school emphasizing the predominant role to be played by the intentions of the original parties in treaty-charter interpretations.[62]

Judge De Castro declared that 'the teaching of the court is, in fact, that for the interpretation of the Charter, account must be taken of its fundamental purposes and it must be recognized that it has the powers which are necessary to achieve them "by necessary implication".'[63] This must be accepted as correct and the teleological approach to charter

Downloaded from https://academic.oup.com/book/10272/chapter/157965946 by University of Melbourne user on 18 March 2024

interpretation as the most important by far of the various schools and the one most productive of viable development. As De Castro pointed out

> it should not be forgotten that the General Assembly and the Security Council have the responsibility for promoting the purposes laid down in the Charter. They cannot remain bound by the possible intentions of the draftsmen, not only because it is difficult to know what those intentions were . . . but also because interpretation necessarily undergoes a process of development and as in municipal law must adapt itself to the circumstances of the time and to the requirements so far as they are foreseeable of the future. The text breaks away from its authors and lives a life of its own.[64]

The nature of the United Nations as an active political structure has reinforced these tendencies, particularly since the balance of membership has moved drastically since 1945.[65] International organizations are competent to interpret their own constitutions, but this is not an unrestricted capacity. They must have regard to the terms of the instrument and the aims and powers of the organisation. As far as the United Nations is concerned, the prime-facie scope for interpretation by subsequent practice is extensive in view of the essential characteristics and purpose of the Organization. Committee IV/2 of the San Francisco Conference reported that 'in the course of operations of the various organs of the organization, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions . . . Accordingly it is not necessary to include in the Charter a provision authorising or approving the normal operation of this principle'.[66]

One question which is of particular concern is whether any special procedure is necessary to bring about a binding interpretation. Vallat, for example, takes the view that authoritative interpretations can only be by way of amendment,[67] while others consider that General Assembly resolutions on their own are quite sufficient.[68] Yet other jurists declare that where resolutions purporting to be interpretations are rejected by some other member States amendments would then be required.[69]

In any event, it appears to be accepted by most writers that at the very least, as noted by Judge Nervo, 'the General Assembly has competence in respect of the interpretation of the Charter'.[70]

The teleological approach has permitted a certain amount of flexibility within the basic structure of the UN Organization and its constitution and has been supported by judicial opinion. In the *Expenses* case, the International Court discussed the meaning of the word 'action' as it appeared in Article 11(2) of the Charter,[71] and came to the conclusion

Downloaded from https://academic.oup.com/book/10272/chapter/157965946 by University of Melbourne user on 18 March 2024

that it referred not to any kind of action, which would effectively reduce the General Assembly's function to simple recommendation, but to coercive or enforcement action alone.[72] In other words, 'action' meant only 'such action as is solely within the province of the Security Council',[73] and in deciding whether the actual expenses authorized were within the meaning of Article 17(2),[74] one had to test them by their relationship to the purposes of the United Nations. Such purposes, though broad, are not unlimited, 'but when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action was not ultra vires the Organization'.[75] Thus the General Assembly was able to establish peace-keeping forces.[76]

The recognition by the ICJ of the competence of the General Assembly to make determinations as to the meaning and scope of Charter provisions, albeit not unlimited with regard to the stated purposes of the Organization, is valuable, but a few guidelines are proposed. The issue basically relates to the political structure and interrelationships of the United Nations and, as the court pointed out,

> in the legal system of States there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted . . . therefore each organ must, in the first place at least, determine its own jurisdiction.[77]

Accordingly, therefore, one must examine the practice of the organ in question in order to see how it has tackled the problem of interpreting the various provisions of the Charter.

The problem is also raised that it is the UN's organs themselves that will usually constitute the fora for the determination of the constitutionality of their own acts.[78] As the court itself remarked in the statement quoted above, attempts to make the ICJ a final authority regarding the interpretation of the Charter were rejected. Recourse to the court will depend upon a positive decision by the particular organ, and the opinions of the International Court are only advisory in this field, though in practice usually adopted by resolution.[79]

This means that in practice a very high proportion of questions relating to the constitutionality of, for example, General Assembly resolutions will be considered only by the Assembly itself, and this has had a blurring effect on the subject of Charter interpretation and its limits.[80] There are

Downloaded from https://academic.oup.com/book/10272/chapter/157965946 by University of Melbourne user on 18 March 2024

indeed dangers inherent in the situation where organs are deemed to be the final authority as regards the constitutionality of their own acts, since majority voting could validate, as it were, provisions manifestly contrary to the stipulations enshrined in the Charter. Some safeguards therefore are necessary to prevent the process from degenerating into licence. These will take the form of determining the requirement of authoritativeness surrounding Charter interpretations in such a way as to protect the interests of the minority as well as to preserve some elements of continuity and stability in evolution of international legal principles.[81]

There have been varying views expressed as to the way in which the Charter may be amended, altered, and interpreted, and such views range widely. At this point we shall take a brief look at some of them in order to clarify the role and potentialities of Charter interpretation, particularly with regard to self-determination.

Chapter XVIII of the Charter prescribes two ways in which the Charter may be changed. The first (Article 108) is by way of amendments, which are to come into force for all UN members when adopted by a vote of two-thirds of the members of the General Assembly and ratified by at least two-thirds of UN members including all the permanent members of the Security Council. The second (Article 109) is by way of alteration, which is to follow upon a general conference for the review of the Charter and a recommendation by a two-thirds vote of the conference ratified by two-thirds of the members of the United Nations, including all the permanent members of the Security Council. These methods are the declared constitutional procedures enshrined in the constituent document of the UN Organization and there is a minority view to the effect that they are the sole means available for the modification of the Charter.[82]

However, despite this view it is possible to achieve some measure of change in the Charter. An instrument may be amended by the subsequent practice of the States parties to it. It is clear that custom may modify a previous treaty norm just as a treaty may alter a previous customary rule,[83] but practice not amounting to custom may accomplish the same objective. As Fitzmaurice has written, 'the way in which the parties have actually conducted themselves in relation to the treaty affords legitimate evidence as to its correct interpretation',[84] and the International Court has on a number of occasions had recourse to subsequent practice in order to aid in the process of treaty interpretation.[85] However, subsequent practice may not only clear up doubts and ambiguities in the text of the treaty, that is, act as an extraneous means of elucidation in the absence of clarity in

Downloaded from https://academic.oup.com/book/10272/chapter/157965946 by University of Melbourne user on 18 March 2024

the ordinary meaning of the words, but may also result in actual revision of the treaty itself.[86] This, as we have already noted, is particularly evident in the case of the international organizations where changing conditions and a wealth of day-to-day practice cannot but result in some modification of the original constituent documents.[87]

The question then arises as to the conditions under which this procedure might operate. It is generally accepted that the conduct involved will have to encompass a large number of the parties to the treaty[88] though conduct by one party might be relevant as regards the doctrines of acquiescence and estoppel. One cannot go so far, however, as to insist upon universal compliance since this could result in one State out of about 150 frustrating an agreement reached by all the others.[89]

Tunkin emphasizes that a further element must be that the practice in question is evidence of an agreement by the relevant parties to the intended modification.[90] This follows from his well-known views of custom as a form of tacit agreement and his emphasis upon the importance of the concordance of States' wills in the formation of rules of international law.[91] To the extent that the subsequent practice must clearly relate to a particular provision or set of provisons in the relevant treaty and that the States involved in the practice clearly wish to amend the treaty, Tunkin's opinion is valid. However, it is felt that the requirement that the practice should evidence the existence among the parties of an agreement respecting the attempted amendments is going too far and fails to recognize the point that the conduct need not amount to a custom before achieving a modification in the terms of the treaty.[92] Of course, a customary norm may alter a previous treaty provision if the necessary conditions apply, but conduct not amounting to custom may operate to alter treaty norms so long as it is clearly aimed as modifying such norms.[93]

General Assembly resolutions are in this instance particularly suited in form for this purpose. They constitute State practice and they are inherently linked to the UN Organization and its Charter. This does not mean that other practice is irrelevant but by the very nature of things Charter modification, by way of amendment or interpretation, may be more readily accomplished by General Assembly resolutions than by other methods.[94]

Judge Spender declared that although members of international organizations have the right to interpret the constituent instruments in good faith, 'their right to interpret . . . gives them no power to alter'.[95] This strict positivist viewpoint is predicated upon the need to preserve the

Downloaded from https://academic.oup.com/book/10272/chapter/157965946 by University of Melbourne user on 18 March 2024

consensual aspect of international law creation and lays excessive emphasis upon the actual wording of the text of the particular instrument. It ignores the fact that to interpret is to create and that the line to be drawn between interpretation *stricto sensu* and actual alteration is hazy and incapable of precise definition.[96]

Fitzmaurice appears to be moving towards this, and tentatively suggests that where subsequent practice has brought about a change or development in the meaning of a treaty through a revision of its terms by conduct, 'it is permissible to give effect to this change or development as an agreed revision but not as an interpretation of its original terms'.[97] Although this may seem confusing in introducing a concept of agreed revision and treating interpretations as equivalent (it would appear) to amendment, it is a recognition that subsequent conduct may reinterpret a treaty, particularly the UN Charter, within certain limits. But the problem still remains; that is, where to draw the line between interpretation and alteration (or, in Fitzmaurice's phrase, agreed revision), if indeed a line has to be drawn.

Tunkin takes the view that custom may amend treaties but not change the basic provisions of the treaty[98] and he gives as an example the modification of Article 27 of the UN Charter,[99] but he criticizes the Uniting for Peace resolution of 1950 as a violation of the Charter since it purported to amend basic provisions of the Charter.[100] In practice this distinction could prove elusive since perceptions as to such basic provisions may well alter with the passage of time and lead to complex problems of determination, while in theory it creates difficulties since it is arguable that even rules of *jus cogens* may be changed by virtue of the tacit consent of the vast majority of the members of a universal organization.[101]

However, one distinction does remain, and that is between amendments by subsequent practice and interpretations. It is a distinction that is in practice extremely difficult to define precisely, since the mechanics of change will be the same and States will rarely specify whether they feel that by a series of, for example, resolutions, they are amending or interpreting the Charter. Nevertheless, it is possible for a Charter provision to be interpreted by a majority of UN members in circumstances that might not amount to an amendment, for example, with respect to the members voting for it. In such cases, the persuasiveness of the interpretation would depend upon the number and identity of the States voting for it. Schachter, however, regards virtual unanimity as the true test of interpretation,[102] and this demonstrates again the process of merging amendment and interpretation in Charter modification.[103] This

Downloaded from https://academic.oup.com/book/10272/chapter/157965946 by University of Melbourne user on 18 March 2024

raises the question of the authoritativeness of such interpretations. Whereas an amendment by subsequent practice will be binding, whether a particular interpretation of a Charter provision contained in one or more resolutions of the General Assembly possesses a persuasive quality, and to what extent, will be determined on the basis of the numbers and identity of States voting for the proposed interpretation. Thus, Charter interpretation in this narrow sense constitutes one element of Charter modification by practice and is subsumed under the generally recognized heading of Charter interpretation. The advantage of this latter process is that it enables the majority of States to modify the Charter to accord with contemporary conditions, while imposing certain limitations as to the quantity of States proposing the change, and thus providing some protection to minorities. It is also necessary for the proposed modification to be directly referable to a particular provision of the Charter.

Such changes may be, and generally will be, accomplished by Assembly resolutions, which may either be related to a specific situation or be more generally framed. Thus, Charter interpretations may occur other than as responses to particular disputes. Not all such resolutions will be of the same persuasive nature and a series of resolutions over a period of time will usually be required.

(b) Self-Determination

1. *General Approach*

At this point we shall turn to examine the question of whether the right of self-determination can be regarded as established through the medium of Charter interpretation as a result of practice subsequent to the creation of the UN Organization. As an introduction, one should note the Universal Declaration of Human Rights. This was adopted on 10 December 1948, in the form of an Assembly resolution by 48 votes to 0, with 8 abstentions. It built upon Charter provisions regarding human rights (for example, Articles 1, 55, 56, 62, and 76) and enumerated a list of human rights and fundamental freedoms 'as a common standard of achievement for all peoples and all nations'.[104] Although the principle of self-determination was not referred to in this Declaration, which concentrated upon the elucidation of individual rights, its path forward was cleared in the same way in that democratic rights seemed to lead inevitably in international society to consideration of the rights of peoples to define their own cultural and national status.[105]

Downloaded from https://academic.oup.com/book/10272/chapter/157965946 by University of Melbourne user on 18 March 2024

The Declaration was not legally binding as such in view of the terms in which it is expressed and the circumstances surrounding its adoption,[106] but has come to have a significant effect within the international community. Some of its provisions might be taken as reflecting general principles of law, others as relatively new international stipulations. However, it can be regarded in essence as an influential interpretation by the General Assembly of the relevant Charter provisions upon human rights and fundamental freedoms, and as such of legal value as part of the law of the United Nations.[107]

There have been a number of resolutions dealing with self-determination both generally and with regard to particular situations, and it is possible to point here to what appears to be a significant distinction. Resolutions and declarations that posit principles of law may be regarded as valid interpretations of the Charter if the necessary requirements of unanimity (or near-unanimity) and referral have been met. However, resolutions and other UN and State practice referable to the specific situations are often limited by two factors. Firstly, such practice in concentrating upon a particular situation is of restrictive value since it deals only with one aspect of the principle under discussion which may be modified or even distorted by virtue of other principles, deemed relevant in that particular situation,[108] and secondly by the greater likelihood of opposing votes and behaviour that will rob the practice of its claim to universality.[109] However, it is possible for such defects to be remedied by a consideration of the temporal element. In other words, a series of resolutions, for example calling for self-determination in different colonial territories, may be regarded as subsequent practice relevant to the interpretation of the particular Charter provisions in question. Examples of such practice will be noted in the following section,[110] but it will be useful in this context to recall the views of the ICJ regarding Article 27 of the Charter. The court declared that 'the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the position taken by members of the Council . . . have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions . . . . This procedure followed by the Security Council . . . has been generally accepted by members of the United Nations and evidences a general practice of that Organization.'[111]

A similar process can be seen with regard to Article 2(7) of the Charter, concerning domestic jurisdiction, which has over the years been increasingly restrictively interpreted[112] while the General Assembly has

Downloaded from https://academic.oup.com/book/10272/chapter/157965946 by University of Melbourne user on 18 March 2024

progressively widened the scope of its jurisdiction under Chapter XI of the Charter by asserting its competence both to request political information on non-self-governing territories under Article 73(e) and to decide which territories may be regarded as non-self-governing.[113] The Assembly has also proclaimed its authority to decide between competing aspirations of the right to self-determination and to declare whether territories have exercised or should exercise the right to self-determination.[114]

In all of these instances State practice over a period of time has been consolidated into Charter interpretation. Whether such practice can be treated as a valid interpretation will depend on all the circumstances of the case, but the presumption would be that the larger the number of resolutions, for instance applying the principle of self-determination to different territories, and the longer the period during which such practice has been operating, the greater would be the likelihood that a persuasive or even binding view of the Charter term has been expressed.

Resolution 421 (V) of 4 December 1950 embodied the request of the General Assembly for a study of the ways and means 'which would ensure the right of peoples and nations to self-determination', and this was taken further by resolution 545 (VI), which stated that the proposed article on self-determination in the International Covenants on Human Rights should be expressed in the terms that all peoples have the right to self-determination. It also noted that the article should stipulate that all States should promote the realization of the right in conformity with the principles and purposes of the United Nations. Resolution 637 (VII) proclaimed that self-determination was a fundamental human right.[115] This resolution also declared that UN member States 'shall recognise and promote the realization of the right' with regard to the peoples of trust and non-self-governing territories under their administration 'according to the principles and spirit of the Charter of the United Nations'.[116] The Commission on Human Rights considered the concept of self-determination over a number of sessions[117] and submitted recommendations to the UN Economic and Social Council, including a suggestion for the establishment of a Special Commission to examine situations resulting from alleged denials or inadequate realizations of the right to self-determination in certain circumstances.[118] This was, however, opposed and the matter was referred back to the Commission on Human Rights for reconsideration.[119] During the reconsideration a number of representatives pointed out that self-determination was only a principle and not a right. It was declared that the Charter had not granted

Downloaded from https://academic.oup.com/book/10272/chapter/157965946 by University of Melbourne user on 18 March 2024

the General Assembly competence to implement self-determination, although by way of contrast, implementation of Article 1(1) was provided for by Article 11 and that of Article 1(3) by Article 13.

Such objections were overridden, as was the view that the realization of self-determination fell essentially within the domestic jurisdiction of States, and the Commission reaffirmed its previous recommendation which was sent to the General Assembly.[120] The General Assembly at its eighth session asked the Commission to give priority to recommendations regarding international respect for the right of self-determination,[121] and by the next session the Assembly already had before it the draft International Covenants on Human Rights prepared by the Commission and transmitted by the Economic and Social Council.[122]

The Commission suggested that both International Covenants should have an identical first article[123] and this article, according to the draft of the Third Committee of the Assembly, read as follows:

> 1. All peoples have the right to self-determination. By virtue of the right they freely determine their political status and freely pursue their economic, social and cultural development . . . .
>
> 3. All States parties to the Covenant including those having responsibilities for the administration of non-self-governing and trust territories shall promote the realization of the right of self-determination and shall respect that right in conformity with the provisions of the UN Charter.[124]

At the Twelfth Session, the Assembly declared in resolution 1188 (XII) that member States were to give due respect to the right of self-determination. From this point, the proposed Covenants became enmeshed in UN discussions from which they were only to emerge nine years later.

At this point we shall turn to two General Assembly declarations that might be treated as authoritative interpretations of the Charter.[125]

The Declaration on the Granting of Independence to Colonial Countries and Peoples (the Colonial Declaration) was adopted by the General Assembly of 14 December 1960 in resolution 1514 (XI) by 89 votes to 0 with 9 abstentions. This has had a profound impact upon international affairs and has been treated with particular reverence by the States of the Third World. It has been regarded by many as the 'second Charter' of the United Nations drawn up for the subjugated peoples of Africa and Asia.[126] Indeed, Parry has written that the Declaration by itself has had the effect of modifying that part of international law that deals with territorial sovereignty.[127]

Downloaded from https://academic.oup.com/book/10272/chapter/157965946 by University of Melbourne user on 18 March 2024

The Declaration emerged after a debate in the Assembly initiated by the Soviet premier[128] and was drafted by forty-three States.[129] The preamble noted that 'all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory' and proclaimed the necessity of 'bringing to a speedy and unconditional end colonialism in all its forms and manifestations'. The Declaration laid down seven principles, stressing that 'all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'. Inadequacy of political, economic, social, or educational preparedness was not to serve as a pretext for delaying independence. Immediate steps were to be taken to transfer power to the peoples of non-independent countries, but attempts aimed at the partial or total disruption of the national unit and territorial integrity of a country were deemed incompatible with the purposes and principles of the UN Charter.

The Declaration has been treated by a number of countries as constituting a binding interpretation of the Charter, or a restatement of principles enshrined in the Charter,[130] and it has been similarly regarded by some writers.[131] However, there are others who dispute this. One view already discussed is that any action by the General Assembly could only be recommendatory in such circumstances and that therefore the Declaration could be nothing more than a general statement of objectives.[132]

But the most significant criticism of the Declaration as an authoritative interpretation of the Charter is concerned with the inconsistencies that are noticeable between the two instruments. Paragraph 1 of the Declaration proclaimed that 'the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights [and] is contrary to the Charter of the United Nations'. However, this is not too clear in the Charter itself, for Chapters XI and XII legitimize certain relationships of dependence regarding non-self-governing and trust territories,[133] subject to defined conditions.

The Declaration in paragraph 3 notes that 'inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence', while Article 73(b) declares that States administering non-self-governing territories must 'assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement' and Article 76(b) underlines that among

Downloaded from https://academic.oup.com/book/10272/chapter/157965946 by University of Melbourne user on 18 March 2024

the basic objectives of the trusteeship system is the 'progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples'.

Paragraph 5 of the Declaration emphasizes that 'immediate steps' should be taken in all non-independent territories to transfer power to the people, and this seems inconsistent with Articles 73 and 76. However, the call by the USSR, in particular, for immediate independence or the proclamation of a date at the end of 1961 for this to be achieved was not accepted[134] and this provision should perhaps be regarded rather as a change of pace than as a change of essence. The Declaration also blurs the distinction between trust and non-self-governing territories by positing the same provisions for all territories that have not yet attained independence. In addition, the Declaration in paragraph 5 appears to regard independence as the only legitimate goal of the whole process. This latter provision runs counter to a number of UN resolutions, for example those recognizing the exercise of self-determination involved in the relationship of dependence between the USA and the Commonwealth of Puerto Rico,[135] and between New Zealand and The Cook Islands[136] and Niue[137] after elections had been held in the respective dependent territories. In fact, the UN Secretary-General noted in 1963 that 'the emergence of dependent territories by a process of self-determination to the status of self-government either as independent sovereign States or as autonomous components of larger units has always been one of the purposes of the Charter and one of the objectives of the United Nations'.[138]

Such inconsistencies have led Bokor-Szego[139] and Martine,[140] for example, to deny that the Colonial Declaration is an authoritative interpretation since it appears actually to amend the Charter, the argument turning on where the line between interpretation and amendment should be drawn. Fifteen years of State practice in the process of decolonization formed the background to the Colonial Declaration and enabled it to bring up to date the relevant Charter provisions in a way marking contemporary consensus views as to, for example, the effect of inadequacy of political, social, economic, or educational preparedness. All interpretations refine and develop the concept under consideration, in a manner acceptable to those concerned, and may be no less influential or binding because of that.[141]

However, it does not follow that everything contained in the Declaration (or in similar resolutions, for that matter) constitutes a

Downloaded from https://academic.oup.com/book/10272/chapter/157965946 by University of Melbourne user on 18 March 2024

binding obligation. Some elements would remain upon a purely hortatory level, for example the solemn proclamation in the preamble to the Declaration stressing 'the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations'. On the other hand, there may be statements which are inconsistent with instruments interpreting the Charter—for instance, the apparent acceptance in the Declaration that independence is the sole object of self-determination. This contrasts with UN practice, as noted above, recognizing other relationships, and with the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (resolution 2625 (XXV)), which noted that 'the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people'.[142]

It would therefore seem that where one is faced by conflicting interpretations of equal standing, resort must be had to the intentions of the members of the United Nations, as revealed in their practice, and upon this basis it would seem that the stipulation in the 1960 Declaration restricting self-determination to the attainment of independence must be regarded as only a suggestion and not an authoritative interpretation of the Charter. Nevertheless the core of the Declaration does constitute an interpretation of the Charter and one that has underpinned the end of colonialism.[143]

Higgins has noted that it 'must be taken to represent the wishes and beliefs of the full membership of the United Nations'.[144] As to the juridical character of the Declaration, Higgins stresses that in it the right of self-determination is regarded 'as a legal right enforceable here and now'.[145]

This approach is underlined by the action taken by the United Nations to implement the Declaration. On 27 November 1961 the General Assembly created a subsidiary organ entitled the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence,[146] which was enlarged from seventeen to twenty-four member States the following year.[147] It has gradually widened its sphere of activity so that, apart from the Trusteeship Council (which is only concerned now with the trust territory of the Pacific Islands), it is the only organ responsible for issues dealing with dependent territories. The Committee has been very active and has done much to

Downloaded from https://academic.oup.com/book/10272/chapter/157965946 by University of Melbourne user on 18 March 2024

pressure the colonial powers and the administering powers.[148] It has also stressed the position that the United Nations intended the Colonial Declaration to act as a juridical signpost to complete decolonization and not merely as a solely hortatory pronouncement.

Virtually all UN resolutions proclaiming the right to self-determination of particular peoples expressly refer to the 1960 Declaration.[149] Judge De Castro particularly noted in the *Western Sahara* case how the African group at the United Nations that prepared a draft resolution on the Sahara problems for discussion in the Fourth Committee was at pains to refer four times to resolution 1514 (XV) in reaffirming the right of the people of Western Sahara to self-determination.[150] The International Court has specifically referred to the Colonial Declaration as an 'important stage' in the development of international law regarding non-self-governing territories,[151] and as 'the basis for the process of decolonization'.[152]

On 16 December 1966 the General Assembly adopted the International Covenants on Human Rights, which consisted of the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the Optional Protocol to the latter. Both Covenants have an identical first article which declares *inter alia* that 'all peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development' and that 'the States parties to the present Convention including those having responsibility for the administration of non-self-governing and trust territories shall promote the realization of the right of self-determination and shall respect that right in conformity with the provisions of the Charter of the United Nations'.

The inclusion of the right to self-determination in the International Covenants occurred because the General Assembly in resolution 545 (VII) recommended that the proposed Covenants should incorporate such a provision and in resolution 637 (VII) declared that the right to self-determination was a 'fundamental human right'. It is to be noted that the preambles to both the Covenants refer to the 'obligation of states under the Charter of the United Nations to promote universal respect for and observance of human rights and freedom'.[153]

The International Covenants came into force in 1976[154] and are thus binding as between the parties, but it would seem that they are of legal value over and above that, not only as practice leading to or reflecting a customary rule, but also as a persuasive interpretation of the notion of human rights as embodied in the Charter.[155]

Downloaded from https://academic.oup.com/book/10272/chapter/157965946 by University of Melbourne user on 18 March 2024

This appears so in view of the drafting history of the Covenants through the various organs of the United Nations, culminating in the adoption of resolution 2200 (XXI), and the emphasis in the many discussions and resolutions and in the Covenants themselves upon the actual provisions of the Charter.[156] The preambles to the Covenants specifically recall various Charter provisions (particularly Articles 1, 55, and 56) and the Universal Declaration of Human Rights.

The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations was unanimously adopted without a vote on 24 October 1970 and is contained in the annexe to General Assembly resolution 2625 (XXV). It proclaims seven principles, including the principle of equal rights and self-determination of peoples. And the question that is raised at this stage is whether this Declaration may be regarded as a binding interpretation of the Charter. The Declaration was specifically stated to deal with certain international legal principles 'in accordance with the Charter of the United Nations' and the preamble includes the phrase 'considering the provisions of the Charter as a whole and taking into account the role of relevant resolutions adopted by the competent organs of the United Nations relating to the content of the principles'. This suggests not only that such resolutions are relevant in a Declaration of principles 'in accordance with the Charter', thus impliedly reinforcing the importance of the interpretative role of such resolutions, but also that the Declaration itself constitutes an interpretation of the Charter provisions. The reason for the interpretation is emphasized in the preamble, which notes that 'the great political, economic and social changes and scientific progress which have taken place in the world since the adoption of the Charter of the United Nations give increased importance to these principles and to the need for their more effective application in the conduct of States wherever carried on'. The Declaration stresses that 'nothing in this Declaration shall be construed as prejudicing in any manner the provisions of the Charter or the rights and duties of member States under the Charter or the rights of peoples under the Charter, *taking into account the elaboration of these rights in this Declaration*'.[157]

The Declaration states that 'by virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine . . . their political status and to pursue their economic, social and cultural development', while 'every State has the duty to respect this right in accordance with the provisions of the Charter'. Arangio-Ruiz strongly asserts the non-legal

Downloaded from https://academic.oup.com/book/10272/chapter/157965946 by University of Melbourne user on 18 March 2024

status of the Declaration since it was effected at the merely organic or institutional level rather than on a formal, legally binding inter-State level[158] and concludes that 'there can hardly be any doubt . . . that the Declaration embodied in Resolution 2625 (XXV) . . . is to be considered from a legal point of view as an instrument of a purely hortatory value'.[159] This approach, however, cannot be supported. The Declaration was intended to act as an elucidation of certain important Charter provisions, although not as an actual amendment of the Charter, and was adopted by member States on that basis.[160]

State practice within and outside the United Nations also supports the view that the right to self-determination exists in international law. State practice, other than resolutions and declarations purporting to express principles of law, can be important in the process of Charter interpretation provided it is linked to particular Charter stipulations and provided over a period of time sufficient practice has accumulated for it to be treated as a valid and general interpretation rather than as strictly limited conduct specifically related to a particular situation.

It is realized that this formulation may fail to provide an adequate guide as to whether a proposition can be accepted as an authoritative Charter interpretation in a number of instances, but it is clearly impossible to lay down firm conditions as to the time that should be encompassed or the number of relevant resolutions that must be adopted. In each case much will depend upon acceptance and acquiescence by an increasing number of States regarding the propositions involved in particular situations constituting general principles interpreting the Charter.

One must be careful not to deny the members of an organization the capacity to harmonize its constitution with contemporary needs by means of their subsequent practice. After all, the aim of interpretation is to enable the overwhelming majority to determine the nature and extent of the obligations and rights they have agreed to in circumstances minimizing adverse effects upon dissentient members.[161]

State practice that does not fall within the categories mentioned may nevertheless be relevant in the process of Charter interpretation as evidence of recognized interpretations, and thus may be of value in emphasizing the form and content of a particular interpretation. It may also play a vital role in pointing out which interpretations are to be regarded as valid, binding ones, much as State practice may also constitute evidence of particular rules of customary law. State practice, of course, may also lead to a new customary law. One should note that those member States that abstain with regard to such interpreting resolutions as

Downloaded from https://academic.oup.com/book/10272/chapter/157965946 by University of Melbourne user on 18 March 2024

the 1960 and 1970 Declarations discussed above may well still be bound by them.[162]

2. *Specific Approach*

State practice, particularly as manifested in the United Nations, concerning the status and application of self-determination in specific situations exceeds the abstract, general expression of self-determination as a right, in terms of both frequency and diversity, and accordingly must be considered as a significant factor.

General Assembly resolutions proclaiming that specific territories should be entitled to the exercise of the right of self-determination are ultimately founded upon the established competence of the Assembly to determine which territories are non-self-governing. This is partly because self-determination has been deemed non-applicable to independent territories and partly to side-step the doctrine of domestic jurisdiction.

Article 2(7) of the Charter declares that 'nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State' and the history of the first decade and a half of the UN Organization largely centres around attempts to establish a balance between this provision and the perceived need to end colonialism. This latter aim was achieved, at least as far as the United Nations was concerned, through establishing a clear divison between the administering State and its administered territories, contrary to the wishes of a number of colonial powers, particularly France with regard to Algeria and Portugal with regard to its African possessions. Having instituted this division and provided an exception to Article 2(7), the Assembly proceeded to make recommendations regarding the future of these non-self-governing territories.[163] Based upon its recognized competence to decide which territories were non-self-governing territories, the General Assembly successfully asserted its competence to determine whether or not a non-self-governing territory had attained a full measure of self-government as referred to in Chapter XI of the Charter, and to this end a series of resolutions were adopted expressing the Assembly's views as regards specific cases.[164] Despite the objections of the colonial powers, the doctrine of domestic jurisdiction as declared in Article 2(7) has been interpreted by the subsequent practice of the UN Organization and its members so that the affairs of non-self-governing territories may be discussed within the Organization and rendered subject to UN resolutions and declarations as to their political status.

Downloaded from https://academic.oup.com/book/10272/chapter/157965946 by University of Melbourne user on 18 March 2024

The competence of the Assembly was initially founded upon Chapter XI of the Charter, but later resolutions disregarded this Chapter and concentrated instead on the concept of self-determination as the basic relevant principle.

The large number of Assembly resolutions calling for self-determination in specific cases represents international practice regarding the existence and scope of a rule of self-determination in customary law. They also constitute subsequent practice relevant to the interpretation of particular Charter provisions. For example, resolutions proclaiming that an obligation exists under Article 73(e) of the Charter to transmit information in a particular case may be regarded as a binding interpretation of the Charter provision in that specific instance since the competence of the General Assembly to determine such matters has been clearly recognized.[165] The change from Chapter XI to self-determination with the Colonial Declaration as the juridical basis for the process marks the stronger line taken by the Assembly as a whole but the effect remains broadly similar—that is, the determination by the General Assembly of a factual situation within which the declared norm will be deemed to operate. By such methods, of course, the outlines of the norm itself will be elucidated, and to that extent factual determinations by the Assembly will be juridically relevant.

However, unlike Assembly resolutions of a general nature, they cannot themselves authoritatively interpret a principle as a legally binding norm; their function in this sphere rests rather upon delimitation,[166] though such determinations may also provide for the application of non-legal principles to a particular situation.

The Algerian problem[167] was first included on the agenda of the assembly in 1955, and it was claimed that France had broken the provisions of the Charter on self-determination.[168] The Assembly, however, decided not to pursue the matter[169] and the Security Council did not place it upon its agenda.[170] In succeeding sessions, resolutions proclaiming the right of the Algerian people to self-determination failed to be adopted although support for the proposition was growing.[171] In fact, it was only in 1960 that a resolution was adopted which referred to the right of the Algerian people to self-determination.[172] Despite this hesitant start, and in view of the changed climate of opinion in France itself, the Assembly passed without opposition in the following session resolution 1724 (XVI) which called for the implementation of 'the right of the Algerian people to self-determination and independence respecting the unity and territorial integrity of Algeria'.

Downloaded from https://academic.oup.com/book/10272/chapter/157965946 by University of Melbourne user on 18 March 2024

This resolution, which significantly referred to the Colonial Declaration of 1960, also asserted that the United Nations had a part to play in the fulfilment of this right.

A large role has been performed in this process by the Special Committee established after the adoption of the Colonial Declaration.[173] For example, the Special Committee was requested to study the situation in Southern Rhodesia by General Assembly resolution 1745 (XVI) and its report formed the basis of an Assembly resolution criticizing the failure of the United Kingdom to carry out the Colonial Declaration, and affirming that Southern Rhodesia was a non-self-governing territory.[174] The Assembly adopted resolution 1755 (XVII) proclaiming the right of the people of Southern Rhodesia to self-determination, and the problem has been discussed at the United Nations at great length.[175] The claim of the United Kingdom that the problem was an internal matter and that therefore the United Nations could not consider it, was clearly rejected, and resolution 1747 (XVI) affirmed that 'the territory of Southern Rhodesia is a non-self-governing territory within the meaning of Chapter XI of the Charter of the United Nations'.[176] This situation was altered, at least as far as the United Kingdom was concerned, by the unilateral declaration of independence by the government of Southern Rhodesia, but the General Assembly vigorously attacked 'any agreement reached between the administering power and the illegal racist minority regime which will not recognise the inalienable rights of the people of Zimbabwe to self-determination and independence in accordance with General Assembly resolution 1514 (XV)'[177]

In its first six years, the Special Committee considered some seventy territories,[178] and in 1974, for example, it discussed thirty-nine territories, the majority being Pacific or Atlantic islands.[179] In virtually all cases the Special Committee has recommended that the territory become independent in the light of its right to self-determination, although in some instances association with another State was accepted, for example, Niue and the Cook Islands.

Throughout the years of the existence of the UN Organization a great number of resolutions have been adopted calling for self-determination in particular situations and these constitute State practice and international practice of overwhelming importance. The majority of such resolutions have referred specifically to the 1960 Colonial Declaration, thus strengthening its claim to be the fount of legality as far as the right to self-determination is concerned. It has been noted that 'if this right [of self-determination] is still not recognized as a juridical norm in the practice of

Downloaded from https://academic.oup.com/book/10272/chapter/157965946 by University of Melbourne user on 18 March 2024

a few rare States or the writings of certain even rarer theoreticians, the attitude of the former is explained by their concern for their traditional interests, and that of the latter by a kind of extreme respect for certain long-entrenched postulates of classical international law'.[180]

It is submitted in conclusion that the right to self-determination has been accepted by the United Nations by virtue of the process of Charter interpretation as a basic principle in the law of the United Nations, and that from this proposition certain legal effects flow with regard to, for example, the definition of the determining unit, the capacity of the people of the territory in question to decide its political, economic and social status, the role of force in the process, and the *locus standi* of the colonial power.[181] Some of these notions will be examined in later chapters.[182]

III. CUSTOMARY INTERNATIONAL LAW

The practice supporting the right of self-determination as emanating from Charter interpretation may also be of relevance in establishing the existence of a right to self-determination as a rule of customary law. Custom differs from treaty interpretation in a number of vital ways. It is founded on State practice, whereas treaty interpretation relates to practice construed with reference to a treaty provision, and it is dependent upon the *opinio juris*, the belief or expression of an accepted legal obligation. This, as we have seen, is not necessarily the case with respect to the interpretation of treaty-charters, for practice not amounting to custom may have the effect of interpreting a particular stipulation.

The International Court of Justice is directed by Article 38(1) of its statute to apply 'international custom as evidence of a general practice accepted as law' and Brierly emphasized this in terms of a 'usage felt by those who follow it to be an obligatory one'.[183] Oppenheim notes that 'whenever and as soon as a line of international conduct frequently adopted by States is considered legally obligatory or legally right, the rule which may be abstracted from such conduct is a rule of customary international law'.[184]

Precisely how one is to interpret and balance the two factors of State practice and *opinio juris* is subject to conflicting analyses,[185] but it is commonly recognized that both elements are required. Usage is needed as the source material delineating the content and scope of the proposed rule, while the *opinio juris* is essential in differentiating norms of customary international law from State behaviour embarked upon for

Downloaded from https://academic.oup.com/book/10272/chapter/157965946 by University of Melbourne user on 18 March 2024

reasons of courtesy, morality, or expediency alone, since the latter forms of conduct are clearly intended to have no legal effect at all.

As far as self-determination is concerned, practice is extensive both within and outside the United Nations. Tied to the issue of colonialism as it has been virtually since the adoption of the Charter, it has constituted one of the major concerns of the Organization as any analysis of debates, resolutions, and declarations will attest. Kay notes that between 1960 and 1967 the number of speeches by representatives of the new nations devoted to decolonization outweighed those relating to any other topic in plenary and main committee meetings, with the exception of the Assembly's Twentieth Session when the issue of economic aid received marginally more attention.[186]

If one includes the topic of South Africa, which has been treated by many nations as an aspect of the general problem of decolonization, the emphasis becomes even more evident. It is clear that the interest of the Third World nations of Africa and Asia has focused primarily upon the decolonization issue, with the problems of economic aid and development coming more to the fore as the number of countries still under colonial rule rapidly declines. This issue has been broadly defined and extended so that it has assumed the status of a general category incorporating a number of specific questions. The Ghanaian representative to the Sixteenth Session of the General Assembly declared that 'in our view, colonialism is the greatest evil of the modern world, the source of all the troubles which presently afflict mankind. It is the root-cause of the arms race and the problem of disarmament. Colonialism and neo-colonialism are a perpetual threat to the peace and sovereignty of the world. Colonialism is the cause of war and conflict among nations and is, therefore, the greatest danger to world peace.'[187]

The number of resolutions directly concerned with self-determination is high and forms a vital part of the UN attitude to the decolonization process. Of necessity, therefore, one must consider whether such resolutions can be regarded as constituting State practice for the purposes of customary law formation.

Resolutions may be relevant in the context of norm creation or determination in a number of differing ways. They may constitute binding or persuasive interpretations of the UN Charter. They may evidence and reflect recognized rules of international law whether created through the medium of treaty or custom or as general principles of law recognized by civilized nations.[188] In this case, resolutions merely underline the accepted position and have no norm-creating functions to fulfil. More

Downloaded from https://academic.oup.com/book/10272/chapter/157965946 by University of Melbourne user on 18 March 2024

crucial is the role played by resolutions within the process of customary law formation. This may take the form either of a stimulus to State practice[189] or of actual State practice or indeed of manifesting the *opinio juris*.

In the first case, that of a resolution encouraging the growth of usage, what is involved is clearly an extra-legal factor and one which does not need to be considered further, since many activities may perform such an encouraging role, ranging from resolutions of private bodies to opinions of legal writers. But the second and third possibilities must be considered briefly. Whether a usage is solely a practice or also incorporates within itself the expression of *opinio juris* is often difficult to decide. A State which makes a claim asserted as a legal right is not only exhibiting a practice but is also evidencing the *opinio juris*, thus the borderline between the material and psychological requirements of customary law created is blurred. This is particularly true with respect to Assembly resolutions, since they are often assertions of rights under international law. An example of this would be the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, adopted unanimously on 13 December 1963.[190] It was regarded as a declaration of existing law by many States, including the most important in the field,[191] as well as by a number of writers.[192]

The expression of State support for a particular declaration or resolution, however, whether by statement or voting, constitutes State practice,[193] while the assertion of the legality of the principles outlined therein is clear evidence of the *opinio juris*.[194] Thirlway has emphasized the need to maintain a clear distinction between usage and *opinio juris* in order to prevent alleged rules lacking both components from becoming part of customary law,[195] but the fact remains that the two are closely intertwined, particularly with regard to UN practice. The difficulty of unravelling the two with respect to Assembly resolutions is one more aspect of the changes brought about by the institution and operations of the United Nations within the sphere of international law.[196] Self-determination was clearly not a rule of customary law prior to the Charter[197] and the overwhelming bulk of practice regarding the concept has clearly occurred in connection with the United Nations.[198] Thus one must focus on this aspect.

The concern of the United Nations with regard to self-determination has been two-pronged. On the one hand, the Organization has affirmed the right to self-determination of all peoples in general terms and consistently since 1952. This has been included not only in a number of

Downloaded from https://academic.oup.com/book/10272/chapter/157965946 by University of Melbourne user on 18 March 2024

Assembly resolutions and declarations but also in the International Covenants on Human Rights adopted in 1966. On the other hand, the right has been declared in a number of specific situations and disputes. This had tended to increase the plausibility of the entry of self-determination into the panoply of international customary rules, since the greater the practice relating to a particular proposition, the greater the likelihood that it has been accepted as a custom. This also applies to the length of time during which the principle has been affirmed as a right. The longer the process has taken the greater the chances that it has hardened into a rule. In any event, it is clear that more practice affords more opportunity from which to infer the *opinio juris*. It is interesting to note that Judge Dillard has stated that 'even if a particular resolution of the General Assembly is not binding, the accumulative impact of many resolutions when similar in content, voted for by overwhelming majorities and frequently repeated over a period of time, may give rise to a general *opinio juris* and thus constitute a norm of customary international law'.[199]

IV. CONCLUSIONS

It is thus concluded that the right to self-determination is a legal right as a result of Charter interpretation and that the possibility, additionally, is raised of the right constituting also a customary right, although UN practice appears to have strongly favoured the former approach.

Recent judicial pronouncements on self-determination are surprisingly rare and centre around the *Namibia* case of 1971 and the *Western Sahara* case of 1975.[200] The court, in the former case, noted that 'the subsequent development of international law in regard to non-self-governing territories as enshrined in the Charter of the United Nations made the principle of self-determination applicable to all of them'[201] without really specifying how this has occurred or what possibly is involved,[202] and proceeded to refer to the Colonial Declaration as 'a further important stage in this development'[203] without further clarification. In interpreting the mandate, therefore, the court had to consider 'the changes which have occurred in the supervening half-century . . . by the subsequent development of law, through the Charter of the UN and by way of customary law'.[204] However, the court failed to confirm whether or not self-determination was a binding legal principle in its own right.

The court's observations of self-determination in the *Namibia* case were quoted extensively in the *Western Sahara* case, where the court

Downloaded from https://academic.oup.com/book/10272/chapter/157965946 by University of Melbourne user on 18 March 2024

similarly refrained from a clear declaration. The Colonial Declaration was referred to as 'the basis for the process of decolonization',[205] and the essence of self-determination was discussed in relation to resolution 1541 (XV) and the 1970 Declaration on Principles of International Law.[206] Such instruments constituted the 'basic principles governing the decolonization policy of the General Assembly'.[207] Judge Dillard regarded the opinion as forthright in proclaiming the existence of the rights as far as the proceedings were concerned, but he went further and declared that 'the pronouncements of the Organization thus indicate . . . that a norm of international law has emerged applicable to the decolonization of those non-self-governing territories which are under the aegis of the United Nations'.[208] Although he does not expressly bring out the process by which this has occurred, Judge Dillard draws attention to the long list of resolutions dealing with self-determination following in the wake of the Colonial Declaration.[209] The result, therefore, appears to be that the opinion recognizes that self-determination is a legal right[210] but is unclear as to how that has arisen exactly.[211]

A norm created as a result of Charter interpretation, it should be noted, will bind all members of the United Nations, while a customary rule will bind all States save those objecting *ab initio*. Thus, the former method would appear the more advantageous, particularly as regards, for example, South Africa. Indeed, the fact that self-determination applies virtually exclusively within the colonial sphere (although with some potential for development) is a further argument favouring the Charter interpretation approach, since the distinction between colonies and metropolitan territories is one made by the Charter.

One further point remains, and that is the possibility that self-determination constitutes a rule of *jus cogens*, and thus a peremptory norm of international law from which no derogation is permitted. The question of the existence and nature of *jus cogens* is one that has received much attention in recent years, being partly stimulated by discussions and debates leading up to the Vienna Convention on the Law of Treaties in 1969.[212] The basis of such rules, which cannot be changed save by contradictory rules of the same status, has been variously ascribed to natural law[213] and to international public policy.[214]

However, despite differences as to the origin of *jus cogens*, its essence is generally accepted.[215] The International Law Commission discussed the concept[216] and incorporated it into the final draft on the law of treaties in 1966.[217] Article 53 of the Vienna Convention specifies that

Downloaded from https://academic.oup.com/book/10272/chapter/157965946 by University of Melbourne user on 18 March 2024

a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

O'Connell has written that 'the inclusion of the concept of *jus cogens* in the Vienna Convention constitutes an important recognition of the fact that contemporary society is bound together by the acceptance of fundamental principles constituting the rule of law'.[218]

If the concept of *jus cogens* is generally accepted, no such agreement is manifested with regard to the creation of rules of *jus cogens* or their scope or, indeed, which rules can be included as rules of *jus cogens*. However, there is a body of juristic opinion which declares that the rules of *jus cogens* are formed in the same way as other norms of international law, that is, primarily by way of custom and treaty, and can be modified by such means,[219] thereby placing the concept firmly within the ambit of positive law and away from any variant of natural law thinking.[220]

The problem of the emergence of a new rule of *jus cogens* is centred upon the conduct of States as a whole and a new principle might arise by way of inference from State practice.[221] How one might decide whether a new rule appertains to *jus dispositivum* or to *jus cogens* is open to question and would depend to a large extent upon the intentions of the international community and the universality of the rule involved.

One may illustrate this point by noting some examples of *jus cogens*.[222] The most recognizable relate to the proscription of aggression[223] and the prohibition of crimes against humanity and peace,[224] while other possibilities include the banning of slavery, piracy, and genocide.[225] Some jurists regard the rule against racial discrimination as an aspect of *jus cogens*.[226]

It is arguable that the principle of self-determination also falls within the category of *jus cogens*[227] and a number of members of the International Law Commission appeared to be of this opinion.[228] It would indeed be difficult to conceive of a treaty providing for the continuation of a colonial relationship against the wishes of the inhabitants of the territory being upheld as valid. Self-determination is a basic principle of international law of universal application, while the weight of international opinion appears to suggest that the right may be part of *jus cogens*.

Downloaded from https://academic.oup.com/book/10272/chapter/157965946 by University of Melbourne user on 18 March 2024

Introduction to the International Human Rights Regime

By

Manfred Nowak

MARTINUS NIJHOFF PUBLISHERS
LEIDEN / BOSTON

Manfred Nowak - 978-90-04-47907-4
Downloaded from Brill.com 12/03/2023 04:04:46PM
via University of Melbourne

Published by:
Brill Academic Publishers
P.O. Box 9000, 2300 PA Leiden, The Netherlands
cs@brill.nl
http://www.brill.nl

Sold and distributed by:
Turpin Distribution Services Limited
Blackhorse Road
Letchworth
Herts SG6 1HN
United Kingdom

In North America:
Brill Academic Publishers
P.O. Box 605
Herndon, VA 20172
USA
cs@brillusa.com

A C.I.P. Catalogue record for this book is available from the Library of Congress.

Printed on acid-free paper.

ISBN 90-0413-658-4 (hardback)
90-0413-672-x (paperback)
© 2003 Koninklijke Brill NV, Leiden, The Netherlands.

This is an updated English translation of the German *Einführung in das internationale Menschenrechtssystem* by Manfred Nowak, published in 2002 by Neuer Wissenschaftlicher Verlag GmbH, Wien/graz

Koninklijke Brill NV incorporates the imprint Martinus Nijhoff Publishers.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, microfilming, recording or otherwise, without written permission from the Publisher.

Authorization to photocopy items for internal or personal use is granted by Brill Academic Publishers provided that the appropriate fees are paid directly to The Copyright Clearance Center, 222 Rosewood Drive, Suite 910, Danvers MA 01923, USA. Fees are subject to change.

Printed and bound in The Netherlands.

Manfred Nowak - 978-90-04-47907-4
Downloaded from Brill.com 12/03/2023 04:04:46PM
via University of Melbourne

Convention on the Law of Treaties (VCLT), which states that treaties are to be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. The general linguistic usage (**ordinary meaning of a term**) may only be deviated from if the parties involved have intended a special meaning. For **systematic interpretations** (terms in their context) it is necessary not only to consider the entire text of a treaty including its preamble and annexes, but the deeds and agreements between the parties relating to the treaty, as well as all subsequent agreed **practices in the application of the treaty**.

Supplementary means of interpretation (the **travaux préparatoires** in particular) may only be resorted to in accordance with article 32 VCLT where the general rules of interpretation leave the meaning ambiguous or obscure, or lead to a result that is manifestly absurd or unreasonable. Essentially the emphasis is on interpreting treaties under international law in the light of their **object and purpose**. Where different yet authentic linguistic versions deviate from each other, precedence is to be given to the version that comes closest to the object and purpose of the treaty as a whole. With human rights treaties, naturally the main object is for states parties to protect the rights set out in the treaties. Especially with human rights treaties, however, it is often difficult to say whether interpretations, that limit the protection of human rights, are still in harmony with the object and purpose of the treaty as a whole.

TEXTBOX 34

RULES OF INTERPRETATION OF HUMAN RIGHTS TREATIES

- Interpretation 'in light of object and purpose'
- Dynamic interpretation (living instrument)
- *Effet utile* ('not theoretical and illusory, but practical and effective')
- Autonomous interpretation
- Restrictive interpretation of national human rights limitations
  - In dubio pro libertate et dignitate
  - Proportionality principle
  - Prohibition of discrimination

Thus, the UN Human Rights Committee decided in the case of *Kennedy* v. *Trinidad and Tobago* in 1999, that the object and purpose of the 1st Optional Protocol to the CCPR was to monitor the obligations of the treaty by an individual complaints procedure. Consequently, a reservation that excludes a particular group of persons (i.e. prisoners sentenced to death) from the right to file an individual complaint was not reconcilable with the object and purpose of the 1st Optional Protocol to the CCPR. International monitoring bodies are generally of the opinion that in **cases of doubt as to object and purpose, interpretation should favour the protection of the individual**, i.e. their freedom and dignity (*in dubio pro libertate et*

Manfred Nowak - 978-90-04-47907-4
Downloaded from Brill.com 12/03/2023 04:04:46PM
via University of Melbourne

dignitate). This is why limitation clauses (3.2.4.), in case of doubt, are to be interpreted restrictively taking into account the proportionality principle (3.2.5.) as well as the prohibition of discrimination (3.2.6.)

This pro human rights interpretation maxim provides the basis for a number of more specific interpretation rules, which, among others, the European Court of Human Rights developed during its many years of practice with the ECHR and which today in principle are recognized for all human rights treaties. These rules include the **principle of dynamic interpretation**. Back in 1978, the Court decided in the case *Tyrer* v. *the United Kingdom* that even fairly mild corporal punishment as still practiced then with adolescents on the Isle of Man, had to be considered a degrading punishment and therefore a violation of article 3 of the ECHR. It was then that the Court first introduced the formula of the ECHR as a living instrument not to be interpreted separately from the circumstances at the time. In other words, once terms such as torture, inhuman and degrading treatment or punishment change their meaning in the everyday usage of European societies, it is no longer admissible to rigidly stick to the meaning of a term coined in 1950 when most European states still did not consider corporal punishment degrading.

In 1979, a judgment was rendered in the case of *Airey* v. *the Republic of Ireland*, which concerned the question of whether, from the right to fair trial as laid down in article 6 of the ECHR, it was possible to derive the right of access to a court, whereby states parties would have a positive obligation to ensure that right. Since then, the Court has been using the interpretation rule of the '***effet utile***', which means that the Convention does not guarantee rights which are theoretical and illusory but those which are practical and effective. Thus, the Irish government in the concrete case of a procedure for legal separation of a marriage, would have had to make available to the applicant legal aid, irrespective of the fact that such claims, under the Convention, are explicitly intended for criminal proceedings only. Although the ECHR repeatedly refers to national legal systems (as with the limitation clauses), the terms for defining the scope of application of specific rights must be interpreted autonomously if protection is not to remain illusory. Interpretation of the terms 'civil rights and obligations' and 'criminal charge' as in article 6(1) of the ECHR, for example, cannot be subject to the meaning of these terms under civil and penal law of the states parties or the competence of national courts. After all, the purpose of a human right of access to an independent tribunal is to define at the level of international law which matters are too important to be decided on by an administrative authority bound by instructions, and rather have to be taken before an independent and impartial court. A treaty, however, will have to use fairly vague terms to arrive at such definitions. Ultimately the Court itself has to give an **autonomous interpretation** of the meaning of 'civil rights and obligations' and 'criminal charge'. This in fact required extensive changes in the laws in continental European states with a highly developed system of administrative law and administrative procedures not subject to judicial review, and therefore was the cause of heavy criticism on the part of governments and scholars.

Manfred Nowak - 978-90-04-47907-4
Downloaded from Brill.com 12/03/2023 04:04:46PM
via University of Melbourne

directly on the UN Charter and increasingly diffused the argument of inadmissible interference in national matters (at least with gross and systematic human rights violations). This gradual development was endorsed by the express recognition of the legitimacy of international measures for the protection of human rights during the 1993 Vienna World Conference on Human Rights (4.6.1.). At the same time, the **UN High Commissioner for Human Rights** (4.4.8.2.) was established, hailing a new era for the UN human rights system, which from promotion and protection was to move on to international enforcement, and finally, to the prevention of human rights violations (2.8.).

With these new tasks of enforcement and prevention, human rights have moved closer, and are in fact inseparably linked to the UN's other main objectives which are those of **securing peace** and **development** (3.1.5. and 3.1.6.). Human rights protection is no longer a case for the conference rooms of Geneva and New York, but is increasingly becoming a field operation. This is illustrated by a new generation of peace operations (16.), a new philosophy of development cooperation based on the human being (3.1.6, 4.4.8.7.), preventive field operations of the High Commissioner for Human Rights (14.2.), a new type of humanitarian relief operations, as well as humanitarian interventions for the protection of human rights. International criminal law, which after the Cold War was suddenly aroused from its long sleep, no longer serves international humanitarian law only, but has become a main pillar of international human rights protection (15.). Human rights are the only normative basis for a new world order, and as such have permeated almost all fields of activity of the United Nations. Many of its bodies that used to act primarily on humanitarian grounds, such as the United Nations Children's Fund (UNICEF) (4.4.8.6.), today have found a new and more solid legal foundation in the relevant human rights treaties, such as the Convention on the Rights of the Child (4.3.6.). This **mainstreaming of human rights** is also reflected in the fact that virtually all of the UN's principal organs, including the Security Council (4.4.7.), have now assumed some of the tasks of human rights protection. With this integration function, human rights are gradually assuming the significance the authors of the UN Charter and the Universal Declaration of Human Rights intended for them, but which then got lost in the times of the Cold War.

4.2. Universal Declaration of Human Rights (UDHR)

The UN Charter did not define the term 'human rights', but rather presupposed it. The first task of the Human Rights Commission founded in 1946 was, therefore, to develop a universally valid definition. The idea was to proceed in three successive steps: to pronounce a non-binding **declaration** as a basis for a legally binding **convention**, and create international **implementation** mechanisms (2.8.). Looking back, it is quite remarkable that in the course of two years the international community was able to agree on a universal declaration, while the adoption of two human rights covenants took two decades and their efficient implementation is still pending. This success is due on the one hand to the personal commitment of individual delegates in the Human Rights Commission like *Eleanor Roosevelt*

Manfred Nowak - 978-90-04-47907-4
Downloaded from Brill.com 12/03/2023 04:04:46PM
via University of Melbourne

(United States) and *René Cassin* (France), but also to the fact that the international community in the 1940s was fairly small, and rigid ideological differences had yet to surface.

While the Universal Declaration of Human Rights of 10 December 1948 (UDHR) primarily reflects the human rights concept of the Age of Enlightenment, in other words, the 'first generation' of civil and political rights (articles 1 – 21), it is remarkable that at the time of its drafting, the 'second generation' of human rights (economic, social and cultural rights) was accepted more or less on equal footing with the first generation by western states (2.6.). In doing so, they pre-empted the doctrine of interdependence and indivisibility of all human rights, which was not formally recognized until the 1993 Vienna World Conference, and in fact, is still a matter of controversy for most industrialized countries (2.7.). More surprising still, the states at the time, obviously still under the shock of the Nazi holocaust, recognized in article 28 that everyone was entitled to a 'social and international order in which the rights and freedoms set forth in this Declaration can be fully realized'. This regulation today not only provides the basis for the 'third generation' of collective rights, but also is considered the foundation for the legitimacy of the international human rights regime in general. The Declaration still includes rights, which were not codified in the two subsequent UN Covenants, such as the right of asylum (article 14) and the right to property (article 17). On the other hand, it does not include peoples' right of self-determination and protection of minorities, which prompted the Soviet Union and its allies to abstain from voting at the General Assembly.

Even though the Universal Declaration – which is formally a resolution of the General Assembly – is not binding under international law, it still represents an **authoritative interpretation of the term 'human rights' in the UN Charter**, and thus can be considered indirectly constituting international treaty law. All human rights activities and mechanisms of the Human Rights Commission and other bodies of the United Nations, which are directly based on the Charter, refer to the Universal Declaration as universally recognized standards by all states. Furthermore, many African and Asian states, which gained their independence after 1948, refer to the Declaration in their constitutions, thus emphasizing its moral, political and legal significance.

No doubt some of its provisions, such as the prohibition of torture and slavery, today enjoy the status of customary international law, yet despite certain legal opinions to the contrary, it is still doubtful whether the Declaration as a whole can be considered as having achieved this status. However, with the increase in ratifications of the two UN Covenants, this academic debate on the status of the Declaration in international law is gradually losing ground.

Manfred Nowak - 978-90-04-47907-4
Downloaded from Brill.com 12/03/2023 04:04:46PM
via University of Melbourne

7

Self-Determination

*Marcelo G. Kohen**

I INTRODUCTION

Alongside the prohibition of the use of force, self-determination constitutes the most important fundamental principle of contemporary international law. It can certainly be described as the most revolutionary of all existing fundamental principles. For the first time in the history of international law, one of its rules recognises the right of certain human communities, the 'peoples', to freely decide their international status, which includes the possibility of independence. In other words, the right to create their own State.[1] Before the emergence of such a right, all struggles for independence were considered to be internal conflicts or civil wars, for which international law had little to say. They were merely envisaged as 'domestic matters'.

The road to such a legal revolution has been long, even if the period in which the norm crystallised and deployed its effects was relatively short, speaking in historical terms. This assertion presupposes a specific stance on a number of issues; in particular, that self-determination as a *right of peoples* must not be conflated with other uses of the same term that were in vogue before its actual incorporation into the *corpus juris gentium*, and indeed with some uses of the term still in use today. What will be considered in this chapter is the right of peoples to self-determination as enshrined in the UN Charter, and the legal developments that occurred as a result of such inclusion. For the first time in history, a treaty – and indeed the very treaty creating an international organisation with a universal scope of action – incorporated self-determination among the principles governing the institution thus created. This does not mean that our analysis will begin in 1945. The struggle for its recognition began well before the end of the Second World War and other related political or legal principles played a role – with varying

* The author is grateful to Professor Jorge Viñuales, without his help it would have not been possible to finish this chapter in due time. He also thanks Mr Najib Messihi, PhD candidate at the Graduate Institute, Geneva, for his assistance and the drafting of the section on the *travaux préparatoires*.

[1] The ICJ expressly acknowledged that:'[d]uring the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation'. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, 403, 436, para 79 (20 July) (referring to *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Res 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16, 31–32, paras 52–53 (21 June); *East Timor (Portugal* v *Australia)*, Judgment, ICJ Reports 1995, 90, 102, para 29 (30 June); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, 171–72, para 88 (9 July).

https://doi.org/10.1017/9781108652889.008 Published online by Cambridge University Press

degrees – in the historical process that led to the emergence of the right to self-determination and its recognition as one of the fundamental principles of international law.

Given its revolutionary nature, conceptually and in practice, it is unsurprising that, until very recently, some colonial powers and authors have continued to deny its legal character, despite paying formal tribute to it as a – mere – 'aspirational' concept (i.e. not one that would possess concrete legal force). Neither is it surprising that the manner in which it is sometimes invoked by some powers is '*à géométrie variable*', fiercely defending its application in one case and completely disregarding it in another. Also, all political groups advancing secessionist claims will duly remember to claim that their community constitutes a 'people' and hence is entitled to the right to self-determination. And we should not overlook some demagogic presentations of the principle, which combine a generous recognition of a broad category of 'right-holders' with, at the same time, a substantial limitation of its content, which practically removes much of its substance. Even if today no one denies its existence as a legal right, self-determination apparently remains an obscure concept, with vague contours and possible right-holders. Highlighting these difficulties, contradictions and different practices is important to appraise the contribution of the Friendly Relations Declaration to the characterisation and operation of the principle of self-determination. It is probably the principle whose formulation in the Declaration contributed the most to the clarification of its content and scope, even if, unsurprisingly, contradictory approaches and claims remain.

In this context, this chapter first attempts to provide an archaeology of the principle, from its roots in the early stages of the science of international law up to the very introduction of the term 'self-determination' in the international political language and to its formal inclusion in the UN Charter. From that moment, the chapter surveys the discussions within and outside the United Nations about its legal character and content, with a particular focus on the *travaux préparatoires* of the Friendly Relations Declaration. The chapter then moves to the characterisation of the principle, first in the Friendly Relations Declaration, and then in the wider body of international law. The latter examination is intended to clarify key questions relating to the legal basis and nature of the principle, its recognition as a 'right', the contexts in which it has deployed its effects, the question of identifying the right-holder under international law and the relations between self-determination and other fundamental principles. The last two sections of the chapter refer to some common 'loose' uses or outright misuses of the principle in international practice, before concluding on the evolution and prospects of self-determination.

II AN ARCHAEOLOGY OF THE IDEA OF SELF-DETERMINATION

The idea that sovereignty resides in the people and not in the prince or king is certainly an important precedent for the idea of self-determination, although it remains distinct from it. The backdrop of popular sovereignty is the pre-existence of a State. This doctrine concerns indeed the identification of the ultimate holder of power within the State as a political organisation. By contrast, whereas the basic meaning of self-determination is the idea that the people decide their own status, its main content resides in the external capacity to decide, a matter that was not of concern for the doctrine of popular sovereignty. It is then for the 'people' to decide whether they will constitute an independent State or be part of on existing State or, still, otherwise determine their international status. As such, the principle was incorporated into international law in the twentieth century, but the idea, and even a parody of 'self-determination' by which some peoples 'decided' to lose their capacity to decide, was already present long before.

https://doi.org/10.1017/9781108652889.008 Published online by Cambridge University Press

When Spain started its colonial expansion in the Americas, the Salamanca School considered that there were no *terrae nullius* and that the sovereignty over such territories was vested in their inhabitants.[2] The Spanish government disregarded this stance and invoked instead the Papal Bull *Inter Ceatera* and then the Treaty of Tordesillas as the basis to acquire sovereignty over the 'new continent'.[3] The practice of European powers to conclude treaties with local entities in order to acquire sovereignty in Asia and Africa demonstrates the recognition by such powers of the legal capacity of such entities to be holders of sovereignty over their territory. Paradoxically, those agreements both implied such recognition and, at the same time, subjected these peoples to the status of colonies or protectorates deprived of the possibility of deciding their destiny by themselves.[4]

In his most prominent work, Grotius examined the question of who is entitled to alienate sovereignty.[5] If sovereignty is vested in the king, only he has capacity to alienate it. If it is vested in the people, then the king could alienate sovereignty but only with the consent of the people. If only a part of the State's territory is alienated, the consent of that part would be necessary. A part of the State cannot secede from the rest, except in a situation of extreme necessity for its conservation. An uninhabited territory, on the contrary, can be alienated by a 'free people' or by the king with the consent of the people.

The French Revolution brought about two related but distinct political principles: popular sovereignty and the principle of nationalities. Condorcet's draft Constitution established a principle that still features in the contemporary French Constitution of the Fifth French Republic: '*Nulle cession, nul échange, nulle adjonction de territoire n'est valable sans le consentement des populations intéressées.*'[6] On this basis, plebiscites were organised in Savoy, Nice, Belgium and the Rhineland region in Germany.[7] This article did not preclude French colonialism all along the nineteenth century and later on and a rather contradictory practice by France in contemporary times.

According to the principle of nationalities, each nation is entitled to constitute its own State. Politically, it was one of the bases invoked in struggles for the emergence of nation-States in the European continent. It was also under this banner, together with that of human rights, that France attempted to conquer the whole continent, disregarding Robespierre's warning: 'Ce n'est pas à la pointe des baïonnettes qu'on porte aux peuples la Déclaration des Droits de l'Homme.'[8]

The first waves of what we would call 'decolonisation' today occurred at the end of the eighteenth and the beginning of the nineteenth centuries, with the independence of the United States of America in 1774, Haiti in 1804 and the Spanish American colonies starting in 1810. The

[2] Francisco de Vitoria, 'The First Reflection on the Indians Lately Discovered (Translation by John Pawley Bate)' in James Brown Scott (ed), *The Classics of International Law* (Carnegie Institution of Washington, 1917) 115–28.

[3] Pope Alexander VI, The Bull Inter Caetera, 4 May 1493 in Frances Davenport (ed), *European Treaties Bearing on the History of the United States and Its Dependencies to 1648* (Carnegie Institution of Washington, 1917) 61–63; Treaty between Spain and Portugal concluded at Tordesillas, 7 June 1494, ibid 93–100.

[4] See Mamadou Hébié, *Souveraineté territoriale par traité. Une étude des accords entre puissances coloniales et entités politiques locales* (PUF, 2015); and, by the same author, 'The Acquisition of Original Titles of Territorial Sovereignty in the Law and Practice of European Colonial Expansionism' in Marcelo G Kohen and Mamadou Hébié (eds), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar, 2018) 36–86.

[5] Grotius, *De iure belli ac paci libri tres* (1625), bk 2, ch 6, V, VI and VII.

[6] Plan de Constitution présenté à la Convention nationale les 15 et 16 février 1793, Titre 13, Art 2; Constitution of the French Republic, 4 October 1958, Art 53.

[7] Over time, there was a degradation in the way in which such consultations took place, most of the times under the pressure and influence of the French authorities. See J Heimweh (probably a pseudonym), *Droit de conquête et plébiscite* (A Colin, 1896) 1–19.

[8] Cited in Jean Jaurès, *L'Armée nouvelle*, vol 1 (Impr Nationale, 1992 [1910]) 125.

https://doi.org/10.1017/9781108652889.008 Published online by Cambridge University Press

bases underlying these independence claims were different. The British colonies based their independence on a matter of (lack of) representation. The Haitian revolution was essentially a matter of liberation from slavery. It was the Spanish American independence that was accomplished under the banner of national struggle inspired by the French revolutionary ideas and also based on local economic interests, which were curtailed by the Spanish monopoly of trade. All these struggles for independence were perceived from a legal perspective as a matter of civil war. The international law of the time did not grant any right to independence. On the contrary, since this was perceived as a pure matter of domestic concern, it entitled the colonial powers to suppress these aspirations by force and required other States not to lend support to the national liberation struggle. Only the success in their struggle allowed these newly independent States to become members of the still closed international legal system.

The idea that peoples, all of them, have a *right* to freely determine their destiny started to be developed as a political claim. On the international plane, it was the Congress of London of 1896 of the Second International which first asserted 'the rights of nations to self-determination'.[9] The matter was in the agenda of the socialist movement. They distinguished class struggle in what today would be called developed countries, including colonial powers, and national struggle in dependent territories or subjugated nationalities within multinational States. The debate was between those who considered that the independence of subjugated nations would favour the development of capitalism, thereby catalysing the advent of socialism, and those who argued that this issue should not be included in the socialist programme. Karl Kautsky was the main exponent of the former idea and Rosa Luxembourg of the latter. In his work *The Rights of Nations to Self-Determination*, Lenin strongly supported Kautsky and criticised Rosa Luxembourg. He provided the following definition:

> self-determination of nations means the political separation of these nations from alien national bodies, and the formation of an independent national state . . . it would be wrong to interpret the right to self-determination as meaning anything but the right to existence as a separate state.[10]

The Decree on Peace of the Soviet Provisional Government adopted the day following the Revolution (26 October 1917 according to the Julian calendar, equivalent to 8 November 1917) included a concrete manifestation of the principle of self-determination when defining what, in the view of the new government, would be a peace 'without annexations':

> In accordance with the sense of justice of democrats in general, and of the working class in particular, the government conceives the annexation of seizure of foreign lands to mean every incorporation of a small or weak nation into large or powerful state without the precisely, clearly, and voluntarily expressed consent and wish of that nation, irrespective of the time when such forcible incorporation took place, irrespective also of the degree of development or

[9] 'This Congress declares that it stands for the full right of all nations to self-determination [*Selbstbestimmungsrecht*] and expresses its sympathy for the workers of every country now suffering under the yoke of military, national or other absolutism. This Congress calls upon the workers of all these countries to join the ranks of the class-conscious [*Klassenbewusste* – those who understand their class interests] workers of the whole world in order jointly to fight for the defeat of international capitalism and for the achievement of the aims of international Social-Democracy.' See the official German report of the London Congress: *Verhandlungen und Beschlüsse des internationalen sozialistischen Arbeiter und Gewerkschafts-Kongresses zu London, vom 27. Juli bis 1. August 1896* (Berlin, 1896), S18. A Russian pamphlet has been published containing the decisions of international congresses in which the word 'self determination' is wrongly translated as 'autonomy'.

[10] Vladimir Ilych Lenin, 'The Right of Nations to Self-Determination (1914)', *Lenin's Collected Works*, vol 20 (Progress Publishers, 1972) 393–454, www.marxists.org/archive/lenin/works/1914/self-det/.

https://doi.org/10.1017/9781108652889.008 Published online by Cambridge University Press

> backwardness of the nation forcibly annexed to the given state, or forcibly retained within its borders, and irrespective, finally, of whether this nation is in Europe or in distant, overseas countries.
>
> If any nation whatsoever is forcibly retained within the borders of a given state, if, in spite of its expressed desire – no matter whether expressed in the press, at public meetings, in the decisions of parties, or in protests and uprisings against national oppression – is not accorded the right to decide the forms of its state existence by a free vote, taken after the complete evacuation of the [aggressive] troops of the incorporating or, generally, of the stronger nation and without the least pressure being brought to bear, such incorporation is annexation, i.e., seizure and violence.[11]

The Decree granting independence to Finland specifically refers (as a ground) to the principle of the right of nations to self-determination.[12]

Another putative father of self-determination is the American President Woodrow Wilson. Much emphasis has been placed on his famous Fourteen Points.[13] However, his true direct references to self-determination can be found in three speeches delivered between 1917 and 1918. The first one, before the US Senate on 22 January 1917 is eloquent:

> No peace can last, or ought to last, which does not recognize and accept the principle that governments derive all their just powers from the consent of the governed, and that no right anywhere exists to hand peoples about from sovereignty to sovereignty as if they were property.[14]

The second one, before a joint session of the US Congress on 11 February 1918, explicitly mentions the term 'self-determination':

> There shall be no annexations, no contributions, no punitive damage. Peoples are not to be handed about from one sovereignty to another by an international conference or an understanding between rivals and antagonists. National aspirations must be respected; peoples may now be dominated and governed only by their own consent. 'Self-determination' is not a mere phrase. It is an imperative principle of actions which statesmen will henceforth ignore at their peril.[15]

President Wilson expounded these ideas for the peace that was to follow the First World War at his Mount Vernon's speech of 4 July 1918:

> The settlement of every question, whether of territory, of sovereignty, of economic arrangement, or of political relationship, upon the basis of the free acceptance of that settlement by the people immediately concerned, and not upon the basis of the material interest or advantage of any other nation or people which may desire a different settlement for the sake of its own exterior influence or mastery.[16]

Wilson's well-known Fourteen Points did not specifically address the idea of self-determination of peoples. Although they deal with territorial issues, they consist rather of a mix of ethnic and

[11] Second All-Russian Congress of Soviet of Workers' and Soldiers' Deputies, www.marxists.org/archive/lenin/works/1917/oct/25–26/26b.htm.

[12] Decree on Finnish State Independence, 18 (31) December 1917, in Russian, www.law.edu.ru/norm/norm.asp?normID=1118681.

[13] Woodrow Wilson, Fourteen Points, 8 January 1918, https://avalon.law.yale.edu/20th_century/wilson14.asp.

[14] Woodrow Wilson, Address of the President of the United Stated to the Senate, 22 January 1917, www-personal.umd.umich.edu/~ppennock/doc-Wilsonpeace.htm.

[15] Woodrow Wilson, Address of the President of the United Stated to the Congress, 11 February 1918, www.gwpda.org/1918/wilpeace.html.

[16] www.mountvernon.org/preservation/mount-vernon-ladies-association/mount-vernon-through-time/mount-vernon-during-world-war-i/woodrow-wilsons-july-4-1918-mount-vernon-speech/.

https://doi.org/10.1017/9781108652889.008 Published online by Cambridge University Press

convenience criteria for the emergence of new independent States, such as Poland, or the drawing of boundary lines, which are not applied in a systematic way. The idea of autonomy was also envisaged in the cases of the Austro-Hungarian and the Ottoman Empires.[17] The Point relating to colonial issues deserves to be cited in full, as it shows that it was out of the question to let the colonised peoples decide their own fate:

> A free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable government whose title is to be determined.

The idea of 'the consent of the governed', which is traditionally linked to Woodrow Wilson's name, can be found in this exact formulation already in the 1774 American Declaration of Independence. Woodrow Wilson had in mind this notion for the settlement of territorial conflicts after the First World War. It did not amount to a recognition of a collective right of a given community to freely decide its destiny. The plebiscites organised (or not) in the inter-war period are very telling in this regard. They were not systematically employed for the decision of the Peace Conference on the fate of certain territories (i.e. there were no plebiscites for the determination of the status of Alsace-Lorraine, Danzig or the Sudeten).

The Covenant of the League of Nations did not contain any reference whatsoever to self-determination in any explicit or implicit form, in any interpretation thereof. The novelty was the establishment of the Mandate regime for territories detached from the defeated States (i.e. within the Ottoman Empire and the German colonies).[18] The alternatives discussed were conquest, as it was the prior practice, or internationalisation of those territories.[19] The compromise, proposed by the South African General Smuts, was the Mandate regime and the establishment of three different categories of Mandates to be applied on the basis of the degree of 'civilisation'. The 'sacred mission of civilisation', the fact that according to the Covenant, the peoples inhabiting those territories were 'not yet able to stand by themselves under the strenuous conditions of the modern world' and the reference to a need for their 'tutelage by advanced nations' all demonstrate that the basis of this regime was not at all self-determination in any recognisable form. General Smuts himself was of the idea that self-determination, understood as the need to have 'the consent of the governed', was exclusively applicable in Europe.[20] Consequently, independence was envisaged for some of the Mandates only (those of type 'A') and not as a right, but as a decision of the States parties to the Covenant and the Mandate agreements.

The debate within the League of Nations concerning the Aaland Islands is perhaps the most representative illustration of the meaning of self-determination and its (lack of) legal value in the inter-war period. The case has been mentioned during the advisory procedure concerning the unilateral declaration of independence of Kosovo, and it was even referred to by some participants as the *locus classicus* on self-determination.[21] The islands belong to Finland but their population is Swedish. A body of jurists was instituted within the League of Nations to study the

[17] See particularly Points VI to XIII.
[18] Covenant of the League of Nations, 29 June 1919, Art 22.
[19] Norman Bentwich, 'Le Système des mandats' (1929) 29 *Recueil des Cours* 121.
[20] Jan C Smuts, *The League of Nations: A Practical Suggestion* (Hodder & Stougthon, 1918) 12–20.
[21] *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, Advisory Opinion, Verbatim Record, 8 December 2009, Ms Kaukoranta (Finland), CR 2009/30, 56, para 12.

https://doi.org/10.1017/9781108652889.008 Published online by Cambridge University Press

issue and make recommendations. The second paragraph of the Committee's Report,[22] reaffirmed in the Commission's Report,[23] clearly stated that self-determination was not a positive rule of the Law of Nations.[24] In the words of the Committee, 'positive International Law does not recognise the right of national groups, as such, to separate themselves from the State to which they form part by the simple expression of a wish'.[25]

The Commission also examined the question from the angle of the right to minorities and explained its rejection of the applicability of the right to self-determination because:

> [t]o concede to minorities ... or to any fractions of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life.[26]

The Commission also questioned the very need for separation when minority rights are respected. It stated the following in this respect:

> what reasons would there be for allowing a minority to separate itself from the State to which it is united, if this State gives it the guarantees ... for the preservation of its social, ethnical or religious character? Such indulgence, apart from every political consideration, would be supremely unjust to the State prepared to make these concessions.[27]

Indeed, if something characterises the impact of international law on collective rights during the inter-war period, this is the focus on the protection of the rights of national minorities in Europe through specific rules and procedures dealing with each of them.

The fight against Nazism during the Second World War was a trigger for the idea of self-determination. The 1941 Atlantic Charter signed by F. D. Roosevelt and Winston Churchill contained two related points carefully drafted to make only limited room for genuine self-determination. The second and third points read as follows:

> Second, they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned;
>
> Third, they respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self government restored to those who have been forcibly deprived of them.[28]

The 1942 Declaration by United Nations simply endorsed the points of the Atlantic Charter and did not contain any reference to self-determination. The Declarations adopted in the 1943 Moscow Conference did not mention the principle either. The Four Powers Dumbarton Oaks Proposals of 1944, which contained the embryo of the purposes and principles of the future Charter did not refer to self-determination. Article 1, paragraph 2, just mentioned the aim '[t]o develop friendly relations among nations, and to take other appropriate measures to strengthen universal peace'. It was only at the San Francisco Conference in 1945, on the proposal of the

[22] 'Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands Question', League of Nations Official Journal, October 1920, Special Supp No 3, 5, para 2.

[23] 'The Aaland Islands Question', Report submitted to the Council of the League of Nations by the Commission of Rapporteurs, 16 April 1921, League of Nations Doc 21/68/106, 27.

[24] 'Report of the International Committee of Jurists' (n 22) 5, para 2.

[25] ibid.

[26] 'The Aaland Islands Question' (n 23) 28.

[27] ibid 28.

[28] Declaration of Principles issued by the President of the United States and the Prime Minister of the United Kingdom, 14 August 1941, www.nato.int/cps/en/natohq/official_texts_16912.htm.

https://doi.org/10.1017/9781108652889.008 Published online by Cambridge University Press

USSR, that this article was revised to state that the friendly relations are 'based on respect for the principle of equal rights and self-determination of peoples'. Yet, the real question concerned the determination of the content of this formula as well as of its legal scope.

In a summary of the discussions within the Committee in charge of the preparation of a draft of the preamble, purposes and principles of the United Nations, the general view was that the principle of self-determination:

> corresponded closely to the will and desires of peoples everywhere and should be clearly enunciated in the Chapter; on the other side, it was stated that the principle conformed to the purposes of the Charter only insofar as it implied the right of self-government of peoples and not the right of secession.[29]

The Rapporteur of this Committee, M. Farid Zeineddine of Syria observed in this regard that:

> It was understood: That the principles of equal rights of people [*sic*] and that of self-determination are two component elements of one norm. That the respect of that norm is a basis for the development of friendly relations, and is in effect, one of the appropriate measures to strengthen universal peace. It was understood likewise that the principle in question, as a provision of the Charter, should be considered in function of other provisions. That an essential element of the principle in question, is a free and genuine expression of the will of the peoples; and thus to avoid cases like those alleged by Germany and Italy. That the principle as one whole extends as a general basic conception to a possible amalgamation of nationalities if they so freely chose.[30]

And, explaining the rejection of a proposal, and the link between self-determination and the principle of equality of rights, the rapporteur further noted that the latter principle 'extends in the Charter to states, nations, and peoples'.[31]

Another reference to self-determination in the UN Charter is found in Article 55, linking self-determination with economic and social progress and human rights.[32] Again, the idea repeated here is that this right means self-government and not secession. No mention of the principle appears in Chapter XI, dealing with Non-Self-Governing Territories,[33] and Chapter XII, dealing with the regime of Trusteeship, that replaced that of the Mandates of the League of Nations. However, Article 76 of the UN Charter established that the basic objectives of the latter regime were, in accordance with the purposes laid down in Article 1 (which include self-determination), to promote the progressive development of the inhabitants of the trust territories 'towards self-government or *independence* as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned'. Unlike the

[29] Commission I, Committee 1, General Provisions, UNCIO, Doc 343 I/1/16, 16 May 1945, 1.

[30] Commission I, Committee 1, General Provisions, UNCIO, Doc 723, I/1/A/19, 1 June 1945, 8–9.

[31] ibid 9.

[32] 'With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development; b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.'

[33] Nevertheless, in 1975, the Court made a link between Art 1, para 2 and Arts 55 and 56 with Chapter XI in the following manner: 'The Charter of the United Nations, in Art 1, para 2, indicates, as one of the purposes of the United Nations: "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . ." This purpose is further developed in Arts 55 and 56 of the Charter. Those provisions have direct and particular relevance for non-self-governing territories, which are dealt with in Chapter XI of the Charter.' *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 31, para 54.

https://doi.org/10.1017/9781108652889.008 Published online by Cambridge University Press

mandates system, this objective applied to all territories and was not qualified by the type of mandate.

It can be concluded that, at the time of the adoption of the Charter, the principle of self-determination of peoples was recognised as such for the first time in a treaty of general character and constitutive of an international organisation of universal vocation. However, the text itself did not explicitly settle the divergence of views regarding its legal character and scope. For some Member States it was a right and included the right of colonial peoples to independence, whereas for others (the colonial powers), it had a limited scope and did not confer such a right. The only major area of consensus was that the principle did not apply to, and consequently did not favour, secession from existing States. Over the years, the evolution of practice following the application of the UN Charter through the work of the organisation, both in the field of human rights and on the application of Chapter XI, allowed the principle to consolidate, as discussed next.

III THE PRACTICE OF THE UNITED NATIONS: A 'CHAPTER XI *BIS*'

Soon after the entering into force of the Charter in 1945 the question of self-determination came to the forefront. The discussion leading to the adoption of the Universal Declaration of Human Rights saw the opposition between the Soviet Union and the Western countries in this regard. The insistence of the former to include the right of self-determination, with the understanding that it was applicable to colonial peoples, met the opposition of most of the members of the United Nations, leading the USSR to abstain from voting on the adoption of the Declaration.[34] Instead, a British proposal was accepted, emphasising individuals and their rights, irrespective of the status of the territory concerned.[35]

Another context where the scope of self-determination was raised concerned the information transmitted by Administering Powers of Non Self-Governing Territories under Article 73 of the UN Charter. Article 73 of the Charter sets out a number of goals to be achieved for these territories and obligations for the colonial States (administering powers) that have been extensively developed by the practice of the General Assembly. The International Court of Justice (ICJ) recognised this practice in its 1971, 1975 and 2019 advisory opinions.[36] It was with the strong participation of the United Nations in general and the General Assembly in particular that many current members of the organisation achieved their independence. More than eighty former colonies comprising some 750 million people have gained independence since the creation of the United Nations.[37] As early as 1950, the UN General Assembly recognised the 'right of peoples and nations to self-determination' as a fundamental human right.[38] Then it decided to include the right of peoples to self-determination in the future Covenant (or Covenants) on Human Rights and explicitly mentioned that self-determination was applicable to non-self-governing territories.[39] Thereafter, the General Assembly adopted, on a yearly basis, resolutions declaring that Member States 'shall recognize and promote the realization of the right to

[34] A/PV183, 926.
[35] The following text was added to Art 2: 'Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.'
[36] *Western Sahara*, Advisory Opinion (n 33) 32, para 56 (referring to its 1971 Namibia Advisory Opinion).
[37] www.un.org/en/decolonization/.
[38] UNGA Res 421 D (V) (4 December 1950).
[39] UNGA Res 545 (VI) (5 February 1952) (42–7–5).

https://doi.org/10.1017/9781108652889.008 Published online by Cambridge University Press

self-determination of peoples of Non-Self-Governing and Trust Territories who are under their administration'.[40] This law of decolonisation developed not without resistance from some colonial powers. In some cases, they denied that particular territories fell within the classification of non-self-governing or colonial territory. The General Assembly considered that it was not for the administering power to unilaterally determine whether the territories fall under Chapter XI. Rather, it was for the General Assembly itself to make this ascertainment. That was for instance the case of the colonies held by Portugal, since the Portuguese government of that time denied that they had such status, claiming they were mere overseas provinces.[41] Through the analysis of the situation in the colonies, the General Assembly also established the general rules for the administration of the territory during the transitional period as well as the modalities for the decolonisation of different territories.

Following the adoption, on 14 December 1960, of the landmark General Assembly Resolution 1514 (XV), 'Declaration on the Granting of Independence to Colonial Countries and Peoples',[42] the monitoring of the decolonisation process was entrusted to the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples. Known as the 'Decolonisation Committee', this body was created in 1961 as the subsidiary organ of the General Assembly exclusively devoted to the issue of decolonisation.[43] In addition to these important developments, other General Assembly resolutions also played an important role in the development of the law of decolonisation. Referring to this growing body of resolutions, the late French jurist Michel Virally spoke of a veritable rewriting of the UN Charter to include 'Chapter XI *bis*'.[44] Of particular significance are the following:

Resolution 1541 (XV) of 15 December 1960: Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter.

Resolution 2621 (XXV) of 12 October 1970: Programme of action for the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, which states inter alia that 'Members shall intensify their efforts to promote the implementation of the resolutions of the General Assembly and the Security Council relating to Territories under colonial domination', considers that 'military activities and arrangements by colonial Powers in Territories under their administration . . . constitute an obstacle to the full implementation of resolution 1514 (XV)' and states that the Decolonization Committee 'shall continue to examine the full compliance of all States with the Declaration and with other relevant resolutions on the question of decolonization' and '[w]here the resolution 1514 (XV) has not been fully implemented with regard to a given Territory, the General Assembly shall continue to bear responsibility for that Territory until such time as the

[40] UNGA Res 637 (VII) (16 December 1952), 738 (VIII) (28 November 1953), 833 (IX) (4 December 1954), 1188 (XII) (11 December 1957).

[41] See Transmission of information under Art 73 (e) of the Charter, UNGA Res 1542 (XV) (15 December 1960), para 1.

[42] This resolution is a turning point, and its importance has been recognised by the ICJ in several occasions. See *Western Sahara* (n 33), para 57; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion (n 1) 436, para 79 and 438, para 82; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, ICJ, Advisory Opinion (25 February 2019), paras 150–53.

[43] The Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1654 (XVI) (27 November 1961).

[44] Michel Virally, 'Droit international et décolonisation devant les Nations Unies' (1963) 9 *Annuaire français de droit international* 508, 526.

https://doi.org/10.1017/9781108652889.008 Published online by Cambridge University Press

people concerned has had an opportunity to exercise freely its right to self-determination and independence in accordance with the Declaration'.

Resolution 2625 (XXV) of 24 October 1970: Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Resolution 35/118 of 11 December 1980: Plan of the Action for the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted at the twentieth anniversary of Resolution 1514 (XV) and being a development of Resolution 2621 (XXII). For the purposes of this case, the condemnation of measures of disruption of the demographic composition of the colonial territories and the request for the immediate and unconditional withdrawal from colonial territories of military bases and installations of colonial powers are specifically relevant.

Resolution 65/119 of 10 December 2010: Third International Decade for the Eradication of Colonialism, which declared the period 2011–20 as the Third International Decade for the Eradication of Colonialism.[45]

In this regard, it can be said that resolutions of the General Assembly establishing which territories are subject to decolonisation, as well as the determination of the manner in which these territories must be decolonised, and when the process has come to an end and consequently the territory ceases to be a 'non-self-governing' one, are more than simple recommendations. Since the General Assembly has the competence to make these ascertainments, its resolutions are authoritative in this regard.

It is against this background and developments that the discussions on the scope of the principle of self-determination within the Committee in charge of the elaboration of what became the Friendly Relations Declaration occurred.

IV SELF-DETERMINATION IN THE FRIENDLY RELATIONS DECLARATION

1 *Introduction*

The process which, between 1963 and 1970, led to the debate, formulation and adoption by consensus of the Friendly Relations Declaration is of major significance for the principle of self-determination. Although the principle had already received in 1960 what became, over time, its canonical formulation, the Friendly Relations Declaration placed it at the heart of the post-war international legal order, alongside other fundamental principles of international law. The process that led to such an achievement was difficult and only completed at the very last session of the intersessional Special Committee established in December 1963, which took place in Geneva from 31 March to 1 May 1970. The purpose of the following sections is to situate self-determination within both the debates of the Special Committee and the broader context of the Friendly Relations Declaration.

2 *The* Travaux Préparatoires

The Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States was initially established in 1964 by the UN General Assembly to deal with the principles of the prohibition of the threat or use of force, the peaceful settlement of

[45] See *Chagos* (n 42), Written Statement of Argentina, para 19.

https://doi.org/10.1017/9781108652889.008 Published online by Cambridge University Press

disputes, non-intervention and sovereign equality of States. It was reconstituted in 1966 and enlarged to thirty-one Member States for the purpose of completing the study of the above-mentioned principles and considering the remaining ones, notably, the principle of equal rights and self-determination of peoples.[46] The Special Committee considered this principle at its 1966, 1967, 1968, 1969 and 1970 sessions, issuing a yearly report that was later discussed within the UN General Assembly, especially its Sixth Committee.

From the very beginning of discussions, there was a general agreement on the fact that self-determination constituted a rule of international law and not a mere moral or political precept.[47] However, States differed on how to give expression to it. If the so-called socialist and non-aligned States formulated it as a right,[48] other States such as the United States of America and the United Kingdom preferred to frame it in terms of an obligation, resting upon States, to respect the principle of self-determination on territories under their jurisdiction, pointing out the difficulty of defining the beneficiaries of the right, namely the 'peoples'.[49] Ultimately, the Drafting Committee of the Special Committee decided to adopt both views by enunciating the principle of self-determination as a 'right of peoples' and a 'duty to respect' imposed on every State.[50]

Member States also disagreed on the scope of the principle of self-determination, including its beneficiaries. For some, the right to self-determination had to be limited to peoples under colonial rule while for others, it had to be either limited or at least extended to the population of already independent and sovereign States.[51] It had also been advanced that the term 'peoples' should correspond to the majority of the population of generally accepted political units or be extended to those living in a zone of military occupation.[52] The case of federal unions whose constitutional law explicitly refers to the principle of self-determination as well as that of territories in free association with the former administering power were mentioned.[53] Finally, the possibility of granting the right of self-determination to the distinct peoples of multinational States was also raised.[54]

The final text of the Declaration did not define the term 'peoples'. However, it stated that '*all* peoples have the right' to self-determination. The proposal by the representative of Nigeria to use the expression 'all *subject* peoples' instead of 'all peoples' was not followed.[55] In the same vein, the suggestion by the United States of America, later endorsed by the United Kingdom, to include an exhaustive list of territories to which the principle of self-determination applies was finally not retained by the Drafting Committee.[56]

The applicability of the principle to both colonial peoples and peoples already possessing a State is confirmed by the discussions related to the content of the right to self-determination. Since the first sessions of the Special Committee that were devoted to this principle, several representatives argued that the right to self-determination had two aspects, an external and a domestic one. It encompassed the right of peoples to freely determine their international

[46] UNGA, Res 2103 (XX).
[47] A/C.6/SR.926, para 9 (USA); Report of the Sixth Committee (1966), para 69.
[48] Report of the Special Committee (1966), paras 457 and 458.
[49] ibid, para 459; Report of the Special Committee (1967), paras 176 and 192.
[50] Report of the Special Committee (1970), para 83; UNGA Res 2625 (XXV) (24 October 1970).
[51] Report of the Special Committee (1967), para 195, A/C.6/SR.928, para 5 (Canada); A/C.6/SR.1002, para 33 (Central African Republic); A/C.6/SR.1160, para 38 (Burma).
[52] Report of the Special Committee (1968), para 163; Report of the Special Committee (1969), para 156 A/5725, p 28 (Cyprus); A/C.6/SR.1182, para 46 (Libya).
[53] Report of the Special Committee (1969), para 156.
[54] Report of the Sixth Committee (1969), para 26.
[55] A/C.6/SR.996, para 28.
[56] Report of the Special Committee (1966), para 459; Report of the Special Committee (1967), para 176.

https://doi.org/10.1017/9781108652889.008 Published online by Cambridge University Press

political status, which includes the establishment of an independent State, but also their right to choose their political, economic and social systems without external interference.[57] This second aspect was understood as permanent in nature. After their independence, peoples remained entitled to internal self-determination, in conformity with other fundamental principles of international law such as the sovereign equality of States and non-intervention.[58]

With regard to the exercise by peoples of their internal self-determination within independent States, some representatives argued that the democratic dimension of the principle of self-determination had to be recognised, for it is based on the free will of peoples.[59] This was further strengthened by the development of human rights at the international level which prohibit discrimination and prescribe that the will of the people shall be the basis of the authority of government.[60] In this respect, the United States proposed to include in the Declaration, a paragraph which reads as follows: 'The existence of a sovereign and independent State possessing a representative Government, effectively functioning as such to all distinct peoples within its territory, is presumed to satisfy the principle of equal rights and self-determination as regards those peoples.'[61]

Some representatives welcomed this formulation. Others expressed their fear about the disruption of the territorial integrity and political unity of States and wanted to make clear that self-determination does not grant to ethnic, racial, national or religious minorities a legal ground for secession.[62] To overcome this difficulty and mitigate the risks, Italy suggested in 1970, drawing upon a previous draft prepared by the Drafting Committee, to add a saving clause right after the US based proposal: 'Nothing in the foregoing paragraphs shall be construed as authorizing any action which would impair, totally or in part, the territorial integrity, or political unity, of such States.'[63] As will be discussed below, the final text adopted by the UN General Assembly included that general safeguard or saving clause. The *a contrario* reading of this clause led some authors and States to invoke a 'remedial secession' exception. A close look at the *travaux préparatoires* of the Declaration discards such interpretation. Statements made by the representatives of States directly involved in the drafting of the saving clause clearly indicate that its object and purpose was to safeguard the territorial integrity and political unity of States. The representative of Italy declared that the inclusion of the saving clause ensured 'that the principle would not be interpreted in such a way as to undermine the territorial integrity of independent States, which was safeguarded as fundamental by the Charter'.[64] In the same vein, the representative of Canada – who assumed, within the Drafting Committee, the chairmanship of the working group on the implementation of self-determination by a State with respect to peoples within its jurisdiction – stated that, thanks to the adoption of the saving clause, there was 'no danger that some might be misled in attempting to invoke the principle to justify the dislocation of a State within which various communities had been cohabitating successfully and peacefully

[57] Report of the Special Committee (1967), para 198; Report of the Sixth Committee (1968), para 47; A/5725, 47 (Romania); A/C.6/SR.998, para 9 (Congo, Brazzaville).
[58] Report of the Special Committee (1966), paras 480–81.
[59] ibid, paras 515 and 518; Report of the Special Committee (1969), para 176.
[60] Report of the Special Committee (1967), para 222.
[61] Report of the Special Committee (1966), para 459. The United Kingdom presented exactly the same proposal one year later: UN Doc A/AC.125/L.44, part VI, repr in Official Records of the General Assembly, Twenty-Second Session, annexes, agenda item 87, UN Doc A/6799 (19 July 1967), para 176.
[62] Report of the Special Committee (1967), paras 221 and 223.
[63] Report of the Special Committee (1970), para 63.
[64] Report of the Special Committee (1969), para 187.

https://doi.org/10.1017/9781108652889.008 Published online by Cambridge University Press

for a considerable period of time'.[65] This interpretation was backed by other States in the last debates preceding the adoption of the final text of the Declaration.[66] In fact, the *a contrario* reading of the saving clause was only evoked by the representative of South Africa, still under the apartheid regime, for the purpose of criticising the clause and expressing reservations.[67]

The interpretation of the saving clause as a provision aiming primarily at protecting the territorial integrity of States is further confirmed by the statements of many States, which considered explicitly during the whole process that the right to self-determination was not applicable to national, ethnic, tribal, racial or religious minority groups.[68] It is also further strengthened by the last paragraph of the Declaration which stipulates that 'Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.'[69] This paragraph was adopted without much debate or difficulties, notably because it 'reassured those who feared that the universal application of the principle might favour secessionist movements inside independent States'.[70]

It is worth noting that the emphasis of the Declaration on the principle of territorial integrity does not undermine or weaken the right of peoples to self-determination, since the sixth paragraph of the text in question sets out that 'the territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it'. This rule was initially advocated by the so-called Socialist and Non-aligned States and opposed by mainly colonial States which contended that it was in contradiction with the established doctrine of international law.[71] It has been nonetheless included in the final text thereby confirming that the accession of a colony to independence does not amount to a violation of the territorial integrity of the administering power.

The *travaux préparatoires* of the Declaration also reveal that States differed on the modes of implementation of the right to self-determination. Some of them were of the view that the principle could only be regarded as fully implemented when the people concerned had attained the status of a sovereign State. For these States, the prior access to independence was a necessary condition for a truly free choice of peoples regarding their future political, economic and social status.[72] However, drawing upon Resolution 1541 of the UN General Assembly and pointing out the differences that might exist in terms of resources, size and population between the different Non-Self-Governing Territories, other States considered that self-determination could also be achieved through free association or integration with an independent State.[73]

The work of the Special Committee on the principle of self-determination was marked by strong opposition over two further aspects: the legal assessment of colonialism and the question of the right of peoples to self-defence. From the very beginning of the process, several States advocated the inclusion of a clear statement that colonialism in all its forms, including racial discrimination, amounted to a violation of international law in general and the principle of self-

[65] Report of the Special Committee (1970), para 177.
[66] ibid, para 219 (India), A/C.6/SR.1183, para 11 (India) and 39 (Ecuador).
[67] A/C.6/SR.1184, para 15.
[68] A/C.6/SR.1002, para 33 (Central African Republic); A/C.6/SR.1003, para 55 (Ecuador); A/C.6/SR.1163, para 18 (Philippines).
[69] UNGA, Res 2625 (XXV).
[70] Report of the Special Committee (1968), para 190.
[71] Report of the Special Committee (1967), para 216.
[72] ibid, para 212; A/C.6/SR.1158, para 31 (Czechoslovakia).
[73] Report of the Special Committee (1967), para 213; A/C.6/SR.1181, para 8 (New Zealand).

https://doi.org/10.1017/9781108652889.008 Published online by Cambridge University Press

determination in particular.[74] Other States, notably the United Kingdom, objected to this proposal, claiming that not all colonial relationships were illegal per se, and pointing out that the Charter did not outlaw colonialism but regulated it instead and provided for its orderly termination in Chapters XI, XII and XIII.[75] The final text of the Declaration borrowed the terms of Resolution 1514 of the UN General Assembly by stating that the 'subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter'. It also called for a 'speedy end to colonialism'.[76]

From the outset too, the so-called socialist and non-aligned countries stressed that self-determination entailed the right of peoples to self-defence against colonial oppression and their right to receive appropriate assistance in their struggle for liberation.[77] Other States considered that such position was incompatible with other fundamental principles of the UN Charter such as the prohibition of the threat or use of force or the principle of non-intervention.[78] The outcome of this debate was a compromise formula recognising the right of peoples to resistance against the forcible actions of the coloniser but limiting the assistance and support to which these peoples are entitled to those which are 'in accordance with the purposes and principles of the Charter'.[79]

3 *The Final Outcome*

The formulation of the self-determination principle in the Friendly Relations Declaration is, with the benefit of hindsight, a major achievement. Although it does not expressly refer to the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, it largely relies on it, thus striking a compromise in the absence of which it would have been impossible to complete the work on the Friendly Relations Declaration. Unsurprisingly, the formulation of the principle was one of 'the most difficult tasks the Committee faced',[80] given the deep and various dividing lines across Committee members and the revolutionary character of this norm.

The final text, with its many nuances and compromises, owes much to the calibre of the international lawyers who took part in the negotiations and drafting. Its significance cannot be underestimated. Self-determination is not only recognised but also woven into the fabric of post-1945 international law and, more specifically, of its fundamental principles. Indeed, the 'principle of equal rights and self-determination of peoples' was now fleshed out in significant detail, including by reference to other principles of the Friendly Relations Declaration. In its eight paragraphs, the Declaration defines the content of the right, the possible outcomes of its exercise, the obligation to put an end to any situation contrary to that right and to promote its

[74] Report of the Special Committee (1966), paras 457, 458 (Written Proposal by Czechoslovakia, para 2), 458 (Joint Written Proposal by Algeria, Burma, Cameroon, Dahomey, Ghana, India, Kenya, Lebanon, Madagascar, Nigeria, Syria, the United Arab Republic and Yugoslavia, para 2(a)) and 482; A/C.6/SR.999, paras 63–65 (United Republic of Tanzania).

[75] A/C.6/SR.1000, para 32 (United Kingdom).

[76] UNGA, Res 2625 (XXV).

[77] Report of the Special Committee (1966), para 458 (Joint Written Proposal by Algeria, Burma, Cameroon, Dahomey, Ghana, India, Kenya, Lebanon, Madagascar, Nigeria, Syria, the United Arab Republic and Yugoslavia, para 2(b)); A/C.6/SR.997, para 17 (Poland); A/C.6/SR.999, paras 42–43 (Ukrainian Soviet Socialist Republics).

[78] Report of the Special Committee (1966), para 497; A/C.6/SR.1000, paras 32–33 (United Kingdom).

[79] UNGA Res 2625 (XXV).

[80] See the article by the US representative to the Special Committee, R Rosenstock, 'The Declaration of Principles of International Law Concerning Friendly Relations: A Survey' (1971) 65 *American Journal of International Law* 713, 730.

https://doi.org/10.1017/9781108652889.008 Published online by Cambridge University Press

respect, the different legal status of colonial territories, the safeguard or saving clause against dismemberment and the obligation to respect the territorial integrity of States and other countries:

> [Paragraph 1] By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.
>
> [Paragraph 2] Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:
>
> (a) To promote friendly relations and co-operation among States; and
> (b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;
>
> and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.
>
> [Paragraph 3] Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.
>
> [Paragraph 4] The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.
>
> [Paragraph 5] Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.
>
> [Paragraph 6] The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.
>
> [Paragraph 7] Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.
>
> [Paragraph 8] Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.

The final text has eight paragraphs, identified between square brackets in the above quotation for ease of reference. The first paragraph expressly recognises a 'right' of 'all peoples' to self-determination, which includes, according to the paragraph 'the establishment of a sovereign and

https://doi.org/10.1017/9781108652889.008 Published online by Cambridge University Press

independent State' as one of the 'modes of implementing the right of self-determination by that people'. All States have a 'duty to respect this right in accordance with the provisions of the Charter' (paragraph 1) as well as other more specific duties, including 'to promote . . . realization of the principle' and 'to render assistance to the United Nations in carrying out' its responsibilities inter alia 'to bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned' (paragraph 2), 'to promote . . . universal respect for human rights' (paragraph 3), 'to refrain from any forcible action' against the exercise of such right (paragraph 5) but also from 'any action' against 'the partial or total disruption of the national unity and territorial integrity of any other State or country' (paragraph 8).

The recognition of a 'right' to self-determination in a text adopted by consensus was a major step in the codification process. Since the adoption of Resolution 2625 (XXV), there has been no challenge of the legal character of the principle. The ICJ has rightly considered that such right was already binding as a matter of general international law in the 1960s, as will be discussed below.[81] The Friendly Relations Declaration largely contributed to the determination of its content.

Two issues of particular importance concern the wider relations between, on the one hand, the right to self-determination and, on the other hand, the prohibition of the use of force and the principle of territorial integrity. The first issue (use of force) is addressed in paragraph 5, whereas the second is covered by paragraphs 6 and 7. Paragraph 8 is relevant for both issues. The issue of secession and, more generally, the relations between self-determination and territorial integrity will be discussed in some detail in sections V.2.3 and 2.4 below. Regarding the use of force, paragraph 5 recognises that forcible actions to prevent peoples exercising their right to self-determination are illegal. However, the final text does not recognise the doctrine of 'self-defence against colonialism', fiercely opposed by the West.[82] According to paragraph 5, peoples are 'entitled to seek and to receive support', and this support cannot be considered as a breach of the principle of non-intervention.[83] Western powers required the addition of the formula 'in accordance with the purposes and principles of the Charter', in order to prevent reliance on paragraph 5 to justify the 'export of revolution', a doctrine in vogue during the 1960s after the triumph of Castro's revolution in Cuba.[84] After the adoption of Resolution 2625 (XXV), it was uncontested that what were popularly called 'wars of national liberation' against colonialism and alien domination had an international character and were not mere internal conflicts. Seven years later, the Additional Protocol I to the four 1949 Geneva Conventions confirmed this categorisation, with an explicit reference to the Friendly Relations Declaration.[85]

V SELF-DETERMINATION IN INTERNATIONAL LAW

1 *Legal Basis and Hierarchy of the Norm*

After the inclusion of self-determination in the UN Charter, the position of some colonial powers and some authors was still to consider the principle a mere aspiration without implying

[81] *Chagos* (n 42), para 152.
[82] See the chapter by O Corten in this volume.
[83] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v *United States of America)*, Merits, Judgment, ICJ Reports 1986, 108, para 206.
[84] Rosenstock (n 80) 733.
[85] Art 1(4) reads: 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations'.

https://doi.org/10.1017/9781108652889.008 Published online by Cambridge University Press

legal obligations.[86] This position has reached the present day in some more refined variations. During the proceedings relating to the advisory opinion in *Chagos* before the ICJ, the United Kingdom (the colonial power) and the United States (the beneficiary of the lease over the Chagos occupied territory) argued that decolonisation was a political rather than a legal process,[87] that the right to self-determination had not yet become a customary norm at the time of the separation of the Chagos island from the territory of the colony in 1965[88] and, for that reason, the UK was not bound to respect the territorial integrity of Mauritius.[89] Indeed, exactly the same arguments had been invoked by the UK during the Chagos Marine Protected Area Arbitration.[90] These arguments called for a clarification by the ICJ of the moment in time when the right to self-determination had entered general international law.

The Court began by recalling Article 1(2) and Chapter XI (particularly Article 73) of the UN Charter and premised its analysis on the observation that 'the Charter included provisions that would enable non-self-governing territories ultimately to govern themselves'. Such was the context in which 'the Court must ascertain when the right to self-determination crystallized as a customary rule binding on all States'.[91] Thereafter, in a few paragraphs that provide both a historical survey of the most relevant instruments and an analysis of their content, the Court observed that Resolution 1514 (XV) of 1960 was 'declaratory' as regards 'the right to self-determination as a customary norm'.[92] The relevant paragraphs read as follows:

> The adoption of resolution 1514 (XV) of 14 December 1960 represents a defining moment in the consolidation of State practice on decolonization. Prior to that resolution, the General Assembly had affirmed on several occasions the right to self-determination (resolutions 637 (VII) of 16 December 1952, 738 (VIII) of 28 November 1953 and 1188 (XII) of 11 December 1957) and a number of non-self-governing territories had acceded to independence. General Assembly resolution 1514 (XV) clarifies the content and scope of the right to self-determination. The Court notes that the decolonization process accelerated in 1960, with 18 countries, including 17 in Africa, gaining independence. During the 1960s, the peoples of an additional 28 non-self-governing-territories exercised their right to self-determination and achieved independence. In the Court's view, there is a clear relationship between resolution 1514 (XV) and the process of decolonization following its adoption … The Court considers that, although resolution 1514 (XV) is formally a recommendation, it has a declaratory character with regard to the right to self-determination as a customary norm, in view of its content and the conditions of its adoption.[93]

Thereafter, the Court observed that common Article 1 to the two 1966 Covenants on Human Rights 'reaffirm[ed]' this right and, importantly for present purposes, that 'the nature and scope of the right to self-determination of peoples … were reiterated' in the Friendly

[86] Among the authors who did not consider self-determination as a legal right, see Boris Mirkine-Guetzevitch, 'Quelques problèmes de la mise en œuvre de la Déclaration Universelle des Droits de l'Homme' (1953-II) 83 *Recueil des Cours* 351; Ivor Jennings, *The Approach to Self-Government* (Cambridge University Press, 1956) 56; Gerald Fitzmaurice, 'The Future of the International Legal System in the Circumstances of Today' in Institut du droit international (ed), *Livre du Centenaire 1873–1973: Evolution et perspectives du droit international* (S Karger, 1973) 233; Wolfgang Friedmann, 'General Course in Public International Law' (1969–II) 127 *Recueil des Cours* 187.

[87] UK, Written Observations, para 4.4.

[88] US, Written Statement, paras 4.46, 4.61 and 4.64, Written Observations, para 3.27; UK, Written Statement, para 8.65, Written Observations, paras 4.18–4.28.

[89] UK, Written Statement, paras 8.55–8.58, Written Observations, para 4.48.

[90] Chagos Marine Protected Area Arbitration, UK, Counter-Memorial, paras 7.14, 7.17 and 7.25. The arbitral award did not discuss this issue. See https://pca-cpa.org/en/cases/11/.

[91] *Chagos* (n 42), para 148.

[92] ibid, para 152.

[93] ibid, paras 150, 152.

https://doi.org/10.1017/9781108652889.008 Published online by Cambridge University Press

Relations Declaration, which further recognised this right as one of the 'basic principles of international law'.[94]

Regarding the hierarchy of the right to self-determination, there is substantial authority to conclude that this right both generates correlative obligations that must be respected by all States (*erga omnes*) and is a peremptory norm of international law.[95] The terminology used for such recognition has varied, however. In the *East Timor* case, the ICJ famously observed that '[t]he assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable' and that self-determination is 'one of the essential principles of contemporary international law'.[96] Also in connection with East Timor, both the UN General Assembly and the Security Council has recognised 'the inalienable right of the people of Portuguese Timor to self-determination', calling upon all States to respect it.[97] While in the *Chagos* advisory opinion the Court did not pronounce about the *jus cogens* character of self-determination, it made explicit the point of the legal interest of all States in the respect of this right and their obligation to co-operate to put it into effect:

> Since respect for the right to self-determination is an obligation *erga omnes*, all States have a legal interest in protecting that right (see *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29; see also *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33). The Court considers that, while it is for the General Assembly to pronounce on the modalities required to ensure the completion of the decolonization of Mauritius, all Member States must co-operate with the United Nations to put those modalities into effect.[98]

Of particular note, the Court referred to the Friendly Relations Declaration (specifically to paragraph 2 of the statement on the right to self-determination) to flesh out the obligations arising for all States.[99]

Today, there can be no doubt about the peremptory norm character of the right to self-determination.[100] The establishment of protectorates or colonial domination in today's world under the cover of the law is simply unthinkable.

2 Scope of the Norm

2.1 A 'Principle' and a 'Right'

As early as 1952, the UN General Assembly decided to include the 'right' of peoples to self-determination in the future Covenant (or Covenants) on Human Rights and explicitly mentioned that self-determination was applicable to non-self-governing territories.[101] Thereafter, the

[94] ibid, paras 154–55.
[95] Fourth Report of the Special Rapporteur on Peremptory Norms of General International Law (*Jus Cogens*), Dire Tladi, UN Doc A/CN.4/727, paras 108–15 (providing a comprehensive review of international and domestic practice).
[96] *East Timor* (n 1), para 29. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (n 1), paras 88, 149 and 155.
[97] See eg UNGA Res 3485 (XXX) (12 December 1975), UNSC Res 384 (1975), preamble and para 1.
[98] *Chagos* (n 42), para 180. In their declarations and opinions joined to the advisory opinions, the following judges expressly recognised the *jus cogens* character of the right of peoples to self-determination: Cançado Trindade and Robinson (joint declaration, para 8; Sebutinde (separate opinion, para 31), Robinson (separate opinion, paras 70–82).
[99] ibid, para 180.
[100] See Fourth Report of the Special Rapporteur on Peremptory Norms of General International Law (*Jus Cogens*), Dire Tladi, UN Doc A/CN.4/727, 48–52, paras 108–15.
[101] UNGA Res 545 (VI) (5 February 1952) (42–7–5).

https://doi.org/10.1017/9781108652889.008 Published online by Cambridge University Press

recognition of a 'right', not merely an 'aspirational principle', followed two parallel and interconnected pathways.

One culminated with the adoption in December 1960 of Resolution 1514 (XV). Paragraph 2 of the Declaration contains what has become the canonical formulation of the principle, both as regard the express recognition of a 'right' and the holders and contents of it: 'All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.' Paragraph 1 gives the context of such right, namely the outlawing of colonialism: 'The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.' As noted earlier, the ICJ has recognised that it is in this formulation that the customary norm was 'declared' by Resolution 1514 (XV).

The second pathway led to the adoption of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966.[102] Article 1 common of the two Covenants reads:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Two traditional colonial powers, the United Kingdom and France, made reservations to this provision on the implicit grounds that the recognition of such right was not necessarily in conformity with the UN Charter itself. According to these two States, in case of contradiction between what is stipulated in Article 1 of the Covenants and Articles 1(2) and 73 of the Charter, the obligations under the Charter would prevail.[103] That amounted to an attempt both to play down the extent to which self-determination was recognised in the Charter and to make such restrictive interpretation prevail over common Article 1 to the two 1966 Covenants. The argument resurfaced in the context of the advisory proceedings relating to the Chagos Archipelago, but the ICJ rejected both premises, reasserting that self-determination is indeed a 'right' and it has been so under customary international as declared by Resolution 1514 (XV).[104]

[102] ICCPR, UNGA Res 2200A (XXI) (16 December 1966); ICESCR, UNGA Res 2200A (XXI) (16 December 1966).

[103] British reservation: 'First the Government of the United Kingdom declare their understanding that, by virtue of Article 103 of the Charter of the United Nations, in the event of any conflict between their obligations under Article 1 of the Covenant and their obligations under the Charter (in particular, under Articles 1, 2 and 73 thereof) their obligations under the Charter shall prevail.' French reservation: 'The Government of the Republic considers that, in accordance with Article 103 of the Charter of the United Nations, in case of conflict between its obligations under the Covenant and its obligations under the Charter (esp Articles 1 and 2 thereof), its obligations under the Charter will prevail.' https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en#EndDec.

[104] *Chagos* (n 42), paras 152–54 (for the argument, see the Written Statement of the United Kingdom, 15 February 2018, paras 8.71–8.75).

https://doi.org/10.1017/9781108652889.008 Published online by Cambridge University Press

The fact that the two Human Rights Covenants of 1966 begin with a common article that enshrines the right of self-determination of peoples does not mean that such right is an individual right, as the Human Rights Committee has observed on different occasions, rejecting requests from individuals who claimed to be victims of a violation of the right to self-determination.[105] By definition, it is a 'collective' right. Individuals participate as such in the exercise of this right together with the other members of the community to which he or she belongs. At the same time, in its General Comment on the first Article of the ICCPR, the Human Rights Committee noted that the realisation of the right to self-determination:

> is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as Articles 1 apart from and before all the other rights in the two Covenants.[106]

Thus, despite attempts by colonial powers to cast doubts on the recognition of a 'right',[107] such recognition is no longer in question today:

> The recognition of a right of 'peoples' to self-determination is, of course, not the end of the matter. Different views have been expounded regarding the content and the holders of this right, with some terminological confusion arising from the use of the term 'people' or 'peoples' to refer to different collective subjects with different rights.

2.2 *Content of the Right*

Opinion No. 2 of the Arbitration Commission established in the framework of the Peace Conference for Yugoslavia (the 'Badinter Commission') stated that 'international law as it currently stands does not spell out all the implications of the right to self-determination'.[108] It is a rather surprising statement coming from an organ whose function was to determine the applicable law to the different aspects of the collapse of the former Yugoslavia.

Despite its abstraction, the right of peoples to self-determination has a content and the interpreter can (and must, if it is a judge or arbitrator or someone performing similar functions) draw the current legal consequences. Of course, the legal scope of the principle as it exists today may or may not please the interpreter or the person who has to apply it, but this is a question of *lege ferendae*. Its salient features can be summarised by saying that (i) the holders of the right of self-determination are the 'peoples', (ii) that, as noted earlier, they can invoke it *erga omnes*, (iii) that the principle is a peremptory norm of international law (*jus cogens*), (iv) that it is applicable everywhere and not only in cases of colonial or foreign domination and (v) that it includes the right of the people concerned to determine their internal and external (or international) political status in complete freedom.

In its 'internal' aspect, the principle implies the freedom for the people to choose their form of government, their economic and social system and the way to freely pursue their economic, social and cultural development. In its 'external' aspect, it grants the freedom to decide their

[105] See *Kitok* v *Sweden* (CCPR/C/33/D/197/1985); *RL* v *Canada* (CCPR/C/43/D/358/1989).
[106] CCPR General Comment No 12 on the Right to Self-Determination (Article 1 of the Covenant), 13 March 1984, HRI/GEN/1/Rev.9 (vol I).
[107] The British position was summarised as follows: 'it was not before the 1970s, at the earliest, that the United Kingdom accepted that it could be said that the principle of self-determination had become a right under general international law' (Counter-Memorial of the United Kingdom, *Chagos Marine Protected Area Arbitration (Mauritius* v *UK)*, Perm Ct Arb, 15 July 2013, para 7.17.
[108] Conference on Yugoslavia, Arbitration Commission, Opinion No 2, 11 January 1992, (1992) 31 ILM 1488, 1498.

https://doi.org/10.1017/9781108652889.008 Published online by Cambridge University Press

international political status, be it independence, free association, integration with another State or any other status. These two aspects are mere manifestations of one indivisible norm, and therefore they cannot be severed from one another. There is no legal basis, whether in treaty or customary law, as reflected by declaratory resolutions, to support the existence of two separate categories or 'rights' to self-determination, one broader than the other. Paragraph 4 of the statement of self-determination in the Friendly Relations Declaration leaves no ambiguity on this point:

> The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

The same is true of earlier statements. Both paragraph 2 of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples and common Article 1 of the two 1966 Covenants on Human Rights use the same wording to state that 'by virtue of that right [all peoples] freely determine their political status', without any qualification of the scope of the right, which is one and indivisible.

The following sections discuss in some detail the relations between the right to self-determination and territorial sovereignty and then move to the examination of the meanings of 'people'.

2.3 *Implications for Territorial Sovereignty*

The principle of self-determination produces two main legal effects on territorial sovereignty. First, it extinguishes territorial titles of colonial powers, if they possessed it. For example, if colonial powers possessed sovereignty over their colonies, it extinguishes their sovereignty, even if their titles were validly acquired in the past. By virtue of the second rule of intertemporal law, colonial powers are recognised as mere administering States of the colonial territories that they still maintain under their control. Second, given the establishment of self-determination as a fundamental principle of international law, peoples that have not yet achieved statehood are also holders of territorial sovereignty. Because, by virtue of their right to self-determination, colonial peoples and peoples under military occupation or under foreign domination possess the right to determine their own status; as a corollary, they also possess the right to dispose of their territory.

One important implication is that their territory cannot be dismembered by the colonial power. As noted earlier, that argument was advanced by the UK in the advisory proceedings relating to the Chagos islands. Because the right was allegedly not yet consecrated, the dismemberment was an admissible reorganisation of the territories and Mauritius would only emerge as a sovereign State within the redesigned boundaries of the colonial power. The ICJ rejected this argument on the grounds that Resolution 1514(XV) protects territories from dismemberment in its paragraph 6, as does the Friendly Relations Declaration in its sixth paragraph.

The UK also invoked the principle of *uti possidetis juris*, which would guarantee territorial integrity of the newly independent State only to the extent of its territory at the time of independence. The question is whether, under this principle, a dismemberment by the colonial power made before independence would be possible and binding as regards the scope of the territory of a newly independent State. The examples furnished by the UK concerned cases of creation of two different colonial units from a single one, or the transfer of territory from one colonial unit to another. The situation of Chagos was completely different. The archipelago was separated from Mauritius with the purpose of being maintained under colonial rule.

https://doi.org/10.1017/9781108652889.008 Published online by Cambridge University Press

The sixth paragraph of the Declaration clarifies the implications of self-determination for territorial sovereignty on this point by stating that:

> The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

In other words, the colonial power cannot claim that its sovereignty over its metropolitan territory extends to the territory of its colonies: the territorial status of the latter is different. This status is of international concern and its main purpose is to allow the exercise of the right to self-determination by the peoples concerned, with the aim of putting an end to colonialism in all its forms and manifestations as early as possible.

2.4 *Self-Determination and* Uti Possidetis Juris

In *Burkina Faso/Mali*, the ICJ envisaged the possibility of conflict between *uti possidetis* and self-determination but disregarded it in the following manner:

> At first sight this principle conflicts outright with another one, the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples.[109]

For its part, the Badinter Commission categorically asserted that the right to self-determination must not involve changes to existing boundaries at the time of independence (*uti possidetis juris*), except where States concerned agreed otherwise.[110]

However, it was advanced at the doctrinal level that self-determination overrides *uti possidetis juris*. The primacy of self-determination would be due to the fact that it is a supervening peremptory norm, to which another rule not having this character cannot be validly opposed.[111] Indeed, there is no need to resort to this hierarchical approach. Self-determination addresses the right to create a State (or to freely choose a specific connection with an existing one), while *uti possidetis juris* defines the territorial extension of the new entity. If there are existing boundaries, these are the boundaries of the new State. If the boundaries are subject to dispute, this is the situation inherited by the newly independent State. Insofar as there are no prior established boundaries, because the new State is a completely new entity without any prior administrative antecedent, *uti possidetis juris* has no role to play. As will be seen below, if one follows a 'territorial approach' to the identification of the holders of the right to self-determination (the 'peoples'), there is, in fact, no room for any contradiction at all.

[109] *Burkina Faso/Mali*, ICJ Reports 1986, para 25.
[110] Self-Determination, Arbitration Commission of the Peace Conference on Yugoslavia, Opinion No 2, 11 January 1992.
[111] G Naldi, 'The Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali): *Uti Possidetis* in an African Perspective' (1987) 36 *International & Comparative Law Quarterly* 900 and 902–3.

https://doi.org/10.1017/9781108652889.008 Published online by Cambridge University Press

2.5 *Secession*

The inclusion of self-determination in international law raised the question of its link with secession. As seen above, when this right was incorporated in the Charter and in later deliberations, the common view was that self-determination did not include a right to secession.

The term secession refers to the creation of a new independent entity through the separation of part of the territory and population of an existing State, without the consent of the latter. Secession can also take the form of the separation of part of the territory of a State in order to be incorporated as part of another State, without the consent of the former.[112]

In the early nineteenth century, when the Spanish colonies in the American continent declared independence, there was neither a legal right to self-determination nor an international law of 'decolonisation'. Therefore, the process took the form of secession and the existence of the newly independent States was a matter of fact and of recognition by the other members of the more limited community of States of the time.

This legal approach drastically changed in the second half of the twentieth century, during the UN era. Decolonisation, the most important means of creation of new States during the second half of the twentieth century, was not viewed by the international legal order as a case of secession. One of the reasons for this is summarised in paragraph 6 of the Friendly Relations Declaration, namely the separate status of the territorial basis of the non-self-governing territory. Nevertheless, secession remained – actually or potentially – another factual possibility as a means of creating States in the contemporary world.

The end of the Cold War brought about new secessionist aspirations and the strengthening and re-awakening of existing or dormant separatist claims in nearly all regions of the world. These concerned mostly the territory of the former USSR and the Socialist Federal Republic of Yugoslavia in the 1990s, and have continued with varying degrees of success. Notably, when some of these attempts at creating new States were successful, they occurred with the consent of the parent State.

The separation of Eritrea from Ethiopia (1993) led to the emergence of important disputes and a bloody armed conflict. Unilateral declarations of independence were issued with respect to Kosovo in February 2008, and regarding Southern Ossetia and Abkhazia some months later. In January 2011, in a referendum held in South Sudan on the basis of the Peace Agreement of 2005 between the Sudanese government and the Sudan People's Liberation Movement/Army, the overwhelming majority of participants decided in favour of the creation of a new State,[113] which came into being on 9 July 2011, and was the last member to be admitted to the United Nations.[114] In the context of the Ukrainian crisis, Crimea and the city of Sebastopol were incorporated into Russia after having declared 'independence', and self-proclaimed independent entities appeared in the eastern part of the country in 2014. Referenda on independence were held in Quebec (1995) and Scotland (2014), with the participants having opted for keeping these territories within their respective States. Another referendum took place in New Caledonia at the end of 2018, in which the population decided to maintain the territory within the French

[112] When a new State is formed from part of the territory of another State with its consent, it is a situation of 'devolution' rather than 'secession'. This presupposes an agreement between both entities and, as such, is not a source of conflict, at least with regard to the existence of the new State itself.

[113] The Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan's People's Liberation Movement/Sudan People's Liberation Army is available on the website of the United Nations Mission in Sudan at http://unmis.unmissions.org. The results of the referendum of 9 January 2011 are discussed in the Report of the Secretary-General on the Sudan, 12 April 2011, UN Doc D/2011/239.

[114] UNGA Res 65/308 (14 July 2011).

https://doi.org/10.1017/9781108652889.008 Published online by Cambridge University Press

Republic. Other controversial referenda were organised unilaterally in Iraqi Kurdistan and in Catalonia (Spain) in 2017.

The question of secession was brought before the ICJ in connection with the unilateral declaration of independence of Kosovo. Yet, the advisory opinion rendered by the Court avoids the core issue and focuses, instead, on the aspirational character of declarations of independence and the fact that – in a controversial assertion contradicted by clear evidence – the authors of the Declaration of Independence were not the provisional institutions of self-government created on the basis of Resolution 1244 (1999) of the Security Council.[115]

The ambiguity of the Court has been exploited in other circumstances in which secession has been at stake. The Russian annexation of Crimea has been justified by Russia as a secession followed by integration with Russia on the grounds that international law does not prohibit unilateral declarations of independence.[116]

The question, of course, is not whether a specific rule prohibiting secession exists. The matter cannot be assessed in a vacuum and it remains governed by the fundamental principles of international law, including the prohibition of the use of force, respect for sovereign equality and territorial integrity, as well as the applicability or not of the right of peoples to self-determination. By focusing on declarations of independence as mere expressions of will not prohibited by international law, the *Kosovo* advisory opinion indirectly recognised that the right of peoples to self-determination was not applicable to the case.

2.6 *The Doctrine of Remedial Secession Based on the 'Saving Clause'*

The idea that a minority within a State that is victim of grave breaches of human rights is entitled to secede as a remedy of last resort has been discussed for a long while. It was officially invoked by some States and strongly rejected by others during the Kosovo advisory proceedings.[117]

To support the doctrine of 'remedial secession', an *a contrario* reading of paragraph 7 of the formulation in the Friendly Relations Declaration is advanced. The territorial integrity of States would be preserved insofar as the State concerned conducts itself 'in compliance with the principle of equal rights and self-determination' and thus possessing 'a government representing the whole people belonging to the territory without distinction as to race, creed or colour'. According to this doctrine, if the minority is oppressed and the government of the State does not include its representation, then the minority will be entitled to separate since the territorial integrity of the State would no longer be guaranteed.

As mentioned above, the *travaux préparatoires* do not allow such a conclusion to be reached. A careful reading of the seventh paragraph within its context and in the light of the object and purpose of the Declaration also leads to the disregarding of this doctrine. The object and purpose of paragraph 7 was to make clear that self-determination would not run against the

[115] *Kosovo*, Advisory Opinion (n 1), para 105. For a comment, see Marcelo Kohen and Katherine Del Mar, 'The Kosovo Advisory Opinion and UNSCR 1244 (1999): A Declaration of "Independence from International Law"?' (2011) 24(1) *Leiden Journal of International Law* 109, 114–18.

[116] Vladimir Putin, Address of the President of the Russian Federation to State Duma deputies, Federation Council members, heads of Russian regions and civil society representatives in the Kremlin, 18 March 2014, http://en.kremlin.ru/events/president/news/20603.

[117] Unilateral Declaration of Independence of Kosovo, Finland, Written Statement, 4–5, paras 9–10; Ireland, Written Statement, 2, 8–10, paras 27–32; Poland, Written Statement, 26, para 6.10; United Kingdom, Written Statement, 92 (however, in its Written Comments, 5–6, para 10, the United Kingdom considers that the Court should not apply this concept in this case); *Contra*: Serbia, Written Statement, 214–30, paras 589–625, Written Comments, 142–49, paras 339–59; Argentina, Written Statement, 34, paras 85–86; Cyprus, Written Statement, 36–38, paras 140–47; Spain, Written Comments, 5–6, para 8; Iran, Written Statement, 6–7, para 4.1; Romania, Written Statement, 42, para 147 and 44, para 156; Russia, Written Statement, 36–38, paras 97–103; Slovakia, Written Statement, para 28.

https://doi.org/10.1017/9781108652889.008 Published online by Cambridge University Press

territorial integrity of existing States. It is for this reason that it is called the 'safeguard' or the 'saving clause'. The historical context in which the Declaration was adopted cannot be neglected either. In the decade that ended with its adoption, the United Nations actively opposed Katangese separatism in the Congo as well as Biafra's attempted secession from Nigeria. Just some months before the adoption of the Declaration, Secretary-General U Thant made his famous statement:

> As far as the question of secession of a particular section of a State is concerned, the United Nations attitude is unequivocable. As an International Organization, the United Nations has never accepted and does not accept and I do not believe will ever accept the principle of secession of a part of its member States.[118]

The text of the paragraph is indeed an interpretation of the six foregoing paragraphs, nothing in them 'must be understood as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States'. The addressees of this paragraph are the actual or potential entities or groups claiming to exercise the right to self-determination. The end of the paragraph recalls nevertheless that States so protected must conduct themselves in compliance with the principle and consequently their government must represent the whole people belonging to the territory without distinction. This is a clear reference to States in which policies such as apartheid – a main concern at that time – were contrary to the principle of self-determination. It was not concerned with secession at all. This interpretation is also reinforced by the eighth and last paragraph, which is a repetition of paragraph 6 of Resolution 1514 (XV) and its addressees are States.

In the *Kosovo* advisory opinion the ICJ decided not to take an explicit stance on the matter, although it ascertained that there were 'radically different views' among those having participated in the proceedings about a right to 'remedial secession'.[119]

3 *Holders of the Right to Self-Determination*

3.1 *The Legal Definition of 'Peoples'*

At the end of the day, the crucial aspect of the entire question of self-determination lies in determining who holds this right or, in other words, what is meant by 'peoples' in the sense of international law. The legal notion of 'people' may or may not coincide with any sociological ones. As a matter of course, it cannot simply adopt the definition any specific group gives itself. No legal system gives to its subject the possibility to decide for themselves whether they are subjects or not and in which category. It is the legal system itself that determines whether or not one is a subject and what one's rights and obligations may be. Hence, 'peoples' as holders of the right to self-determination in international law are neither defined through self-qualification nor through exclusively socio-cultural criteria.

The first conclusion then is that not every population inhabiting a territory constitutes a 'people' from this perspective. The Court reflected this basic premise in its *Western Sahara* and *Chagos* advisory opinions:

> [t]he validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly

[118] (1970) 7 *UN Monthly Chronicle* 36.
[119] *Kosovo*, Advisory Opinion (n 1), para 82.

https://doi.org/10.1017/9781108652889.008 Published online by Cambridge University Press

> has dispensed with the requirement of consulting the inhabitants of a given territory. *Those instances were based either on the consideration that a certain population did not constitute a 'people' entitled to self-determination* or on the conviction that a consultation was totally unnecessary, in view of special circumstances.[120]

International law distinguishes different types of human communities with different rights. 'Peoples', 'minorities'[121] and 'indigenous peoples'[122] are three legal categories whose existence in a given territory implies different consequences as to the possibility to decide about territorial sovereignty. Only 'peoples', in the international legal sense of the word, are holders of the right to self-determination. As an example, the ICJ's *Wall* advisory opinion, while discussing the applicability of the principle to the issue, noted that as regards the right of self-determination, 'the existence of a Palestinian "people" is no longer an issue'.[123]

National, religious, linguistic and other minorities enjoy their specific rights, which do not include the right to self-determination. If the opposite were true (i.e. if minorities were 'peoples' entitled to self-determination), there would be no need to make this legal distinction. It is worth mentioning the commentary to Article 27 of the ICCPR (related to individual belonging to minorities) made by the Human Rights Committee in this regard:

> 3.1. The Covenant draws a distinction between the right to self- determination and the rights protected under article 27. The former is expressed to be a right belonging to peoples and is dealt with in a separate part (Part 1) of the Covenant. Self-determination is not a right cognizable under the Optional Protocol. Article 27, on the other hand, relates to rights conferred on individuals as such and is included, like the articles relating to other personal rights conferred on individuals, in Part III of the Covenant and is cognizable under the Optional Protocol.
>
> 3.2. The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party.[124]

The fact that there is no explicit definition of 'peoples' in any international instrument must not detract the interpreter, both practitioners and scholars, from the identification of the holder of a recognised right in international law. A look at the relevant instruments and practice followed allows such right-holders to be identified. In order to determine who is the holder of the right to self-determination, international law follows a 'territorial approach'. Undoubtedly, the right of self-determination applies to peoples in non-self-governing territories, including colonies,[125] mandates or trust territories recognised as such by the relevant international organ.[126] Still in these cases, it is for the relevant supervisory organ to recognise the existence (or not) of a people or even a plurality of them in the territory concerned. Beyond the decolonisation context,

[120] *Western Sahara*, Advisory Opinion (n 36) 12, 33, para 59 (16 October); *Chagos* (n 42), Advisory Opinion, para 158 (emphasis added).

[121] See Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; European Framework Convention for the Protection of National Minorities, Council of Europe, UNGA Res 47/135 (10 November 1994).

[122] See UN Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (13 September 2007).

[123] *Construction of a Wall on Occupied Palestinian Territory*, Advisory opinion (n 1), para 118.

[124] CCPR General Comment No 23 on the Rights of Minorities (Article 27 of the Covenant) CCPR/C/21/Rev.1/Add.5 (1994).

[125] The definition of non-self-governing territories given in principle IV of UNGA Res 1541 (XV) (15 December 1960) is normally used to define peoples subject to colonial domination: 'a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it'. The primary criterion is of a territorial nature, but ethno-cultural considerations are also taken into account, particularly to avoid including in the definition the own populations exported by the colonial power to the colonial territory.

[126] For a consistent view see Bernt Elsner, *Die Bedeutung des Volkes im Völkerrecht. Unter besonderer Berücksichtigung der historischen Entwicklung und der Praxis des Selbstbestimmungsrechts der Völker* (Duncker & Humblot, 2000).

https://doi.org/10.1017/9781108652889.008 Published online by Cambridge University Press

the notion of a people applies to the entire population inhabiting an independent State, even when there are minorities within it. The exception to this is when the State itself recognises that it is composed of several peoples entitled to exercise their right of self-determination. Some examples include the former Yugoslavia, Serbia-Montenegro, Saint-Kitts and Nevis, Ethiopia and Uzbekistan.[127] Such recognition entitles these peoples to exercise a right to self-determination.

In addition, there are also cases in which human communities that were not considered as holders of the right to self-determination succeeded in creating new States. This was the case in Bangladesh and South Sudan. It was then their factual capacity to create a sovereign State that transformed these communities in 'peoples'. It is to be noticed that in the former case the recognition of the parent State came later, whereas in the latter case it came earlier, allowing the community to decide upon the creation of a new State. In its *Kosovo* advisory opinion, the ICJ noticed that, if many States were created during the second half of the twentieth century as a result of the exercise of the right to self-determination, there were other 'declarations of independence' outside of this context.[128]

At first sight, the territorial approach may appear to put more emphasis on geography than on the human factor. In *Western Sahara*, Judge Dillard wrote that 'it is for the people to determine the destiny of the territory and not the territory the destiny of the people'.[129] This assertion sounds sympathetic. However, as Judge Rosalyn Higgins commented in her Hague lectures, the territorial question must come first since until it is determined where territorial sovereignty lies, it is impossible to see if the inhabitants have a right of self-determination.[130] Indeed, it is impossible to define a 'people' in the international legal sense without a prior specific determination of its spatial scope.

The definition of 'people' in international law then is a legal one and practice in the last half-century shows that the key criterion is the territorial basis. It is the territory which defines the 'people' in legal terms rather than the other way around. Neither objective conceptions of 'peoples' (based on ethnic, religious, linguistic and other considerations) nor subjective ones (based on the 'self-qualification' of a group as a people) or any combination thereof provide clear guidance as to the definition of peoples in international legal practice. These different elements can of course be taken into account, but they are not decisive. It is on the basis of the territorial approach that the inhabitants of Taiwan, Hong Kong or Macau have not been considered a separate people. All these populations are technically part of the Chinese people. Similarly, the population of Mayotte, an island which is part of the Comoros Islands, is only a component of the Comorian people, despite its declared will to be considered as French.[131] Similarly, self-determination has not been applied to the inhabitants of the Falkland/Malvinas Islands by the UN General Assembly and its Decolonization Committee.[132] The *Chagos* advisory opinion also

[127] Constitution of Ethiopia, Art 47; Constitution of Saint Kitts and Nevis, Art 113; Constitution of Uzbekistan, Art 74; Constitution of Serbia-Montenegro, Art 60. In the latter case, Montenegro effectively exercised its right to self-determination and became independent in 2006 following a referendum.

[128] *Kosovo*, Advisory Opinion (n 1), para 79.

[129] *Western Sahara*, Advisory Opinion (n 36) 122.

[130] Rosalyn Higgins, 'International Law and the Avoidance, Containment and Resolution of Disputes: General Course on Public International Law' (1991) 230 *Recueil des Cours* 174.

[131] See UNGA Res 3385 (XXX) (12 November 1975), in which the Comoros is admitted as a member of the United Nations and which explicitly states that the four islands are part of the archipelago, and Res 32/7 (1 November 1977), on the 'Question of the Comorian island of Mayotte'.

[132] See among others UNGA Resolutions 2065 (XX) (16 December 1965), 3160 (XXVIII) (14 December 1973), 31/49 (1 December 1976), 37/9 (4 November 1982) and 38/12 (16 November 1983). The UK amendment project of what became Res 40/21 (27 November 1985), which referred to the applicability of the right to self-determination to the

https://doi.org/10.1017/9781108652889.008 Published online by Cambridge University Press

offers an important insight in this regard: the people entitled to self-determination considered for the ICJ analysis were the Mauritian people, which includes the inhabitants of the Chagos Archipelago, not the latter separately.[133]

In this regard, international recognition by the relevant organ is much more important, even decisive, than the recognition of new States by their peers. The UN practice on decolonisation is, indeed, decisive. An example is the position of the UN General Assembly on the creation of two different States in the former Palestine, due to the recognition of two different peoples.[134] By contrast, the absence of a recognised separate people in the Falkland/Malvinas has led the General Assembly to recommend an end to this colonial situation through the settlement of the sovereignty dispute between Argentina and the United Kingdom, just taking into account the 'interests' of the population but not their 'will'.[135] This analysis is confirmed by instances in which some States have authorised the holding of referenda in parts of their territory to determine whether this territory will become independent. The holding of these referenda is the product of the decision of the State concerned, and not the result of an obligation imposed by international law. It is a matter that international law leaves to the discretion of the domestic law of States.

3.2 *Other 'Peoples' and Other 'Rights'*

The fact that some human communities that are not recognised as peoples under international law do not possess a right to decide the fate of the territory they inhabit does not mean that they do not possess other important collective rights. Certain populations within existing States, such as 'indigenous peoples', 'tribal peoples' and 'first nations' are holders of collective rights recognised by instruments such as the African Charter of Human and Peoples' Rights,[136] the International Labour Organization (ILO) 1989 Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries,[137] or the 2007 UN Declaration on the Rights of Indigenous Peoples.[138]

Yet, none of these instruments clearly confer a right to self-determination with the same scope as the one discussed so far on these other groups. Article 1(3) of the ILO Convention No. 69 expressly states that 'The use of the term *peoples* in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.' Thus, the Convention preserves the understanding of the right to self-determination of peoples developed under the aegis of UN practice.

The situation of Article 20 of the African Charter, although more complex, does not question the conclusion reached in the previous section of this chapter. Article 20 of the African Charter states:

> 1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status

inhabitants of the islands, was rejected by the UN General Assembly (see Doc A/40/L.20 of 22 November 1985. See also (1985) 56 *British Yearbook of International Law* 402–6 and (1985) 31 *Annuaire Français de Droit International* 560). For the Decolonization Committee, see the resolution adopted on 21 June 2018: A/AC.109/2018/L.8.

[133] Only two judges expressed a different view: see the declaration by Judge Abraham and the separate opinion of Judge Gaja, para 6.

[134] UNGA Res 181 (II) (29 November 1947).

[135] See n 132.

[136] African Charter of Human and Peoples' Rights, OAU, 27 June 1981.

[137] Convention Concerning Indigenous and Tribal Peoples in Independent Countries, ILO C169, 27 June 1989.

[138] UN Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (13 September 2007).

https://doi.org/10.1017/9781108652889.008 Published online by Cambridge University Press

and shall pursue their economic and social development according to the policy they have freely chosen.

2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

The specific content of the right to self-determination in this provision does not mention 'independence' as a possible outcome, although that possibility is implicit in the free determination of their political status (paragraph 1) and right to 'free themselves' or 'to assistance . . . in their liberation struggle' (paragraphs 2 and 3). What remains undefined is the term 'peoples'. One prominent commentator has noted, in this regard, that this term 'varies in nature according to the right which is to be implemented'.[139] In *Mgwanga Gunme* v. *Cameroon*, the African Commission observed that the term had been deliberately left open so as to afford flexibility in the subsequent implementation of the African Charter.[140] In this context, the complexity comes from the use of the term 'peoples' and the term 'rights' to refer to different realities as explained by the African Court in the *Ogiek* case, although with some lack of clarity:

> It is generally accepted that, in the context of the struggle against foreign domination in all its forms, the Charter primarily targets the peoples comprising the populations of the countries struggling to attain independence and national sovereignty . . .
>
> In the circumstances, the question is whether the notion 'peoples' used by the Charter covers not only the population as the constituent elements of the State, but also the ethnic groups or communities identified as forming part of the said population within a constituted State. In other words, the question that arises is whether the enjoyment of the rights unquestionably recognised for the constituent peoples of the population of a given State can be extended to include sub-state ethnic groups and communities that are part of that population . . .
>
> In the view of the Court, the answer to this question is in the affirmative, *provided such groups or communities do not call into question the sovereignty and territorial integrity of the State without the latter's consent*. It would in fact be difficult to understand that the States which are the authors of the Charter intended, for example, to automatically recognize for the ethnic groups and communities that constitute their population, the right to self-determination and independence guaranteed under Article 20(1) of the Charter, which in this case would amount to a veritable right to secession. On the other hand, nothing prevents other peoples' rights, such as the right to development (Article 22), the right to peace and security (Article 23) or the right to a healthy environment (Article 24) from being recognised, where necessary, specifically for the ethnic groups and communities that constitute the population of a State.[141]

Thus, the collective rights recognised in respect of 'other' peoples are also 'other' rights, not including the right to self-determination as understood in UN practice.

Similar considerations are applicable to the right to self-determination recognised in the preamble and Articles 3 and 4 of the 2007 UN Declaration on the Rights of Indigenous Peoples, which was perhaps the most controversial issue of the drafting process and possibly responsible for a

[139] Fatsah Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Development* (Martinus Nijhoff, 2002) 211.

[140] Communication 266/03, *Kevin Mgwanga Gunme et al* v *Cameroon* (2009), para 169.

[141] *African Commission on Human and Peoples' Rights* v *Republic of Kenya (Ogiek case)*, ACtHPR App 006/2012, Judgment of 26 May 2017, paras 197–99 (emphasis added).

https://doi.org/10.1017/9781108652889.008 Published online by Cambridge University Press

delay of ten years in its adoption.[142] Indeed, whereas Article 3 applies to 'indigenous peoples' the wording used in common Article 1 to the two 1966 Covenants on Human Rights, Article 4 immediately adds that:

> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Moreover, Article 46(1) of the Declaration clearly states that:

> Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or *construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States*. [emphasis added]

This language is familiar. It is taken from the saving clause (paragraph 7) in the formulation of self-determination in the Friendly Relations Declaration. Since the adoption of this Declaration, one can conclude that, together with peoples and minorities, a third legal category has been delineated with specific rights: that of indigenous peoples. If one follows the Declaration, they are holders of the right to self-determination, but only in its internal dimension.

4 *The 'Human Factor' and 'Self-Determination' in Territorial Disputes*

Outside the principle of self-determination, the human factor still plays an important role in territorial disputes today, not with regard to the fate of the territory, but with respect to the rights and obligations that must be applied and respected with regard to the inhabitants. In the *El Salvador/Honduras* case, the ICJ held that:

> The effect of the Chamber's Judgment will however not be that certain areas will 'become' part of Honduras; the Chamber's task is to declare what areas are, and what are not, already part of the one State and the other. If Salvadorians have settled in areas of Honduras, neither that fact, nor the consequences of the application of Honduran law to their properties, can affect the matter.[143]

But the Chamber also recognised that:

> [T]he situation may arise in some areas whereby a number of the nationals of the one Party will, following the delimitation of the disputed sectors, find themselves living in the territory of the other, and property rights apparently established under the laws of the one Party will be found to have been granted over land which is part of the territory of the other. The Chamber has every confidence that such measures as may be necessary to take into account of this situation will be framed and carried out by both Parties, in full respect for acquired rights, and in a humane and orderly manner.[144]

[142] See Marc Weller, 'Self-Determination of Indigenous Peoples: Articles 3, 4, 5, 18, 23 and 46(1)' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2018) 116.

[143] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, ICJ Reports 1992 351, 419, para 97 (11 September).

[144] ibid at para 66. In *Croatia/Slovenia*, the tribunal also noted that 'in some limited areas (such as the situations described in paragraphs 565 and 630) the course of the boundary, as it results from an application of the law, may not be considered the most practical boundary, whether for reasons of physical or human geography. For the avoidance of

https://doi.org/10.1017/9781108652889.008 Published online by Cambridge University Press

Similarly, in the *Cameroon* v. *Nigeria* case, the nationals of the parties had occupied villages located on the other side of the boundary. The Court reaffirmed in this context that:

> [I]t has no power to modify a delimited boundary line, even in a case where a village previously situated on one side of the boundary has spread beyond it. It is instead up to the Parties to find a solution to any resultant problems, with a view to respecting the rights and interests of the local population.[145]

In the same case, the Court dismissed the relevance of services that Nigeria had provided to the inhabitants of the disputed territory. Although they could be seen as *effectivités*, these Nigerian actions came up against the established title of Cameroon over the disputed territory. In such circumstances, preference is to be given to the title.[146]

The human factor can also play a role in territorial disputes when equity *infra legem* is applicable. Faced with its duty to make a decision in circumstances in which sovereignty does not appear in a clear manner from the available evidence, a tribunal can choose a solution that better reflects the human factor. For example, in *Burkina Faso/Mali*, the ICJ divided the pools in the disputed area in such a way as to allow equal access to water in these arid regions.[147] In the *Frontier Dispute (Burkina Faso/Niger)*, the Court was also guided by such considerations when deciding the point at which the boundary line reaches the 'River Sirba at Bossebangou'. The Court observed that it was unclear whether the boundary line stopped at one or the other of the banks of the river or that the river was attributed in its entirety to one of the parties. As a result, the Court held that:

> In this regard, the Court notes that the requirement concerning access to water resources of all the people living in the riparian villages is better met by a frontier situated in the river than on one bank or the other. Accordingly, the Court concludes that, on the basis of the Arrêté, the endpoint of the frontier line in the region of Bossébangou is located in the River Sirba. This endpoint is more specifically situated on the median line because, in a non-navigable river with the characteristics of the Sirba, that line best meets the requirements of legal security inherent in the determination of a boundary.[148]

When a decision on territorial sovereignty subjects a group or a private person to the sovereignty of another State, there is a rebuttable presumption that vested rights acquired in good faith in the area – or at least the narrower category of 'traditional rights' – are not affected. After reviewing the relevant case law, the arbitral tribunal in the *Abyei* case reached the following conclusion:

> The jurisprudence of international courts and tribunals as well as international treaty practice lend additional support to the principle that, in the absence of an explicit prohibition to the contrary, the transfer of sovereignty in the context of boundary delimitation should not be construed to extinguish traditional rights to the use of land (or maritime resources).[149]

doubt, the Tribunal reiterates that, while the present Award fixes the boundary in such areas with binding effect (as the Parties have requested), the Award does not preclude the Parties from subsequently reaching agreement between themselves on practical arrangements concerning the boundary.' *Croatia/Slovenia Arbitration*, Award, Perm Ct Arb, 29 June 2017, 1, 114, para 357.

[145] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v *Nigeria: Equitorial Guinea intervening)*, Merits, ICJ Reports 2002, 303, 373–74, para 123 (10 October). See also 370, para 107.

[146] ibid 415, paras 222–23.

[147] *Frontier Dispute (Burkina Faso/Mali)*, Judgment (n 109) 554, para 150.

[148] *Frontier Dispute (Benin/Niger)*, Judgment, ICJ Reports 2005, 90, 85, para 101 (12 July).

[149] *Delimitation of the Abyei Area between the Government of Sudan and the Sudan People's Liberation Movement/Army*, Award, Perm Ct Arb, 22 July 2009, RIAA, vol XXX, 145, para 263. *Concerning maritime delimitation, reference may be*

https://doi.org/10.1017/9781108652889.008 Published online by Cambridge University Press

VI SELF-DETERMINATION AS A REVOLUTIONARY PRINCIPLE

In what became his last written contribution, the former President of the ICJ, the late Sir Robert Jennings, questioned the legal character of the principle of self-determination due to its easy manipulation in territorial matters:

> International lawyers have tended not to look for better ways of making policy territorial decisions but have instead tried to extend the legal 'modes'; as for example by the transformation of 'self-determination' from being a useful political notion, into a 'right' of 'self-determination', apparently enjoyed by 'peoples'. This circular and question-begging 'right' still calls for a political decision about what is a 'people' for this purpose, as indeed also what status they self-determine on a scale varying between independence and dependence. How much better it would have been to recognize that wise or right policy sometimes makes certain changes desirable and that there should therefore be a regular legal machinery for making changes on grounds of policy, rather than a 'right' that actually by the 'self' element puts a premium on successful violence.[150]

The ostensible manipulations by some States of the right to self-determination are well known,[151] as is the fact that any separatist movement within States claims to be the representative of 'the people' and that 'the people' are entitled to self-determination. However, these situations must not lead to the denial of the legal existence of this right. This is not the first time that a right is misconstrued and will certainly not be the last.

Self-determination has become a fundamental principle of international law. All relevant texts affirm that 'all peoples have the right to self-determination'. This clear assertion contradicts the view that only peoples subject to colonial, racist or foreign domination are beneficiaries of the right to self-determination. Peoples who are not in these situations also hold the same right. Situations of colonial, racist or foreign domination are simply flagrant cases of violations of the right of peoples to self-determination. The fact of not being deprived of the exercise of one's right does not mean that one is not – or no longer – a holder of the right concerned. General Assembly Resolution 56/141 on the 'Universal realization of the right of peoples to self-determination' is correct when it reaffirms, on the one hand, the right of peoples 'under colonial, foreign or alien occupation' and, on the other hand, that foreign military intervention and occupation are threatening to suppress, or have already suppressed, the right to self-determination of sovereign peoples and nations'.[152] There are people who have already achieved statehood and others who have not. Both categories, however, hold the same right of peoples to self-determination.

The interpretation of self-determination followed here is the one that conciliates the right of peoples and the equality of human beings within existing States, no matter their origin, language, religion or other differences. Other alleged 'contemporary' interpretations of the principle are rather the expression of atavistic approaches based on ethnic considerations or on the simplistic idea that the way to solve ethnic, regional or cultural problems within States is by their division. For the time being, international law does not follow this dangerous path, while at the same time favours the liberation of those 'peoples' whose exercise of the right to self-determination continues to be denied. It is in this sense that it can be categorised as a revolutionary principle, not an anarchical one.

made, with certain reservations, to the award in Maritime Delimitation Procedure (Eritrea/Yemen) (Second Stage of the Proceedings), Award, 1999, RIAA, vol XXII, 335, 357–8, paras 92 and 95 (17 December).

[150] Robert Y Jennings, 'The Imbalance of the International Law System' (2004) 6 *Forum de droit international* 127–28.

[151] See Marcelo Kohen, 'Sur quelques vicissitudes du droit des peuples à disposer d'eux-mêmes' in N Angelet, O Corten and P Klein (eds), *Droit du pouvoir, pouvoir du droit, Mélanges offerts à Jean Salmon* (Bruylant, 2007) 961–82.

[152] UNGA Res 56/141 (11 February 2002).

https://doi.org/10.1017/9781108652889.008 Published online by Cambridge University Press



The Oxford Handbook of International Human Rights Law
Dinah Shelton (ed.)
https://doi.org/10.1093/law/9780199640133.001.0001
Published: 2013 **Online ISBN:** 9780191756672 **Print ISBN:** 9780199640133

CHAPTER

8 General Principles and Constitutions as Sources of Human Rights Law

Michael O'Boyle, Michelle Lafferty Author Notes

https://doi.org/10.1093/law/9780199640133.003.0009 Pages 194–221
Published: 16 December 2013

Abstract

This article examines influence of general principles of law and constitutions in the formulation of human rights standards and in their interpretation and application by international courts, particularly the Universal Declaration of Human Rights (UDHR). It describes and compares the application and interpretation of human rights by the International Court of Justice (ICJ), the European and Inter-American Courts of Human Rights, and the Court of Justice of the European Union (CJEU). This article also highlights the fact that majority of human rights instruments and provisions subsequently adopted at the national and international levels have built upon the guarantees elaborated by the UDHR.

Keywords: human rights standards, general principles of law, constitutions, UDHR, international courts, ICJ, Courts of Human Rights, CJEU

Subject: Human Rights and Immigration, Law

Series: Oxford Handbooks

Collection: Oxford Handbooks Online

Downloaded from https://academic.oup.com/edited-volume/42626/chapter/358047931 by University of Melbourne user on 16 November 2023

1. Introduction

ALTHOUGH the term 'human rights' is often understood as a Western concept, many of the basic values underlying human rights—reason, justice, the inherent dignity of human beings, and the need to secure their welfare—have long been current in other civilizations and cultures, as well. Important historic texts, some of which are discussed below and elsewhere in this volume, include the Code of Hammurabi, the Charter of Cyrus (Persia), the Hungarian Golden Bull, and the Magna Carta. Acceptance of the need for
p. 195 enforceable human rights guarantees is, however, of ↳ more recent vintage. The first real breakthrough occurred with the adoption of human rights declarations in the late eighteenth century and their subsequent inclusion in the constitutions of France and the United States. A number of developments in international law, including the concept of diplomatic protection, the emergence of humanitarian law, and a growing awareness of the need for protection of minorities, further promoted human rights ideals. The progress made in human rights protection prior to the end of the Second World War, however, is dwarfed by the explosion in human rights instruments and jurisprudence which has occurred since the creation of the United Nations in 1945. The adoption of the Universal Declaration of Human Rights (UDHR) in 1948 marked a turning point in international human rights protection due to its comprehensive content and wide geographic remit, and it has since been at the root of the development of human rights at international, regional, and national levels.

This chapter will examine the role general principles and constitutions played both in the formulation of human rights standards, principally in the UDHR, and in their interpretation and application by international courts.

2. Preliminary Comments on General Principles and Constitutions

The term 'general principles' is a familiar, though elusive, concept. Article 38 § 1(c) of the Statute of the International Court of Justice (ICJ) refers to 'the general principles of law recognized by civilized nations' as one of the four sources of international law to be applied by the court.[2] However, two immediate complications arise.

The first concerns the meaning of the phrase 'general principles of law' in this context. As Lammers commented in 1980: 'Few things have in the past given rise to so much diversity of opinion as precisely the nature and function of these principles.'[3] The thirty years which have passed since this comment have done
p. 196 little to bring clarity to this area.[4] General principles of law identified in the case law ↳ of international courts and arbitral tribunals, derived from commonly accepted domestic rules, include, inter alia, the principle of good faith, the obligation to make reparation for international wrongs, the principle of *res judicata*, the principle of estoppel, the principle of *jus novit curia*, equality of the parties to a dispute, the rights of the defence, and respect for fundamental rights.[5] They have served to fill the gaps resulting from the absence of any treaty or customary obligation. A basic distinction is often drawn between principles which arise from domestic or 'municipal' law (*foro domestico*) and principles proper to international law itself.[6] While the inclusion of the former in the 'general principles of law' to which Article 38 refers is widely accepted, the extent to which the latter are encompassed by that provision is the subject of doctrinal controversy. Alston and Simma argue that the development of international human rights law has had a significant impact on our understanding of the notion of 'general principles', and certain human rights principles have been progressively 'accepted and recognized' as binding, even peremptory, by the international community of states as a whole. Such a process does not necessarily lead to the formation of customary law—although this is also possible—but to the formulation of general principles within the meaning of Article 38 § 1(c) of the ICJ Statute.

Downloaded from https://academic.oup.com/edited-volume/42626/chapter/358047931 by University of Melbourne user on 16 November 2023

The second difficulty arises from the fact that those drawing on 'general principles' as a source of human rights law do not always define them as such or distinguish them from principles of customary law. In the *Mavrommatis Palestine Concessions* case, for example, the Permanent Court of International Justice spoke of 'an elementary principle' of international law,[7] while the International Court of Justice in the *Corfu Channel* case referred to 'general and well-recognized principles' of international law.[8] The European Court of Human Rights, for its part, has invoked 'fundamental principles of law'[9] and 'generally recognised international standards' in some of its judgments.[10] These references may relate to the concept of general
p. 197 principles of law, but the ambiguity that the use of different terminology ↳ causes leaves a certain doubt and is probably meant to do so. Notably, the European Court of Human Rights has so far refrained from elucidating the content of the reference to 'general principles' in Article 7(2) of the ECHR, even when the nature of the case invites it to do so—perhaps to steer clear of the difficulties under discussion.[11] This chapter, in contrast, explores the extent to which general principles of law that neither originate in nor derive their validity from treaty or customary law can be said to have contributed to the elaboration of human rights standards.

It is clear that some overlap exists between general principles and constitutions in this context. If at least some of the general principles are said to derive from municipal law, then in the human rights context such law may well be of a constitutional nature. An examination of the constitutions of democratic states today reveals that the vast majority of them, if not all of them, contain human rights provisions. This is unsurprising given the significant developments in human rights protection which began with the adoption of the UDHR in 1948, followed by the formulation of other human rights standards, which both inspired and obliged states to mirror these provisions in their domestic constitutions. However, the presence of provisions guaranteeing respect for human rights in constitutions around the world cannot solely be attributed to the influence of international human rights instruments adopted, and obligations imposed, in the wake of the UDHR. Long before the Nazi atrocities of the Second World War had created the political impetus to put in place international human rights guarantees, human rights standards were present in constitutional documents across the globe. Some of these constitutional provisions remain in force today.

In the United Kingdom, the Magna Carta, adopted in 1215 by King John and the nobility, was intended to curb the excesses of monarchical power.[12] It stipulated, inter alia, that no one's rights or justice would be refused or withheld, nor would he be dispossessed of his property rights without the legal judgment of his peers. These provisions have been described as the precursors of the rights against arbitrary detention and unfair trials that many modern human rights instruments contain.[13] They also lay the foundation for the development of the rule of law and influenced constitution makers throughout the common law world and beyond. The subsequent English Bill of Rights of 1689 included a right to free elections and guaranteed freedom of speech in Parliament. It also prohibited cruel and unusual punishment. Much of the Bill of Rights remains in force today.[14]

France proclaimed the Declaration of the Rights of Man and of the Citizen in 1789. The text of its preamble
p. 198 refers to the natural, inalienable, and sacred rights of man, ↳ and stipulates, in its Article 1, that men are born and remain free and equal in rights. It also contains provisions prohibiting unlawful arrest and retroactive criminal law, as well as protecting freedom of expression and opinion and property rights. The Declaration was included in the 1791 French Constitution and, with one limited exception, all subsequent constitutions have protected the rights it contains. The current 1958 Constitution establishing the Fifth Republic refers to the Declaration in its preamble.

In the United States, the 1776 Declaration of Independence proclaimed that all men were created equal, that they were endowed with certain unalienable rights, and that among these rights were life, liberty, and the pursuit of happiness. The Bill of Rights of the United States, in the form of amendments to the federal Constitution, was ratified in 1791 and protects citizens from, inter alia, unreasonable search and seizure, double jeopardy, self-incrimination, and deprivation of property, liberty, or life without due process of law.

Downloaded from https://academic.oup.com/edited-volume/42626/chapter/358047931 by University of Melbourne user on 16 November 2023

It also contains fair trial guarantees and prohibits cruel and unusual punishment. State constitutions, some containing more extensive guarantees than those of the federal Constitution, both preceded and followed the federal amendments.

The emergence of independent states in Latin American in the nineteenth century saw the enactment of further constitutional guarantees. In the first half of the twentieth century, an increasing number of states in other parts of the world began to include human rights provisions in their constitutions. As will be seen, the inclusion of human rights guarantees in constitutions had a significant impact on the content of the rights which were ultimately included in the UDHR.

3. The Universal Declaration of Human Rights

The adoption of the Universal Declaration of Human Rights constituted a landmark moment in human rights law. Its thirty articles cover civil, political, economic, social, and cultural rights. Two international covenants, under discussion at the same time and which together with the UDHR constitute the international bill of rights, further developed these rights. The drafting of the UDHR was heavily influenced by the provisions of national constitutions and the general principles of law derived from them, both of
p. 199 which formed the raw material out of which the rights were fashioned during the drafting process.[15] ↳

The UN Commission on Human Rights designated a drafting committee to be responsible for drafting a human rights instrument. At its first meeting, the drafting committee charged three of its members with responsibility for drafting a human rights instrument. The three members were Eleanor Roosevelt, the US member and chairman of the committee; Peng-Chun Chang, the member representing the Republic of China; and Charles Malik, the member for Lebanon. They were charged with preparing a preliminary draft of the Declaration with the assistance of the secretariat.[16]

The then Director of the United Nations Division of Human Rights, John Humphrey, prepared the initial text of the declaration, containing forty-eight articles.[17] In putting together his draft outline of the declaration, Humphrey drew on material from a number of sources. He had at his disposal, and made extensive use of, draft declarations submitted by governments and by non-governmental organizations.[18] Alongside the draft outline, the Secretariat also compiled a 408-page 'documented outline'[19] linking each of the rights in the Humphrey draft to provisions contained in the constitutions of the then fifty-five member states of the United Nations.[20] This document clearly underlines the important role constitutions played as sources of the rights contained in the Declaration. Each of the forty-eight articles in the original Humphrey draft was linked in the documented outline to a corresponding constitutional guarantee which existed, in some form, in world constitutions at that time. However, national constitutions played a greater role in the elaboration
p. 200 of some standards than others. ↳

The inclusion of civil and political rights in the UDHR was hardly surprising. As observed above, such rights were already well-established in eighteenth-century human rights texts, and these provisions had inspired similar constitutional texts in many of the member states.[21] As Morsink explains, most delegations had 'little difficulty' voting for many of the rights contained in the draft Declaration, because similar guarantees appeared in their own national constitutions.[22]

The inclusion of economic, social, and cultural rights in the UDHR was a more significant development, however.[23] These rights appeared in a large number of the constitutions, from Latin American and Communist states in particular, and the draft declarations submitted by Chile, Panama, and Cuba included the socialist rights guaranteed by their constitutions. Although other member states of the UN did not have corresponding constitutional provisions, Humphrey decided to include them in his first draft, based on the

Downloaded from https://academic.oup.com/edited-volume/42626/chapter/358047931 by University of Melbourne user on 16 November 2023

draft declarations he had received and supported by the constitutional provisions of a large number of Latin American states. This was the first step towards ensuring their inclusion in the final text of the UDHR.[24]

After Humphrey had prepared his draft, the drafting committee met and agreed to set up a temporary working group composed inter alios of René Cassin (France), Geoffrey Wilson (the United Kingdom), and Mr Malik (Lebanon).[25] Its mandate was largely to suggest a 'logical rearrangement' of the articles of the draft outline the Secretariat supplied and to suggest a redraft of the various articles in the light of the discussions of the drafting committee.[26] The working group requested that René Cassin undertake the writing of a draft declaration based on the Secretariat draft outline. He prepared a draft with a preamble and forty-four articles, a draft discussed and revised in the working group before being presented to the drafting committee. The texts prepared at the various stages of the procedure were submitted to the Commission on Human Rights and formed the basis of negotiations for the final text.[27]

The fate of some of the economic rights first included in the draft outline by John Humphrey is instructive.
p. 201 The draft contained five work-related rights—the ↳ right of equal access to vocations and professions (draft Article 24); the right and duty to perform socially useful work (draft Article 37); the right to good working conditions (draft Article 38); the right to an equitable share of the national income as justified by a person's work (draft Article 39); and the right to the public help necessary to support a family (draft Article 40). As the documented outline indicates, a right of equal access to professions and vocations appeared in the Chilean draft declaration. Similar or related provisions could also be found in the constitutions of fifteen Latin American states, three Scandinavian countries, two Communist countries, Afghanistan, and Siam. The provisions subsequently appeared as Article 16 of the Cassin redraft. A right to work appeared in the three draft declarations Chile, Cuba, and Panama submitted and was guaranteed in the constitutions of ten Latin American states and five Communist states. Aside from these fifteen states, only China, France, and Turkey guaranteed a right to employment. The right and duty to work duly appeared in the Humphrey draft and in Article 29 of the Cassin revised text. The right to good working conditions also appeared in the three draft declarations submitted to the Secretariat by the Latin American states. In the documented outline, it is linked to constitutional provisions in fourteen Latin American states, as well as China, France, the Philippines, Poland, and Yugoslavia. It appears in a revised form in Cassin's Article 31. Humphrey's Article 39 originated exclusively in Latin American and Communist traditions; the documented outline links this article to provisions in two of the three Latin American drafts, as well as the constitutions of six Latin American and four Communist states. Article 40 had its roots in provisions contained in two of the drafts that the committee submitted. Related provisions appeared in a large number of constitutions: fifteen Latin American states, three Communist states, China, France, and the Netherlands. The same idea appeared in Article 31 of Cassin's redraft.

It can be seen that the five work-related rights that appeared in the original Humphrey draft, inspired largely by the Latin American tradition as manifested in the constitutional provisions of those states, are the foundation of the final provision which appears today in the UDHR. In large part as a result of their common constitutional traditions, Latin American states were in broad agreement as to the inclusion of these rights in the UDHR throughout the drafting process. Their general consensus was separately manifested in their adoption, together with the United States, of the American Declaration of the Rights and Duties of Man in April 1948, while the UDHR was still under negotiation. With the support of the Communist bloc, most of the economic, social, and cultural rights survived the drafting process in some form.[28] Article 23 of the Declaration is one of the lengthier articles in the Declaration and proclaims a number of work-
p. 202 related rights, including the right to ↳ work, to free choice of employment, to just and favourable work conditions, and to protection against unemployment; the right to equal pay for equal work; the right to just and favourable remuneration supplemented, if necessary, by other means of social protection; and the right to form and to join trade unions for the protection of one's interests. While it is important not to overstate the role that Latin American, and to a lesser extent Communist, state constitutions played in the final

Downloaded from https://academic.oup.com/edited-volume/42626/chapter/358047931 by University of Melbourne user on 16 November 2023

inclusion of a detailed right to work in the UDHR, it is clear from the above analysis that the protection of a variety of rights in the constitutions of a large number of Latin American states strongly influenced both their inclusion and content in the Humphrey draft, as well as their eventual position in the final text.[29]

The influence of constitutions is all the more striking if one examines the drafting history of Article 24 of the Declaration, which guarantees the right to rest and leisure, including reasonable limitations on working hours and periodic holidays with pay. Such a provision did not appear in any of the draft declarations to which Humphrey referred in preparing his draft outline. However, the right to rest-days or to paid annual leave appeared in the constitutions of thirteen of the states surveyed: nine Latin American states and four Communist states. From these constitutional provisions, Humphrey accordingly drafted a provision on the right to rest and leisure, which was preserved in Article 36 of the Cassin draft and finally adopted in the Declaration text itself (Article 24).

More generally, the human rights instruments of the eighteenth century mark the overall tenor and language of the UDHR.[30] One of the principal similarities can be seen in the underlying rationale behind the UDHR, set out in the first recital of its preamble, namely the 'inherent dignity' and the 'equal and inalienable rights of all members of the human family', which reflect the provisions of the French Declaration, as well as the US Declaration of Independence. The inspiration these texts provided is also seen in the UDHR's first article, which stipulates that all men are born free and equal in dignity and rights.[31]

The Humphrey draft did not include a draft preamble, but merely made reference to what such a preamble should contain. There was no reference to human dignity or equality, nor did any article of the Humphrey
p. 203 draft contain language of the nature ↳ found in Article 1 of the UDHR. The inclusion of Article 1 in the text occurred during Cassin's re-working of the Humphrey draft. It is clear that in carrying out this task, Cassin drew inspiration from the provisions of the 1789 French Declaration, and in particular its preamble and first article. Indeed, Morsink describes the first sentence of Article 1 of the UDHR as 'a virtual rewrite' of Article 1 of the French Declaration.[32]

The drafting history of the UDHR demonstrates that a number of sources inspired its thirty articles. That the principal motivation for the declaration stemmed from the atrocities of the Second World War is indisputable; frequent reference was made during the deliberations to the human rights violations committed in Nazi Germany prior to and during the War.[33] However, the rights that national constitutions across the globe had already secured inspired the formulation and content of the rights. For certain topics, some of which have been discussed above, the influence of constitutional rights was considerable. If one accepts, as is often claimed,[34] that the first draft of the Declaration was prepared by John Humphrey, then the influence of constitutions on the rights it contains is indisputable. In any case, it can be concluded that constitutions were treated as a source of human rights in the drafting process of the UDHR and that their contribution was significant.

As noted above, the Universal Declaration has in turn inspired a wide range of human rights texts at the international level, as well as human rights provisions in national constitutions.[35] As such, the UDHR has been described as the constitution of the entire human rights movement,[36] a description which is arguably no exaggeration. Indeed, it has been suggested that the UDHR may well constitute an expression of the 'general principles of law recognised by civilised nations',[37] and many of its provisions are now considered
p. 204 to form part of customary international law.[38] ↳

Downloaded from https://academic.oup.com/edited-volume/42626/chapter/358047931 by University of Melbourne user on 16 November 2023

4. The Application and Interpretation of Human Rights by International Courts

The adoption of human rights instruments is only one part of the story of the development of human rights to date. Human rights treaties by their nature often focus on broad principles; even when drafters provide some details regarding particular rights, their specific content and scope is generally left to national courts or international treaty bodies to develop. Aside from judicial bodies created with the specific role of ensuring the effective implementation of a particular human rights treaty, international courts more generally may be called upon to develop human rights standards in the context of their activities in other areas of international law.

The following section examines the practice of the Permanent Court of International Justice (PCIJ) and International Court of Justice (ICJ), as well as the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU), in order to explore the extent to which general principles and constitutions play a role in the application and development of human rights standards today.

4.1 The Permanent Court of International Justice and the International Court of Justice

The PCIJ and, in its later incarnation, the ICJ are unique among the courts examined here, in that from the outset their respective statutes conferred on them a mandate to apply general principles of law recognized by civilized nations.[39] As noted above, despite the inclusion of the phrase in the statutes of the two courts, there was no agreement as to what it envisaged. Even the drafters of the PCIJ Statute were not united in their understanding of the meaning of the term.[40] Despite this uncertain origin, the courts have made regular reference to general principles in deciding the cases before them. Bearing in mind, however, that they are
p. 205 courts of public international law and not human rights courts, an examination of their jurisprudence ↳ paints a more nuanced picture of the extent to which the general principles they have invoked have contributed to the development of human rights law.

One early example arose in the case of the *Minority Schools in Albania*.[41] Following the conclusion of the First World War and the redrawing of national boundaries in Europe, various states concluded a number of minority treaties to protect the newly created national minorities. Albania, home to a large Greek-speaking minority, had made a declaration before the Council of the League of Nations in 1921 to the effect that its racial, religious, and linguistic minorities would have the same rights as other Albanian nationals. The Council subsequently requested that the PCIJ express an opinion on whether the abolition of private schools in Albania, which included Greek schools, conformed to the letter and spirit of the 1921 Declaration. The PCIJ observed that the 1921 Declaration was intended to apply to Albania the general principles of the minority treaties, and it therefore approached the question before it from this perspective. It explained that the idea underlying the minority treaties was to secure for racial, linguistic, or religious minorities the possibility of living peaceably alongside the majority population, while at the same time preserving their distinctive characteristics and satisfying the special needs which resulted therefrom. The PCIJ found that in order to achieve this, two aspects were particularly necessary: first, a prohibition on discrimination; and second, putting in place measures permitting the minority group to preserve its minority culture and traditions.[42] Against this background, and after careful examination of the text of the 1921 Declaration, the PCIJ concluded that the general abolition of private schools, although a universal measure, failed to conform to the Declaration's letter and spirit.

This was not, strictly speaking, a case in which general principles lay at the heart of the court's reasoning. Nonetheless, its decision to situate the dispute within the general context of the minorities regime then in

Downloaded from https://academic.oup.com/edited-volume/42626/chapter/358047931 by University of Melbourne user on 16 November 2023

place, and to examine the idea underlying the minorities regime, before considering Albania's obligations arising from the 1921 Declaration was an important signal that the court was willing to look beyond treaty law and custom and to take into account more general considerations arising in respect of minority rights in deciding the case before it.

The ICJ first referred to general principles in its judgment in the *Corfu Channel* case.[43] The United Kingdom brought the case against Albania as a claim for compensation following the death of naval personnel and damage to naval vessels resulting from hitting a minefield in Albanian waters in 1946. The court found that the laying of the minefield could not have been accomplished without the knowledge of the Albanian authorities. As a consequence, the Albanian authorities had a duty to warn of the imminent danger the
p. 206 British warships faced. The court found ↳ that this obligation arose not under the Hague Convention of 1907, which applied in times of war, but under 'certain general and well-recognized principles', which included 'elementary considerations of humanity, even more exacting in peace than in war'.[44] The principles to which the court was referring here appeared to be of the nature of fundamental principles of international law itself, which imposed a duty, independent of treaty or customary international law, to take steps to avert a serious threat to life and to property.

Subsequently, in its Advisory Opinion on the *Reservations to the Genocide Convention*, the court found that the principles underlying the Genocide Convention were principles which civilized nations recognized as binding on states, even without any conventional obligation.[45] In the formulation used, the court left open whether it was referring to general principles or to customary international law. In its 1973 Advisory Opinion on the *Application for Review of Judgment No 158 of the United Nations Administrative Tribunal*, the ICJ referred to the content of the general principles of law as regards procedural rights and equality of arms, concluding that there did not appear to be any principle which required an opportunity to make oral representations in review proceedings, provided that both parties had an equal opportunity to present their cases in written submissions.[46]

In its judgment in the *United States Diplomatic and Consular Staff in Tehran* case, having concluded that Iran had breached its obligations towards the United States in respect of the seizure and occupation of the US embassy in Tehran, the court went on to say that:

> wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.[47]
>
> 47 *US Diplomatic and Consular Staff in Tehran Case* 42.

It is regrettable that this statement appeared in the judgment almost as a kind of postscript; the court had already concluded on the basis of a detailed examination in the earlier pages of its judgment that Iran had breached its international obligations.[48] However, the court's statement is nonetheless a welcome
p. 207 suggestion that the principles set out in the UDHR and the 'human rights' and 'fundamental freedoms' ↳ to which the Charter refers, are principles which may be capable of being invoked in future cases.[49]

More recently, in its 1996 Advisory Opinion in the *Legality of the Threat or Use of Nuclear Weapons* case, the ICJ indicated that states had to take environmental considerations into account when assessing necessity and proportionality in the pursuit of legitimate military objectives.[50] In support of its approach, it referred to provisions of the Rio Declaration[51] and to a General Assembly resolution on the protection of the environment in times of armed conflict.[52] In formulating this requirement to consider environmental considerations, the court based its approach on provisions of 'soft law', rather than on any legally binding instruments. Such soft law, constituting neither treaty law nor customary international law, is arguably one of the most significant sources of the general principles to which Article 38 § 1(c) refers. The ICJ's reference

Downloaded from https://academic.oup.com/edited-volume/42626/chapter/358047931 by University of Melbourne user on 16 November 2023

to the Rio Declaration and the General Assembly resolution allowed it to develop its case law regarding environmental rights.

Notwithstanding these precedents, there is a remarkable absence of discussion of human rights principles in the case law of the ICJ. In recent cases in which human rights issues have, at least from a general perspective, been firmly in the foreground, the court has eschewed any reference to, or development of, general principles as an important element of its reasoning or as the foundation for its decisions.[53] The reluctance of the ICJ to develop general principles in the context of human rights has been the subject of comment in two weighty separate opinions.

In the *South-West Africa Cases*,[54] Liberia and Ethiopia commenced proceedings against South Africa, contending that the latter had, by its policy of apartheid, violated international law in the discharge of its obligations as mandatory in respect of what is now Namibia. The court ultimately rejected the claims on the grounds that Liberia and Ethiopia had no legal right or interest in the subject matter. Judge Tanaka dissented and set out his reasons in full in a 150-page opinion.[55] In his view, the cases essentially concerned the question of whether there existed a legal norm regarding equality or non-discrimination, which he explained was intimately related to the essence and nature of fundamental human rights, the promotion
p. 208 and encouragement of which was ↳ one of the purposes of the UN according to its Charter.[56] He considered that such an obligation arguably arose from the terms of the UN Charter and was a norm of customary international law. He then turned to examine whether it formed part of the general principles of law.[57] Drawing on the reasoning of the court in the *Reservations to the Genocide Convention* advisory opinion, he concluded that human rights are not created, but merely declared by treaties; they exist independently of the will of states. As a consequence, he considered that the general principles mentioned in Article 38 § 1(c) included the concept of human rights and of their protection. The principle of equality and non-discrimination, he noted, were stipulated in the list of human rights that the domestic systems of virtually every state recognized and had become an integral part of the constitutions of most of the world's civilized countries. As such, it constituted, in his view, one of the specific general principles to which Article 38 referred.[58] The Inter-American Court of Human Rights has developed the point further. In its Advisory Opinion on the *Juridical Condition and Rights of the Undocumented Migrants*, it considered the 'fundamental principles of equality and non-discrimination' to have entered the domain of *jus cogens* and to entail obligations *erga omnes* that bind all states and generate effects with regard to third parties, including individuals.[59]

In the *Pulp Mills* case,[60] the ICJ was asked to rule on a dispute between Argentina and Uruguay in respect of pulp mills constructed on the Uruguay River which forms the border between the two countries. Both parties contended that the 1975 Statute of the River Uruguay had to be interpreted in the light of principles governing the law of international watercourses and principles of international law ensuring protection of the environment, although they disagreed as to the content of those principles. The ICJ made a brief reference to the 'principle of prevention' and to a precautionary approach, but it did not afford either any particular attention in its judgment. In his separate opinion,[61] Judge Cançado Trindade lamented the fact that the ICJ had overlooked the general principles of law in deciding the case, despite the fact that they were invoked by both parties. He considered that in taking the approach it did, the ICJ had missed 'a unique occasion to give a remarkable contribution to our discipline'.[62] He discussed the use made of general
p. 209 principles by both the PCIJ and the ICJ in some depth, observing that considerably more ↳ attention was devoted to the principles of international law decades ago (including the times of the PCIJ) than at present.[63] As to the issues arising in the *Pulp Mills case*, he considered the applicable law to be composed of the 1975 Statute, together with the relevant principles of law. The latter encompassed, in his view, principles of international environmental law, which included the principles of prevention, precaution, and sustainable development.[64]

Downloaded from https://academic.oup.com/edited-volume/42626/chapter/358047931 by University of Melbourne user on 16 November 2023

It seems clear, particularly in light of the opinions of Judges Tanaka and Cançado Trindade, that the ICJ has displayed a certain reluctance to invoke general principles of law in cases in which human rights issues arise. There is no doubt that the vast and complex network of international legal instruments provides, in many instances, a highly regulated framework within which to decide disputes, but there remain nonetheless areas in which general principles have a role to play. This is particularly so in cases, such as those touching upon issues of environmental law, where the rights in question have not been the subject of any detailed treaty obligations.[65] Referring to general principles, rather than treaty obligations, as a source of human rights obligations may also be particularly important in cases where the respondent state has not ratified any relevant treaty, or simply to make the point that the rights in question are fundamental. In this respect it is worth mentioning the court's case law attesting to the existence of *jus cogens*, which are peremptory norms of international law and are generally agreed to include a number of human rights principles.[66] Courts often refer to the prohibition of torture and genocide, the principles of equality and non-discrimination, the prohibition of racial discrimination and apartheid, the prohibition of slavery and the slave trade, the prohibition of massive pollution of the atmosphere or of the seas, and the right of self-determination as falling into this elevated category of human rights norms.[67] However, given the uncertain
p. 210 and evolving nature of *jus cogens* rules, claims in ↳ this area are to be treated with circumspection, and generally international human rights tribunals, with the notable exception of the Inter-American Court, have been cautious in their pronouncements. The UN Human Rights Committee in its General Comment on States of Emergency lists a series of principles, beyond the list of non-derogable provisions set out in Article 4(2) of the International Covenant on Civil and Political Rights, from which there can be no derogation under Article 4 because, in the Committee's view, they have become absolute norms of general international law.[68]

By finding the source of such obligations outside treaty law, the possibility of their universal application is ensured and their potential for contributing to the development of the ICJ's human rights case law enhanced. It would appear, therefore, that whatever the view held as to the contribution of general principles to the development of human rights by the ICJ to date, there remains much scope for such principles to be employed to greater effect in the future.

4.2 The European Court of Human Rights

In the European Convention on Human Rights, reference is made to 'general principles' in Article 7, which encapsulates the principle of *nullum crimen nulla poena sine lege*. Concerned with ensuring that the article did not impugn the validity of the Nuremberg judgments, the article reproduces the text of the corresponding article of the International Covenant on Civil and Political Rights, clarifying that: 'This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.'[69] In its case law, the Court has not sought to develop the meaning of general principles in this
p. 211 context. In *Streletz, Kessler and Krenz v Germany*, which concerned the legal basis under ↳ German law for the convictions of senior officials held responsible for the policy of killing those seeking to escape from the GDR, the court found that the acts in question also constituted offences that the rules of international law on the protection of human rights defined with sufficient accessibility and foreseeability. It was thus not necessary to consider Article 7 § 2. Several judges concurring in the result considered, however, that the acts amounted to a crime against humanity which was a general principle of international law at the material time.[70] The United Nations Human Rights Committee, dealing with a similar case, noted that 'the disproportionate use of lethal force was criminal according to the general principles of law recognized by the community of nations already at the time when the author committed his acts'.[71]

Despite this limited reference to general principles in the text of the ECHR, the court has, from an early stage, drawn on the concept of general principles in order to interpret and apply the rights guaranteed by

Downloaded from https://academic.oup.com/edited-volume/42626/chapter/358047931 by University of Melbourne user on 16 November 2023

the Convention. For example, it regularly relies on the general principle of estoppel in rejecting preliminary objections relating to admissibility.[72] The court also applies the principle of *res judicata* as an element of legal certainty, itself inherent in the rule of law. In *Brumarescu v Romania* it found a violation of Article 6 (right to a fair trial) on the grounds that the Supreme Court of Justice had set aside a judicial decision that was irreversible under Romanian law.[73] It is tempting to consider the principle of proportionality as a general principle that runs throughout the Convention, but the principle has no operation in cases concerning Article 3 (prohibition of torture, inhuman, and degrading treatment). The court has asserted the principle of 'fair balance' between the rights of the individual and the interests of the community in the *Soering* judgment,[74] but it is more a principle of interpretation rather than a general principle of law. In *Vilho Eskelinen and Others v Finland*, on the other hand, the court attached weight to the general principle of judicial control of administrative action—a principle of law underlying the constitutional traditions common to member states and reflected in Articles 6 and 13 (right to an effective remedy) of the ECHR—in finding that civil servants (in this case police officials) should be able to submit their disputes to a court. The right of access to a court has long been considered to be a general principle.

In the case of *Golder v United Kingdom*, the applicant, a serving prisoner, complained to the court under Article 6 § 1 that the UK authorities had refused to permit him to consult a solicitor with a view to bringing a civil action for libel against ↳ a prison officer. The applicant argued that the right to a fair trial that the
p. 212 ECHR guaranteed encompassed a right of access to court. Citing Article 31 § 3(c) of the Vienna Convention on the Law of Treaties (although not yet in force at the time), the court referred to the need to take into account any relevant rules of international law applicable between the parties, which in its view included general principles of law. Indeed, the court observed that during the negotiations on the drafting of the Convention, the Committee on Legal and Administrative Questions had foreseen in August 1950 that the court 'must necessarily apply such principles' in the execution of its duties and thus considered it unnecessary to insert a specific clause to this effect in the Convention.[75] The court found that the principle whereby a civil claim must be capable of being submitted to a judge ranked as one of the 'universally "recognised" fundamental principles of law'. It considered the same to be true of the principle of international law which forbade the denial of justice. It concluded that Article 6 § 1 had to be read in light of these principles, and on that basis concluded that it did include a right of access to a court.[76] Other notable examples can be given.

In *Marckx v Belgium* the court relied on the principle of legal certainty to dispense the Belgian state from reopening legal acts or situations that antedated the delivery of judgment finding inter alia that distinctions in succession law between 'legitimate' and 'illegitimate' children were discriminatory and in breach of Article 14 (prohibition of discrimination).

In *John Murray v United Kingdom*, the court, when asked by an applicant to interpret the right to a fair trial as including the right to remain silent and the privilege against self-incrimination, found that these were 'generally recognised international standards which [lay] at the heart of the notion of a fair procedure under Article 6'.[77] Also in *Scoppola (No 2) v Italy*, the court was influenced by the identification of the *lex mitior* as a fundamental principle of criminal law. Remarkably, it found that where the penalty for a crime had been lowered since the commission of the offence, Article 7 § 1 of the Convention required that the convicted person be given the benefit of the more lenient penalty. The court's interpretation is notable since the language of Article 7 § 1 is confined textually to the principle that penalties should not be greater than that existing at the time of the offence.[78] Nothing is said about lesser penalties. The court has thus relied on a general principle to implicitly amend a Convention provision, undoubtedly influenced by a similar provision
p. 213 in the EU Charter on Fundamental Rights.[79] ↳

It should also be mentioned that the court will interpret the ECHR against the background of international law (including general principles) and will seek to harmonize its interpretation of the ECHR with such principles.[80] It also operates a rebuttable presumption that Security Council resolutions do not impose a

Downloaded from https://academic.oup.com/edited-volume/42626/chapter/358047931 by University of Melbourne user on 16 November 2023

requirement to breach fundamental rights.[81] In *Al-Adsani v United Kingdom*, the court further recognized the prohibition of torture to be a peremptory norm of international law (*jus cogens*), but it also held that it did not trump the principle of the sovereign immunity of states.[82]

It appears that even more significant in the development of the court's case law is its practice of reviewing the national laws and constitutions of member states when examining the scope and content of Convention rights. This practice is particularly evident in its assessment of the qualified rights contained principally in Articles 8 to 11 of the Convention, which expressly permit restrictions on rights, provided that these restrictions are in accordance with a legitimate aim and are necessary in a democratic society. In such areas, the court has developed the concept of the margin of appreciation, which essentially permits member states a certain degree of discretion in deciding how best to secure the rights set out in the Convention. The width of the margin depends on various factors, and one such factor is the presence or absence of a European consensus on the matter in question.[83] Aside from having regard to member states' constitutional provisions, the court also has regard to other international norms concluded in the relevant field in assessing the extent of any margin of appreciation which arises and the content of the obligations that a particular Convention provision imposes.

Examples of both practices can be seen in the court's 2008 judgment in *Demir and Baykara v Turkey*, a case in which the court was asked to examine the extent to which Article 11 (freedom of association) guaranteed rights of association to civil servants, including the right to join trade unions and the right to collective bargaining. The court reiterated its approach to interpreting the provisions of the Convention and referred to its practice of taking into account the relevant rules and principles of international law, quoting with approval its finding in the *Golder* case that the relevant rules of international law included 'general
p. 214 principles of law ↳ recognised by civilised nations'.[84] In this connection, it found that the common international or domestic law standards of European states, composed as they were of rules and principles accepted by the vast majority of states, reflected a reality which the court could not disregard when called upon to clarify the scope of a Convention provision.[85] Importantly, the court emphasized that the level of consensus established by the existence of norms of international law was not dependent on the respondent state in the case having ratified the international norm in question.[86] The court summarized its approach as follows:

> The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.
>
> …In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies.[87]

87 *Demir and Baykara* (n 84) paras 85–86.

In concluding that civil servants were entitled to the guarantees of Article 11, the court drew support from the practice of European states, observing that all member states of the Council of Europe recognized the right of such employees to join trade unions.[88] As to whether civil servants enjoyed the right to bargain collectively, the Court noted that such a right had been recognized as applicable to civil servants in the 'vast

Downloaded from https://academic.oup.com/edited-volume/42626/chapter/358047931 by University of Melbourne user on 16 November 2023

majority' of the member states, albeit subject to certain restrictions.[89] This was one of the factors which led the court to conclude, in a landmark judgment, that its previous case law to the effect that the right to bargain collectively did not constitute an inherent element of Article 11 should be reconsidered.[90] In short the court found that such a right had become 'one of the essential elements' of the right to form and join trade unions that Article 11 guaranteed.[91]

The case law of the court is rich in examples of its practice of referring to member states' constitutions in order to determine the width of the margin of appreciation in a given case. Thus in *Ünal Tekeli v Turkey*,[92] the court considered the emergence of a consensus among the member states of the Council of Europe, which
p. 215 favoured allowing parties to a marriage to choose the family name, to be ↳ relevant to the applicant's complaint that the refusal of the Turkish courts to allow her to bear her maiden name after her marriage constituted a violation of Article 8 of the Convention (the right to respect for private life), read alone and in conjunction with Article 14. In *Evans v United Kingdom*,[93] a case involving the destruction of embryos, the court held that the issue of when the right to life began fell within the margin of appreciation of the respondent state (which did not recognize any independent rights or interests enjoyed by embryos), in light of the absence of any European consensus on the scientific and legal definition of the beginning of life. In its judgment in *Lautsi and Others v Italy*,[94] the court considered that the decision whether crucifixes should be present in state-school classrooms was a matter falling within the margin of appreciation of the respondent state, in the absence of any European consensus on the question of the presence of religious symbols in state schools. A very recent application of the court's approach can be seen in *Stübing v Germany*,[95] which involved a criminal conviction for incest, where the court considered that the data before it were demonstrative of a broad consensus that sexual relations between siblings were accepted by neither the legal order nor society as a whole. It concluded that there was insufficient empirical support for the assumption of a general trend towards decriminalization of such acts, and as a result, no violation of the Convention had occurred.

There is similarly a wealth of developing case law on the court's use of obligations set out in international instruments to assess the compatibility of states' acts or omissions with provisions of the Convention. In *Rantsev v Cyprus and Russia*,[96] the court borrowed heavily from the Palermo Protocol to the United Nations Convention against Transnational Organised Crime and the Council of Europe's Convention on Action against Trafficking in Human Beings in order to identify the positive obligations which arose under Article 4 (prohibition of slavery and servitude) in the context of human trafficking. In *Tnase v Moldova*,[97] which concerned the right of dual nationals to stand for election, the court reiterated that it was for it to decide which international instruments and reports it considered relevant and how much weight to attribute to them. In the case before it, such relevant instruments and reports included the European Convention on Nationality, the conclusions and reports of European Commission against Racism and Intolerance and the European Commission for Democracy through Law, as well as the resolutions of the Parliamentary Assembly of the Council of Europe.

The above examples show that the European Court of Human Rights consistently looks to both national constitutions and international instruments in order to identify general principles or common approaches when applying the provisions of the ECHR. Through its dynamic interpretation of the Convention, the court
p. 216 has ↳ made a significant contribution to the protection of human rights across Europe. As domestic legislatures review and modernize their approaches to human rights within the national arena, so too can the court continue to evolve by drawing on those standards in order to ensure the effective and practical protection of human rights across Europe and beyond.

Downloaded from https://academic.oup.com/edited-volume/42626/chapter/358047931 by University of Melbourne user on 16 November 2023

5. The Court of Justice of the European Union

The founding treaties of the European Communities[98] contained no general provisions on the protection of human rights.[99] The Communities were conceived as essentially economic organizations, and as such their founders appear to have considered that there was no need for such provisions in the Community legal order.[100] In the absence of any treaty provision, the European Court of Justice,[101] the judicial body of the European Communities, was initially reluctant to accept that fundamental rights its member states' constitutions guaranteed could form part of any general principles that it was required to apply in its adjudication of cases brought before it.[102]

The court's approach raised a number of concerns in Germany, where a system of constitutional review existed in order to examine the constitutionality of legislation passed, about the absence of any human rights protection under Community law.[103] These concerns led to a decision of the German Constitutional Court in October 1967 that provisions of Community law had to be assessed at the national level in order to
p. 217 review their compliance with the German constitution. The decision had ↳ significant implications, as the European Court of Justice had only recently adopted its judgment establishing the primacy of Community law.[104] If national courts subjected Community law to internal scrutiny, and reserved to themselves the power to strike down provisions which they considered did not apply, the very foundations of the Community legal order could have been thrown into doubt.

Accordingly, in a series of rulings beginning in the late 1960s, the court was forced to review its approach to the question of the extent to which general principles, including considerations of human rights, formed part of Community law. The real turning point came with the Court's judgment in *Internationale Handelgesellschaft*. The Frankfurt Administrative Court referred the case to the court for a ruling on the validity of a system of deposits for issuing export licences for cereals, established by an EEC Regulation, under which the deposit was forfeited if exportation was not effected during the period of validity of the export licence. In its referral order, the Frankfurt Administrative Court emphasized that although Community Regulations were not German national laws, they had to respect the elementary fundamental rights guaranteed by the German constitution and the essential structural principles of national law. It further emphasized that in the event of an incompatibility with those principles, the primacy of supranational law conflicted with the principles of the German Basic Law.

The Court began by observing that the validity of a Community measure could not be challenged as being contrary to fundamental rights set out in national constitutions, because the Treaty of Rome was an independent source of law which could not be overridden by provisions of national law without the legal basis of the Community itself being called into question. However, it explained that it was necessary to examine whether any 'analogous guarantee inherent in Community law' had been disregarded.[105] It found:

> In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.[106]

106 *Internationale Handelsgesellschaft* (n 105) para 4.

Over the ensuing years, the Court of Justice continued to develop its case law on fundamental rights, adding to the catalogue of rights to be guaranteed as fundamental principles of Community law. In *Nold v Commission*, the applicant alleged a violation of his fundamental rights, invoking inter alia the right to property and the right to free pursuit of business activity guaranteed by the German Basic Law, by the constitutions of other member states, and by various international treaties, including the ECHR. The court reiterated that fundamental rights formed an integral part of the general principles of law, the observance

Downloaded from https://academic.oup.com/edited-volume/42626/chapter/358047931 by University of Melbourne user on 16 November 2023

p. 218 of which the court ensured. ↳ It explained that in safeguarding these rights, it was 'bound to draw inspiration from constitutional traditions common to the member States', and that it could not uphold measures which were incompatible with fundamental rights that member states' constitutions recognized and protected.[107] It further indicated that international human rights treaties, such as the ECHR, could supply 'guidelines' which should be followed within the framework of Community law. As to the extent of the rights in question, it noted that the rights invoked, as guaranteed by national constitutions, were subject to limitations in the public interest, and that such limitations were also legitimate within the Community legal order.

In 1977, the Commission, the Council, and the Parliament adopted a Joint Declaration of Fundamental Rights. In the preamble to the declaration, the three institutions noted that the Court of Justice had recognized that the law applicable to the activities of the European Community included the general principles of law and, in particular, the fundamental rights on which the constitutional law of the member states was based. The institutions accordingly stressed the prime importance they attached to the protection of fundamental rights, as derived in particular from the constitutions of the member states and the ECHR.[108]

In *AM & S v Commission*, the applicants argued, in the context of a challenge to a Commission decision regarding a competition investigation, that the principle of legal privilege applied and that a provision of the decision requiring full disclosure of confidential documents should be annulled. The court heard extensive evidence as to the practice of the member states in this field. It concluded that Community law had to take into account the principles and concepts common to the laws of the member states concerning the observance of lawyer–client confidentiality.

The Court of Justice's approach to human rights was finally enshrined in the Maastricht Treaty in 1992, which established the European Union and provided that the Union would respect fundamental rights, as guaranteed by the ECHR and as they resulted from the constitutional traditions common to the member states, as general principles of Community law.[109] Thus was the court's approach to protection of fundamental rights via general principles derived from the constitutional traditions of the member states confirmed and firmly entrenched in the legal order of the European Union. The court's continued application of this approach over the subsequent years has seen the confirmation of a number of human rights as applicable in the Community legal order.

The continued efforts of the court in the course of the 1990s went hand in hand with moves at a political level to place human rights protection in the European Community and the European Union on a more
p. 219 secure legal footing. These ↳ developments culminated in the December 2000 proclamation of a Charter of Fundamental Rights, which although without binding legal effect, was nonetheless of significant political importance. The Charter did not create new rights; instead, it drew together for the first time in a single document, existing rights which were to be protected within the EU legal order. It states in its preamble that it reaffirms the rights contained in the Charter as they result, in particular, from the constitutional traditions and international obligations common to the member states, the ECHR, the Social Charters that the Union and the Council of Europe adopted, and the case law of the Court of Justice and of the European Court of Human Rights. Article 52 § 4 of the Charter provides that, in so far as the Charter recognizes fundamental rights as they result from the constitutional traditions common to the member states, such rights are to be interpreted in harmony with those traditions.

The significance of the Charter was that it essentially codified the various fundamental rights which the Court of Justice had developed in its extensive case law. In the context of the institutional changes which occurred with the conclusion of the Treaty of Lisbon in December 2007, the Charter acquired legally binding force. At the time, the Bureau of the Convention prepared informal explanations to provide information on the source of each of the rights contained in the Charter,[110] and these were updated and published following

Downloaded from https://academic.oup.com/edited-volume/42626/chapter/358047931 by University of Melbourne user on 16 November 2023

the conclusion of the Lisbon Treaty.[111] These explanations illustrate clearly the pivotal role of the Court of Justice in developing a number of the Charter rights, as well as the importance of general principles deriving from the member states' constitutional traditions. Thus, they reveal, freedom to choose an occupation enshrined in Article 15(1) of the Charter was a right originally developed by the Court of Justice in the early cases of *Nold* and *Hauer v Land Rheinland-Pfalz*, both mentioned earlier. Article 20 of the Charter, which guarantees equality before the law, 'corresponds to a general principle of law which is included in all European constitutions'.[112] It was also recognized as a basic principle of Community law in the court's judgments in *Racke* and *Karlsson*. Article 47 of the Charter guarantees the right to an effective remedy before a tribunal, a right the Court of Justice originally elaborated as a general principle of Union law in *Johnston*.[113] The origin of the *ne bis in idem* rule in Article 50 also lies in the extensive case law of the Court of Justice and the Court of First Instance.[114] The Charter is now regularly invoked before and by the Court of Justice in
p. 220 cases which raise ↳ human rights issues.[115] In a process of cross fertilization, the ECJ today interprets the Charter with regard to case law developed by the Strasbourg court—indeed it is mandated to do so by Article 52 § 3 of the Charter—and the broader wording of provisions of the Charter and their interpretation by the Court of Justice in turn influence that court.

Thus it can be seen that general principles and constitutional traditions common to the member states lay at the very heart of the development of a system for human rights protection in the European Union. Through its judgments, the Court of Justice essentially read an 'unwritten bill of rights' into Community law, in a remarkable development.[116] In due course, the case law of the court formed the basis of a written charter of human rights which now has legally binding force in the field of the activities of the European Union and the implementation of EU legislation.[117]

6. Conclusion

There can be no doubt as to the central role that general principles and constitutions played as sources of human rights law. The eighteenth-century human rights declarations, which formed part of the constitutions of France and the United States, were influential in the general approach taken to the underlying philosophy of the UDHR. The nature and content of the rights guaranteed was heavily inspired by the constitutional traditions of the fifty-five member states of the United Nations. It is arguable that given their relative novelty at the time of the UDHR negotiations, the economic and social rights the UDHR guaranteed may never have seen the light of day without reference to the constitutions of the Latin American and Communist states. The vast majority of human rights instruments and provisions subsequently adopted at the national and international levels have built upon the guarantees elaborated in that timeless instrument.

Clearly, the role of constitutions and general principles as sources of human rights guarantees did not cease with the conclusion of the UDHR. An examination of the approach international courts have taken to questions of interpretation of human rights standards demonstrates the central role that the concept of
p. 221 general principles ↳ and the content of national constitutions retain. The ICJ has indicated that the provisions of the UDHR are relevant principles to be taken into account in its judgments, although there is potential for greater use of general principles by the ICJ judges. General principles and constitutions are solely responsible for the importation of human rights standards into the activities of the European Community and the later European Union, now enshrined in a legally binding Charter of Fundamental Rights, applicable in the EU's legal space and radiating an influence on how the Court in Strasbourg interprets provisions of the ECHR. Finally, general principles and constitutions regularly influence the approach of regional tribunals, such as the European Court of Human Rights and the Inter-American Court of Human Rights, to the interpretation of the respective Conventions, ensuring that the guarantees they

Downloaded from https://academic.oup.com/edited-volume/42626/chapter/358047931 by University of Melbourne user on 16 November 2023

contain remain relevant to the threats posed today. The Inter-American Court stands out, in particular, through its development of *jus cogens.*[118]

In 1955, Green wrote:

> There is not sufficient in common among the nations of the world, nor in their historical development, to allow human rights, even though they may be generally recognised in the various systems of law, to be considered as general principles of law recognised by civilised nations and, as such, rules of international law.[119]

The practice of the International Court of Justice, the European and Inter-American Courts of Human Rights, and the Court of Justice of the European Union, suggests the contrary is true today.

Further Reading

Hersch J (ed), *Birthright of Man* (UNESCO 1968)
Google Scholar Google Preview WorldCat COPAC

Lammers JG, 'General Principles of Law Recognized by Civilised Nations' in Frits Kalshoven, Pieter J Kuyper, and Johann G Lammers (eds), *Essays on the Development of the International Legal Order: In Memory of Haro F van Panhuys* (Martinus Nijhoff 1980) 53
Google Scholar Google Preview WorldCat COPAC

Leuprecht P, *Reason, Justice and Dignity: A Journey to Some Unexplored Sources of Human Rights* (Martinus Nijhoff 2012)
Google Scholar Google Preview WorldCat COPAC

Simma B and Alston P, 'The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles' (1988–89) 12 *Aust YBIL* 82

Notes

2 The provision replicates Art 38(c) of the Statute of the Permanent Court of International Justice. More recently, the term 'general principles' has also appeared in Art 21 § 1(c) of the 1998 Rome Statute of the International Criminal Court, which instructs the court to apply 'general principles of law derived by the Court from national laws of legal systems of the world'.

3 JG Lammers, 'General Principles of Law Recognized by Civilised Nations' in Frits Kalshoven, Pieter J Kuyper, and Johann G Lammers (eds), *Essays on the Development of the International Legal Order: In Memory of Haro F van Panhuys* (Martinus Nijhoff 1980) 53.

4 A vast amount of literature exists on the interpretation of 'general principles of law', and it is outside the scope of this chapter to explore in any detail the different views that literature expresses. See, among many other scholarly works, LC Green, 'General Principles of Law and Human Rights' (1955–56) 8 CLP 162; Sir Arnold McNair, 'The General Principles of Law Recognised by Civilised Nations' (1957) British YBIL 1; Lammers (n 3); Maria Panezi, 'Sources of Law in Transition: Re-visiting General Principles of International Law' (2007) 2 Ancilla Iuris 66; Giorgio Gaja, 'General Principles of Law' in *The Max Planck Encyclopedia of Public International Law* (OUP 2008) online edition: <http://www.mpepil.com> accessed 22 April 2012.

5 For a comprehensive list, see Patrick Dallier, Mathias Forteau, and Alain Pellet, *Droit International Public* (8th edn, LGDJ 2009) 380–86. International human rights courts have recognized many of these principles in their adjudication of disputes—see, in this context, the judgments of the European Court of Human Rights, referred to below in the section examining the Court's case law, and the judgments of the Inter-American Court of Human Rights, which Judge Cançado Trindade referred to in his concurring opinion in the Advisory Opinion of 17 September 2003 on the *Juridical Condition and Rights of the Undocumented Migrants* para 55.

Downloaded from https://academic.oup.com/edited-volume/42626/chapter/358047931 by University of Melbourne user on 16 November 2023

6 See Green (n 4) 176–218; Lammers (n 3) 56–59; Gaja (n 4).
7 *The Mavrommatis Palestine Concessions Case* para 21.
8 *Corfu Channel Case* para 22.
9 *Golder v UK*, para 35.
10 *John Murray v UK*, para 45.
11 See *Streletz, Kessler and Krenz v Germany*, discussed later.
12 Parliament has since confirmed the Magna Carta on a number of occasions, and some of its provisions are still in force today.
13 AW Bradley and KD Ewing, *Constitutional and Administrative Law* (12th edn, Longman 1998) 15.
14 The Scottish Parliament enacted a Claim of Rights, in similar terms, in 1689.
15 See, among many others works, Nehemiah Robinson, *The Universal Declaration of Human Rights: Its Origin, Significance, Application, and Interpretation* (Institute of Jewish Affairs and World Jewish Congress 1958); Asbjørn Eide, Gudmundur Alfredsson, Göran Melander, Lars Adam Rehof, Allan Rosas, and Theresa Swineheart (eds), *The Universal Declaration of Human Rights: A Commentary* (Scandinavian UP 1993); Johannes Morsink, *The Universal Declaration of Human Rights: Origin, Drafting & Intent* (U Pennsylvania Press 1999).
16 See UNCHR 'Memorandum on Historical Background of the Committee' (29 May 1947) UN Doc E/CN.4/AC.1/2.
17 UNCHR 'Draft Outline of International Bill of Rights' (4 June 1947) UN Doc E/CN.4/AC.1/3.
18 See Morsink (n 15) generally, and more specifically at 6, 131. The governments of Chile, Cuba, and Panama each submitted draft declarations, and the governments of India and the United States of America submitted proposals.
19 UNCHR 'International Bill of Rights Documented Outline' (11 June 1947) UN Doc E/CN.4/AC.1/3/Add.1.
20 UNCHR, 'International Bill of Rights Documented Outline' (n 20). The fifty-five member states were Afghanistan, Argentina, Australia, Belgium, Bolivia, Brazil, the Byelorussian Soviet Socialist Republic, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, the Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, Iceland, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, the Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, the Philippine Republic, Poland, Saudi Arabia, Siam, Sweden, Syria, Turkey, the Ukrainian Soviet Socialist Republic, the Union of South Africa, the Union of Soviet Socialist Republics, the United Kingdom, the United States, Uruguay, Venezuela, Yugoslavia.
21 See Lauri Hannikainen and Kristian Myntti, 'Article 19' and Allan Rosas, 'Article 21' in Eide (n 15) 275, 300.
22 Morsink (n 15) 72.
23 Asbjørn Eide comments that Roosevelt's 'freedom from want' was the most innovative in the new international humanitarian order envisaged after the Second World War. Asbjørn Eide, 'Article 25' in Eide (n 15) 385.
24 See Morsink (n 15) 89, 130–33, 157, 191.
25 UNCHR 'Summary Record of the Sixth Meeting' (16 June 1947) UN Doc E/CN.4/AC.1/SR.6.
26 UNCHR 'Draft Report of the Drafting Committee to the Commission on Human Rights' (23 June 1947) UN Doc E/CN.4/AC.1/14.
27 UNCHR 'Report of the Drafting Committee to the Commission on Human Rights' (1 July 1947) UN Doc E/CN.4/21.
28 For a detailed discussion of the drafting of the 'work-related' rights contained in the UDHR, see Morsink (n 15) ch 5.
29 Morsink explains that the united voice of the Latin American delegations, together with the support of the Communist states, ensured that the substance of the original work-related provisions remained in Art 23 as finally adopted. Morsink (n 15) 130, ch 5 generally. However, a number of other organizations also played a role, especially in the development of the trade union rights in the Declaration, including the International Labour Organization, the World Federation of Trade Unions, and the American Federation of Labor. See Morsink (n 15) 168–81.
30 See Morsink (n 15) 281.
31 The similarities are noted by Tore Lindholm, 'Article 1: A New Beginning' in Eide (n 15) and discussed by Morsink (n 15) ch 8.
32 Morsink (n 15) 281.
33 For an overview, see generally Morsink (n 15).
34 See eg Morsink (n 15) 6.
35 See Jan Mårtenson, 'The Preamble of the Universal Declaration of Human Rights and the UN Human Rights Programme' in Eide (n 15); Morsink (n 15) 20. The 2002 issue of the United Nations' compilation of international human rights instruments covered almost 100 human rights instruments. UN High Commissioner for Human Rights, *Human Rights: A Compilation of International Instruments* (UN 2002).
36 Henry J Steiner, Philip Alston, and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (3rd edn, OUP 2008) 136.
37 See Green (n 4) 174–75; and Gunnar G Schram, 'Article 15' in Eide (n 15).
38 Simma and Alston (n 4) 84, 90–96; Steiner, Alston, and Goodman (n 36) 137.

Downloaded from https://academic.oup.com/edited-volume/42626/chapter/358047931 by University of Melbourne user on 16 November 2023

39 See above. The European Convention on Human Rights (ECHR), the basis of the activities of the ECtHR, does refer to general principles of law in the context of Art 7 (which reflects the principle of legality). However, the ECHR does not contain any general provision indicating that principles are a source of law relevant to interpreting its provisions and are to be applied by the ECtHR. The founding treaties of the European Communities contained no reference to general principles.

40 See Gaja (n 4) para 3.

41 *Minority Schools in Albania Case*.

42 *Minority Schools in Albania Case* (n 41) 17.

43 *Corfu Channel Case* (n 8).

44 *Corfu Channel Case* (n 8) 22.

45 *Reservations to the Genocide Convention Case* 23. The ICJ subsequently held that the prohibition of genocide constitutes an e*rga omnes* obligation and is *jus cogens*. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* 616; *Armed Activities on the Territory of the Congo* 32.

46 *Application for Review of Judgment No 158* 181.

48 *US Diplomatic and Consular Staff Case* (n 47) 42.

49 Rodley takes a different view of the significance of the case. See Nigel S Rodley, 'Human Rights and Humanitarian Intervention: The Case Law of the World Court' (1989) 38 ICLQ 321, 324–27.

50 *Legality of the Threat or Use of Nuclear Weapons Case* 242.

51 Principle 24 of the 1992 Rio Declaration on Environment and Development provides that states should respect international law by providing protection for the environment in times of armed conflict.

52 Protection of the Environment in Times of Armed Conflict, UNGA Res 47/37 (25 November 1992) UN Doc A/47/49.

53 See, for example, *South-West Africa Cases*, discussed later; *US States Diplomatic and Consular Staff Case* (n 47).

54 *South-West Africa Cases (Second Phase) Judgment* [1966] ICJ Rep 6.

55 *South-West Africa Cases* (n 54) 250, dissenting Opinion of Judge Tanaka.

56 *South-West Africa Cases* (n 54) 287.

57 *South-West Africa Cases* (n 54) from 294.

58 *South-West Africa Cases* (n 54) 299–300.

59 See also Judge Cançado Trindade's concurring opinion in the same context, discussing the interrelationship between general principles and international human rights norms. The United Nations Human Rights Committee has been more cautious, but in its General Comment No 18, it finds that 'equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights'. UNHRC 'General Comment No 18: Non-Discrimination' (10 November 1989) UN Doc HRI/GEN/1/Rev.9.

60 *Pulp Mills on the River Uruguay*.

61 *Pulp Mills* (n 60) para 135 (separate opinion of Judge Cançado Trindade).

62 *Pulp Mills* (n 60) para 5.

63 *Pulp Mills* (n 60) para 37.

64 *Pulp Mills* (n 60) para 220. See also his concurring opinion in the Advisory Opinion of the Inter-American Court of Human Rights on the *Juridical Condition and Rights of Undocumented Migrants* (n 5).

65 This is likely to be the case in respect of most of the 'third generation' rights.

66 The Court alluded to the existence of such norms in *Barcelona Traction, Light and Power Company, Limited* 32 (rights giving rise to duties *erga omnes*). The ICJ cited protection from slavery and racial discrimination as examples of *erga omnes* norms. See also *East Timor* 102 (right to self-determination); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 45) 616 (prohibition of genocide). The ICJ has, on occasion, expressly referred to *jus cogens* in its judgments and advisory opinions. See eg *Legality of the Threat or Use of Nuclear Weapons* (n 50) 258 (not necessary to pronounce on whether principles and rules of humanitarian law are part of *jus cogens*); *Armed Activities on the Territory of the Congo* (n 45) 32 (prohibition of genocide is *jus cogens*). The International Criminal Tribunal for the Former Yugoslavia has also invoked the principle of *jus cogens*. See *Prosecutor v Furundžija* 55, 58–61 (prohibition of torture is *jus cogens*).

67 See Chapter 24 in this *Handbook* and, generally Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2008); Jochen A Frowein, '*Ius Cogens*', *The Max Planck Encyclopaedia of Public International Law* (OUP 2008) online edition: <http://www.mpepil.com> accessed 22 April 2012.

68 See UNHRC, 'General Comment No 29: States of Emergency (article 4)' (31 August 2001), UN Doc No CCPR/C/21/Rev.1/Add.11 paras 11–13. While this would appear to be, at least in part, a reference to *jus cogens* norms, the Committee took care not to characterize them as such. The list includes the following (a) all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person; (b) prohibitions against the taking of hostages, abductions, or unacknowledged detention; (c) the international protection of the rights of

Downloaded from https://academic.oup.com/edited-volume/42626/chapter/358047931 by University of Melbourne user on 16 November 2023

persons belonging to minorities includes elements that must be respected in all circumstances (as reflected in the prohibition against genocide, the inclusion of a non-discrimination clause in Art 4 § 1, as well as the non-derogable nature of Art 18); (d) deportation or forcible transfers of populations that amount to a crime against humanity as set out in the Rome Statute of the International Criminal Court.

69 Article 7 § 2 of the Convention. See Art 15 § 2 of the ICCPR. There are two other references in the ECHR. Article 35 § 1 requires that all domestic remedies be exhausted 'according to the generally recognised rules of international law'. Article 1 of Protocol No 1 protecting the right to property provides that: 'No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.' In the field of expropriation these principles have been held not to apply to the taking of the property of nationals (*James v UK*, paras 60–66).

70 *Streletz, Kessler and Krenz v Germany* (n 11) paras 105–106. See also the concurring opinions of Judges Loucaides and Levits.

71 *Baumgarten v Germany* para 9.4.

72 For example, *Markin v Russia*, para 96.

73 Paragraph 62.

74 *Soering v UK*.

75 Consultative Assembly, 'Working Paper No 93' (1950) vol III, 982.

76 *Golder* (n 9) paras 35–36.

77 *John Murray* (n 10) para 45.

78 See, in this respect, *Scoppola (No 2) v Italy*; the partly dissenting opinions of Judges Nicolau, Bratza, Lorenzen, Jociene, Villiger, and Sajó; and Art 49 § 1 of the Charter.

79 See below for a discussion of the Charter. In the area of criminal law, see also *AP, MP and TP v Switzerland*, where the court considered that criminal liability does not survive the person who has committed the criminal act. This was considered to be a fundamental rule of criminal law linked to the presumption of innocence. Inheritance of the guilt of the dead was not considered to be compatible with the standards of criminal justice in a society governed by the rule of law.

80 *Al-Saadoon and Mufdhi v UK*, para 126. See also *Mamatkulov and Askarov v Turkey*, where the dissenters (Judges Caflisch, Turmen, and Kovler) considered that there was no general principle of law recognizing the interim measure that an international court issues as obligatory. The majority found that such a measure, under the Convention, was binding on the state, but reached this conclusion on the basis of an interpretation of the ECHR, without making a finding concerning the existence of a general principle.

81 *Al-Jedda v UK*, para 102.

82 Paragraph 61. The ICJ vindicated the Court's view on state immunity in the *Jurisdictional Immunities of the State* case, 37–39.

83 See Kanstantsin Dzehtsiarou, 'Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights' [2011] *PL* 534.

84 *Demir and Baykara v Turkey*, paras 67, 71.

85 *Demir and Baykara* (n 84) para 76.

86 *Demir and Baykara* (n 84) para 79.

88 *Demir and Baykara* (n 84) para 106.

89 *Demir and Baykara* (n 84) para 151.

90 *Demir and Baykara* (n 84) para 152.

91 *Demir and Baykara* (n 84) para 155.

92 Paragraph 61.

93 Paragraphs 54–56.

94 Paragraphs 26–28, 70.

95 Paragraphs 60–61.

96 Paragraphs 285–89.

97 Paragraph 176.

98 European Coal and Steel Community Treaty, concluded in 1951, and the 1957 Treaties of Rome, which created the European Economic Community and the European Atomic Energy Community.

99 The only human rights guarantee appeared in Art 4 of the Treaty of Rome which prohibited, within the scope of application of the Treaty, discrimination on the grounds of nationality, a prohibition reflected in other more specific articles of the Treaty (see, for example, Art 40(3)).

100 See Ulrich Scheuner, 'Fundamental rights in European community law and in national constitutional law' (1975) 12 CML Rev 171; GF Mancini, 'The Making of a Constitution for Europe' (1989) 26 CML Rev 595, 608–609; Bruno De Witte, 'The Past

Downloaded from https://academic.oup.com/edited-volume/42626/chapter/358047931 by University of Melbourne user on 16 November 2023

and Future Role of the European Court of Justice in the Protection of Human Rights' in Philip Alston (ed), *The EU and Human Rights* (OUP 1999) 864.

101 It was renamed the Court of Justice of the European Union following the treaty changes the Treaty of Lisbon introduced in 2007.

102 See *Stork v High Authority*; *Geitling and Others v High Authority*; *Sgarlata and Others v Commission*.

103 See Mancini (n 100) 609; and Scheuner (n 100) 172–73, 177–80 for more detailed discussion.

104 *Costa v ENEL*.

105 *Internationale Handelsgesellschaft*, para 4.

107 *Nold v Commission*, para 13.

108 For consideration of the Declaration in the context of the right to property, see *Hauer v Land Rheinland-Pfalz*.

109 Article 6(2).

110 'Draft Charter of Fundamental Rights of the European Union' (11 October 2000) CHARTE 4473/00.

111 Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/17.

112 Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/17.

113 *Johnston v Chief Constable of the Royal Ulster Constabulary*.

114 See eg *Gutmann v Commission*; *Limburgse Vinyl Maatschappij NV and Others v Commission*; *Gözütok and Brugge*.

115 The first case in which the Court of Justice referred to the Charter in its reasoning was *European Parliament v Council*.

116 Mancini (n 100) 611.

117 See Allan Rosas and Heidi Kaila, 'L'Application de la Charte des Droits Fondamentaux de l'Union Européenne par la Cour de Justice: Un Premier Bilan' [2011] *Il Diritto dell'Unione Europa* 9.

118 See Judge Cançado Trindade, 'The Expansion of the Material Context of *Jus Cogens*: The Contribution of the Inter-American Court of Human Rights' in Dean Spielmann, Marialena Tsirli and Panayotis Voyatzis (eds), *The European Convention on Human Rights, a Living Instrument; Essays in Honour of Christos L Rozakis* (Bruylant 2011) 27–46.

119 See Green (n 4) 183.

Downloaded from https://academic.oup.com/edited-volume/42626/chapter/358047931 by University of Melbourne user on 16 November 2023

NGOs have been no less active in the drive toward equality of the sexes and the advancement of the status of women. They have taken various initiatives and have greatly affected the agendas of the Commission on the Status of Women, culminating in the adoption of both the Declaration (1967) and the Convention on the Elimination of All Forms of Discrimination Against Women (1979) and other special conventions to protect women. From the International Women's Year (1975) to the Beijing Women's Conference (1995), groups concerned with the well being of women have accelerated their efforts toward equality, development, and peace, and pressed on in the twenty-first century. The importance of NGOs to the cause of women is such that the General Assembly, in Resolution 40/108, "Implementation of the Nairobi Forward-Looking Strategies for the Advancement of Women," adopted in December 1985, specifically acknowledged the constructive contributions made by NGOs, in general, and the Non-Governmental Organizations Forum, in particular, to the advancement of women and invited their continued participation in implementing the strategies formulated at the Nairobi Conference.[33]

Unfortunately, promotional activities are still too often carried forward from parochial and fragmented, rather than inclusive, perspectives. A frequent limitation on adequate performance of the promoting function comes from the all-too-frequent domination of public channels of communication by agents (official or unofficial) of special interests. Once having degenerated into propaganda of narrow views, promotional activities all too often have been perceived in terms of inter-bloc warfare—East against West, North against South, globalization against national interests, and so on. Problems arise, for example, when ideological polemics become a substitute for serious negotiation toward reduction and control of strategic and conventional armaments, or when measures to address climate change are opposed in the name of private interests. Nonnegotiable polemics must not overwhelm genuine expressions of common interests.

(p. xcv) The Prescribing Function

The prescribing function entails the adoption of community policies or rules by competent decision-makers. In practice, the act of prescription continues to be dominated by state actors. However, non-state actors enjoy an increasingly prominent role in the deliberation and adoption of legislation, treaties, resolutions, and other prescriptive acts. Their influence is keenly felt in the intelligence and promoting functions that invariably precede the act of prescription. Consider, for example, the adoption of the United Nations Convention on the Rights of the Child, the Mine Ban Treaty, and the Rome Statute of the International Criminal Court, whose contents were greatly enriched by the lobbying of NGOs representing broad perspectives and identifications.

In a fundamental sense, prescription results from a process of communication that proceeds on three levels: the designation of the content of a policy, creation of expectations about the authority of the policy so designated, and the creation of an expectation that the policy will be put into controlling practice through appropriate sanctioning measures. In the world community, as in its lesser component communities, processes of communication by which prescriptions are shaped range from the most deliberate forms of expression—international agreements and treaties—to the least deliberate form—the vast flow of expectations derived from and implicit in uniformities in decision and behavior. For this reason, it is important not to focus too narrowly on the formalities of the prescriptive process, but rather to probe for its effects wherever they may be found. The diversity and abundance of the processes of communication by which legal norms are made in the contemporary world are staggering. Those involved include not only the officials of states and intergovernmental organizations but also the representatives of political parties, pressure groups, and private associations, not to mention individual human beings with all their manifold identifications. The perspectives of participants are evidenced in their myriad demands, identifications, and expectations with varying degrees of compatibility or incompatibility with common interests and fundamental general community policies. The strategies participants employ to manage

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

their base values manifest varying degrees of explicitness and implicitness in relation to prescription and a wide continuum of persuasion and coercion. They encompass the modalities suggested in Article 38 of the Statute of the ICJ, as well as the procedures used in different arenas, and all other strategies characteristically employed within the value processes.

(p. xcvi) The crucial point for the present inquiry is the degree to which policies about human rights, however projected, become a part of the working expectations of the effective participants within the world community. Expectations are generated and reflected in a dynamic process of communication and practice. Only when the prescribing function is explicitly related to the ongoing, larger processes of communication and decision can the dynamics inherent in lawmaking be realistically and fully brought to the fore. In a public order of human dignity, the fundamental freedoms and rights of the individual would be so widely shared, intensely demanded, and highly cherished, they would be given special protection by formal prescriptions encompassing all values. The effective functioning of the prescribing function would ensure representative perspectives of the community are given expression in authoritative texts and force through controlling practice. Community policy would be inclusive in its concern, rejecting all claims of special interests. Reasonable latitude would be preserved for the recognition of emerging conceptions of rights.

The most striking contemporary developments in terms of the prescribing function relate to the growing role of international governmental organizations (IGOs). Contrary to the lingering myth that such organizations enjoy little direct prescriptive competence, they play an increasingly important role as forums for the flow of explicit communications and acts of collaboration that generate expectations about authoritative community policy. This is especially true of the United Nations and its affiliated agencies. The prescriptive power of IGOs challenges the notion that states are the sole legitimate subjects of international law. Intergovernmental bodies such as the United Nations are equipped with an international legal personality and fundamental rights that have been affirmed by the ICJ. While IGOs are formed by states in order to pursue common interests, these organizations, owing to their legal personhood, function independently of the host states in which they operate. Their efforts have contributed to an ever-growing body of rules and norms, including most significantly international treaties as well as mechanisms for resolving international disputes, between both nations and private parties.

The evolution of the Universal Declaration of Human Rights as quasi-legislation and custom offers an instructive example. When the Universal Declaration was adopted unanimously in December 1948 by the General Assembly, the original shared expectation was that it represented only “a common standard of achievement” without direct legal authority and enforceability. (p. xcvii) But the authoritative nature of the Universal Declaration has grown in the seven decades since. It has been affirmed and reaffirmed by numerous resolutions of UN entities and related agencies, invoked and reinvoked by various participants, and incorporated into international agreements and national constitutions, finding increasing expression in judicial decisions, both transnational and national. Today, the Universal Declaration, along with the two International Covenants, is widely acclaimed as the “Magna Carta of humankind,” to be observed by all the participants in the world arena. The authoritative effect of the Universal Declaration is recognized in a number of ways: as the authoritative identification and clarification of human rights guaranteed under the UN Charter, as part of customary international law, as a vital component of *jus cogens*, and as an indispensable component of the developing global bill of human rights. Likewise, in the arena of international humanitarian law, officials and nonofficials look to the Geneva Conventions as representing customary expectations of conduct during times of war. The treaties’ authoritative effect is evidenced by the degree to which they have been invoked by states as legitimate expressions of basic rights by both signatory and nonsignatory nations.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

Provisions outlawing practices, most notably torture, have attained status as *jus cogens* as the result of their widespread adoption over the decades since the conventions' ratification.

The world arena lacks a well-organized, centralized lawmaking institution. Under the deliberate mode of prescription, states are not bound by a particular international agreement unless they give express consent. Nevertheless, the global prescribing process increasingly exhibits features of inclusivity, rationality, and effectiveness. An appropriate inclusivity is greatly fostered by the informal components in the transnational prescribing process that permit expectations about policies, authority, and control to be created by cooperative behavior of both official and unofficial participants. Such processes represent a preferred policy of democracy and representativeness because they entail a constant accommodation of the interests and behavior of all actors affected by the prescriptions thus created.

The Invoking Function

As described above, the invoking function refers to the provisional characterization of events in terms of community prescriptions. The objectives of invocation extend from obtaining the benefits of an informal appreciation of events (p. xcviii) to setting in motion a formal application by authoritative decision-makers. The participants in invocation before transnational arenas include states, international governmental organizations, nongovernmental organizations and groups, and individuals. In situations of a lesser degree of institutionalization, invocation is generally open to all effective participants; in arenas of a higher degree of institutionalization, access is available only through formal channels and may be highly restricted.

The process of invocation ordinarily proceeds through phases of initiation, exploration of facts and policies, and stimulation of the applicative arenas to take action. Like other claims to authority, an invocation involves assertions about facts, relevant policies, and appropriate remedies. The claimants who invoke a rule do so by making allegations about what has happened, what policies have been violated, and what future action is needed to remedy the wrong. They may do so through formal or informal channels. Specific and responsible allegations of violations of international legal norms, though falling short of mobilizing formal application by authoritative decision-makers, could nevertheless in the aggregate produce significant effects in ending lawless acts or in securing greater compliance with established international standards. World public opinion is the court of last resort for informal invocations, which can be undertaken day in and day out by nongovernmental groups, the media of mass communication, and concerned individuals. Publicity mobilizes support, support leads to action, and action alleviates abuses. In a basic sense, the terms of a human rights treaty may be invoked as effectively in a widely broadcast news report as in a legal brief presented before a tribunal.

Maintenance of minimum world order depends on timely invocation in response to breaches of peace and other gross violations of international law. Respect for and confidence in processes of authoritative decision depend greatly on the ability of individuals and private groups to challenge unlawful deprivations. As such, invocation within a world order of human dignity evidences the highest degree of inclusivity in terms of access to arenas of authority. Special provision is made for individual claimants to bring claims concerning putative deprivations and to secure remedies before authoritative decision-makers. Provision is also made for the invocation of rights on behalf of the community. Since the original edition of *Human Rights and World Public Order*, the ability for individual petitioners to be heard by human rights courts and other authoritative bodies has been greatly expanded. Individuals previously were dependent on state actors to take up their

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

Oxford Public International Law

Part 1 Delimitation of the Problem, Four The Global Constitutive Process of Authoritative Decision

From: Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity (2nd Edition)

Myres S. McDougal, Harold D. Lasswell, Lung-chu Chen

Content type: Book content
Product: Oxford Scholarly Authorities on International Law [OSAIL]
Published in print: 07 February 2019
ISBN: 9780190882631

Subject(s):

Access to justice — International procedural law

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

2. Application.

   Provision is made for the applicability of intensely demanded prescriptions about individual rights to all decision makers and community members, whether official or nonofficial. Officials at all levels of government, from central to provincial, are required to observe and promote these rights, and nonofficials are required to respect the equal rights of others in all interactions in social process.

   Prescriptions designed to protect human rights are buttressed by specialized institutions for application. Allocations of competence may be balanced so as to secure disinterested judicial review of decisions and activities by officials and others who are alleged to have imposed deprivations of human rights.

3. Invocation.

   Special provision is made to enable individuals who allege that their human rights have been violated to challenge putative deprivations before authoritative decision makers.

   Provision is made for specialized invocation by representatives of the community, such as ombudsmen or attorneys general.

4. Termination.

   Special difficulties are placed in the way of amending or terminating intensely demanded prescriptions about human rights. It is commonly the case that such prescriptions can be changed only in the ways that they are created.

(p. 320) It may now be demonstrated that all these different features of constitutive process, so thoroughly tested and so highly cherished in national communities, have appeared, or are in process of appearing, in global constitutive process in relation to the protection of human rights. It is convenient, again, in recounting these developments to focus upon each of the four decision functions.

Prescription

The prescriptions about human rights range, as described above, from the most deliberate form (agreement) to the least deliberate form (customary development), with a paramount role being increasingly accorded communication emanating from the United Nations.[558]

The deliberate effort to create an international bill of human rights began even before the formal establishment of the United Nations. In recognition of the intimate relationship between human rights and peace, as vividly brought home by the atrocities of the Third Reich, a proposal to include an International Bill of Human Rights in the United Nations Charter itself was presented at the San Francisco conference.[559] While the delegates were not ready for such a proposal, the Charter, as finally adopted, did contain several significant human rights provisions;[560] and the "idea of establishing an International Bill of Rights" was, in the words of Schwelb, "treated as inherent in the Charter."[561] Appearing at the close of the San Francisco conference, President Truman stated emphatically:

> We have good reason to expect the framing of an international bill of rights, acceptable to all the nations involved. That bill of rights will be as much a part of international life as our own Bill of Rights is a part of our Constitution. The Charter is dedicated to the achievement and observance of human rights and fundamental freedoms. Unless we can attain those objectives for all men and women everywhere

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

> —without regard to race, language or religion—we cannot have permanent peace and security.[562]

(p. 321) Prior to the Charter's coming into force on October 24, 1945, the Preparatory Commission of the United Nations and its executive committee had recommended that the Commission on Human Rights, as provided in the Charter, accord the top priority to the "formulation of an international bill of rights" in its future work.[563] Hence, when the Commission on Human Rights was created in February 1946, "an international bill of rights" was the first item on its agenda.[564] Shortly after the Commission and a drafting committee commenced their work, it became apparent that there were differences among the members regarding the appropriate modality of the envisaged international bill of rights —whether in the form of a "declaration" or "manifesto" by the General Assembly or of an international convention.[565] While the proponents of the "declaration" route expected the proposed declaration to be reinforced by one or more conventions, the proponents of the "convention" route endorsed the adoption also of a general and comprehensive declaration. Eventually, in 1947, it was decided that the contemplated "International Bill of Human Rights" would consist of a Declaration, a Convention (Covenant), and "Measures of Implementation."[566] The first part of this international bill—the Universal Declaration of Human Rights—was adopted unanimously on December 10, 1948, by the General Assembly in the form of a resolution.[567]

Subsequent to the adoption of the Universal Declaration, the ideological controversy relating to the nature and prominence of "civil and political rights" and of "economic, social, and cultural rights" led the General Assembly to decide, in 1952, that two covenants —one on civil and political rights and the other on economic, social, and cultural rights— should be simultaneously prepared, submitted, approved, and opened for signature, (p. 322) and that "measures of implementation" should be incorporated in each of the two covenants.[568] The Human Rights Commission, entrusted with the primary task of drafting, completed its work on the two draft covenants in 1954.[569] After the lapse of more than a decade, the General Assembly, on December 16, 1966, adopted unanimously the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights,[570] and, by majority vote, the Optional Protocol to the International Covenant on Civil and Political Rights (dealing with procedures for individual petitions).[571] Despite some gloomy predictions, the Covenant on Economic, Social, and Cultural Rights has been in force since January 3, 1976, while the Covenant on Civil and Political Rights and its Optional Protocol have been in force since March 23, 1976.[572] Thus, the International Bill of Human Rights, as contemplated at the founding of the United Nations, has been projected in familiar form.

This developing International Bill of Human Rights has, further, been greatly fortified by various ancillary instruments dealing with particular categories of participants (women, refugees, stateless persons, youths, children, mentally retarded persons, and so on), or particular value categories or subject matters (genocide, apartheid, discrimination, racial discrimination, sex-based discrimination, slavery, forced labor, nationality, employment, education, marriage, and so on),[573] by the decisions and recommendations of international governmental organizations (especially by the various organs and entities of the United Nations), and by customary developments in the transnational arena.

Representing a new departure from traditional preoccupation with "interstate" relations, the United Nations has projected an unmistakably new commitment toward world order, seeking to secure not only a minimum order (in the sense of minimization of unauthorized coercion) (p. 323) but also a maximum order (in the sense of the greater production and wider distribution of all values). The United Nations Charter offers multiple provisions suggesting that the protection of human rights is a coequal, even indistinguishable, goal in relation to the maintenance of peace and security. The determination of the peoples of the

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

United Nations “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women,” as expressed in the preamble, is immediately followed, in Article 1(3), by the enunciation of the following as a principal purpose of the United Nations:

> To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

Toward this purpose, the General Assembly is authorized, under Article 13(1)(b), to “initiate studies and make recommendations”; the Economic and Social Council is similarly authorized, under Article 62(2), to “make recommendations”; and Article 76c makes explicit that enhancement of “respect for human rights and for fundamental freedoms” is one of the “basic objectives” of the international trusteeship system. Most importantly, Articles 55 and 56 together oblige all member states to “pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of,” among other things, “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”

In the light of this mass of explicit references to the protection of human rights, many scholars have, from the beginning of the United Nations, taken the position that the human rights provisions of the Charter are law in the sense of imposing definite legal obligations upon the member states and others. Dismissing the argument that the Charter provisions on human rights “are a mere declaration of principle devoid of any element of legal obligation” as “no more than a facile generalisation,”[574] Lauterpacht eloquently stated:

> For the provisions of the Charter on the subject figure prominently in the statement of the Purposes of the United Nations. Members of the United Nations are under a legal obligation to act in accordance with these Purposes. It is their legal duty to respect and observe fundamental rights and freedoms. . . .[575]

(p. 324) Drawing upon other Charter provisions, he elaborated:

> There is a mandatory obligation implied in the provision of Article 55 that the United Nations “shall promote respect for, and observance of, human rights and fundamental freedoms”; or, in the terms of Article 13, that the Assembly shall make recommendations for the purpose of assisting in the realisation of human rights and freedoms. There is a distinct element of legal duty in the undertaking expressed in Article 56 in which “All Members pledge themselves to take joint and separate action in cooperation with the Organisation for the achievement of the purposes set forth in Article 55.” The cumulative legal result of all these pronouncements cannot be ignored. The legal character of these obligations of the Charter would remain even if the Charter were to contain no provisions of any kind for their implementation. For the Charter fails to provide for the enforcement of its other numerous obligations the legal character of which is undoubted.[576]

The position taken by Jessup is equally emphatic: “It is already the law, at least for Members of the United Nations, that respect for human dignity and fundamental human rights is obligatory. The duty is imposed by the Charter, a treaty to which they are parties.”[577]

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

This interpretation of the human rights provisions of the Charter, as imposing definable specific obligations upon states, has recently received authoritative confirmation from the International Court of Justice. In the *Namibia* case, in 1971, the Court held that the extension of apartheid to Namibia (South West Africa) by the government of South Africa is in contravention of the Charter of the United Nations.[578] The Court declared:

> Under the Charter of the United Nations, the former Mandatory had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to (p. 325) enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.[579]

In particular application to the case before it, the Court stated emphatically that

> no factual evidence is needed for the purpose of determining whether the policy of *apartheid* as applied by South Africa in Namibia is in conformity with the international obligations assumed by South Africa under the Charter of the United Nations. In order to determine whether the laws and decrees applied by South Africa in Namibia, which are a matter of public record, constitute a violation of the purposes and principles of the Charter of the United Nations, the question of intent or governmental discretion is not relevant; nor is it necessary to investigate or determine the effects of those measures upon the welfare of the inhabitants.[580]

In his incisive analysis of the Court's opinion, Schwelb notes that "the interpretation of the human rights clauses [as imposing legal obligation upon member states] contained in the Advisory Opinion is backed by the authority of the Court as a body and of the thirteen Judges who voted for it and . . . is not challenged by one of the two dissenting Judges and not specifically objected to by the other."[581] "To sum up," Schwelb adds, "the authority of the Court is now clearly behind the interpretation of the human rights clauses of the Charter as presented almost a generation ago by Lauterpacht and others."[582]

The very general authoritative prescriptions of the Charter about human rights were shortly given somewhat more detailed specification in the Universal Declaration of Human Rights, adopted in 1948. This Declaration has acquired, as we have already described, the attributes of authority in two different ways.[583] First, it is commonly accepted as an authoritative specification of the content of the human rights provisions of the United Nations Charter. Secondly, its frequent invocation and application by officials, at all levels of government and in many different communities about the world, have conferred upon its content those crystallized expectations of future invocation and application characteristic of customary law.

(p. 326) Thus, the Montreal Statement of the Assembly for Human Rights (a world assembly attended by both officials and nonofficials in commemoration of the International Year of Human Rights) declared, in March 1968, that "The Universal Declaration of Human Rights constitutes an authoritative interpretation of the Charter of the highest order, and has over the years become a part of customary international law."[584] Similarly, in his separate opinion in the *Namibia* case, Judge Ammoun, vice-president of the Court, after observing that the Court's "Advisory Opinion takes judicial notice of the Universal Declaration of Human Rights,"[585] elaborated as follows:

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

> Although the affirmations of the Declaration are not binding *qua* international convention within the meaning of Article 38, paragraph 1(a), of the Statute of the Court, they can bind States on the basis of custom within the meaning of paragraph 1(b) of the same Article, whether because they constituted a codification of customary law as was said in respect of Article 6 of the Vienna Convention on the Law of Treaties, or because they have acquired the force of custom through a general practice accepted as law, in the words of Article 38, paragraph 1(b), of the Statute.[586]

In documenting a thesis that "the adoption of the [Universal] Declaration may well have been one of the greatest achievements of the United Nations,"[587] Humphrey offers relevant historical context for the Declaration:

> It provides the framework for the international recognition of those human rights and fundamental freedoms that were left undefined by the Charter. In the tradition of Magna Carta, the American Declaration of Independence, the French Declaration of the Rights of Man, and other historic statements, the Universal Declaration of Human Rights enshrines on the international level a universally accepted philosophy of freedom for the 20th century moving beyond the historic declarations by recognizing that civil and political rights can have little meaning without economic, social, and cultural rights. Its moral and political authority is equal to that of the Charter itself.[588]

(p. 327) In summarizing the use to which the Universal Declaration has been put, Humphrey concludes:

> In the more than a quarter of a century since its adoption, however, the Declaration has been invoked so many times both within and without the United Nations that lawyers now are saying that, whatever the intention of its authors may have been, the Declaration is now part of the customary law of nations and therefore is binding on all states. The Declaration has become what some nations wished it to be in 1948: the universally accepted interpretation and definition of the human rights left undefined by the Charter.[589]

The same conclusion is announced by Waldock in a much quoted passage:

> This constant and widespread recognition of the principles of the Universal Declaration clothes it, in my opinion, in the character of customary law. Be that as it may, the Declaration has acquired a status inside and outside the United Nations which gives it high authority as the accepted formulation of the common standards of human rights. Furthermore, if you look at the Declaration, you will see that it unequivocally starts from the standpoint of the rule of law—the standpoint that the function of law is not merely to regulate the conduct of the governed but also to protect them from abuses of power by the governors.[590]

The two International Covenants on Human Rights and the Optional Protocol to the Covenant on Civil and Political Rights have, as indicated, been in effect since early 1976. They are of course binding for all states that have ratified or acceded to them. Like the Universal Declaration, they are, further, authoritative interpretations of the Charter provisions on human rights, as well as vital components in the flow of communication that creates the expectations comprising customary international law. They have both given further detailed specification to the content of internationally protected human rights and provided structures and procedures (albeit with some inadequacies) for remedying deprivations, thereby contributing mightily to the stabilization of authoritative expectations about the defense and fulfillment of human rights.[591] Similarly, a (p. 328) growing body of

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

more particular conventions dealing with certain deprivers or various deprivations has significantly contributed to the enrichment and growth of the core content of the human rights prescriptions projected in the United Nations Charter.[592]

The authoritativeness of the Charter provisions on human rights, and of the specification of these provisions in the Universal Declaration and related instruments, has been greatly fortified by the practice of international governmental organizations, especially the various organs of the United Nations. As Schwelb observes:

> In the practice of the United Nations and of its Members neither the vagueness and generality of the human rights clauses of the Charter nor the domestic jurisdiction clause have prevented the United Nations from considering, investigating, and judging concrete human rights situations, provided there was a majority strong enough and wishing strongly enough to attempt to influence the particular development.[593]

Some of the more important aspects of this United Nations practice have already been summarized by reference to each of the seven decision functions performed.[594] Here attention may be called to a recent, somewhat more comprehensive, and conventionally organized study emanating from the United Nations, which describes the depth and wide acceptance of this practice.[595] This study summarizes in terms of:

1. “General pronouncements endorsing the Universal Declaration or calling upon Governments to live up to its provisions.” [596]

   The list includes:

   General Assembly Resolution on “Essentials of Peace” of December 1, 1949;

   The “Uniting for Peace” Resolution adopted by the General Assembly on November 3, 1950;

   The Resolution on “Observance of Human Rights” adopted by the General Assembly on February 4, 1952;

   The landmark Declaration on the Granting of Independence to Colonial Countries and Peoples adopted by the Assembly on December 14, 1960;

   (p. 329) The United Nations Declaration on the Elimination of All Forms of Racial Discrimination adopted on November 20, 1963;

   The General Assembly Resolution on measures to accelerate the promotion of respect for human rights and fundamental freedoms adopted on December 18, 1965;

   The General Assembly Resolution of December 19, 1968, endorsing the Proclamation of Teheran as “an important and timely reaffirmation of the principles embodied in the Universal Declaration and in other international instruments in the field of human rights”;

   The Declaration on Social Progress and Development of 1969;

   The General Assembly Declaration on the Occasion of the Twenty-fifth Anniversary of the United Nations (October 24, 1970). [597]

2. “United Nations resolutions invoking the Universal Declaration in support of action on a world-wide scale for the solution of human rights problems in specific fields.” [598]

   These specific fields include:

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

Action against discrimination in general;

Action against sex-based discrimination and for the protection of women;

The right of asylum;

Administration of justice;

Freedom of information;

The protection of refugees;

The protection of the child and of the youth;

The protection of the elderly and the aged;

The protection of mentally retarded persons;

Action against the outflow of skilled personnel from developing to developed countries. [599]

3. "United Nations resolutions invoking the Universal Declaration in regard to concrete human rights situations." [600] (p. 330)

The concrete human rights situations involved include:

Respect for human rights in non-self-governing territories;

The racial situation in southern Africa;

The Namibia controversy;

Matters relating to forced labor;

The exploitation of labor through illicit and clandestine trafficking;

The policy of apartheid in South Africa;

The Russian wives case;

The question of Tibet. [601]

The summary in the United Nations study includes also a specification of "the influence of the Universal Declaration on international treaties"[602] and of "the influence of the Universal Declaration on national constitutions, municipal laws and court decisions."[603] The first influence, that on the proliferation of human rights conventions, has already been noted.[604]

The second influence of the Universal Declaration, that on the making of national constitutions, statutes, and decisions, is of particular importance in augmenting the great historic communication—that the protection of human rights is of the highest priority—inherent in the practice of national constitutionalism during the past two hundred years. This flow of communication on the national level confirms community-wide expectations that the basic content of human rights, as specified in many relevant documents, is rapidly becoming the most fundamental law of the global community. The United Nations study offers this summation:

> Evidence of the impact of the Universal Declaration may be found in texts of various national constitutions which were enacted after the adoption of the Universal Declaration. Several of these constitutions expressly refer, either in their preambles or in their operative provisions, to the Universal Declaration. In addition, many other constitutions contain detailed provisions on a number of human rights, most of which are inspired by, or often modelled on, the text of the articles of the Declaration.[605]

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

(p. 331) Another important body of practice contributing to the establishment and maintenance of a global bill of rights is the customary international law of the responsibility of states about the treatment of aliens. This still vital inheritance, which afforded transnational protection to a particular category of human beings (nationals abroad) in an era when human rights matters were commonly accepted as within the domain of domestic jurisdiction, continues to serve the common interest today. In fact, as we have developed elsewhere, the customary international law of state responsibility, in constant interaction with the contemporary human rights movement and as an integral part of this movement, has greatly contributed to the sum total of the human rights protection, helping to raise the level of transnational protection of nationals as well as of aliens.[606] The conjunction of the customary protection through state responsibility and the new human rights prescriptions generated by, and radiated from, the United Nations Charter has eliminated “out-groups” in the regime of transnational protection of human rights and accorded protection to all human beings, irrespective of their nationality or their place of sojourn.

The end result of all this comprehensive and continuing prescription, ranging in modality from the most deliberate to the least deliberate, would appear to be that the core content of the various communications has, in the immemorial manner of constitutive process, been prescribed as a global bill of human rights. This global bill of rights is in form and policy content very much like those bills of rights created and maintained in the more mature national communities. The English constitution, for example, supposedly “unwritten,” is in fact composed both of a series of instruments, traceable back to Magna Carta, and of customary practice.[607] Similarly, when the United States Constitution is properly understood, it is not merely a single written document, but the whole flow of communication and decision, preceding 1787 and coming down to date;[608] the Bill of Rights in this Constitution goes well beyond the (p. 332) confines of the first eight or ten articles of the amendments to the Constitution.[609] In any constitutive process, it is not merely a simple isolated act of communication, but a whole flow of communication and decision through time, that establishes and maintains authoritative expectations.[610]

Application

The contemporary transnational prescriptions for the protection of human rights would appear to project the same broad compass in applicability characteristic of the bills of rights of mature national communities. These prescriptions are clearly made applicable to the United Nations and its organs and other international governmental organizations, to nation-states and all their officials, and to all the non-governmental groups and individuals active in the whole of world social process.

The United Nations and Its Organs

The United Nations Charter is commonly expected, as indicated in a vast flow of communication before and since 1945, to be the most fundamental law of the global community, binding all participants. For member states this is made explicit in Article 103, the Charter’s supremacy clause. This article stipulates: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” It is not to be thought that the member states and their global audience could have understood by these words that the members were creating an organization or agencies with a competence to transgress the obligations, with respect to security and human rights, that they themselves were assuming. The struggle to bring kings and presidents and other agencies within the confines of the fundamental laws of national communities has left too indelible an impression upon too many peoples to make plausible

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

(1970); THE SUPREME COURT AND THE JUDICIAL FUNCTION (P. Kurland ed. 1975); JUDICIAL REVIEW AND THE SUPREME COURT (L. Levy ed. 1967); E. Rostow, THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW (1962); H. Wechsler, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW (1961); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 768 (1971).

Constitutional law case books typically begin with judicial review. *See* P. Brest, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 46–87 (1975); E. Barrett, CONSTITUTIONAL LAW: CASES AND MATERIALS 17–153 (5th ed. 1977); J. Barron & C. Dienes, CONSTITUTIONAL LAW: PRINCIPLES AND POLICY: CASES AND MATERIALS 1–139 (1975); P. Freund, A. Sutherland, M. Howe, & E. Brown, CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS 1–146 (4th ed. 1977); G. Gunther, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1–80 (9th ed. 1975); P. Kauper, CONSTITUTIONAL LAW: CASES AND MATERIALS 1–314 (4th ed. 1972); W. Lockhart, Y. Kamisar, & J. Choper, CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS 1–159 (4th ed. 1975).

557 *See* notes 635–99 and 748–67 *infra* and accompanying text.

558 *See* notes 315–67 *supra* and accompanying text.

559 *See* R. Russell, A HISTORY OF THE UNITED NATIONS CHARTER 323–27 (1958); E. Schwelb, HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY 31 (1964) [hereinafter cited as E. SCHWELB]; U.S. Department of State, POSTWAR FOREIGN POLICY PREPARATION, 1939–1945, at 115–16, 472, 483–85 (1949); Sohn, *A Short History of United Nations Documents on Human Rights*, in COMMISSION TO STUDY THE ORGANIZATION OF PEACE, THE UNITED NATIONS AND HUMAN RIGHTS 39, 46–56 (1968) [hereinafter cited as Sohn, *A Short History*].

560 *See* U.N. Charter, Preamble and Arts. 1(3), 13, 55, 56, 62(2), and 76(c).

561 E. SCHWELB, *supra* note 559, at 31.

562 1 United Nations Information Organization, DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION 717 (1945).

563 REPORT OF THE PREPARATORY COMMISSION OF THE UNITED NATIONS 28, 36 (1946).

564 G.A. Res. 7, U.N. Doc. A/64 at 12 (1946); E.S.C. Res. 5, 1 U.N. ESCOR 163 (1946).

565 See Commission on Human Rights, *Report of the Drafting Committee on an International Bill of Human Rights: First Session*, U.N. Doc. E/CN.4/21 (1 July 1947).

566 *See* Report of the Commission on Human Rights, 2d Session, 6 U.N. ESCOR, Supp. (No. 1) 5, U.N. Doc. E/600 (1947). *See also* G.A. Res. 543, 6 U.N. GAOR, Supp. (No. 20) 36, U.N. Doc. A/2119 (1952); G.A. Res. 421, 5 U.N. GAOR, Supp. (No. 20) 42, U.N. Doc. A/1775 (1950); G.A. Res. 217 F, U.N. Doc. A/810, at 79 (1948).

For accounts of this development, *see* Y.B.U.N. 1947–48, at 572–73. *See also* Schwelb, *Notes on the Early Legislative History of the Measures of Implementation of the Human Rights Covenants*, in MELANGES OFFERTS À POLYS MODINOS 270–89 (1968); Sohn, *A Short History*, *supra* note 559, at 60–67 (1968).

567 Universal Declaration, *supra* note 45.

For its history and growth, *see N. Robinson, supra* note 363; E. SCHWELB, *supra* note 559; UNITED NATIONS ACTION, *supra* note 73, at 8–19; Cassin, *From the Ten Commandments to the Rights of Man*, in OF LAW AND MAN: ESSAYS IN HONOR OF HAIM H. COHN 13–25 (S. Shoham ed. 1971); Humphrey, *The UN Charter and the Universal Declaration of Human Rights*, in E. LUARD, INTERNATIONAL PROTECTION, *supra* note 57, at 39–58.

568 G.A. Res. 543, 6 U.N. GAOR, Supp. (No. 20) 36, U.N. Doc. A/2119 (1952).

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

For a detailed account of this decision, *see Annotations on the Draft Covenants, supra* note 411, at 7–10. *See also* Schwelb, *Some Aspects, supra* note 301, at 105–07; Sohn, *A Short History, supra* note 599, at 101–07.

569 The completed work of Human Rights Commission on the draft covenants is fully incorporated in *Annotations on the Draft Covenants, supra* note 411.

570 Covenant on Economic, Social, and Cultural Rights, *supra* note 47; Covenant on Civil and Political Rights, *supra* note 48.

571 Optional Protocol, *supra* note 49. The Optional Protocol was adopted by a vote of sixty-six for, two against, and thirty-eight abstentions.

572 *See After 30 Years, an International Bill of Human Rights*, 13 UN MONTHLY CHRONICLE 50 (Apr. 1976); Schwelb, *Entry into Force of the International Covenants on Human Rights and the Optional Protocol to the International Covenant on Civil and Political Rights*, 70 AM. J. INT'L L. 511 (1976).

573 These instruments are conveniently collected in U.N. HUMAN RIGHTS INSTRUMENTS, *supra* note 51. *See also* BASIC DOCUMENTS ON HUMAN RIGHTS (I. Brownlie ed. 1971).

574 H. LAUTERPACHT, *supra* note 39, at 147.

575 *Id.*

576 *Id.* at 148.

577 P. JESSUP, *supra* note 16, at 91. *See also* G. TUNKIN, *supra* note 315, at 80–82; Carey, *The International Legal Order on Human Rights*, in 4 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 268, 269–70 (C. Black & R. Falk eds. 1972); Newman, *Interpreting the Human Rights Clauses of the UN Charter*, 5 HUMAN RIGHTS J. 283 (1972). For other views endorsing this position, *see* Schwelb, *The International Court of Justice and the Human Rights Clauses of the Charter*, 66 AM. J. INT'L L. 337, 339–41 (1972) [hereinafter cited as Schwelb, *ICJ and Human Rights*]. Dissenting views are summarized in Schwelb, *supra*, at 338–39.

578 Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16 [hereinafter cited as Advisory Opinion on Namibia].

579 *Id.* at 57.

580 *Id.*

581 Schwelb, *ICJ and Human Rights, supra* note 577, at 350.

582 *Id.*

583 *See* notes 358–67 *supra* and accompanying text.

584 MONTREAL STATEMENT OF THE ASSEMBLY FOR HUMAN RIGHTS (1968).

See also Sohn, *The Human Rights Law of the Charter*, 12 TEXAS INT'L L.J. 129, 132–34 (1977).

585 [1971] I.C.J. 67, 76.

586 *Id.* at 76.

587 Humphrey, *The International Bill of Rights: Scope and Implementation*, 17 WM. & MARY L. REV. 527, 529 (1976) [hereinafter cited as Humphrey, *The International Bill of Rights*].

588 *Id.*

589 *Id.*

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

590 Waldock, *Human Rights in Contemporary International Law and the Significance of the European Convention*, in THE EUROPEAN CONVENTION ON HUMAN RIGHTS 1, 15 (1965) (Brit. Institute of Int'l & Comp. L., Int'l L. Series No. 5).

591 *See* notes 96, 376–83, 434–64 *supra* and accompanying text. *See also* A. ROBERTSON, *supra* note 551; Humphrey, *The International Bill of Rights, supra* note 587; Schwelb, *Civil and Political Rights, supra* note 382; Schwelb, *The Nature of the Obligations, supra* note 460; Schwelb, *Some Aspects, supra* note 301.

592 *See* notes 326–46 *supra* and accompanying text.

593 Schwelb, *ICJ and Human Rights, supra* note 577, at 341.

594 *See* notes 154–68 *supra* and accompanying text.

595 UNITED NATIONS ACTION, *supra* note 73.

596 *Id.* at 9.

597 See *id.* at 9–11.

598 *Id.* at 11.

599 *See id.* at 11–14.

600 *Id.* at 14.

601 *See id.* at 14–15.

602 *Id.* at 16.

603 *Id.* at 17.

604 *See* notes 326–46 *supra* and accompanying text.

605 UNITED NATIONS ACTION, *supra* note 73, at 17.

606 *See* chapter 14 *infra*.

607 *Cf.* A. DICEY, *supra* note 544; F. Maitland, THE CONSTITUTIONAL HISTORY OF ENGLAND (1908).

For more recent developments, *see* Daintith, *The Protection of Human Rights in the United Kingdom*, 1 HUMAN RIGHTS J. 275 and 407 (1968).

608 *See* H. McBain, THE LIVING CONSTITUTION (1927); C. Merriam, THE WRITTEN CONSTITUTION AND THE UNWRITTEN ATTITUDE (1931); *Comprehensiveness in Conceptions of Constitutive Process, supra* note 3; Grey, *Do We Have an Unwritten Constitution?* 27 STAN. L. REV. 703 (1975); Miller, *Notes on the Concept of the "Living" Constitution*, 31 GEO. WASH. L. REV. 881 (1963); Reich, *The Living Constitution and the Court's Role*, in HUGO BLACK AND THE SUPREME COURT 133–62 (S. Strickland ed. 1967).

Contrast Rehnquist, *The Notion of a Living Constitution*, 54 TEXAS L. REV. 693 (1976).

609 For a comparable view, *see* W. Cohen & J. Kaplan, BILL OF RIGHTS: CONSTITUTIONAL LAW FOR UNDERGRADUATES 1–3 (1976).

610 *See* Miller, *supra* note 608. For a comprehensive development of this theme, *see* P. BREST, *supra* note 556.

611 I. BROWNLIE, *supra* note 172, at 677.

612 Goodrich, Hambro, and Simons point out:

> Article 2 is of fundamental importance in the total economy of the Charter. It lays down basic principles which the Organization, functioning through its various organs, and its members, must respect. Since the General Assembly, the Security Council, the Economic and Social Council, and the Trusteeship Council are composed of member states, it might be thought that—at least with respect to the

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

HUMAN RIGHTS AND HUMANITARIAN INTERVENTION: THE CASE LAW OF THE WORLD COURT

NIGEL S. RODLEY*

THIS article briefly canvasses a small number of International Court of Justice cases in which the Court has addressed human rights issues. From this it emerges that the Court has unambiguously accepted that the obligation to respect fundamental human rights is an obligation found in general international law. Questions may, however, remain as to:

(1) whether all the human rights enumerated in the Universal Declaration of Human Rights are equally binding;
(2) whether the content of all the rights may be equally discoverable; and
(3) how far the rights may be protected or implemented apart from such measures as particular human rights treaties may themselves provide. One measure of implementation that is clearly not allowed is unilateral resort to armed force by one State to adjust the human rights situation in another State (the doctrine of humanitarian intervention).

The cases in question are the advisory opinions on *Reservations to the Genocide Convention*[1] and on *Namibia*[2] and the decisions in the contentious cases in *South-West Africa*,[3] *Barcelona Traction*,[4] *US Diplomatic and Consular Staff in Tehran*,[5] and *Military Activities in Nicaragua*.[6] I shall treat the earlier cases, much pored over already, in less detail than the last one.

* Head of Legal and Inter-Governmental Organisations Office, Amnesty International; part-time lecturer in law, London School of Economics and Political Science. This is a revised version of a paper read to the British Branch of the International Law Association in Oxford on 9 May 1987. The views it contains are those of the author and are not to be attributed to any organisation.

1. *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* [1951] I.C.J. Rep. 15.
2. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)* [1971] I.C.J. Rep. 6.
3. *South-West Africa Cases (Ethiopia* v. *South Africa*; *Liberia* v. *South Africa) (Second Phase)* [1966] I.C.J. Rep. 6.
4. *Case Concerning the Barcelona Traction, Light and Power Company Limited (Belgium* v. *Spain), Second Phase* [1970] I.C.J. Rep. 3.
5. *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran)* [1980] I.C.J. Rep. 3.
6. *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits* [1986] I.C.J. Rep. 14.

https://doi.org/10.1093/iclqaj/38.2.321 Published online by Cambridge University Press

I. THE EARLIER CASES

A. The Reservations *Case*

In the *Reservations* case the main point for the purposes of this article is the Court's observation that "the principles underlying the Convention are principles which are recognised by civilised nations as binding on States, *even without any conventional obligation*".[7] In other words, regardless of participation in the Genocide Convention, the obligation not to commit genocide existed independently under general international law. The observation was important to the thrust of the Court's reasoning. The Court had been asked by the General Assembly whether, *inter alia*, the existence of reservations by one or more States, objected to by other States, could prevent the reserving States from becoming parties to the Convention. The Court's answer in short was: not unless the reservations are incompatible with the object and purpose of the treaty. It stated:

> The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis. It is inconceivable that the contracting parties readily contemplated that an objection to a minor reservation should produce such a result.[8]

The Court was, thus, seemingly at pains to avoid taking a position whereby limited participation risked undermining the notion that genocide was illegal, "even without any conventional obligation". With the passage of time it is easy to overlook the striking importance of this notion. The advisory opinion was handed down only some two and a half years after the adoption of the Convention by the General Assembly.[9] Moreover, the Convention was itself innovative: the Charter and Judgment of the International Military Tribunal at Nuremberg had recognised genocide as a crime against humanity, which was a crime under international law when committed *in connection with crimes against peace or war crimes*;[10] the Convention required no such limitation. It provided that the crime of genocide could be committed outside the context of international armed conflict, in other words, even in peacetime. The opinion represented a first brave breach by the Court of the doctrine of domestic jurisdiction. In subsequent cases the Court

7. [1951] I.C.J. Rep. 15, 23 (emphasis added).

8. *Idem*, p.24.

9. The Convention was adopted by the UN General Assembly on 9 Dec. 1948: G.A. Res.260A (III). The Court handed down its opinion on 28 May 1951.

10. Art.6, Charter of the International Military Tribunal annexed to the Agreement for the Establishment of an International Military Tribunal, concluded at London, 8 Aug. 1945: 5 U.N.T.S. 251. The judgment of the tribunal (1946) is reproduced in (1947) 41 A.J.I.L. 172.

https://doi.org/10.1093/iclqaj/38.2.321 Published online by Cambridge University Press

has confirmed and elaborated on with greater precision what it said in this case about the legal prohibition of genocide.

B. The Barcelona Traction *Case*

The *Barcelona Traction* case concerned a Canadian corporation with subsidiaries operating in Spain, which was sued for bankruptcy in Spanish courts. The company was allegedly owned largely by Belgian shareholders and the issue before the Court was whether Belgium might exercise diplomatic protection of its nationals, who claimed that their interests had been harmed by action of the Spanish courts. It was fundamental to the Court's finding against Belgium's standing to bring a claim against Spain that there was a distinction between what it called bilateral obligations and obligations "towards the international community as a whole". The latter obligations were:

> By their very nature . . . the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes* [paragraph 33].
>
> Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, *as also from the principles and rules concerning the basic rights of the human person*, including protection from slavery and racial discrimination [paragraph 34, emphasis added].

Thus in this 1970 decision the Court articulated the proposition that obligations towards the international community as a whole derive from, *inter alia*, the principles and rules concerning the rights of the human person. It mentioned the prohibitions of slavery and racial discrimination as examples of such principles and rules, but only as examples. Their inclusion may be attributed to the need to give a clear retrospective reference to the earlier *South-West Africa* case (1966), wherein the Court's decision had provoked widespread criticism.[11] Further, as with the reference to genocide, these categories stood out since they are the subject of specific treaties. Indeed, an extensive list of inclusions would have risked adverse interpretation of unintentional omissions of certain principles and rules. None of the separate or dissenting opinions challenged this statement of the Court.[12]

11. [1966] I.C.J. Rep. 6. The Court had held in this case that Ethiopia and Liberia, having no direct interest at stake, had no standing to receive a decision of the court against South Africa, despite the fact that the subject matter of the case related to the human rights provisions of the League of Nations mandate under which South Africa administered South-West Africa (now Namibia).

12. [1970] I.C.J. Rep. 3, 55–357. As explained below, the Court subsequently pointed out that not all States have "the capacity to *protect* the victims of infringements of [human] . . . rights irrespective of their nationality" (para.91, emphasis added). This foreshadows *Nicaragua*.

https://doi.org/10.1093/iclqaj/38.2.321 Published online by Cambridge University Press

C. *The* Namibia *Case*

A year later the Court handed down its advisory opinion on *Namibia*. This advisory opinion was sought by the General Assembly precisely because of the unsatisfactory nature of the 1966 decision on South-West Africa, and an expectation that the Court would wish to pronounce on the substance of the problem, something which it had avoided in 1966. The opinion confirmed the view of the UN Security Council that the continued presence of South Africa in Namibia was illegal. The Court stated in its opinion:

> To establish . . . and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter [paragraph 131].

A distinguished commentator has already pointed out the importance of not claiming too much from this statement.[13] For the Court opinion deals only with the sort of discrimination explicitly covered by the relevant UN Charter articles.[14] It is authority, however, for the proposition that there is under the UN Charter a clear legal obligation on governments not to commit such discrimination. As a former President of the Court has put it, this wording "leaves no room for doubt that, in its view, the Charter does impose on the Members of the United Nations legal obligations in the human rights field".[15] The Charter provisions are therefore not just hortatory and programmatic.[16]

D. *The* Tehran Hostages *Case*

The clearest statement on the juridical nature of human rights is to be found in the 1980 judgment in the *Tehran Hostages* case. The Court found that Iran had incurred responsibility towards the United States as a result of the continued detention of United States diplomatic and con-

13. J. P. Humphrey, "The Universal Declaration of Human Rights: Its History, Impact and Juridical Character", in B. J. Ramcharan (Ed.), *Human Rights: Thirty Years After the Universal Declaration* (1978), p.21, 36. Professor Humphrey was the first Director of the UN Division of Human Rights.

14. See e.g. Art.1(3) of the UN Charter, which places among the "purposes" of the UN: "to achieve international co-operation in . . . promoting and encouraging respect for human rights and for fundamental freedoms for all, without distinction as to race, sex, language, or religion"; as well as Arts.55 and 56, by which member States pledge themselves "to take joint and separate action in co-operation with the organisation for the achievement" of certain purposes including the promotion "of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

15. Nagendra Singh, *Enforcement of Human Rights in Peace and War and the Future of Humanity* (1986), p.28.

16. See E. Schwelb, "The International Court of Justice and the Human Rights Clauses of the Charter" (1972) 66 A.J.I.L. 350–351.

https://doi.org/10.1093/iclqaj/38.2.321 Published online by Cambridge University Press

sular staff in Tehran, mainly in the premises of the United States embassy. In the judgment the Court stated:

> Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights [paragraph 91].

In respect of the plight of diplomatic and consular staff held hostage, the jurisdiction of the Court had been based on the Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations.[17] Its jurisdiction in respect of "two private individuals of United States nationality" was based on the Treaty of Amity, Economic Relations, and Consular Rights of 1955 between Iran and the United States.[18] The statement quoted above goes beyond both these instruments and was presumably made pursuant to the Court's finding that Iran had committed "successive and continuing breaches of the obligations laid upon it by . . . the applicable rules of general international law" (paragraph 90). This formulation is itself interesting. The United States, in its memorial, had invoked human rights in the framework of its argument relating to the applicability of the Treaty of Amity. Claiming a violation by Iran of the Treaty's obligation to provide "the most constant protection and security" and "humane and reasonable treatment" to United States nationals, the United States argued that one measure of that standard was represented by international human rights.[19] The Court, on the other hand, referred to principles of human rights in the context of a finding of breaches of general international law.

Neither the separate opinion of Judge Lachs[20] nor the dissenting opinion of Judge Tarazi[21] contested this aspect of the Court's decision. However, Judge Morozov in his dissenting opinion complained that the statement in effect "serves . . . to level at Iran *the unfounded allegation that it has violated the Charter of the United Nations and the Universal Declaration of Human Rights*".[22] In the context in which this opinion is found, the basis of Judge Morozov's objection is not clear. It may be that he doubted the jurisdiction of the Court on a matter (human rights) not covered by the Vienna Conventions and the Treaty of Amity which

17. Vienna Convention on Diplomatic Relations (1961), 500 U.N.T.S. 85; Vienna Convention on Consular Relations (1963), 596 U.N.T.S. 261.
18. Cited at para.77 of the Court's judgment.
19. [1981] *I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran*, 179–183.
20. [1980] I.C.J. Rep. 3, 47–50.
21. *Idem*, pp.58–65.
22. *Idem*, p.53.

https://doi.org/10.1093/iclqaj/38.2.321 Published online by Cambridge University Press

permitted the unilateral application to the Court[23] or that he felt that responsibility should not be attributed to Iran for the acts of the "militants" who seized control of the embassy and the personnel; or he may have considered that the evidence capable of demonstrating such violations was insufficient or, finally, that the behaviour in question did not amount to violations of the Charter or the Declaration. There appears to be no challenge, however, to the contention that general international law prohibits at least some acts against human beings that are incompatible with the principles of the UN Charter and those of the Universal Declaration of Human Rights.

Thus, the apparently unanimous view of the Court is that the Universal Declaration of Human Rights is a document of sufficient legal status to justify its invocation by the Court in the context of a State's obligations under general international law. This opinion would seem to imply much more than simply the respect which is accorded to a resolution (that is, a recommendation) of the General Assembly. The Court speaks of Iran's violating the "fundamental principles enunciated in the Universal Declaration of Human Rights". It is not clear whether the Court is here distinguishing between *fundamental* principles contained in the Declaration and *other* principles therein. If it is, then it seems to be singling out the prohibition against torture or cruel, inhuman or degrading treatment or punishment and right to liberty and security of the person for specific status. But this would be a strained and unduly narrow interpretation. A more natural interpretation is that the Court was simply stating that the Declaration as a whole propounds fundamental principles recognised by general international law.

E. Conclusions Drawn from the Earlier Cases

So far, the following seems to emerge from the case law (jurisprudence) of the Court:

(a) the human rights clauses of the UN Charter contain binding legal obligations (*Namibia*);
(b) the principles and rules of international law concerning the basic rights of the human person engender obligations *erga omnes* (*Barcelona Traction*);
(c) such obligations may be found in the UN Charter and the Universal Declaration of Human Rights (*Tehran Hostages*);

23. The Court's jurisdiction was based on Art.I common to the Optional Protocol to each Convention Concerning the Compulsory Settlement of Disputes (*supra* n.17) but the jurisdiction is stipulated to concern "disputes arising out of the interpretation or application of" the conventions. It may be that, in Judge Morozov's view, human rights issues were not addressed by the conventions and therefore did not fall within the scope of this provision.

https://doi.org/10.1093/iclqaj/38.2.321 Published online by Cambridge University Press

(d) wrongful deprivation of freedom involving physical constraint in conditions of hardship is an example of a breach of such obligations (*Tehran Hostages*);

(e) at least, the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment and the right to liberty and security of the person seem to be covered by this latter formulation. The better interpretation would be that the Universal Declaration of Human Rights states fundamental principles, violation of which involves violation of general international law.

II. THE *NICARAGUA* CASE

THE Court's most recent judgment in which it deals with human rights is *Military Activities in Nicaragua*. Its treatment of the issue has been severely criticised from a human rights perspective:[24] either, it is argued, the Court was saying that "there are no human rights obligations apart from treaty or other formal commitments",[25] or it was saying that "regardless of the source of human rights obligations, where there is a convention, the *protection* of those rights takes the *form* of those arrangements provided for in the convention".[26]

I do not think the judgment warrants such a pessimistic reaction. Indeed, I find its approach reasonable, predictable and very much in line with what it has said earlier. The case involved Nicaragua claiming that military activities by the United States, including the mining of Nicaragua's harbour and the support given to the opposition Contras, amounted to unlawful armed intervention against Nicaragua. The thrust of the judgment is that the right of self-defence, individual or collective, does not apply in this case as a legal defence to the accusation.[27]

The central element to be borne in mind is how the question arises at all, namely, the extent to which the United States could invoke Nicaragua's human rights record to justify its military activities. The burden of the Court's message is that the United States could not; and, in the process, it has confirmed the view of those of us who argue that the doctrine

24. F. Tesón, "Le Peuple, c'est moi! The World Court and Human Rights" (1987) 81 A.J.I.L. 173.

25. *Idem*, p.174.

26. *Idem*, p.176.

27. As far as human rights violations by the Contras are concerned (they fall more into the realm of humanitarian law than human rights), the Court finds the Contras' acts not attributable or imputable to the USA (although the USA was rebuked for encouraging violations of common Art.3 of the Geneva Conventions of 12 Aug. 1949 by its production of a CIA manual advocating certain strategies of terror).

https://doi.org/10.1093/iclqaj/38.2.321 Published online by Cambridge University Press

of unilateral armed humanitarian intervention has no justification at law.[28]

The point here is that if one reads what the Court says about human rights in the light of its central argument (i.e. that they cannot be invoked to justify armed intervention), one finds that the Court tends to confirm its recognition that human rights principles *are* part of general international law.

First of all, the Court deals with an alleged commitment to the Organisation of American States by Nicaragua to adopt a system of representative democracy, including holding free elections, respecting human rights and so on. The Court took the view that Nicaragua's social and political system was an internal matter (paragraph 258). Of course, it would be possible to make a binding international commitment to establish such a system (paragraph 259), but on the facts Nicaragua had not done so (paragraph 261): it had made a political pledge, not a legal one. Thus, its internal system was a matter of its own domestic jurisdiction (paragraph 263).

Despite this finding, the Court makes a crucial observation. Referring to the specific accusation that Nicaragua had violated human rights, it says:

> This particular point requires to be studied independently of the question of the existence of a "legal commitment" by Nicaragua towards the Organisation of American States to respect these rights; the absence of such a commitment would not mean that Nicaragua could with impunity violate human rights [paragraph 267].

This obviously means that human rights represent a legal obligation flowing from a source other than the specific commitment that had been under discussion. Such a source would include custom or treaty. Unfortunately, the Court makes no direct reference to custom. In the passage directly following the words denying impunity to human rights violations, the Court continues:

> However, where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves. The political pledge by Nicaragua was made in the context of the Organisation of American States, the organs of which were consequently entitled to monitor its observance . . . [T]he Nicaraguan Government has since 1979 ratified a number of international instruments on human rights, and one of these was the American Convention on Human

28. Protagonists of both sides of the argument may be found in R. B. Lillich (Ed.), *Humanitarian Intervention and the United Nations* (1973). My own views, coinciding with those of the Court, are developed in T. Franck and N. Rodley, "The Law, the United Nations and Bangladesh" (1972) 2 Is. Y.B. Human Rights 142, and T. Franck and N.

https://doi.org/10.1093/iclqaj/38.2.321 Published online by Cambridge University Press

> Rights (the Pact of San José, Costa Rica). The mechanisms provided for therein have functioned. The Inter-American Commission on Human Rights in fact took action and compiled two reports (OEA/Ser. L/V/11.53 and 62) following visits by the Commission to Nicaragua at the Government's invitation. Consequently, the Organisation was in a position, if it so wished, to take a decision on the basis of these reports [paragraph 267].

This is the passage that gives rise to the apprehension of the commentator I quoted earlier. Indeed, taken out of context, it could be understood as seeming to confine human rights to the realm of treaty law or at least to confine their protection to that realm where States are parties to human rights treaties.

But, read in context, it may be understood as addressing something else. The Court may be paraphrased as saying:

> Nicaragua allegedly pledged itself to the Organisation of American States legally to respect human rights together with other values. In fact the pledge should be seen as political rather than legal, but this is no obstacle to the Organisation acting: this is because Nicaragua is party to a number of human rights treaties including the Pact of San José. As such it is subject to implementation measures that do not constrain other States. These measures had yielded results (in the form of two reports) that would have permitted the Organisation to act, if they had found serious human rights violations and wished to act on the basis of them. So the United States has nothing to complain about in terms of the opportunities for the Organisation to deal with the human rights situation in Nicaragua.

While it might have been helpful—if only to avoid any misunderstanding—for the Court to reaffirm *expressis verbis* the obligation under general international law to respect fundamental human rights, it seems to me that it implicitly has reaffirmed the obligation. The issue before the Court was not the obligation but its *implementation*. The Court could pronounce on the allegations of violations of the obligation only if they were properly before the Court: they were not. The limited questioned was whether they justified the United States military activities: they did not. Perhaps, if the United States had participated in the proceedings and itself brought a counterclaim against Nicaragua in respect of Nicaragua's human rights performance (if that could have survived the "Connally amendment"), the Court would have had squarely to

Rodley, "After Bangladesh: The Law of Humanitarian Intervention by Military Force" (1973) 67 A.J.I.L. 275. A recent study of the issue adopts the same approach: N. Ronzitti, *Rescuing Nationals Abroad and Intervention on Grounds of Humanity* (1985), Chap.4.

https://doi.org/10.1093/iclqaj/38.2.321 Published online by Cambridge University Press

confront the issue.[29] It would indeed be unfortunate if in the future the Court were to say that it would not exercise jurisdiction on a human rights dispute under Article 36 of its Statute in respect of a State that happened to be party to an international human rights treaty with its own implementation mechanism. The effect of that would be for the treaties then to be a shield against authoritative scrutiny that other States could not invoke. I do not believe that this is the Court's line. Rather the Court seems merely to be pointing out the obvious: that international treaties do have implementation machinery of various sorts; this machinery provides, at least, the primary means of securing State compliance with the treaties' provisions; moreover, some international organisations also have available procedures for dealing with human rights disputes whether or not the States in question are parties to the treaties.[30] All these are noted as a means of asserting that the international community is not without some tools to seek to induce compliance with international legal obligations to respect human rights. This is the context which is invoked to mitigate the rigour of the clear prohibition of humanitarian intervention.

It must be acknowledged, however, that this is not the first time the Court has used notably cautious language when dealing with the *protection* of agreed human rights. In *Barcelona Traction*, the Court had referred to regional mechanisms, such as those of the European Convention on Human Rights, for a solution to the problem of enforceability of human rights standards regardless of nationality, noting the

29. The USA boycotted the proceedings (as Iran had done in *Tehran Hostages*), taking the view that the Court had erred in declaring that it had jurisdiction at all. While the Court was at pains to raise *arguendo* defences that the USA might have raised, the analysis may be thought to suffer from the element of artificiality of the exercise.

The "Connally amendment" is the term used to describe the "self-judging" clause of the US acceptance of the compulsory jurisdiction of the Court under Art.36 of its Statute. According to this clause, the declaration does not apply to "disputes with regard to matters which are essentially within the domestic jurisdiction of the [USA] as determined by the [USA]". Since such restrictions may be invoked on a reciprocal basis, Nicaragua could, had it been the target of a US complaint as to its human rights performance, have argued that this touched on matters essentially within the domestic jurisdiction of Nicaragua as determined by it and was thus removable from the Court's scrutiny. In reaction to the Court's handling of the case, the USA withdrew its acceptance of the Court's compulsory jurisdiction.

30. For example, the jurisdiction of the Inter-American Commission on Human Rights itself, a body which existed before the coming into force of the American Convention on Human Rights (Pact of San José), continues to extend to Organisation of American States members not parties to the Convention. In respect of these countries, it applies the American Declaration of the Rights and Duties of Man rather than the Convention. Examples of UN procedures applicable to all UN members, regardless of treaty participation, are those recently established by the Commission on Human Rights, that is, the Working Group on Enforced or Involuntary Disappearances, the Special Rapporteur on summary or arbitrary executions and the Special Rapporteur on torture: see N. Rodley, "United Nations Action Procedures Against 'Disappearances', Summary or Arbitrary Executions, and Torture' (1986) 8 Human Rights Q. 700.

https://doi.org/10.1093/iclqaj/38.2.321 Published online by Cambridge University Press

inter-State complaint procedure under that convention. For, "on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights, irrespective of their nationality" (paragraph 91). It should be remembered that the Court was speaking before the coming into force of the International Covenant on Civil and Political Rights, which does have an (optional) system of reviewing inter-State and even individual complaints of violations of the Covenant.[31] Accordingly, it was describing the then conventional reality. The Court in *Barcelona Traction* did consider that "human rights . . . include protection against denial of justice" (paragraph 91). If this means that denial of justice is an infringement of human rights as recognised by general international law, and in so far as a denial of justice was central to Belgium's claim, it is difficult to follow the logic of the Court's holding that the claim raised only an issue of bilateral obligations and not one of obligations *erga omnes*. For it had said in paragraph 35, quoted earlier, that "the principles and rules concerning the basic rights of the human person" give rise to obligations *erga omnes*. Probably the Court should be understood as intending to distinguish between the notion of denial of justice—at least in so far as it may cover economic rights—and that of the basic rights of the human person.[32] If so, doubt is left as to whether the socio-economic rights found in the Universal Declaration have the same legal status as (some of) the civil and political rights.

It is also true that the Court in *Nicaragua* elided the sensitive area of enquiry as to the point at which systems of government may inherently violate internationally agreed human rights standards. Some would argue, for example, that a Marxist–Leninist system of government (in so far as the Sandinista government of Nicaragua can be so described) cannot fully respect the free exercise of political rights. In fact there is not yet an authoritative enunciation of the concept of political rights. That the Court avoided an analysis of this issue evidences, I suggest, normal judicial prudence, especially in view of the fact that the central point would remain that the outcome of the enquiry would still have been that the United States was not entitled unilaterally to use armed force to change the situation.

31. According to Art.41 of the Covenant, States parties may make declarations whereby they accept that the Human Rights Committee, established by the Covenant, has the competence to receive complaints of their infringement of the provisions of the Covenant submitted by other States parties having accepted the same burden. Under the Optional Protocol to the Covenant, States parties to it accept the competence of the Committee to receive complaints of such infringements by individuals claiming to be victims of such infringements.

32. The point is developed in my "The Nationalization by Peru of the Holdings of the International Petroleum Company", in N. Rodley and C. N. Ronning (Eds.), *International Law in the Western Hemisphere* (1974), p.112, 121–123.

https://doi.org/10.1093/iclqaj/38.2.321 Published online by Cambridge University Press

On this issue, the Court could not have been clearer:

> In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equiping of the Contras. The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States [paragraph 268].

This language unmistakably places the Court in the camp of those who claim that the doctrine of humanitarian intervention is without validity. Under that doctrine a State could rely on an alleged exception to the principle prohibiting unilateral resort to armed force by one State against another, where the purpose of its intervention was to protect persons (other than its own citizens) from serious and widespread violations of their human rights. It has been a doctrine defended in recent years by commentators, rather than by States. The States that might have been expected to invoke it (India, in respect of Bangladesh; Vietnam, in respect of Kampuchea; Tanzania, in respect of Uganda; and the United States itself, in respect of Grenada) have been notably hesitant to do so, at least in their formal legal justifications for their actions.[33]

The Court's confirmation of the inapplicability of the doctrine should not be seen as a setback for human rights. There is nothing in its history to suggest that it was ever more than a rare and arbitrary alleviation of the hapless plight of those who happened to be suffering in a small country where the political interests of a militarily more powerful country conduced to the intervention. The ruling is more a clarification aimed at preventing breaches of international peace and security.

III. CONCLUSION

THE need for increasingly effective measures, within the framework of competent inter-governmental organisations, to protect against grave and systematic human rights violations remains and is indeed underlined by the *Nicaragua* judgment. In recent years there has been an impressive development in the array of inter-governmental machinery available to investigate alleged human rights violations and even intercede on behalf of victims. However, criminal violations of human rights, such

33. Ronzitti, *op. cit. supra* n.28, at pp.92–93 and 108, develops the point in respect of Bangladesh, Uganda and Kampuchea. For the US legal justification of its action in Grenada, see (1984) 78 A.J.I.L. 203–204. Three grounds are cited: 1. a request from the Governor-General of Grenada; 2. regional collective self-defence; and 3. protection of US citizens in Grenada.

https://doi.org/10.1093/iclqaj/38.2.321 Published online by Cambridge University Press

as torture, murder and prolonged or permanent abduction (the so-called "disappearance"), continue to be widely reported.[34] If the ban on unilateral humanitarian intervention is to be politically credible, it should be accompanied by more determined inter-governmental action, not necessarily excluding coercive measures, to eliminate such practices.

Under the Court's jurisprudence, accordingly, it appears, first, that fundamental human rights must under general international law be respected; second, that it remains to be confirmed whether *all* the guaranteed rights under the Universal Declaration of Human Rights fall under that law (I suggest that they do, but that the content of some—socio-economic rights, political rights—is not ripe for judicial determination at the universal level); third, that implementation mechanisms established by treaty are a useful means of promoting respect for human rights; fourth, that while they are probably not the only means, the Court's language has left room for some doubt which could be helpfully dispelled at the earliest opportunity; and, finally, that individual States may not use armed force to intervene against other States on the ground of the latter's human rights record or socio-political system.

While human rights lawyers can be well satisfied with this record there is still substantial room for improvement in the field of inter-governmental action to constrain the more grievous practices of human rights violation.

34. See e.g. the annual *Amnesty International Report* and those of the UN Commission on Human Rights procedures referred to *supra* n.30.

https://doi.org/10.1093/iclqaj/38.2.321 Published online by Cambridge University Press

Oxford Public International Law

Part I Introductory Chapters, 5 Legal Form of the Paris Agreement and Nature of Its Obligations

Ralph Bodle, Sebastian Oberthür

From: The Paris Agreement on Climate Change: Analysis and Commentary
Edited By: Daniel Klein, María Pía Carazo, Meinhard Doelle, Jane Bulmer, Andrew Higham

Content type: Book content
Product: Oxford Scholarly Authorities on International Law [OSAIL]
Published in print: 20 July 2017
ISBN: 9780198789338

Subject(s):

Climate change — Environmental disputes — Treaties, binding force — Treaties, interpretation — General principles of international law

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 04 February 2024

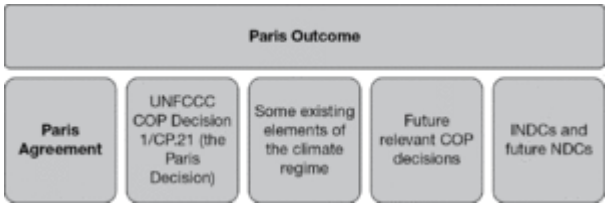
(p. 91) 5 Legal Form of the Paris Agreement and Nature of Its Obligations

The question of the 'legal form' and 'legal nature' of the Paris Outcome and its particular obligations was one of the core issues in the negotiations leading up to the Paris Agreement.[1] The terms 'legal form', 'legal nature', and 'bindingness' tend to obscure what is not a single issue but several. While these issues are inter-related, it is useful to distinguish the following main aspects: (1) whether and to what extent the Paris Outcome includes a binding instrument of international law, ie an international treaty; (2) the placement, or 'housing', of any actions and targets, especially those regarding the mitigation of greenhouse gas (GHG) emissions; (3) how the Agreement's sections and individual provisions are legally linked; (4) the prescriptiveness and precision of the wording of specific commitments and provisions;[2] (5) the nature of the obligation or commitment,[3] eg whether a given obligation is one of result or conduct; and (6) the provisions and mechanisms to ensure accountability and promote effective implementation.[4] These aspects will be addressed in the sections below.

In this chapter we first analyse the legal structure of the overall Paris Outcome in terms of the legal status of the different texts, how they are linked, and how they together form the new climate regime (section 5.A). We also look at the structure of the Paris Agreement's content, ie how its individual provisions work together (section 5.B). This is followed by a bird's eye view of the legal nature of individual sections and provisions (section 5.C) and conclusions (section 5.D).

A. Legal Structure of the Overall Paris Outcome: Several Documents and Elements

The legal regime created in Paris comprises and anticipates several elements with different legal status: (a) the Paris Agreement, (b) UNFCCC COP Decision 1/CP.21 (the (p. 92) Paris Decision), (c) some existing elements of the climate regime, (d) future 'relevant' decisions of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA), (e) intended nationally determined contributions (INDCs) and future nationally determined contributions (NDCs) (see Figure 5.1).



View full-sized figure

Figure 5.1 Structure of the Paris Outcome

The *Paris Agreement* is a treaty under international law.[5] This is not a merely academic issue. Besides the political implications, in many countries it determines the internal procedures for ratification, eg whether the Agreement has to be approved by Parliament. In addition, at least in theory, parties could incur legal consequences for breaches of legal obligations. That it is a treaty is clear from several formal indicators, notably that the Paris Agreement provides for its 'entry into force' and that it is subject to ratification, acceptance, accession, or approval under the usual procedure for treaties.[6] While the Paris Decision that adopts the Paris Agreement leaves open the question of whether the Paris Agreement is a 'protocol' under Article 17 of the UNFCCC, the potential legal consequences either way are negligible. According to Article 21.1 of the Paris Agreement, it enters into force once at least fifty-five Parties to the Convention accounting for at least an estimated

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 04 February 2024

55% of global emissions ratify. It is noteworthy that Article 27 excludes any reservations. States are not allowed to exclude certain provisions and the Paris Agreement has to be ratified as a whole and 'as is'. Therefore, formally speaking, the whole Paris Agreement is binding for its parties under international law after its entry into force on 4 November 2016.[7]

The Paris Agreement was adopted 'under' the UNFCCC by Decision 1/CP.21 as contained in an annex to that decision. The Paris Decision specifies further details, a work programme with mandates for elaborating modalities, procedures, and guidelines, as well as political processes. Decision 1/CP.21 also establishes institutions such as the Paris Committee on Capacity-building[8] and a new interim body, the Ad Hoc (p. 93) Working Group on the Paris Agreement (APA), to carry out many of these tasks for approval by the CMA.[9]

The Paris Agreement also makes the content of certain *existing and future decisions* binding in international law. By default, COP decisions are not binding as such[10] but can be if the treaty so provides or implies (the latter is a matter of interpretation). For example, in paragraphs 8 and 9, Article 4 establishes a legal obligation for parties to 'communicate' NDCs and provide certain information 'in accordance with Decision 1/CP.21 and any relevant decisions' of the CMA. Similarly, parties are to follow guidance on reporting and review contained in Decision 1/CP.21 and future relevant decisions of the CMA.[11] The Paris Agreement also provides that the rules of procedure of the COP 'shall be applied *mutatis mutandis*' to the CMA unless the CMA decides otherwise.[12]

The so-called *nationally determined contributions* (NDCs) are basically individual parties' climate action plans. In the negotiations leading to COP 21, the issue of whether the mitigation targets and actions to be pursued by the parties would be formally part of the treaty had a strong political and symbolic dimension. Although legally the treaty could make elements that are not formally part of it binding, for some parties politically it was preferable to keep them outside.[13]

In the Paris Agreement, NDCs are not formally part of the treaty, although it refers to them. NDCs are recorded in a 'public registry maintained by the Secretariat'.[14] Their legal nature is analysed below.[15] The INDCs that were submitted by more than 180 countries prior to the Paris conference will constitute the first NDCs, unless the party concerned decides otherwise.[16]

Since parties' individual climate plans and actions are at the heart of the international effort to tackle climate change, housing NDCs outside the treaty text raises questions regarding the clarity, predictability, and stability of the international climate regime and international law. First, it might be difficult to ascertain the content of NDCs. In this regard, the Paris Agreement does provide that the registry is 'public' and Decision 1/CP.21 mandates the elaboration of modalities and procedures, as well as of information to be submitted along with the NDCs.[17] (p. 94) Secondly, in the absence of specific rules, any external placement raises the question of how the content of what is housed 'outside' the treaty could be changed, given that the rules for amending the treaty and its annexes do not apply.[18] Regarding the NDCs, the Paris Agreement provides specific rules: each party is free to unilaterally adjust its NDC at any time, subject to a number of more or less strict conditions: adjustments should enhance the level of ambition; and developed countries are expected to maintain economy-wide absolute emission-reduction targets, while developing countries are expected to move towards economy-wide targets over time. The CMA has the task of developing further guidance on this matter.[19]

The Paris Agreement does not replace but instead complements the UNFCCC. It refers to and *incorporates existing elements of the climate regime* through different legal techniques.[20] For instance, it provides that the new transparency system shall 'build on and enhance' the existing Convention system, which has to 'form part of the experience drawn upon' for the modalities of the new system.[21] The Paris Decision further specifies that the

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 04 February 2024

transparency rules developed under the Paris Agreement shall eventually supersede the system of biennial reporting that was established at COP 16 in Cancún.[22] Several institutions established under the UNFCCC are enshrined in the Paris Agreement text,[23] such as the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts,[24] the Financial Mechanism of the Convention including its operating entities,[25] and the Technology Mechanism.[26] Others are instructed to serve the Paris Agreement by the Paris Decision.[27] Another example is the Adaptation Fund (AF), which works under the authority of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP). The Paris Decision 'recognizes' that the AF 'may serve' the Paris Agreement in the future if both the CMA and the CMP so decide.[28] UNFCCC bodies and institutional arrangements that are not specifically referred to in the Paris Agreement can be made to serve the Paris Agreement by a CMA decision.[29]

(p. 95) B. Legal Structure of the Paris Agreement's Content: How Do the Provisions Work Together?

At its core, the Paris Agreement's content is structured around its overarching purpose. It stipulates a general obligation on parties to make efforts towards this purpose and elaborates this general obligation in specific thematic provisions (see Figure 5.2).

Article 2 defines the general purpose of the Paris Agreement, including three non-exclusive elements in its paragraph 1. The purpose includes holding temperature increase to 'well below' 2°C above pre-industrial levels, while also pursuing efforts to stay below 1.5°C, increasing the ability to adapt, and the transformation of (all) finance flows towards low GHG emissions and climate-resilient development.[30]

Article 3 imposes an obligation[31] on all parties to undertake efforts towards that purpose. It refers to the specific efforts as defined in the subsequent Articles 4, 7, 9, 10, 11, and 13, which cover the UNFCCC's traditional thematic areas of mitigation, adaptation, finance, technology, capacity-building, and reporting, review, and accounting ('transparency').[32] Each of these articles defines a thematic objective and what parties (p. 96) are to do to achieve it, although they differ in terms of precision and prescriptiveness (see section 5.C below). Whereas Article 2 defines the purpose of the Paris Agreement, Article 3 is a hinge and engine because it links that purpose with specific obligations in other articles and requires ambitious and progressive efforts of parties over time.

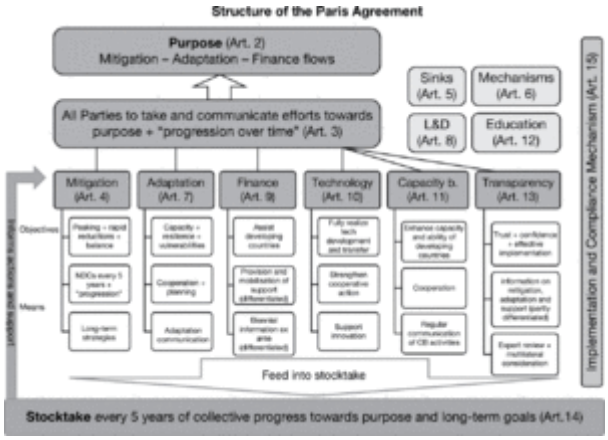
It should be noted that the reference in Article 3 to the purpose of the Agreement 'as set out in Article 2' is open to interpretation. It could mean that the 'purpose' only includes Article 2.1, but not Article 2.2. This could avoid potential difficulties of including the 'will' provision on implementation in Article 2.2 in the purpose and thus in the global stocktake. However, the most straightforward and politically reasonable interpretation is that the reference includes the entire Article 2, because it includes in a nutshell the central compromise on differentiation in Article 2.2.

Further, the wording of Article 3 uses the factual and ambiguous 'will' for the concept of progression, instead of an unequivocal 'shall'.[33] The provisions on sinks in Article 5, cooperative mechanisms in Article 6, loss and damage in Article 8, and education and awareness in Article 12[34] are not listed in Article 3. They are therefore not included in the general obligation regarding efforts towards the Paris Agreement's purpose and progression over time.

These efforts to be undertaken by parties are embedded in a structure that is designed to make parties raise their ambition over time: there is a procedural obligation to define and communicate individual efforts in the form of NDCs every five years. Also, every five years a global stocktake assesses the collective progress of parties towards the purpose and long-term goals of the Paris Agreement.[35] Since Article 3 defines the whole of Article 2 as the purpose, the assessment has to include progress towards all elements of Article 2.[36] The

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 04 February 2024

outcome of the stocktake ‘shall inform’ the subsequent efforts of parties. Ideally, parties then define and implement more ambitious efforts until the next stocktake, and so on.[37] For virtually all of these core obligations, the Paris Agreement and the Paris Decision contain mandates for elaborating details on how to implement them. These core obligations are accompanied by institutional provisions and the establishment of an implementation and compliance mechanism.[38]



View full-sized figure

Figure 5.2 Structure of the Paris Agreement

Source: Bodle/Donat/Duwe (2016) (modified)

Probably the most difficult political issue in the negotiations leading up to Paris was how to address differentiation between developed and developing countries. Since the adoption of the UNFCCC in 1992, the obligations under the international climate regime have been based on the principle of ‘common but differentiated responsibilities and respective capabilities’.[39] The main obligations under the UNFCCC differentiate between countries listed in Annex I to the UNFCCC, which are considered to be ‘developed countries’, and all other countries (‘non-Annex I countries’), considered to (p. 97) be ‘developing countries’.[40] The Paris Agreement breaks new ground in addressing the developed/developing country divide by:

(i) Establishing core obligations for *all* parties: the Paris Agreement explicitly states that ‘all’ parties ‘are to’ undertake actions towards its purpose, on mitigation, adaptation, means of implementation and transparency. The Paris Agreement does not refer to the annexes of the UNFCCC. However, it should be noted that many provisions in the Paris Agreement still distinguish between ‘developing countries’ and ‘developed countries’, although without defining these categories. This had increasingly become practice since COP 15 in Copenhagen. [41]

(ii) Supplementing the principle of common but differentiated responsibilities with the addition ‘in the light of different national circumstances’: this addition could increase the range of factors that may serve as a basis for determining differentiation. [42]

(iii) Addressing differentiation in a variety of ways: each individual article takes a slightly different approach to differentiation: the core obligations on mitigation, such as submission of NDCs, and on transparency apply to all parties in principle, with differentiation and flexibility to be added rather than intrinsic. [43] The Paris Agreement also recognizes the special circumstances of least developed countries (LDCs) and small island developing states (SIDS) in the context of NDCs, financial support, capacity-building and transparency. [44]

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 04 February 2024

C. Legal Nature of Individual Sections and Provisions: A Bird's Eye View

It is important to distinguish between the legal form and structure of the Paris Agreement as a whole and the specific content of its individual provisions and elements. While formally speaking the whole of the Paris Agreement is binding on its parties under international law, whether and to what extent its individual provisions establish legal rights and obligations, ie determine what a party is entitled to do or must do, depends on their wording. For instance, legal provisions may be worded more or less precisely or prescriptively for reasons of legal craftsmanship or underlying politics.[45]

(p. 98) In treaty language the most prescriptive term is usually 'shall'. Throughout the Paris Agreement, many of the provisions that use 'shall' are procedural in content,[46] eg by establishing duties to communicate or report. Other uses of 'shall' mandate institutions or processes under the Paris Agreement,[47] or create entitlements, especially for developing countries.[48] In addition, the Paris Agreement also uses the ambiguous term 'will' instead of an unequivocal 'shall'.[49] Grammatically speaking, 'will' is factual language referring to the future. It is not the usual language to express an obligation, although it has been used in COP decisions before. There is also one instance of using the wording 'are to' to indicate a duty.[50]

Besides these few prescriptive elements, the Paris Agreement also employs factual, programmatic, declaratory, or legally 'soft' language that nudges but does not prescribe. The term 'should' appears several times.[51] It is less prescriptive than 'shall' as it is not absolute, but it is stronger than eg the merely permissive 'may'. A 'should' obligation creates an expectation that the provision is to be complied with, and that a party has to have reasons in case it does not. However, it would be difficult to show that a party is in breach if it does not do what it 'should', in particular if it puts forward reasons for its acts or omissions.

Additionally, in many places the language used would be expected in a preamble rather than operational treaty text, such as parties 'reaffirming', 'recognizing' or 'acknowledging' something, eg 'the importance of …'.[52] In several areas the Paris Agreement has virtually no precise and prescriptive obligations on individual parties.

The Paris Agreement's preamble, ie the text before the articles in the operative part, is by its placing and wording not binding as it does not contain specific obligations for parties to implement. But it can guide interpretation and contains some important and sometimes innovative issues.[53]

The overarching provisions in Article 2 and in Article 3 differ slightly as regards their legal nature. Article 2 is legally non-prescriptive in setting the temperature goal,[54] enshrining adaptation in its own right and for the first time addressing the general transformation of finance flows. The same applies to the modernization of differentiation in its paragraph 2 ('will'). Article 3, which links the specific efforts under the Paris Agreement to the overall purpose, appears to be prescriptive, but a close look at the wording shows softeners and ambiguities: the wording that parties 'are to' undertake and communicate ambitious efforts is rather unusual treaty language, which can either be understood as prescriptive or as expressing futurity or (p. 99) arrangement in advance.[55] Parties are required to make these efforts under the specific Articles 'with the [sic] view to achieving the purpose'[56] of the Paris Agreement, ie with the aim, or intention.[57] The requirement to make ambitious efforts could mean that Article 3 specifies the standard for *how* parties have to fulfil the specific obligations that Article 3 refers to. Alternatively, Article 3 could be a self-standing obligation *next to* the other, specific obligations. Either way, Article 3 requires conduct and not result.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 04 February 2024

Another softener on prescriptiveness is the use of 'will' to express the principle of progression in the second sentence of Article 3.

In the subsequent articles of the Paris Agreement the provisions that clearly establish prescriptive and precise obligations for individual parties relate to the preparation, communication, maintenance, and implementation of NDCs,[58] as well as transparency and accounting.[59] The formulae agreed to in these cases tend towards 'obligations of conduct', which are qualified in a number of ways.[60]

On mitigation, there is a prescriptive and generally precise obligation on each party to 'prepare, communicate and maintain' successive NDCs.[61] However, it does not specify the content or quality that an NDC should have. Furthermore, parties 'shall pursue domestic mitigation measures, with the aim of achieving' their NDCs' objectives. While this carefully drafted wording does not establish a clear 'obligation of result' to implement, let alone to achieve the NDCs, it combines domestic conduct ('prepare', 'pursue domestic mitigation measures') with international conduct ('communicate and maintain'), and it establishes a standard for assessing domestic measures to implement the NDCs: the measures must be pursued 'with the aim of achieving' the NDCs' objectives.[62] Again, the principle of progression is expressed by the factual 'will'.[63]

The provisions on finance show a similar pattern but with important differences. First, the finance provisions in Article 9 are generally more strongly bifurcated than (p. 100) the other sections,[64] in terms of prescriptiveness and transparency: although the Paris Agreement does not determine the countries with financial obligations by referring to a list as in UNFCCC Annex II (containing the member states of the Organisation for Economic Co-operation and Development (OECD) in 1992 and the European Union (EU)), the obligations on finance explicitly refer to developed country parties.[65] Other parties are merely encouraged in non-prescriptive terms, or, as in the case of mobilizing climate finance, are implicitly included in the formulation 'global effort'. The second special aspect is that there are several provisions outside of Article 9 that stipulate the recipients of support but not who has to provide it. Provisions such as 'support shall be provided to developing country parties', are clearly prescriptive but define collective entitlement instead of individual or collective obligations to provide or mobilize.[66] The third aspect is that the financial provisions in Article 9 are linked, by Article 3, to the overarching purpose in Article 2.1(c) to transform finance flows.

Apart from these particular aspects, developed countries' finance obligations are also focused on international and domestic conduct, with accompanying 'soft' indications towards a result:[67] the strict obligation to provide financial resources is not quantified and in continuation of existing obligations under the Convention;[68] the obligation to include 'projected levels of public financial resources to be provided' in the biennial *ex ante* information[69] is qualified by the addition of 'as available'; and the requirement of a 'progression beyond previous efforts' in the mobilization of climate finance is worded as a 'should'.[70]

The global stocktake in Article 14 is a mandatory collective exercise with a double legal link back to parties' subsequent individual NDCs. The link is prescriptive, but the content of the obligation leaves broad room for interpretation, as it provides that the global stocktake 'shall inform' parties.[71] The general idea is clear, but how the stocktake is going to work is left open to be negotiated by parties.[72]

In addition, the global stocktake refers to the Paris Agreement's 'long-term goals' in the plural, but the Paris Agreement is not entirely clear on what qualifies as long-term goals in this respect. One long-term goal is defined in Article 4.1, which explicitly refers to 'the long-term temperature goal set out in Article 2'. Therefore, that goal in Article 2.1(a) is both part of the Paris Agreement's 'purpose' (according to Article 3) as well as one of its 'long-term goals' (according to Article 4.1).[73] In terms of terminology this could be confusing because

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 04 February 2024

Article 14.1 appears to suggest a distinction between (p. 101) the *purpose* of the Paris Agreement and its *long-term goals*. In addition, it is not quite clear which other long-term goals the plural in Article 14.1 refers to. Article 7.1 establishes the 'global goal on adaptation', but this is already included in the global stocktake by virtue of Article 7.14(d).

The provisions on transparency and accountability have a double function as obligations in their own right, as well as adding teeth to the prescriptiveness of the overall regime. They are mainly procedural and quite prescriptive in terms of general principles and reporting and communication obligations. The Paris Agreement's transparency obligations can be regarded as hybrids, formally framed as international conduct ('provision' of information) which includes a result (a report) and is based on domestic conduct (collection of information) subject to modalities, procedures, and guidelines (to be adopted by the CMA).[74]

The mechanism to facilitate implementation and to promote compliance established under Article 15 similarly has the potential to strengthen the Agreement's legal force. Article 15.2 clarifies that the mechanism consists of a committee, and the accompanying Paris Decision determines its size and composition. Further modalities and procedures are currently being developed for consideration and adoption by the CMA in 2018.[75]

On adaptation, the definition of a general adaptation goal is followed by several provisions in which parties merely 'recognize' or 'acknowledge' something.[76] Prescriptive wording is either imprecise or softened by qualifiers: Article 7.3, which provides that 'adaptation efforts shall be recognized', is highly prescriptive but also highly imprecise, as it leaves open what this recognition means or entails. The provisions on cooperation and adaptation communications use 'should',[77] while Article 7.9 on adaptation planning and actions softens the highly prescriptive 'shall' by the qualifier 'as appropriate'. The few prescriptive and precise provisions are procedural[78] or financial.[79]

The picture is similar for technology and capacity-building: apart from one prescriptive but vague provision to strengthen cooperative action on technology development and transfer,[80] there is no specific obligation on individual parties. Instead, the provisions in Article 10 are procedural,[81] institutional,[82] or financial.[83] On capacity-building, Article 11 contains general principles and 'should' obligations to cooperate, for developed countries to enhance support, and for developing countries to communicate on progress.[84] Again, the prescriptive and precise provisions are procedural and institutional.[85]

(p. 102) The provisions and thematic areas that are not linked to the overall purpose by Article 3 also follow this pattern. The provision on sinks in Article 5 is an obligation with discretion, general content, and qualified by 'as appropriate'.[86] Article 6 establishes three different types of international cooperation on mitigation and notably also on adaptation. It is peculiar because of the artfully *implied* permission given to parties, without explicitly saying so, to utilize international market mechanisms, subject to certain conditions which need to be elaborated in detail.[87] Loss and damage is included in the Paris Agreement as a distinct issue and article, but its only obligation on parties is at the low end of prescriptiveness and precision.[88] Similar to technology, the Paris Agreement anchors an existing institution in the legal text.[89] The Paris Decision avoids potential ambiguity by explicitly excluding liability and compensation from the scope of Article 8.[90] Finally, the only provision on education, public awareness, public participation, and public access to information is seemingly prescriptive, but vague in content and qualified by 'as appropriate'.[91]

The individual provisions of the Paris Agreement thus show a pattern of apparent precision and prescriptiveness, combined with ambiguity and softeners in the details. Few provisions clearly establish obligations for individual parties and score high on both prescriptiveness and precision. They relate to the preparation, communication, maintenance, and implementation of NDCs, as well as transparency and accounting. The content of these

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 04 February 2024

obligations tends towards ‘obligations of conduct’, which are qualified in a number of ways. The Paris Decision contains many mandates and work programmes for elaborating details and sharing ideas and practices.

D. Conclusions and Consequences for Implementation

It is important to distinguish between the legal form and structure of the Paris Agreement as a whole and the specific content of its individual provisions and elements. The Paris Agreement is an international treaty at the core of a regime that includes other elements with different legal status. It does not replace but instead complements the UNFCCC, and it incorporates existing elements of the climate regime.

At its core, the Paris Agreement’s architecture is based on defining its overarching purpose, then stipulating a general obligation on parties to make efforts towards this purpose, and elaborating this general obligation in specific thematic provisions. Article 3 serves as a legal hinge and the engine of the Paris Agreement, because it establishes a link between the Paris Agreement’s purpose in Article 2 and specific (p. 103) obligations in other articles and because it requires increasingly ambitious action over time.

The efforts are embedded in a legal structure that is designed to include developed as well as developing country parties and make them raise individual and collective ambition over time. The Paris Agreement modernizes differentiation and establishes core obligations for *all* parties, while at the same time addressing differentiation in varying ways for different provisions.

Few provisions of the Paris Agreement are prescriptive and create precise legal obligations, and these are primarily procedural and focused on ‘nationally determined contributions’ (on mitigation) and a core transparency framework, plus collective obligations regarding finance. The Paris Agreement uses a broad range of wordings and qualifiers, which give parties more or less flexibility or discretion regarding whether and how to implement its provisions.[92] The provisions tend towards ‘obligations of conduct’, which are qualified in a number of ways. The obligations relating to finance are generally more strongly bifurcated between developed and developing countries than the other sections.

The provisions on transparency and accountability have a double function as obligations in their own right, as well as adding teeth to the prescriptiveness of the overall regime. The latter is also applicable to the mechanism to facilitate implementation and promote compliance that has the potential to clarify and ‘harden’. the obligations of the Paris Agreement.

The approach taken by the Paris Agreement is an experiment that relies on the parties to determine at national level which efforts they intend to make, combined with the persuasive impact of the transparency framework, support in terms of finance, technology, and capacity-building, and the regular taking stock of progress.[93] Through this structure the Paris Agreement establishes a political narrative that is clearer than its less prescriptive and precise legal backbone. The political narrative aims to guide the implementation and future evolution of the Agreement, including raising ambition over time. The details to be agreed and developed in further guidelines, modalities, and procedures could be crucial for safeguarding ambition and making the political narrative effective.(p. 104)

Footnotes:

1 See Sebastian Oberthür and Ralph Bodle, ‘Legal Form and Nature of the Paris Outcome’ (2016) 6 Climate Law 40, 40–46.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 04 February 2024

[2] While prescriptiveness and precision may be considered separate criteria, they are *de facto* closely related.

[3] In this text we use the terms 'commitment' and 'obligation' interchangeably as establishing a legal duty. The term 'commitment' is less common in international law, but is widely used in the UNFCCC to this end, along with 'obligation'.

[4] See Oberthür and Bodle (n 1) 40–46.

[5] In accordance with art 2.1(a) of the Vienna Convention on the Law of Treaties (VCLT), '"treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'. The name chosen for a particular instrument does not necessarily indicate whether it is binding or not, VCLT (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 2.1(a). See also Daniel Bodansky, 'The Paris Climate Change Agreement: A New Hope?' (2016) 110 AJIL 288.

[6] In this chapter we use 'ratification' as a short term encompassing all these forms. See ch 21.

[7] See https://treaties.un.org (last accessed 10 February 2017).

[8] Decision 1/CP.21 para 71. See ch 16.

[9] Decision 1/CP.21 para 7.

[10] One of the reasons is the design of national constitutional rules regarding international obligations: if COP decisions were binding, many countries would require parliamentary approval, similar to ratification, before they would agree to be bound at the international level. For details see Oberthür and Bodle (n 1) 43–44.

[11] Paris Agreement art 13.11 and 13.12 (technical expert review); arts 9.7 and 13.13 (reporting on support). Another example is art 6.2 requiring that parties who use internationally transferred mitigation outcomes comply with guidance on accounting.

[12] Paris Agreement art 16.5. This incorporates rules that have never been formally adopted under the UNFCCC and have merely been applied provisionally at each session, without the contested—and still bracketed—rule on voting.

[13] See Oberthür and Bodle (n 1) 47.

[14] Paris Agreement art 4.12. See UNFCCC Secretariat, Message to Parties (9 March 2016) http://unfccc.int/files/focus/indc_portal/application/pdf/first_ndc.pdf (last accessed 10 February 2017).

[15] See section 5.C below.

[16] Decision 1/CP.21 paras 12 and 22.

[17] The Subsidiary Body for Implementation (SBI) is tasked with the registry, while the newly established Ad Hoc Working Group on the Paris Agreement is mandated to provide further guidance on features and information to be provided in the NDCs. See Paris Agreement art 4.8 and 4.10 as well as Decision 1/CP.21 paras 26–28. The interim registry is public at http://www4.unfccc.int/ndcregistry/Pages/Home.aspx> (last accessed 10 February 2017).

[18] See Paris Agreement art 23; see also VCLT (n 5) arts 39–41.

[19] Paris Agreement art 4.4 and 4.11.

[20] See also ch 2.A.4 and Fig 5.1.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 04 February 2024

[21] See Paris Agreement art 13.3 and 13.4.

[22] Paris Agreement art 13.3; Decision 1/CP.21 para 98. See ch 18.

[23] Including the COP (which is called for this purpose the 'Conference of the Parties serving as the meeting of the Parties to the Paris Agreement', CMA), the UNFCCC Secretariat, the Subsidiary Body for Scientific and Technological Advice (SBSTA), and the SBI. See ch 2.

[24] Established in 2013 by COP Decision 2/CP.19. See Decision 2/CP.19, Warsaw international mechanism for loss and damage associated with climate change impacts, FCCC/CP/2013/10/Add.1 (31 January 2014) para 1.

[25] Paris Agreement art 9.8.

[26] Paris Agreement art 10.3.

[27] The forum on the impact of the implementation of response measures, several funds, the Standing Committee on Finance; see Decision 1/CP.21 paras 33, 58, and 63.

[28] Decision 1/CP.21 para 59.

[29] Paris Agreement art 19.1. See ch 21.C.1.

[30] See ch 7.

[31] See section 5.C on whether the unusual wording 'Parties are to …' establishes an obligation.

[32] The new umbrella term 'transparency' includes reporting and review; there are different views as to whether this also includes accounting or whether it belongs to the thematic areas. In the Paris Agreement, accounting is placed in the thematic provisions on mitigation (art 4), cooperative approaches (art 6.2), and in finance (Decision 1/CP.21 para 57). See chs 9, 11, and 14.

[33] For details on the legal meaning of these and other terms used in the Paris Agreement see section 5.C and Oberthür and Bodle (n 1) in particular 49–50.

[34] See chs 10, 11, 13, and 17.

[35] Paris Agreement arts 14.1 and 4.9; Decision 1/CP.21 paras 99–101.

[36] See chs 8 and 9.

[37] See ch 19.

[38] Paris Agreement art 15.

[39] UNFCCC art 3.1.

[40] For financial obligations, the differentiation is between a list of countries contained in Annex II of the UNFCCC, a subset of those listed in Annex I, and everyone else, non-Annex II countries.

[41] See eg the Cancún Agreements (15 March 2011); see Bodansky (n 5) 298–300 and Lavanya Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics' (2016) 65 ICLQ 493, 493–514.

[42] See Meinhard Doelle, 'The Paris Agreement: Historic Breakthrough or High Stakes Experiment?' (2016) 6 Climate Law 1. See also ch 4.C and ch 8.A.

[43] For details see Ralph Bodle, Lena Donat, and Matthias Duwe, 'The Paris Agreement: Analysis, Assessment and Outlook' (2016) 10 Carbon & Climate Law Review 18; Bodansky (n 5) 300. See also chs 9 and 18.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 04 February 2024

[44] See Paris Agreement arts 4.6, 9.4, 11.1, and 13.3.

[45] Oberthür and Bodle (n 1) 49.

[46] See Paris Agreement art 4.2, 4.8, 4.9, 4.12; art 11.4; art 13.7, 13.9, 13.11, 13.12; and art 14.1.

[47] ibid eg arts 4.10, 6.4–6.6, 7.12, 7.14, 8.2, 8.5, 9.6, 9.8, 9.9, 10.3, 11.5, 13.2–13.4, 14, and 15.2–15.3; see also arts 16–26 and 28–29, including the final clauses.

[48] ibid eg 'support shall be provided' arts 4.5, 7.13, 10.6, 13.14, and 13.15.

[49] ibid art 2.2; art 3 (second sentence); art 4.1, 4.3, 4.5, and art 6.4. For details on the legal meaning of these and other terms used in the Paris Agreement see Oberthür and Bodle (n 1) 49–50.

[50] ibid art 3 and analysis below.

[51] ibid art 4.4, 4.14 and 4.19, art 5, art 7.5, 7.7 and 7.10, art 8.3, art 9.3 and 9.4.

[52] ibid eg art 5.2, art 7.4, 7.5, 7.6, art 8.1, art 10.1 and 10.2.

[53] cf art 31.2 VCLT (n 5); Bodle, Donat, and Duwe (n 43) 20. See also ch 6.

[54] See ch 7 and ch 9 on the references to 2°C and 1.5°C in art 2 as *one* temperature goal.

[55] cf the 'full definition of "be"' as a verbal auxiliary at www.merriam-webster.com/dictionary/be; www.oxforddictionaries.com/definition/english/be; and www.bbc.co.uk/worldservice/learningenglish/grammar/learnit/learnitv103.shtml (all last accessed 10 February 2017).

[56] Sic. The correct idiom would be 'with *a* view'. This appears to be a linguistic imprecision without legal implications. For more on art 3 see ch 8.

[57] As the starting point for interpretation in accordance with VCLT art 31.1, the ordinary meaning includes the mere 'hope' of achieving the purpose; cf Oxford Dictionaries online 'view' www.oxforddictionaries.com/definition/english/view (last accessed 10 February 2017). However, in a treaty text in general and in this place in particular it would seem meaningless to require the mere hope of parties.

[58] Paris Agreement art 4.2, 4.8, 4.9 and Decision 1/CP.21 para 25. Further precise prescriptive provisions relate to parties acting jointly, including in the context of a regional economic integration organization such as the EU; see art 4.16–4.18.

[59] ibid art 4.13, art 9.5, 9.7, art 11.4, art 13.7, 13.9, and 13.11; Decision 1/CP.21 paras 31, 32, and 90.

[60] Oberthür and Bodle (n 1) 53–54.

[61] Paris Agreement art 4.2.

[62] In combination with art 3, according to which parties are to undertake 'ambitious efforts' that 'will represent a progression over time', it has been argued that this is a 'due diligence' standard; see Christina Voigt, 'The Paris Agreement: What Is the Standard of Conduct for Parties?' (2016) 26 Questions of International Law 24. However, the due diligence standard does not necessarily constitute a universal standard in international law that applies by default to otherwise unspecified obligations of conduct. It could be problematic to impute a 'duty of care' into the relevant wording in the Paris Agreement, which falls short of expressions which usually indicate prescriptive and precise legal obligations: the factual 'will' and the 'are to' in arts 3 and 4.3.

[63] Paris Agreement art 4.3; on progression see ch 4.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 04 February 2024

[64] See ch 14.

[65] Paris Agreement art 9.1, 9.5, and 9.7.

[66] ibid art 4.5, art 7.13, art 10.5–10.6, art 13.14–13.15.

[67] Oberthür and Bodle (n 1) 54.

[68] Paris Agreement art 9.1. The existing quantified political commitment of mobilizing US$100 billion per year by 2020 is extended until 2025 in Decision 1/CP.21 para 53, using the factual 'will'. The same goes for the provision that prior to 2025 the CMA 'will' set a 'new collective quantified goal from a floor of USD 100 billion per year'.

[69] ibid art 9.5.

[70] ibid art 9.3. Note the difference in the factual wording 'will' for the progression requirements in arts 3 and 4.3.

[71] ibid art 14.3 and art 4.9. On the different models that were available for including a dynamic element into the Paris Agreement see Lena Donat and Ralph Bodle, 'A Dynamic Adjustment Mechanism for the 2015 Climate Agreement: Rationale and Options' (2014) 8 Carbon and Climate Law Review 13.

[72] Decision 1/CP.21 para 101. On the global stocktake see ch 19.

[73] See also Decision 1/CP.21 para 20.

[74] See Oberthür and Bodle (n 1) 53.

[75] Decision 1/CP.21 paras 102–103; Decision 1/CMA.1, Matters relating to the implementation of the Paris Agreement, FCCC/PA/CMA/2016/3/Add.1 (31 January 2017) paras 5 and 8; see also ch 20.

[76] Paris Agreement art 7.2, 7.4–7.6.

[77] ibid art 7.7, 7.10.

[78] ibid art 7.12 on the registry and art 7.14 on adaptation-specific requirements for the global stocktake.

[79] ibid art 7.13, which requires that the financial support provided for adaptation under other articles has to be 'continuous and enhanced'.

[80] ibid art 10.2.

[81] ibid art 10.6, second sentence.

[82] ibid art 10.3 anchors the Technology Mechanism established under the Convention in the Paris Agreement; art 10.4 establishes a technology framework; art 10.5, second sentence, tasks the Technology Mechanism.

[83] ibid art 10.5, second sentence; art 10.6, first sentence, includes technology-specific requirements for the global stocktake.

[84] ibid art 11.2–11.4.

[85] ibid art 11.4 and 11.5.

[86] ibid art 5.1.

[87] See ch 11; Oberthür and Bodle (n 1) 50–51.

[88] Paris Agreement art 8.3 provides that parties should enhance understanding, action, and support, as appropriate, on a cooperative and facilitative basis.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 04 February 2024

[89] The Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts, Paris Agreement art 8.2.

[90] Decision 1/CP.21 para 51, which qualifies as an interpretative agreement amongst parties under VCLT (n 5) art 31.2(a) or art 31.4. The exclusion is limited to the interpretation of art 8 of the Paris Agreement. The decision text could in theory be changed or superseded in future, but this is a matter of legal durability rather than ambiguity.

[91] Paris Agreement art 12 establishes a duty to 'cooperate in taking measures'.

[92] See eg Paris Agreement arts 7.3, 7.9, 7.11, 11.4, and 12. We suggest that calling this 'more' or 'less' binding is confusing terminology.

[93] See Bodle, Donat, and Duwe (n 43) 21.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 04 February 2024

The AMERICAN SCHOLAR

Genocide

Author(s): Raphael Lemkin

Source: *The American Scholar*, Spring 1946, Vol. 15, No. 2 (Spring 1946), pp. 227-230

Published by: The Phi Beta Kappa Society

Stable URL: https://www.jstor.org/stable/41204789

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at https://about.jstor.org/terms



The Phi Beta Kappa Society is collaborating with JSTOR to digitize, preserve and extend access to *The American Scholar*

This content downloaded from 122.150.168.62 on Mon, 18 Mar 2024 04:29:00 +00:00
All use subject to https://about.jstor.org/terms

Genocide

Raphael Lemkin

The last war has focused our attention on the phenomenon of the destruction of whole populations — of national, racial and religious groups — both biologically and culturally. The German practices, especially in the course of occupation, are too well known. Their general plan was to win the peace though the war be lost, and that goal could have been achieved through successfully changing the political and demographic interrelationships in Europe in favor of Germany. The population not destroyed was to be integrated in the German cultural, political and economic pattern. In this way a mass obliteration of nationhoods had been planned throughout occupied Europe. The Nazi leaders had stated very bluntly their intent to wipe out the Poles, the Russians; to destroy demographically and culturally the French element in Alsace-Lorraine, the Slavonians in Carniola and Carinthia. They almost achieved their goal in exterminating the Jews and Gypsies in Europe. Obviously, the German experience is the most striking and the most deliberate and thorough, but history has provided us with other examples of the destruction of entire nations, and ethnic and religious groups. There are, for example, the destruction of Carthage; that of religious groups in the wars of Islam and the Crusades; the massacres of the Albigenses and the Waldenses; and more recently, the massacre of the Armenians.

While society sought protection against individual crimes, or rather crimes directed against individuals, there has been no serious endeavor hitherto to prevent and punish the murder and destruction of millions. Apparently, there was not even an adequate name for such a phenomenon. Referring to the Nazi butchery in the present war, Winston Churchill said in his broadcast of August, 1941, "We are in the presence of a crime without a name."

II

Would mass murder be an adequate name for such a phenomenon? We think not, since it does not connote the motivation of the crime, especially when the motivation is based upon racial, national or religious considerations. An attempt to destroy a nation and obliterate its cultural personality was hitherto called denationalization. This term seems to be inadequate, since it does not connote biological destruction. On the other hand, this term is mostly used for conveying or for defining an act of deprivation of citizenship. Many authors, instead of using a generic term, use terms connoting only some functional aspect of the main generic notion of the destruction of nations and races. Thus, the terms "Germanization," "Italianization," "Magyarization" are used often to connote the imposition by a stronger nation (Germany, Italy, Hungary) of its national pattern upon the national group controlled by it. These terms are also inadequate since they do not convey biological destruction, and they cannot be used as a generic term. In the case of Germany, it would be ridiculous to speak about the Germanization of the Jews or Poles in western Poland, since the Germans wanted these groups eradicated entirely.

Hitler stated many times that Germaniza-

© RAPHAEL LEMKIN, eminent Polish scholar, and author of many books and articles published in several languages, is adviser on foreign affairs to the War Department. In his recent book, *Axis Rule in Occupied Europe*, Dr. Lemkin originated concepts included in the indictment of German war criminals at the Nuremberg trials, where he served on the staff of the U. S. Chief of Counsel for Prosecution of Criminality.

This content downloaded from
122.150.168.62 on Mon, 18 Mar 2024 04:29:00 +00:00
All use subject to https://about.jstor.org/terms

tion could only be carried out with the soil, never with men. These considerations led the author of this article to the necessity of coining a new term for this particular concept: *genocide*. This word is made from the ancient Greek word *genos* (race, clan) and the Latin suffix *cide* (killing). Thus, genocide in its formation would correspond to such words as tyrannicide, homicide, patricide.

III

Genocide is the crime of destroying national, racial or religious groups. The problem now arises as to whether it is a crime of only national importance, or a crime in which international society as such should be vitally interested. Many reasons speak for the second alternative. It would be impractical to treat genocide as a national crime, since by its very nature it is committed by the state or by powerful groups which have the backing of the state. A state would never prosecute a crime instigated or backed by itself.

By its very legal, moral and humanitarian nature, it must be considered an international crime. The conscience of mankind has been shocked by this type of mass barbarity. There have been many instances of states expressing their concern about another state's treatment of its citizens. The United States rebuked the government of Czarist Russia as well as that of Rumania for the ghastly pogroms they instigated or tolerated. There was also diplomatic action in behalf of the Greeks and Armenians when they were being massacred by the Turks. States have even entered into international treaties by which they assumed specific obligations in the treatment of their own nationals. We may, in this respect, refer to the treaty entered into between the United States and Spain in 1898, in which the free exercise of religion was assured by the United States to the inhabitants of the territories which were ceded to her.

Another classical example of international concern in the treatment of citizens of other states by their governments is provided by the minority treaties under the auspices of the League of Nations which were signed by a number of European countries after the first World War. Again, the declaration of the Eighth International Conference of American States provides that any persecution on account of racial or religious motives which makes it impossible for a group of human beings to live decently is contrary to the political and judicial systems of America. The Charter of the United Nations Organization also provides for the international protection of human rights, indicating that the denial of such rights by any state is a matter of concern to all mankind.

Cultural considerations speak for international protection of national, religious and racial groups. Our whole cultural heritage is a product of the contributions of all nations. We can best understand this when we realize how impoverished our culture would be if the peoples doomed by Germany, such as the Jews, had not been permitted to create the Bible, or to give birth to an Einstein, a Spinoza; if the Poles had not had the opportunity to give to the world a Copernicus, a Chopin, a Curie; the Czechs, a Huss, a Dvorak; the Greeks, a Plato and a Socrates; the Russians, a Tolstoy and a Shostakovich.

There are also practical considerations. Expulsions of law-abiding residents from Germany before this war created frictions with the neighboring countries to which these peoples were expelled. Mass persecutions forced mass flight. Thus, the normal migration between countries assumes pathological dimensions.

Again, international trade depends upon confidence in the ability of the individuals participating in the interchange of goods to fulfill their obligations. The arbitrary and wholesale confiscations of the properties of whole groups of citizens of one state for racial or other reasons deprives them of their capacity to discharge their obligations to citizens of other states. Many American citizens were deprived of the possibility of claiming debts incurred by German importers after these importers were destroyed by the Hitler regime.

Finally, genocide in time of peace creates international tensions and leads to war. It was used by the Nazi regime to strengthen the alleged unity and totalitarian control of the German people as a preparation for war.

This content downloaded from
122.150.168.62 on Mon, 18 Mar 2024 04:29:00 +00:00
All use subject to https://about.jstor.org/terms

IV

Once we have recognized the international implications of genocidal practices, we must create the legal framework for the recognition of genocide as an international crime. The significant feature of international crime is a recognition that because of its international importance it must be punished and punishable through international cooperation. The establishment of international machinery for such punishment is essential.

Thus, it has been recognized by the law of nations and by the criminal codes of many nations that crimes which affect the common good of mankind — as, for example, piracy, unlawful production and trade in narcotics, forgery of money, trade in women and children, trade in slaves — all these are international crimes (*delicta juris gentium*). For such crimes, the principle of universal repression has been adopted: namely, the culprit can be punished not only before the courts of the country where the crime has been perpetrated, but also by courts of the country where the culprit can be apprehended if he escaped justice in his own country. For example, a currency forger who committed his crime in Paris and escaped to Prague can be punished validly in the latter city.

In 1933, at the Fifth International Conference for the Unification of Criminal Law (under the auspices of the Fifth Committee of the League of Nations) the author of the present article introduced a proposal providing for this type of jurisdiction for acts of persecution amounting to what is now called genocide. Unfortunately, at that time, his proposal was not adopted. Had this principle been adopted at that time by international treaty, we would not now have all the discussions about *ex post facto* law, in relation to crimes committed by the German government against its own citizens prior to this war.

V

A ruthless regime finds it easiest to commit genocide in time of war. It then becomes a problem of the treatment, or, rather, mistreatment, of a civilian population by an occupant. The Fourth Hague Convention establishes a rule of law in the protection of civilian populations which an occupant must respect. Within the purview of this law comes the protection of the honor, liberty, life, family rights and property rights of the population in the occupied country.

Genocide can be carried out through acts against individuals, when the ultimate intent is to annihilate the entire group composed of these individuals; every specific act of genocide as directed against individuals as members of a national or racial group is illegal under the Hague Convention. If the killing of one Jew or one Pole is a crime, the killing of all the Jews and all the Poles is not a lesser crime. Moreover, the criminal intent to kill or destroy all the members of such a group shows premeditation and deliberation and a state of systematic criminality which is only an aggravated circumstance for the punishment.

Genocide has been included in the indictment of the major war criminals for the use of the Nuremberg trials. It reads as follows:

> They (the defendants) conducted deliberate and systematic genocide — viz., the extermination of racial and national groups — against the civilian populations of certain occupied territories in order to destroy particular races and classes of people, and national, racial or religious groups, particularly Jews, Poles, Gypsies and others.

By including genocide in the indictment, the enormity of the Nazi crimes has been more accurately described. Moreover, as in the case of homicide, the natural right of existence for individuals is implied: by the formulation of genocide as a crime, the principle that every national, racial and religious group has a natural right of existence is proclaimed. Attacks upon such groups are in violation of that right to exist and to develop within an international community as free members of international society. Thus, genocide is not only a crime against the rules of war, but also a crime against humanity.

Only after the cessation of hostilities could the whole gruesome picture of genocide committed in the occupied countries be reviewed. During the military occupation unconfirmed rumors about genocide leaked out from behind the iron curtains covering enslaved

This content downloaded from
122.150.168.62 on Mon, 18 Mar 2024 04:29:00 +00:00
All use subject to https://about.jstor.org/terms

Europe. The International Red Cross was precluded from visiting occupied countries and gathering information about the mistreatment of the civilian populations. It so happened because the Geneva Convention gave to the International Red Cross the right to supervise and control only the treatment of prisoners of war. A paradoxical situation was created: men who went into the battlefield with a considerable expectancy of death survived, while their families, left behind in supposed security, were annihilated. The author of the present article has proposed in his book *Axis Rule in Occupied Europe* that international law be changed so that in time of war the treatment of civilian populations will also be under supervisory control of an international body like the International Red Cross. The Swedish newspaper, *Dagens Nyheter*, of November 2, 1945, announced that the chairman of the Swedish Red Cross, Count Bernadotte, referred to the author's proposal as acceptable for consideration at a future conference of the International Red Cross, and declared that the Swedish Red Cross would support it. While the writer is gratified by this development, he hopes that other governments will support the proposal to change international law.

VI

On the basis of the foregoing considerations, the author proposes that the United Nations as they are now organized, together with other invited nations, enter into an international treaty which would formulate genocide as an international crime, providing for its prevention and punishment in time of peace and war. This treaty, basically, should include, among other things, the following principles:

1. The crime of genocide should be recognized therein as a conspiracy to exterminate national, religious or racial groups. The overt acts of such a conspiracy may consist of attacks against life, liberty or property of members of such groups merely because of their affiliation with such groups. The formulation of the crime may be as follows: "Whoever, while participating in a conspiracy to destroy a national, racial or religious group, undertakes an attack against life, liberty or property of members of such groups is guilty of the crime of genocide." The crime so formulated should be incorporated in every national criminal code of the signatories.
2. The defendants should be liable not only before the courts of the country where the crime was committed, but in case of escape shall be liable, as well, before the courts of the country where they are apprehended.
3. Persons accused of genocide should not be treated as political criminals for purposes of extradition. Extradition should not be granted except in cases where sufficient evidence exists to indicate that the requesting country will earnestly prosecute the culprits.
4. The liability for genocide should rest on those who gave and executed the orders, as well as on those who incited to the commission of the crime by whatever means, including formulation and teaching of the criminal philosophy of genocide. Members of governments and political bodies which organized or tolerated genocide will be equally responsible.
5. Independently of the responsibility of individuals for genocide, states in which such a policy obtains should be held accountable before the Security Council of the United Nations Organization. The Council may request the International Court of Justice to deliver an advisory opinion to determine whether a state of genocide exists within a given country before invoking, among other things, sanctions to be leveled against the offending country. The Security Council may act either on its own initiative or on the basis of petitions submitted by members of interested national, religious or racial groups residing either within or without the accused country.
6. The Hague Convention and other pertinent treaties should be changed to the effect that in case of war, an international body (such as the International Red Cross) should have the right to supervise the treatment of civilian populations by occupants in time of war in order to ascertain whether genocide is being practiced by such occupant.
7. A multilateral treaty for the prevention and punishment of genocide should not preclude two or more countries from entering into bilateral or regional treaties for more extensive protection against genocide. In this connection it is well to note that the Allied Governments in accordance with the Moscow agreements of December, 1945, have decided to enter into formal treaties of peace with the Axis satellite countries, Hungary, Bulgaria and Rumania, which practiced genocide in this war according to the German pattern. It is of impelling importance that anti-genocide clauses be included in these treaties.

This content downloaded from
122.150.168.62 on Mon, 18 Mar 2024 04:29:00 +00:00
All use subject to https://about.jstor.org/terms

INTERNATIONAL HUMAN RIGHTS LAW

Third Edition

EDITED BY

DANIEL MOECKLI

University of Zurich

SANGEETA SHAH

University of Nottingham

SANDESH SIVAKUMARAN

University of Nottingham

CONSULTANT EDITOR:

DAVID HARRIS

Professor Emeritus and Co-Director, Human Rights Law Centre, University of Nottingham

OXFORD
UNIVERSITY PRESS

While there is some criticism of the Committee taking this stance, other international human rights treaties do not tend to contain the restriction that only individuals are able to bring a complaint. For example, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR) allows for complaints by groups concerning the rights protected by the ICESCR, which includes the right of self-determination.

1.3 RELEVANCE OF GROUP RIGHTS

While there are a range of group rights, such as the prohibition on genocide, the right to development, and the right to a clean environment, a specific focus of this chapter is on the right of self-determination (sometimes called the right *to* self-determination). This is because the right of self-determination is protected under the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR, it has been considered in case law and other jurisprudence, and it has wide and significant impacts across the international community, as will be shown.

The rights of minorities have similar wide and significant impacts, as there are minorities in every state. While these rights have often been seen as within the compass of individual rights, it will be shown that they are also now considered as group rights. One type of collective that has been especially affected by the development of peoples and minorities rights is indigenous peoples, and so they are also considered in this chapter.

The acknowledgment that peoples, minorities, and indigenous groups have human rights, and that their rights should be protected in international law, has taken a long time. They are still not fully understood and respected. However, they are important human rights that affect the whole of the international community. With the reality that almost every state in the world has some current or potential issue connected with group rights, it is important that these rights are understood, respected, and applied appropriately.

2 THE RIGHT OF SELF-DETERMINATION

2.1 CONCEPT

Claims have been made for centuries about matters that could now be seen in terms of self-determination, with some writers tracing it as far back as the early stages of the institution of government. However, the use of self-determination in an international legal context primarily developed during the immediate post-First World War period, with US President Wilson stating that, '[P]eoples may now be dominated and governed only by their own consent. "Self-determination" is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril.'[5]

At about the same time Marxist thought on national liberation took root in the USSR. The combined effect of these ideas (and others) was that self-determination, despite its vague content and the sense to which it could be applied to a range of situations, became an accepted term of use in international relations. Then in 1945 the UN Charter proclaimed

[5] Wilson, *War Aims of Germany and Austria* (1918), reproduced in Baker, Dodd, and Leach (eds), *The Public Papers of Woodrow Wilson: War and Peace* (Harper and Brothers, 1927) 177 at 182. Wilson was supported by the British Prime Minister, Lloyd George, who declared that one reason for the UK entering the First World War had been the 'principle of self-determination' and that future territorial questions should be resolved by respecting 'the consent of the governed': address to the Trade Union Conference, 5 January 1918, reported in *The New York Times Current History* (New York) 270.

that one of the purposes of the UN was 'respect for the principle of equal rights and self-determination of peoples'.[6]

Since that time, through resolutions of the Security Council and the General Assembly, in decisions and opinions of the International Court of Justice (ICJ), in treaties, and in state practice—some of which will be referred to in this chapter—the idea of self-determination of peoples has been restated, reinforced, and reinvigorated. It has also been used in diverse contexts, not least because 'couching political goals in the language of legal entitlement has an undisputed rhetorical appeal',[7] and has become part of international law.

2.2 DEFINITIONS

Despite the general acceptance that self-determination is part of international law, it was not until the conclusion of the two international human rights Covenants that it was accepted that self-determination was a human right and that some form of legal definition was provided. Article 1 ICCPR and ICESCR provides:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

The definition in Article 1(1) is largely repeated in all the subsequent international and regional human rights treaties and documents that contain a right of self-determination, although the African Charter on Human and Peoples' Rights (ACHPR) elaborates on it slightly.[8]

Yet this definition does not clarify all aspects of the right. While it is evident that it is a right that is relevant in political contexts, it is also applicable in economic, social, and cultural contexts, with, for example, Article 1(2) of the Covenants dealing with a particular economic manifestation of the right and Article 55 UN Charter referring to economic and social aspects of the right. It is also a right of peoples as distinct from individuals, although the lack of further clarification as to who are the 'peoples' who have the right, has been a major stumbling block for many diplomats and writers.

[6] UN Charter, Art 1(2).

[7] Drew, 'Self-Determination, Population Transfer and the Middle-East Peace Accords' in Bowen (ed), *Human Rights, Self-Determination and Political Change in the Occupied Palestinian Territories* (Martinus Nijhoff, 1997) 127.

[8] ACHPR, Art 20 provides:

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

The term 'Non-Self-Governing Territories' refers to the list of territories held by the UN that was meant to designate which were colonial territories. While this list was never comprehensive (especially as it was possible for states unilaterally to remove territories from the list), the term was a recognized UN abbreviation for colonial territories or colonies.

The ICJ has consistently held that the right of self-determination applies to all peoples in all colonial territories. In its *Namibia Opinion*, concerning the illegal presence of South Africa in Namibia, the Court's view was:

> [T]he subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them. . . . The ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned.[18]

This position was confirmed by the ICJ in the *Western Sahara Case*, with Judge Dillard stating that '[t]he pronouncements of the Court thus indicate, in my view, that a norm of international law has emerged applicable to the decolonisation of those non-self-governing territories which are under the aegis of the United Nations'.[19]

State practice confirms that the right of self-determination applies to all peoples in colonial territories. This is evident not only from the vast number of colonial territories that have exercised their right of self-determination to become new states, but also because of the acceptance by the colonial powers that they have a legal obligation to allow this exercise. Some writers have concluded from this consistent state practice, *opinio juris*, and lack of any denial by states that the right of self-determination of colonial peoples is now a matter of *jus cogens*.[20]

3.2 OUTSIDE THE COLONIAL CONTEXT

State practice shows that the right of self-determination has definitely been applied outside the colonial context. For example, when East and West Germany were united into one state in 1990, it was expressly stated in a treaty signed by four of the five permanent members of the UN that this was done as part of the exercise of the right of self-determination by the German people.[21] The right of self-determination was also referred to in the context of the dissolution of the USSR and Yugoslavia,[22] internally within states, and the ICJ confirmed that the right of self-determination applies to the Palestinian people in its *Advisory Opinion on the Wall*.[23]

The ICJ has gone further and has declared that the right of self-determination is 'one of the essential principles of contemporary international law' and has 'an *erga omnes* character'.[24] By having an *erga omnes* character it means that there is an obligation on *all states* to protect

[18] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16, para 52.

[19] *Western Sahara Case* [1975] ICJ Rep 12, per Judge Dillard at 121, and see Majority Opinion, paras 54–5.

[20] eg Cassese, *Self-Determination of Peoples: A Legal Appraisal* (CUP, 1995) 140; Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, 2002) in relation to Art 41; Saul, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?' (2011) 11 *HRLR* 609. See Chapter 4 for an explanation of *jus cogens*.

[21] Treaty on the Final Settlement With Respect to Germany (1990) 29 *ILM* 1186.

[22] eg the terms of the European Community's Declaration on Yugoslavia and its Declaration on the Guidelines on Recognition of New States in Eastern Europe and the Soviet Union (16 December 1991), (1992) 31 *ILM* 1486.

[23] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, paras 118 and 122.

[24] *East Timor Case (Portugal v Australia)* [1995] ICJ Rep 90, para 29. The HRC also requires all states parties to the ICCPR to report on their protection of the right of self-determination: General Comment 12, para 3.

and respect the right of self-determination. This makes clear that it is not only an obligation on colonial powers and so the right applies to peoples beyond the colonial context.

Indeed, since 1960 the right of self-determination has not been expressed in any international or regional instrument solely in the context of colonial territories but as a right of 'all peoples'. This is seen in the Declaration on Principles of International Law 1970 (which is often considered as being an internationally agreed clarification of the principles of the UN Charter) which provides:

> [All States should bear] in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle [of equal rights and self-determination of peoples], as well as a denial of fundamental human rights, and is contrary to the Charter of the United Nations.[25]

In fact, even the Declaration on Independence of Colonial Countries and Peoples 1960 dealt with colonialism 'in all its forms and manifestations'. The forms and manifestations of colonialism relevant to the application of the right of self-determination are about the oppressive *nature* of the administrative power over a people and not simply about the physical distance of the administering colonial power from the colonial territory. Hence, where a group or groups in a state administer power in such a way that there is 'subjugation, domination and exploitation' of another group that oppresses, demeans, and undermines the dignity of that group, then the right of self-determination may apply to the latter group. Therefore, the right of self-determination applies to any peoples in any territory (including non-colonial territories) who are subjected to 'alien subjugation, domination and exploitation'. Indeed, it would be contrary to the concept of a human right if the right of self-determination could only be exercised once (such as by a colonial territory) and then not again. All peoples in all states have the right of self-determination.

4 THE EXERCISE OF THE RIGHT OF SELF-DETERMINATION

4.1 EXTERNAL AND INTERNAL SELF-DETERMINATION

Under international human rights law, there is a concentrated focus on the *exercise* of a human right. This is usually because a particular issue has arisen due to an alleged restriction on the exercise of a right by a state. Similarly, the exercise of the right of self-determination is a crucial aspect in understanding the right.

The Declaration on Principles of International Law sets out the principal methods as to how the right of self-determination can be exercised. It provides that:

> The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

While the vast majority of peoples in colonial territories exercised their right of self-determination by independence, this was not the only method of exercise that was either available or used. For example, the British and the Italian Somaliland colonies joined into one state of Somalia, part of the British colony of Cameroon merged with the French

[25] GA Res 2625(XXV) (1970) Annex.

CHAPTER XVI

The Principle of Self-Determination

In its Wilsonian heyday self-determination seemed to many a simple and straightforward proposition consolidating under one rubric a number of nineteenth-century liberalism's most cherished propositions as to freedom and democracy and the rights of individuals and peoples. Its subsequent history has been a checkered one, both in its practical application and in the theorizing concerning it. It has tempted the sophisticate to display his wit and learning by demonstrating its inadequacies and contradictions and forced many statesmen to shake their heads in dismay at its uncouth proportions. Neither the skeptical sophisticate nor the perturbed statesman, it should immediately be added, has had any significant bearing on the revolutionary drive of peoples to achieve their independent destiny in their own fashion.

A summary glance at the experience of the world with self-determination since World War I will indicate its curious career. Brought to explicit formulation by Woodrow Wilson and the Bolsheviks in the course of the war, it became one of the fundamental principles of international society, and yet it found no place in the League Covenant. It served as a guideline for much of the reshaping of states in the peacemaking that followed close on the heels of the war, but after that process was completed the only new states to emerge on the international stage in the interwar decades were Eire in Europe and Iraq and Saudi Arabia in Asia. (The short-lived Japanese puppet state of Manchukuo may properly be ignored in this context, as may Hitler's creations in Central Europe.)

The experience of the Second World War and its aftermath

is in many respects the reverse of the first. Although the Atlantic Charter paid appropriate homage to self-determination in a somewhat indirect fashion, the Allies, leaving aside the restoration of peoples overrun by the Axis, were not only divided as to the application of self-determination but had also largely lost their enthusiasm for it as anything approaching a panacea. For the Soviet Union the aim in relation to its Western neighbors had become one of absorption or domination, and for the colonial powers self-determination meant self-destruction of empire. Hence, although the principle of self-determination of peoples now figured among the purposes of the United Nations Charter, it played only a scanty role in such peacemaking as took place. As a sorry substitute for a peace settlement, the cold war indeed worked to produce national partitions at some of the key points on the new-style international frontier. In Germany, Korea, and Vietnam the pleas of nations for unity were subordinated to the high strategy of international politics with the result that each had a jealously guarded barricade erected across it to demarcate the spheres of the two great opposing blocs; and China underwent a division between the mainland and Formosa. In each instance there were two bitterly opposed regimes, one Communist and the other non-Communist, each claiming to represent the national will under its own symbols.

Self-determination was still very much alive but its locus had shifted from Europe to Asia, the Middle East, and Africa, with the anti-colonial powers tending to insist that it was for practical purposes an issue which had relevance only in the colonial realm. In 1919, even though the Versailles peacemakers could frequently do little more than ratify states of fact already accomplished by the peoples directly concerned, the reordering of Central and Eastern Europe was carried on under the auspices of the victorious Allies essentially at the cost of their enemies and Russia. In 1945 and thereafter self-determination was a weapon aimed primarily at the victorious imperial powers themselves, and was under their control only in the sense that they could either fight it outright, as in Indochina and Indonesia, or yield to it with greater or less grace, as in the Philippines, India, Burma, and Ceylon. In contrast to Iraq's lonely eminence in the interwar decades, a host of new Asian and

African states were added to the international family in the years following the Second World War; and more are in process of being created out of the dwindling colonial empires.

The principle of self-determination derives from a familiar set of doctrines, whose apparent simplicity conceals a multitude of complications. The prime starting point is presumably the eighteenth-century proposition that governments must rest upon the consent of the governed, to which the nineteenth and twentieth centuries added the assumption that, since man is a national animal, the government to which he will give his consent is one representing his own nation. For full-blown self-determination to emerge it was only necessary to secure recognition of a new principle of natural law which entitles nations to possess their own states and, as the other side of the coin, renders illegitimate states with a non-national base. As Woodrow Wilson put it, the Central Empires had been forced into political bankruptcy because they dominated "alien peoples over whom they had no natural right to rule." [1] With the aid of a little sleight of hand the original claim that individuals must consent to or contractually establish the governments ruling them is thus transmuted into the natural right of nations to determine their own statehood.

The difficulties of self-determination become most serious when the doctrine is brought down from abstraction to working reality and when an effort is made, as in the United Nations' covenants on human rights, to translate it from ethical and political precepts to binding legal norms. In the current temper of world opinion no one can in principle oppose what has come to be the almost self-evident right of peoples to dispose of their own destinies, but it is unfortunately equally impossible to formulate this right in such terms as to make it meaningfully applicable to reality. Who can say the nations nay, and yet who can say what nations are and when and how they may assert themselves?

A RIGHT OF REVOLUTION

If the issue is put in its most drastic terms, to accept the right of self-determination in blanket fashion is to endow social entities

Human Rights Law Review, 2021, 21, 264–301
doi: 10.1093/hrlr/ngaa056
Advance Access Publication Date: 8 February 2021
Article

OXFORD

The Use of International Human Rights Law in the Universal Periodic Review

Sangeeta Shah* and Sandesh Sivakumaran†

ABSTRACT

Universal Periodic Review provides a unique insight into states' perceptions of IHRL. States issue recommendations on fulfilling human rights obligations and commitments. HRC Resolution 5/1 sets out the bases of the reviews: the UN Charter, the UDHR, human rights instruments to which the state is party and voluntary pledges and commitments. Relevant IHL is 'take[n] into account'. Analysing the identification of these bases of review and how they have been used in the 57,685 recommendations from the first two cycles of UPR, we demonstrate states' understanding of the term 'human rights' and their preferences for certain sources of law. States have not limited themselves to the bases of review in Resolution 5/1. They have used additional materials and rejected distinctions between 'hard' and 'soft' law. They have interpreted the notion of 'human rights' expansively but largely ignored regional human rights instruments. A body of generalised, non-specific IHRL has been recognised.

KEYWORDS: Universal Periodic Review, Human Rights Council, United Nations, human rights, international law, international human rights law

1. INTRODUCTION

The Universal Periodic Review (UPR) provides valuable insights into states' perceptions of international human rights law. Facilitated by the Human Rights Council, it is a regular review process by which every UN member state is assessed by other member states on the fulfilment of 'human rights obligations and commitments'.

When establishing the Human Rights Council in 2006, the General Assembly (GA) mandated the Council to undertake a 'universal periodic review, based on objective and reliable information, of the fulfilment by each state of its human rights obligations

* Associate Professor, School of Law, University of Nottingham, United Kingdom (sangeeta.shah@nottingham.ac.uk).

† University Reader in International Law; Co-Deputy Director, Lauterpacht Centre for International Law; Fellow, St Edmund's College, University of Cambridge, United Kingdom (ss369@cam.ac.uk).

© Crown copyright 2021.

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

and commitments'.[1] What was meant by 'human rights obligations and commitments' was left undefined and the Council was left to debate its meaning when developing the modalities of the UPR process.[2] A product of compromise, Human Rights Council Resolution 5/1 (2007) provides that the basis of the review is to be: (a) the UN Charter; (b) the Universal Declaration of Human Rights (UDHR); (c) 'human rights instruments to which a state is party'; and (d) 'voluntary pledges and commitments made by States', including those presented by states when standing for election to the Council. The resolution also provides that 'the review shall take into account applicable international humanitarian law' and that 'subsequent review[s] should focus, *inter alia,* on the implementation of the preceding outcome', where 'outcome' includes the 'voluntary commitments' of the state under review—namely, accepted recommendations.[3]

The 'big data'[4] generated by UPR has been mined for various empirical studies. Most notable is the work by the non-governmental organisation UPR Info.[5] This organisation has created a comprehensive and fully searchable database of all UPR recommendations made to date,[6] which has served as the basis for various influential studies of the UPR process.[7] Another non-governmental organisation, the Universal Rights Group,[8] has also produced important studies and reports on UPR and the Human Rights Council more generally.[9] These policy studies have focussed on the quality of recommendations, especially the action required by the state under review, and the implementation of accepted recommendations. There have been numerous other studies of the practice of UPR, although many of these are not empirical. Some have focussed on particular issues, such as the rights of indigenous peoples,[10]

1 GA Res 60/251, 3 April 2006, A/RES/60/251, para 5(e).

2 See Summary of the Discussion on Universal Periodic Review Prepared by the Secretariat, 13 March 2007, A/HRC/4/CRP3, para 4. Records of these negotiations are available on the OHCHR Extranet: extranet.ohchr.org/sites/hrc [last accessed 1 November 2020].

3 HRC Res 5/1, 18 June 2007, A/HRC/RES/5/1, Annex, paras 1 and 34. See also HRC Dec 17/119, 19 July 2011, A/HRC/DEC/17/119, para II.2 and HRC Res 16/21, 12 April 2011, A/HRC/RES/16/21, Annex, para I.C.1.6.

4 McMahon, 'Understanding the UN Human Rights Council Universal Periodic Review: Methods of Assessing its Functioning' (June 2017), 5, available at: www.upr-info.org/en/analyses/Studies [last accessed 1 November 2020].

5 See: www.upr-info.org/en [last accessed 1 November 2020].

6 The database is available at: www.upr-info.org/database/ [last accessed 1 November 2020].

7 See, UPR Info, *Beyond Promises. The Impact of UPR on the Ground* (2014), available at: www.upr-info.org/en/analyses/Studies [last accessed 1 November 2020]. See also the studies conducted by Edward McMahon who assisted in the development of the original database: e.g., McMahon and Ascherio, 'A Step Ahead in Promoting Human Rights: the Universal Periodic Review of the UN Human Rights Council' (2012) 18 *Global Governance* 231; McMahon, *The Universal Periodic Review: A Work in Progress* (September 2012), available at: library.fes.de/pdf-files/bueros/genf/09297.pdf [last accessed 1 November 2020]; McMahon and Johnson, *Evolution not Revolution* (September 2016), available at: library.fes.de/pdf-files/iez/global/12806.pdf [last accessed 1 November 2020].

8 See: https://www.universal-rights.org/ [last accessed 1 November 2020].

9 E.g. Gujadhur and Limon, *Towards the Third Cycle of UPR: Stick or Twist* (URG, 2016), available at: www.universal-rights.org/wp-content/uploads/2016/07/URG_UPR_stick_or_twist.pdf [last accessed: 1 November 2020]. For a comparison of the methodologies used by UPR Info and URG when analysing UPR recommendations, see McMahon, supra n 4.

10 Higgins, 'Creating a Space for Indigenous Rights: the Universal Periodic Review as a Mechanism for Promoting the Rights of Indigenous Peoples' (2019) 23 *International Journal of Human Rights* 125.

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

international humanitarian law,[11] women's rights[12] and the rights of LGBT persons.[13] Others have examined how particular states or regions have engaged with the UPR process.[14] However, there has been little engagement with the bases of review in the UPR.[15] This article seeks to fill this gap.

By studying UPR, we are able to provide insight into states' views of international human rights law. Given that states remain the most influential actor in international human rights law, how they perceive and use this body of law is of considerable importance. The negotiations on the bases of the UPR are revealing in this regard. However, they only provide a part of the picture. This article goes further and presents an empirical analysis of the 57,685 recommendations made during the first two UPR cycles. We demonstrate how the bases of review set out in Resolution 5/1 have *actually been used*, providing evidence on how broadly states understand the term 'human rights' and states' preferences for certain sources of human rights law.

Our analysis focuses on the text of UPR recommendations and does not go behind this text. As such, it does not address *how* states make their recommendations, *why* they do so, or the political dynamics of making recommendations. Rather, our findings are based on the premise that the text of a recommendation is the product of a reflexive

11 Zhu, 'International Humanitarian Law in the Universal Periodic Review of the UN Human Rights Council: An Empirical Survey' (2014) 5 *Journal of International Humanitarian Legal Studies* 186; Chang, 'International Humanitarian Law in the Universal Periodic Review of the UN Human Rights Council: An Empirical Survey' (2015) 8 *Journal of East Asia and International Law* 549.

12 Tufano, 'The "Holy Trinity" of the United Nations Universal Periodic Review: How to Make an Effective Recommendation Regarding Women's Rights' (2018) 21 *University of Pennsylvania Journal of Law and Social Change* 187.

13 Cowell and Milon, 'Decriminalisation of Sexual Orientation through the Universal Periodic Review' (2012) 12 *Human Rights Law Review* 341; ILGA, *Sexual Orientation, Gender Identity and Expression, and Sex Characteristics at the Universal Periodic Review* (November 2016), available at: ilga.org/downloads/SOGIESC_at_UPR_report.pdf [last accessed: 1 November 2020].

14 E.g. the various surveys in Charlesworth and Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (2015); Mao and Sheng, 'Strength of Review and Scale of Response: A Quantitative Analysis of Human Rights Council Universal Periodic Review on China' (2016–2017) 23 *Buffalo Human Rights Law Review* 1; Cofelice, 'Italy and the Universal Periodic Review of the United Nations Human Rights Council. Playing the Two-Level Game' (2017) 47 *Italian Political Science Review* 227; Cochrane and McNeilly, 'The United Kingdom, the United Nations Human Rights Council and the First Cycle of the Universal Periodic Review' (2013) 17 *International Journal of Human Rights* 152; Etone, 'The Effectiveness of South African's Engagement with the Universal Periodic Review (UPR): Potential for Ritualism' (2017) 33 *South African Journal of Human Rights* 258; Harrington, 'Canada, the United Nations Human Rights Council, and Universal Periodic Review' (2009) 18 *Constitutional Forum* 79; Smith, 'To See Themselves as Others See Them: The Five Permanent Members of the Security Council and the Human Rights Council's Universal Periodic Review' (2013) 35 *Human Rights Quarterly* 1; Abebe, 'Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council' (2009) 9 *Human Rights Law Review* 1; Smith, 'A Review of African States in the First Cycle of the UN Human Rights Council's Universal Periodic Review' (2014) 14 *African Human Rights Law Journal* 346; Smith, 'The Pacific Island States: Themes Emerging from the United Nations Human Rights Council's Inaugural Universal Periodic Review' (2012) 13 *Melbourne Journal of International Law* 569.

15 Limited studies are provided by Kälin, 'Human Rights Treaties within the UPR Process: Opportunities and Limits of Inter-Governmental Monitoring of Human Rights' (2017) 60 *Japanese Yearbook of International Law* 243; Rodley, 'UN Treaty Bodies and the Human Rights Council' in Keller and Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (2012) 320. For an analysis of whether UPR recommendations may contribute to the formation of customary international law, see Cowell, 'Understanding the Legal Status of Universal Periodic Review Recommendations' (2018) 7 *Cambridge International Law Journal* 164.

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

choice made by the recommending state,[16] so that 'every time a state makes a recommendation during a UPR review, the speaker implicitly asserts the validity, legitimacy and relevance of the invoked human rights guarantee'.[17] This is carried forward to the acceptance of recommendations.[18]

Several findings emerge from our study. First, states have not limited themselves to the bases of review in Resolution 5/1. Instead, they have broadened the review by referring to a variety of other international law material in their recommendations.[19] In doing so, states eschew the traditional distinctions between 'hard' and 'soft' human rights law. Second, states have interpreted the notion of *human rights* law expansively to include international criminal law, international refugee law, international law regarding statelessness and international labour law. The boundary between human rights law and related bodies is revealed to be porous. Third, UPR tends not to engage explicitly with regional human rights law. Finally, there is frequent reference to human rights 'obligations', 'standards' and 'instruments' in recommendations. The precise content of these is not identified. States appear to have identified a body of generalised, non-specific international human rights law.

The article proceeds along the following lines. Section 2 provides an account of the concerns that directed states' choices of the bases of review. This sets the backdrop for our empirical study. Section 3 sets out the methodology used to collate and analyse the use of the bases of review in UPR recommendations made during the first two cycles of review. Section 4 presents the extent to which the bases of review have been utilised in UPR recommendations and Section 5 discusses the principal findings from our study.

2. 'OBLIGATIONS' AND 'COMMITMENTS': THE BASES OF REVIEW

When establishing the Human Rights Council in 2006, the GA instructed the Council to 'develop the modalities' for a 'universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner that ensures universality of coverage and equal treatment with respect to all States'.[20] An inter-sessional, inter-governmental working group agreed the modalities within one year, and in June 2007, the Council adopted Resolution 5/1, which sets out the objectives and mechanics of the UPR process.[21]

One of the areas for determination was what the basis of the review should be; that is, what did the GA's reference to 'human rights obligations and commitments' translate to? Some bases of review were easy to identify and attracted universal support from states, whilst others were the subject of significant debate.

16 The drafting of recommendations and decisions on their acceptance are often undertaken 'at a very high level: for instance at plenipotentiary and/or government level': see Bertotti, 'Separate or Inseparable? How Discourse Interpreting Law and Politics as Separable Categories Shaped the Formation of the UN Human Rights Council's Universal Periodic Review' (2019) 23 *International Journal of Human Rights* 1140 at 1151.

17 Kälin, 'Ritual and Ritualism at the Universal Periodic Review: A Preliminary Appraisal' in Charlesworth and Larking (eds), supra n 14, 33.

18 See Kälin, supra n 15 at 257–8.

19 On the range of international law material, see Baxter, 'International Law in Her Infinite Variety' (1980) 29 *International and Comparative Law Quarterly* 549.

20 GA Res 60/251, para 5(e).

21 Small changes were made following the review of the Human Rights Council in 2011.

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

A. The UN Charter

Using the UN Charter as a basis of review was not contentious.[22]

B. The Universal Declaration of Human Rights

Inclusion of the UDHR—a non-binding international instrument—attracted widespread support from states from all UN regional groups.[23] When discussing whether UPR would oversee compliance with treaties, states were keen to emphasise that UPR ought to focus on *accepted* treaty obligations. However, when it came to the UDHR, only one state expressed the concern that 'as the UDHR was merely a declaration containing general provisions . . . [it] would pose difficulties as a basis of review'.[24] Bernaz has suggested that the UDHR was included because its 'normative status is unquestionable', that it is an 'undeniable material source of international human rights law' and so '[i]ts absence from the list of standards would have damaged the periodic review process, even if, from a strict legal point of view, states are not bound to comply with it'.[25] During the negotiations, only one state—Liechtenstein—explained its value in the process: 'This will enable the UPR to address the whole set of internationally agreed human rights and fundamental freedoms, regardless of how many treaties the state under review is party to'.[26]

C. Human Rights Instruments to Which a State is Party

Basing UPR on human rights instruments to which a state is party was also relatively uncontentious.[27] The term 'instrument' is a broad one and may include declarations and resolutions. However, states tended to use the language of *treaties* when discussing this basis of review[28] and the use of 'party' in Resolution 5/1 confirms that it is confined

22 States that spoke in support of inclusion of the UN Charter include: Algeria (on behalf of the African Group of states), Argentina, Australia, Azerbaijan, Bangladesh, Brazil, Canada, Chile, Costa Rica, Cuba, Ecuador, Egypt, Finland (on behalf of the European Union (EU)), Indonesia, Iran, Japan, Liechtenstein, Malaysia, Mexico, Pakistan (on behalf of the Organization of the Islamic Conference (OIC)), Panama, Peru, Romania, Singapore, Sri Lanka, Switzerland, Tunisia, Uruguay, and Zambia.

23 The five UN regional groups were established in 1963: African Group, Asia-Pacific Group, Eastern European Group (EEG), Latin American and Caribbean Group (GRULAC) and Western European and others Group (WEOG). States that spoke in support of inclusion of the UDHR include: Algeria (on behalf of the African Group of states), Argentina, Australia, Azerbaijan, Bangladesh, Belgium, Bhutan, Brazil, Canada, Chile, China, Costa Rica, Cuba, Ecuador, Egypt, Finland (on behalf of the EU), Indonesia, Iran, Italy, Japan, Malaysia, Mexico, Pakistan (on behalf of the OIC), Panama, Peru, Philippines, Romania, Singapore, Sri Lanka, Switzerland, Thailand, Tunisia, the US, Uruguay, Venezuela, and Zambia.

24 See 'Summary of the discussion prepared by the Secretariat', 30 November 2006, A/HRC/3/CRP.1, para 17.

25 Bernaz, 'Reforming the UN Human Rights Protection Procedures: A Legal Perspective on the Establishment of the Universal Periodic Review Mechanism' in Boyle (ed.), *New Institutions for Human Rights Protection* (2009) 75, at 81.

26 Statement to Human Rights Council (4 December 2006), available on OHCHR extranet.

27 States that spoke in support of basing UPR on *accepted* treaty obligations include: Algeria (on behalf of the African Group), Australia, Bhutan, Brazil, Canada, Chile, Cuba, Finland (on behalf of the EU), Guatemala, India, Indonesia, Iran, Japan, Malaysia, Mexico, Nepal, Netherlands, Pakistan, Philippines, Romania, Switzerland, and the US.

28 See 'Summary of the discussion', supra n 24 at paras 18–20.

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

to treaties. Indeed, the OHCHR defines human rights 'instruments' as 'treaties'[29] and this basis of review is often referred to in the literature as 'human rights *treaties*' to which the state is a party.[30]

States from all regional groups were adamant that UPR should only focus on *accepted* treaty obligations.[31] Singapore and the Russian Federation objected to basing UPR on treaty obligations because this would lead to a duplication of the work of the UN human rights treaty bodies,[32] and GA Resolution 60/251 explicitly provides that the UPR should 'complement and not duplicate the work of the treaty bodies'.[33] Other states acknowledged this duplication risk and suggested that UPR should focus on procedural obligations to cooperate with UN treaty bodies (including reporting obligations) and on follow-up to concluding observations of the treaty bodies.[34]

D. Voluntary Pledges and Commitments

The fourth basis of review set out in Resolution 5/1—'voluntary pledges and commitments made by States, including those undertaken when presenting their candidatures for election to the Human Rights Council'—reflects the GA requirement that UPR consider 'the fulfilment of each State of its human rights obligations *and commitments*'.[35] Precisely what is meant by pledges and commitments was left unspecified. States from all regional groups spoke in favour of including those pledges made by states when standing for election for the Human Rights Council.[36] Only Guatemala expressed a concern that using election pledges would create an unequal basis for review and undermine the basic principles of universality and equal treatment underpinning UPR because not all states would stand for election to the Council.[37] This concern was dismissed without discussion.

Including explicit reference to '[c]ommitments undertaken in relevant United Nations conferences and summits',[38] or specific conference outcomes such as the

29 See OHCHR, 'Basic facts about the UPR': 'The UPR will assess the extent to which States respect their human rights obligations set out in: . . . human rights instruments to which the State is party (human rights treaties ratified by the State concerned)' (www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx) [last accessed 18 December 2020].

30 See e.g. Bernaz, supra n 25 at 79; Smith, 'African States', supra n 14 at 350 (emphasis added). See also Etone, supra n 14 at 259.

31 Algeria (on behalf of the African Group), Australia, Bhutan, Brazil, Canada, Chile, Cuba, Finland (on behalf of the EU), Guatemala, India, Indonesia, Iran, Japan, Malaysia, Mexico, Nepal, Netherlands, Pakistan, Philippines, Romania, Switzerland, and the US spoke in favour of this view.

32 See Compilation of Proposals and comments at November 2006 Working Group meeting, available on OHCHR extranet.

33 GA Res 60/251, para 5(e).

34 See, e.g., statement by Finland on behalf of the EU, November 2006.

35 GA Res 60/251, para 5(e) [emphasis added].

36 Including: Algeria (on behalf of the African Group), Australia, Bangladesh, Canada, Chile, Ecuador, Finland (on behalf of the EU), India, Indonesia, Japan, Malaysia, Maldives, Mexico, Netherlands, Philippines, Romania, Singapore, Sri Lanka, and the US.

37 International Service for Human Rights, 'Council Monitor. Working Group to Develop the Modalities of the UPR. 12–15 February 2007', available at: olddoc.ishr.ch/hrm/council/wg/wg_reports/wg_upr_feb_07.pdf [last accessed 18 December 2020].

38 This was compromise text proposed by the Facilitator of the UPR Working Group, see A/HRC/4/117, 20 March 2007.

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

Vienna Declaration and Programme of Action[39] and the 2005 World Summit Outcome, was considered.[40] However, this was met with opposition on various grounds, including the 'aspirational' and non-binding nature of such documents.[41] In the end, no reference was made to commitments arising from conference outcomes in Resolution 5/1.

E. Applicable International Humanitarian Law

The most controversial basis of review was international humanitarian law (IHL).[42] From the outset of negotiations, several Latin American states suggested that UPR should consider implementation of IHL.[43] States in support of this view stressed the overlaps between the content and applicability of the other bases of review and IHL.[44] Pakistan, on behalf of the OIC, suggested that, 'international humanitarian law will be directly relevant to . . . situations of armed conflict'.[45] Malaysia also confirmed that international humanitarian law was relevant, but was keen to restrict the inclusion of IHL instruments to those ratified by the state under review.[46] With reference to the 'latest case-law of the ICJ', Azerbaijan stated that 'human rights need to be respected both in times of peace and armed conflict' and suggested that IHL may be regarded as 'protecting human rights only when it is the *lex specialis* to human rights in times of armed conflict'.[47]

Opposition came from a wide variety of states, including Australia, China, Guatemala, India, Norway, Turkey and the US.[48] Concerns were articulated on two main grounds. First, the view was put forward that the GA had called for a review of fulfilment of *human rights* obligations and commitments.[49] Second, it was suggested

39 Proposed by Germany. Algeria (on behalf of the African Group), Argentina, Brazil, Chile, Colombia, Mexico, and the Russian Federation also supported this idea.

40 Suggested by Argentina.

41 'Summary of the discussion prepared by the Secretariat' A/HRC/4/CRP.1, 13 March 2007, para 17.

42 For detailed discussion see Zhu, supra n 11.

43 Argentina, Chile, Costa Rica, Cuba, Ecuador, Panama, Paraguay, Peru, and Uruguay. See OHCHR, Updated Compilation of Proposals and Relevant Information on the Universal Periodic Review, 5 April 2007 at 12 and 26. Although Ecuador appeared to change position—see ISHR, 'Council Monitor', supra n 37, 4, n9. Belgium, Canada, Egypt and Switzerland are also reported as supporting the (qualified) inclusion of international humanitarian law at some point during the institution-building phase of the Council, see Zhu, supra n 11.

44 Finland, on behalf of the EU, suggested, 'international humanitarian law could form part of the review where specific obligations are replicated, inter alia, the UN Charter, the UDHR, human rights treaty obligations undertaken by the state or a state's voluntary commitments.' Statement by Finnish Presidency on behalf of the European Union, 4 December 2006.

45 Statement by Pakistan's Permanent Representative on behalf of the Organisation of the Islamic Conference, 4 December 2006.

46 Statement by Malaysia, 12 February 2007.

47 Azerbaijan speech to Working Group, February 2007.

48 Redondo, 'The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session' (2008) 7 *Chinese Journal of International Law* 721, 727, also suggests that the UK was 'systematically opposed' to using IHL as a basis for review.

49 India speech to Working Group, February 2007. The US maintained its traditional position on the non-applicability of human rights to armed conflict situations. US Statement to Human Rights Council, 15 November 2006.

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

that the Council was not competent to consider IHL for reasons of lack of expertise[50] and lack of mandate.[51]

Resolution 5/1 sets out a compromise formula in a separate paragraph to the other bases of review, which recognises 'the complementary and mutually interrelated nature of international human rights law and international humanitarian law'.[52]

F. UPR Recommendations

Finally, mention should be made of UPR recommendations as a basis of review. Whilst other methods of follow-up and oversight were disputed,[53] there was a convergence of opinion that successive cycles of UPR should focus on the implementation of accepted recommendations from preceding reviews. Once again, there was a focus on what states have consented to. Resolution 5/1 provides that 'subsequent review[s] should focus, inter alia, on the implementation of the preceding outcome', where the 'outcome' includes the 'voluntary commitments' of the state under review—namely, accepted recommendations.[54]

G. Key Themes in the Identification of the Bases of Review

Two main themes can be observed from the discussions regarding identification of the bases of review. First, the debates tended to ignore the traditional distinctions between hard and soft international human rights law.[55] In light of the instruction in GA Resolution 60/251, soft law instruments were included alongside those containing binding obligations. In fact, one source of binding obligations was explicitly excluded. A proposal to include customary international law in the bases of review[56] attracted significant opposition and was rejected due to the difficulties with its identification.[57] Only outcomes from conferences were dismissed on the basis that they were aspirational. What is apparent is that the idea of 'consent' was a key consideration for determining the bases of review. States were keen to emphasise that only accepted obligations and commitments voluntarily entered into should be used as standards for review. This explains the inclusion of human rights instruments 'to which a state is party'

50 Turkey speech to Working Group, February 2007.

51 Australia Statement to UPR Working Group, 12 February 2007. Norway made similar comments.

52 This language was inserted by the President of the Human Rights Council. See Zhu, supra n 11.

53 E.g., there was some debate on whether other human rights bodies—such as special procedure mandate holders and treaty bodies—should have a role in overseeing implementation of accepted UPR recommendations. This recommendation was not taken up. See ISHR, 'Council Monitor', supra n 37; and Summary of Discussion, supra n 24, paras 63–6.

54 HRC Res 5/1, para 34. See also HRC Dec 17/119, para 11.2: further cycles of UPR 'should focus on, inter alia, the implementation of the accepted recommendations and the development of the human rights situation in the State under review'; and HRC Res 16/21, para I.C.1.6.

55 By 'soft law', we are referring to 'any international instrument other than a treaty containing principles, norms, standards, or other statements of expected behaviour.' Shelton, 'International Law and "Relative Normativity"', in Evans (ed.), *International Law*, 1st edn (2003) 166.

56 See statement by Uruguay (on behalf of Argentina, Chile, Costa Rica, Ecuador, Panama, Paraguay, Peru) to UPR WG, 16 November 2006. Finland (on behalf of the EU) supported the inclusion of custom but only where the norm was replicated in other bases of review; whilst Switzerland expressed regret that customary international law would not be included as basis for review.

57 A view promoted by Indonesia, Iran, Japan, Pakistan (on behalf of the OIC) and Singapore.

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

and 'voluntary pledges and commitments', as well as accepted recommendations from previous UPR cycles as bases of review. Even the justification provided by Liechtenstein for including the non-binding UDHR suggested that it contains 'internationally agreed' rights and freedoms. Second, the debate regarding the inclusion of IHL reflects states' preoccupation with ensuring that the scope of UPR remained within the mandate of the Council, that is: 'protection and promotion of human rights'.[58] It also reveals an uncertainty as to the precise scope of 'human rights'.

3. METHODOLOGY

UPR recommendations have been the subject of various studies: some empirical, some not. Many of these studies have retrieved data from the comprehensive database of UPR recommendations created by UPR Info.[59] The web-hosted, searchable database contains records of every UPR recommendation.[60] Each record contains, *inter alia*, the text of the recommendation, the state under review (and their regional group and organisational affiliation[61]), the recommending state (and their regional group and organisational affiliation), the thematic issues raised,[62] categorisation of the action required,[63] the response (i.e. whether the recommendation was accepted or 'noted'), as well as the session and cycle of UPR in which the recommendation was made.

In the UPR Info database, a recommendation is coded as raising issues regarding 'international instruments' or 'treaty bodies' when it refers to a treaty or the outputs of a treaty body. However, a random check of the database found that these categorisations were not comprehensive and some recommendations that ought to have been captured were not. In addition, given our interest is broader and more specific than references to treaties, we reviewed *all* the recommendations in the UPR Info database[64] to identify those that refer to one or more of the bases of review and created our own database.

58 This concern regarding mandate was also reflected in a further refrain which echoed throughout the institution-building period: namely, that the UPR should 'complement and not duplicate the work of treaty bodies', GA Res 60/251, para 5(e). See also HRC Res 5/1, Annex, para 3(f).

59 E.g. Mao and Sheng, supra n 14; Higgins, supra n 10.

60 See supra n 6. There are some issues with the database: e.g., France was recorded as having 'noted' all recommendations made during its first round of UPR. However, a review of the responses provided by France suggests that some recommendations were in fact accepted. In our version of the database, identified discrepancies were rectified. Other authors have undertaken similar corrections, see Baird, 'The Universal Periodic Review: Building a Bridge between the Pacific and Geneva' in Charlesworth and Larking, supra n 14, 187 at 195.

61 E.g., Saudi Arabia is listed as a member of the OIC and the Arab League. Some states—e.g., Japan and Georgia—are not members of such organisations.

62 UPR Info has identified 56 categories of 'issues' covered in recommendations. A recommendation may relate to more than one issue; e.g., recommendations regarding the use of child soldiers are 'tagged' as 'rights of the child' and 'international humanitarian law'.

63 UPR Info has created a unique ranking scale of the action required. Recommendations are ranked on a scale from 1 (minimal action) to 5 (specific action). An explanation is available at: www.upr-info.org/database/files/Database_Action_Category.pdf [last accessed 1 November 2020].

64 A .xls file of the UPR Info database downloaded from the UPR Info website was used as the basis for our database. Since the creation of our database, UPR Info have created a new web-hosted database in partnership with HURIDOCs. See: upr-info-database.uwazi.io/en/page/bdcsi0m0n8f [last accessed 1 November 2020].

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

When examining the recommendations, it soon became apparent that states were not limiting themselves to the bases of review set out in Resolution 5/1. They were also referring to a range of other international law material. Accordingly, references to this other material were also recorded.

Our interest lies in *explicit* references to the bases of review or other international law material.[65] Therefore, our database contains all recommendations made during the first two cycles of UPR that explicitly refer to one or more of the bases of review identified in Resolution 5/1 or other international law material. Each record includes the data captured by UPR Info as well as information on the material(s) referred to in the recommendation and action called for in respect thereof. Many recommendations refer to more than one international instrument and each reference and associated action is logged in our database. For example, each of the three treaties referred to in the recommendation to 'Ratify CAT, ICRMW and the Optional Protocol to CAT',[66] as well as the call for ratification, were included in the record for this recommendation. The total number of references to each of the bases of review and other international law material is therefore higher than the number of recommendations in the database.

Whilst references to the UDHR, the UN Charter and other treaties can be identified with relative ease, some explanation of our process of identifying the other bases of review is required. 'Voluntary pledges and commitments' were identified where the language of 'voluntary pledge', 'pledge' or 'commitment' was used in the recommendation. For example, recommendations such as 'Fully enforce the commitment to abolishing female genital mutilation',[67] 'Honour its pledge to look into abolishing the death penalty',[68] and 'Continue its efforts to complete the implementation of the voluntary pledges'[69] were identified as referring to voluntary pledges and commitments. In addition to clear references to the implementation of UPR recommendations, phrases such as 'as previously recommended' and 'as accepted previously' (and variations thereof) were considered to reflect UPR recommendations and categorised accordingly.

As noted above, other international law material that is not listed in the bases of review in Resolution 5/1 is also explicitly referenced in UPR recommendations. Judgments from international courts, outputs from UN bodies—including the OHCHR, special procedure mandate holders, the Security Council, the GA, the United Nations High Commissioner for Refugees (UNHCR), human rights treaty bodies and various specialised agencies—, outputs from regional organisations such as the African Union and Council of Europe, and other regulatory regimes adopted at the inter-state level are all explicitly referred to in UPR recommendations. These recommendations are included in our database.

65 This is likely to undercount the use of international law as a basis for recommendations. Treaty obligations may be the basis of a recommendation even if there is no clear reference to the treaty. Rodley attempted to trace the provenance of recommendations to their treaty body source (Rodley, supra n 15 at 328–30). However, this was a very limited and, by his own admission, 'evidently unscientific' study.

66 HRC, Report of the Working Group on the Universal Periodic Review: Grenada (9 April 2015) A/HRC/29/14, Rec 72.18. Hereinafter, only the state, date and UN document reference will be provided for these reports.

67 Eritrea (4 January 2010) A/HRC/13/2, Rec 42.

68 Iraq (12 December 2014) A/HRC/28/14, Rec 127.116.

69 Sri Lanka (18 December 2012) A/HRC/22/16, Rec 127.53.

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

Finally, what might be termed 'general' references to international law material are frequently made in UPR recommendations. For example, Mexico recommended that Micronesia 'Adopt a law on access to information in accordance with international standards on the issue'.[70] Similarly, in a recommendation to Turkey, the UK suggested the state 'take steps to ensure she upholds her international obligations on freedom of expression and freedom of association'.[71] These recommendations also indicate engagement with international human rights law and so are taken into account in our study. Recommendations that make general, non-specific references to international 'obligations', 'law', 'standards', 'norms' or 'instruments' are therefore included in our database. Such references are labelled 'general human rights law'.[72] Similarly, if it is clear that the reference was to IHL standards then it is coded 'general IHL'. So, for example, the recommendation to Syria to '[a]bide by the laws of war, especially by immediately ending all deliberate, indiscriminate and disproportionate attacks against civilians'[73] is included in our database as a reference to 'general IHL'.

4. THE BASES OF REVIEW IN UPR RECOMMENDATIONS

Of the 57,685 recommendations in the UPR Info database, only 31% (18,129) explicitly refer to one or more of the bases of review listed in Resolution 5/1 or other international law material. The majority (69%) do not include any explicit reference to any of the bases of review. Examples of such recommendations include 'completely abolish the death penalty'[74] and 'combat violence against women and trafficking of child victims of prostitution'.[75] Our database is comprised of the 18,129 recommendations that explicitly engage with the bases of review and/or other international law material.

Figure 1 sets out the number of recommendations made by each regional group as well as observers to the Human Rights Council. Although the Western European and Others Group (WEOG) states make the most recommendations (19,554 recommendations in the first two cycles of UPR),[76] they do not make the most recommendations that explicitly refer to the bases of review or other international law material. States from the Latin American and Caribbean Group (GRULAC) are most likely to make such recommendations (37%), while recommendations from Asia-Pacific Group states

70 Federated States of Micronesia (23 December 2015) A/HRC/31/4, Rec 62.77.

71 Turkey (13 April 2015) A/HRC/29/15, Rec 148.121.

72 In some instances, whilst there was a lack of specificity in terms of which international instrument was being referred to there was a high level of certainty regarding which instruments were being referred to. In such cases, the specific instruments referred to were identified through further research: e.g., Senegal recommended to Côte D'Ivoire that it should 'Spare no effort to complete as soon as possible the ratification process for the international human rights instruments listed in pages 23 and 24 of the national report in its French version', Côte D'Ivoire (4 January 2010) A/HRC/13/9, Rec 18. The national report prepared by Côte D'Ivoire was consulted to identify that the instruments being referred to were: the Convention on the Reduction of Statelessness, CPED, ICMW, CEDAW, CRC-OP-AC, CRC-OP-SC, ICESCR-OP, ICCPR-OP2 and OPCAT.

73 Syrian Arab Republic (27 December 2016) A/HRC/34/5, Rec 109.105.

74 Tajikistan (14 July 2016) A/HRC/33/11, Rec 115.48.

75 Austria (22 December 2015) A/HRC/31/12, Rec 139.91.

76 See also, e.g., Kälin, supra n 15 at 257.

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

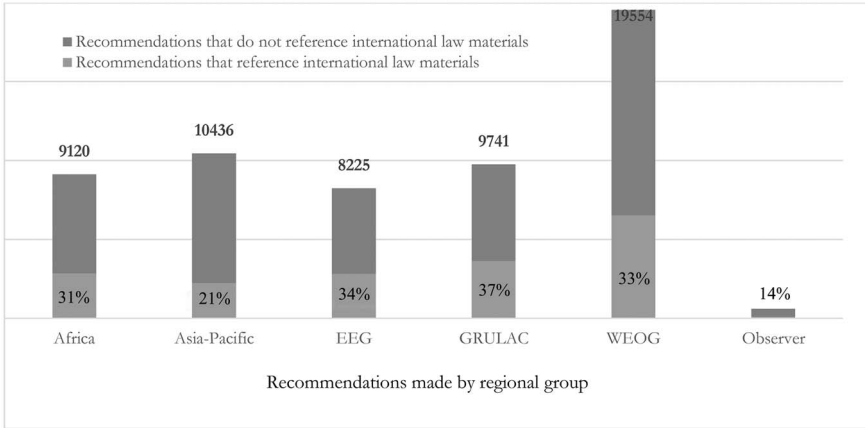


Figure 1. UPR recommendations made by regional group

are least likely to contain such references (21%). The other regional groups make explicit references to the bases of review or other international law material in 31–34% of recommendations. The much lower rate of reference to international law by Asia-Pacific states likely reflects what has been described as Asia's 'ambivalence' towards international law.[77]

The overall acceptance rate for recommendations during the first two cycles of UPR is 73%. Whilst the acceptance rate for recommendations that do not mention the bases of review or other international law material is 80%, only 59% of recommendations that do mention these were accepted. There appears to be some hesitancy on the part of states to commit to recommendations that explicitly refer to the bases of review or other international law material. Both Eastern European Group (EEG) and African Group states accepted a much higher proportion of such recommendations than states from other groups. EEG states accepted 71% of recommendations that explicitly refer to international law, whilst African states accepted 66%. By comparison, GRULAC states accepted 56% of such recommendations, whilst Asia-Pacific and WEOG states accepted 54%.

The extent to which the different bases of review are referred to varies considerably.

A. The UN Charter

Only two recommendations mention the UN Charter. Despite being an uncontroversial inclusion in the list of bases of review, it is barely used in the practice of UPR.

The rare citation of the UN Charter is understandable given that the references to human rights therein are general in nature. For example, Article 55 provides that 'the UN shall promote . . . universal respect for, and observance of, human rights and

77 Chesterman, 'Asia's Ambivalence about International Law and Institutions: Past, Present and Futures' (2017) 27 *European Journal of International Law* 945. Cf Quane, 'The Significance of an Evolving Relationship: ASEAN States and the Global Human Rights Mechanisms' (2015) 15 *Human Rights Law Review* 283.

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

fundamental freedoms for all without distinctions as to race, sex, language, or religion' and Article 56 calls for state action in support of this UN goal. Given these general references to human rights, any recommendation based on the UN Charter is unlikely to be precise enough to require deliberate action. Furthermore, as there are many more specific UN human rights treaties, it is appropriate that they are referenced far more frequently instead.[78] When the Charter has been referenced, it does not appear to have been invoked for its human rights provisions. Rather, in one recommendation, it was invoked to support the principle of state sovereignty;[79] and, in the other, the specific provision of the UN Charter to which the recommendation relates is unclear.[80]

B. The Universal Declaration of Human Rights

As with the UN Charter, there are very few references to the UDHR. Only 31 recommendations reference the Universal Declaration. Thus, two of the bases of review that were uncontroversial during the negotiations of Resolution 5/1 are rarely referred to in the practice of UPR.

Using the UN Charter and the UDHR as bases of review allows for states to be assessed against a broader range of internationally accepted human rights standards than human rights treaty obligations alone. It has been argued that this is particularly important where a state has not ratified one or more of the core UN human rights treaties. In such circumstances, a recommendation can be made calling upon the state to respect a right set out in the UDHR even though there is no treaty obligation to do so. Acceptance of such a recommendation 'confirm[s] its validity and contribute[s] to a universal consensus' on the meaning and content of human rights obligations.[81] Chauville has called this 'rhetorical entrapment'.[82]

However, this theoretical promise has not been realised in practice. Of the 31 recommendations invoking the UDHR less than a quarter (8) were accepted. Over one-third (12) of recommendations cite the UDHR alongside an explicit reference to a treaty obligation. For example, Malaysia recommended to Belgium that it should 'Rescind the decision to prohibit the peaceful expression of religious beliefs, including the wearing of religious symbols in schools, in line with the freedom of religion or belief guaranteed by the Universal Declaration of Human Rights, the Convention on the Rights of the Child, and the European Union Guidelines on the promotion and

78 See Section 4.C.

79 Cuba recommended to the US to 'Suspend the interception, holding and use of communications, including the surveillance and extraterritorial interception and the scope of surveillance operations against citizens, institutions and representatives of other countries, which violate the right to privacy, international laws and the principle of State sovereignty recognised in the Charter of the United Nations.' United States of America (20 July 2015) A/HRC/30/12, Rec 176.302.

80 China recommended that the US 'Quickly close down Guantanamo prison and follow the provision of the United Nations Charter and the Security Council Resolution by expatriating the terrorist suspect to their country of origin.' United States of America (4 January 2011) A/HRC/16/11, Rec 92.157.

81 See Kälin, supra n 17 at 33–4. See also Mao and Sheng, supra n 14 at 8; Kälin, supra n 15 at 258–59.

82 Chauville, 'The Universal Periodic Review's First Cycle: Successes and Failures' in Charlesworth and Larking, supra n 14, 87 at 89.

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

protection of freedom of religion or belief'.[83] In these cases, reference to the UDHR only adds emphasis to existing treaty obligations. Furthermore, 60% of recommendations invoking the UDHR in relation to civil and political rights do so when the state under review was a party to the ICCPR (12 out of 20), whilst all such recommendations relating to economic, social and cultural rights (5) were issued to states that are party to the ICESCR.

During the negotiations on the bases of review, one delegation raised a concern that the UDHR lacked specificity in terms of human rights *obligations*.[84] This view may explain the reticence to refer to the UDHR where there are no human rights treaty obligations, as well as its (limited) use to buttress calls for compliance with existing treaty obligations.

C. Human Rights Instruments to Which the State is Party

A significant number—11,054—of recommendations explicitly refer to one or more treaties.[85] That is, 61% of the recommendations in our database explicitly call for action in relation to treaties. A further 744 recommendations (4%) make general references to treaties and treaty norms and obligations without specifying which treaty. This latter group includes recommendations such as 'Accede to international human rights instruments'[86] and 'incorporate international human rights treaties into national law'.[87]

Treaties are by far the most relied upon basis of review. As Tables 1 and 2 show, various treaties are invoked.

(i) 'Core' UN human rights treaties

Table 1 refers to the 'core'[89] UN human rights treaties and their optional protocols. There is considerable variation in the number of times each of the treaties is referred to. There are significantly more references to the ICCPR than the ICESCR. Optional protocols that establish individual complaints mechanisms are referenced fewer times than their 'parent' treaty.[90] Of the 1188 references to the ICMW, 36% were made by African states, 22% by Asian states and 34% by GRULAC states. WEOG and EEG states only made 88 recommendations that referred to the ICMW, amounting to 7% of all such recommendations. Of these 88 recommendations, Turkey made 33 and Azerbaijan 24; both states are parties to the ICMW unlike most EEG and WEOG members. At the other end of the spectrum, WEOG and EEG states made 69% of the recommendations referring to the ICCPR-OP2 regarding the abolition of the death penalty. This can be explained by the fact that Europe is a death penalty free zone and most of the states

83 Belgium (11 April 2016) A/HRC/32/8, Rec 141.29.
84 See Section 2.B.
85 References to international humanitarian law treaties are not included. See Section 4.E.
86 Marshall Islands (20 July 2015) A/HRC/30/13, Rec 75.21.
87 Montenegro (6 January 2009) A/HRC/10/74, Rec 66.5.
88 Many recommendations call for action in relation to more than one treaty. Therefore, the total number of references to *treaties* is greater than the number of *recommendations*.
89 There are 9 'core' UN human rights treaties: www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx [last accessed 1 November 2020].
90 Namely, ICCPR-OP1, ICESCR-OP, OP-CEDAW, OP-CRC-IC and OP-CRPD.

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

Table 1. References to 'core' UN human rights treaties and their optional protocols[88]

Treaty	Number of references	Consider/become a party to the treaty (% of references)
ICERD	309	74%
ICCPR	1047	62%
ICCPR-OP1	212	98%
ICCPR-OP2	1030	97%
ICESCR	697	93%
ICESCR-OP	472	99%
CEDAW	739	33%
OP-CEDAW	413	98%
CAT	1114	77%
OP-CAT	1414	92%
CRC	503	19%
OP-CRC-AC	330	91%
OP-CRC-SC	360	90%
OP-CRC-IC	274	97%
ICMW	1188	98%
CPED	1095	99%
CRPD	879	85%
OP-CRPD	253	98%

Table 2. References to regional human rights treaties by regional group

	Number of references						
	Africa	Asia-Pacific	EEG	GRULAC	WEOG	Observer	Total
African Union treaties	15	0	2	4	19	0	40
Council of Europe treaties	4	3	54	4	96	1	162
Organisation of American States treaties	0	0	1	19	1	0	21

that retain the death penalty are members of GRULAC or the African and Asia-Pacific groups.[91]

There are three main types of recommendations made to states regarding 'human rights instruments to which a state is party': (1) those that call for a state to become a party to the treaty; (2) those that call for a state to remove its reservations to the treaty; and (3) those that call for the state to implement the treaty obligations substantively

91 See Amnesty International, 'Abolitionist and Retentionist Countries as of July 2018', available at: www.amnesty.org/download/Documents/ACT5066652017ENGLISH.pdf [last accessed 1 November 2020].

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

or call for the incorporation of the treaty into domestic law. As Table 1 shows, a significant proportion of recommendations regarding UN human rights treaties call for the state under review to become a 'party' to the relevant treaty or to 'consider' doing so. Whilst the vast majority of recommendations in our database call for such action, there are two treaties for which this is not the case: CEDAW and the CRC. Both treaties were widely ratified prior to the commencement of the UPR process and so only 33% of recommendations referring to CEDAW call for the state under review to become a party to the treaty, and 19% of recommendations referring to the CRC call for the same action.[92] Conversely, over 90% of the recommendations referring to an optional protocol to one of the core UN human rights treaties called for the state under review to become a party to the treaty. In the case of the ICESCR-OP, the figure is as high as 99%. Similarly, 99% of recommendations referring to CPED—which was adopted in December 2006—call for the state under review to become a party.

This practice of calling for states to become a party to a treaty is notable given that UPR is concerned with assessing a state's human rights record against those 'human rights instruments to which a state is party'. The phrasing in Resolution 5/1 necessarily means that a state has already signed and ratified, or acceded to, a treaty. This interpretation accords with the views expressed when the UPR process was being developed. States were keen to emphasise that the UPR should focus on *accepted* treaty obligations.[93] Recommendations calling for the state under review to *become* a party to a treaty, however, relate to treaties to which a state is *not* already party. Such recommendations have been described as 'non-confrontational' and 'politically neutral'.[94] To call on a state to ratify a treaty does not engage in criticism of a state's action on the domestic plane and this may explain the dominance of such recommendations in the practice of UPR. Despite such recommendations going beyond the intended purview of the UPR process, states have routinely accepted them. Forty-eight percent of recommendations calling for specific action to become a party to a core UN human rights treaty or its optional protocol were accepted, whilst 53% of softer recommendations calling for the state under review to 'consider' becoming a party to the treaty were accepted.[95]

(ii) Regional human rights treaties

Although regional human rights treaties are captured under 'human rights instruments to which a state is party', there were only 6 references to the African Charter on Human and Peoples' Rights, 11 references to the European Convention on Human

92 A few of the recommendations regarding the CRC were issued erroneously to states that were already party to the treaty (e.g. Brunei Darussalam, India, Iraq, Maldives, Micronesia, the Seychelles, Singapore and Tanzania). The majority called for action from Somalia, South Sudan and the US. Both Somalia and South Sudan accepted these recommendations and became parties to the CRC in 2015. The US remains a signatory.

93 See Section 2.C.

94 Kälin, supra n 17 at 32.

95 This data includes all recommendations that call for the state under review to 'sign', 'ratify', 'accede', 'adhere', 'join' and 'become a party' to a core UN human rights treaty or for the state under review to 'consider' such action.

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

Rights, 1 reference to the European Social Charter and 16 references to the American Convention on Human Rights. No references were made to the Arab Charter on Human Rights. References to other regional and sub-regional treaties[96] are sporadic. This is despite the number of such treaties. Only the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) stands out as an outlier to this general trend: 88 recommendations refer to this treaty.

As Table 2 shows, references to regional treaties tend to be made by those states that are members of the relevant regional organisation. There are some exceptions. In its second UPR, Somalia received three recommendations referring to the Protocol to the African Charter on the Rights of Women (Maputo Protocol): two of which were from WEOG states (Australia and Sweden).[97] It is likely that one impetus for these recommendations was the inclusion in one of the reports on which UPR is based—the OHCHR summary of stakeholders' information[98]—of a submission from Human Rights Watch regarding ratification of the Maputo Protocol.[99] However, a general lack of knowledge about regional human rights treaties is likely to be a contributing factor to the low number of references to regional human rights treaties. Regional human rights treaties rarely feature in the three reports on which each UPR is based. Whilst states are directed to provide information on the 'scope of international obligations identified in the "basis of review" in resolution 5/1' in their national reports,[100] very few refer to regional human rights treaties. This information is not included in the OHCHR compilation of UN information that forms part of the information base for each UPR. It is only included in the OHCHR summary of stakeholders' information if raised in submissions.

(iii) Other treaties

Treaties that are not *human rights* treaties *stricto sensu* are also cited in UPR recommendations. Table 3 sets out the most frequently referenced of these 'other' treaties and the regional groups that refer to these treaties in their recommendations. There are significantly more recommendations referring to these treaties than regional human rights treaties. The numerous recommendations referring to these treaties suggest that states act as though the boundaries between human rights law and other areas of law are porous.

There are 383 recommendations that reference one or more conventions adopted by the International Labour Organisation, and these have been made by all regional groups. States that made the recommendations consider these treaties to be part of

96 E.g. the South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution and the Southern African Development Community Protocol on Gender and Development.

97 Somalia (13 April 2006) A/HRC/32/12, Recs 135.9 and 136.80. Namibia made the third recommendation (Rec 135.8).

98 HRC Res 5/1, para 15(b).

99 Summary prepared by the OHCHR in accordance with paragraph 15(c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Somalia (6 November 2015) A/HRC/WG.6/24/SOM/3, para 6.

100 HRC Dec 6/102, 27 September 2007, A/HRC/DEC/6/102, para 1.

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

the human rights regime. Furthermore, the number of recommendations referring to the Refugee Convention and/or its Protocol (144) and those treaties relating to statelessness (145) would suggest that the states invoking these instruments are making the same assumption.

The blurring of boundaries is particularly pronounced as regards international criminal law. The number of references to the Rome Statute of the International Criminal Court, Kampala Amendments to the Rome Statute and Agreement on the Privileges and Immunities of the International Criminal Court is greater than for many of the core UN human rights treaties. There are 933 recommendations that refer to the Rome Statute alone, making it the seventh most cited treaty behind the ICCPR, ICCPR-OP2, CAT, OP-CAT, ICMW and CPED and ahead of core human rights treaties such as the ICESCR, CEDAW and CRC. States occasionally acknowledge that the Rome Statute is not a human rights treaty,[101] but the sheer number of references suggests this is not the dominant view. EEG, GRULAC and WEOG states in particular promote the view that international criminal law—and its oversight mechanisms—are considered as part of the international human rights regime through their copious invocations of the Rome Statute.

Other treaties referenced include conventions adopted by the Hague Conference on Private International Law (including the Hague Convention on Civil Aspects of International Child Abduction and the Hague Convention on the Protection of Children and Cooperation in Respect of Inter-country Adoption). There are also references to the Arms Trade Treaty, the Convention on the Suppression of Terrorism, the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, the Minamata Convention on Mercury, the UN Framework Convention on Climate Change, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, the UN Convention against Transnational Organised Crime, the UN Convention against Corruption, the Convention on the Political Rights of Women, the WHO Framework Convention on Tobacco Control, the Marrakesh Treaty to facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled and the Vienna Convention on Consular Relations. In invoking these treaties, the recommending states accept, albeit implicitly, that these treaties are relevant to the enjoyment of human rights. However, given the paucity of references to these treaties—fewer than 20 for most of these treaties—it is premature to argue that there is a widespread view amongst states that these are part of the human rights regime, even if some states are of that view.

In fact, it is remarkable that some treaties are not referred at all. Security treaties, such as nuclear weapon free zone treaties,[102] are not raised in UPR recommendations. States do not seem to perceive these as human rights treaties, even though they are premised on ideas of freedom from fear, and the prohibition on nuclear weapons is linked to human rights.[103]

101 E.g. Hungary recommended Israel '[r]atify OP-CAT and, although not a human rights instrument per se, the Rome Statue of the International Criminal Court (ICC)': Israel (19 December 2013) A/HRC/25/15, Rec 136.8.

102 E.g. Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean 1967; South Pacific Nuclear Free Zone Treaty 1985.

103 See Human Rights Committee, General Comment No 36, 30 October 2018, para 66.

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

Table 3. Recommendations referring to 'other' treaties by regional group

	Number of recommendations	Recommendations by regional group (% of references)[104]				
		Africa	Asia-Pacific	EEG	GRULAC	WEOG
Rome Statute of the ICC, Kampala Amendments, and Agreement on Immunities and Privileges	991	11	5	32	20	31
ILO Conventions[105]	383	9	26	9	36	20
Refugee Convention and Protocol	144	12	4	13	34	37
Statelessness Conventions[106]	145	9	2	30	30	29
UNESCO Conventions[107]	94	39	18	18	16	7
Genocide Convention	85	20	0	60	15	5
Palermo Protocols[108]	79	11	15	16	20	37
Peace Agreements	59	25	5	7	5	56

Another set of instruments referenced in UPR recommendations are peace agreements. These include inter-state peace agreements,[109] as well as agreements concluded between a state and a non-state armed group.[110] Most recommendations referencing peace agreements are issued by African and WEOG states. Peace agreements concluded between states are accepted as treaties.[111] By contrast, there is considerable debate on the legal nature of a peace agreement that is concluded between a state and an armed

104 Three references to the treaties were made by Palestine and the Holy See as 'observer' states to the UN and are not indicated in the proportion of references made by regional groups.

105 Including references to the treaties listed infra n 208, as well as Convention Nos 2, 81, 97, 102, 117, 118, 143, 155, 169, 170, 174, 186, 188 and 189.

106 Convention Relating to the Status of Stateless Persons 1954 and Convention on the Reduction of Statelessness 1961.

107 Including: UNESCO Convention against Discrimination in Education 1960; UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage 2003; and UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005.

108 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children 2000; Protocol against the Smuggling of Migrants by Land, Sea and Air 2000; and Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition 2001.

109 E.g. Peace, Security and Cooperation Framework for the Democratic Republic of the Congo and the Region 2013.

110 E.g. Comprehensive Peace Agreement between the Government of Nepal and the Communist Party of Nepal (Maoist) 2006.

111 Article 2(1)(a) VCLT defines a treaty as 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single agreement or in two or more related instruments and whatever its particular designation.'

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

group: some see these as 'binding international instruments',[112] whilst others simply suggest that they are 'not treaties'.[113] Regardless of their characterisation as a treaty or another instrument, it is difficult always to characterise peace agreements as *human rights* treaties or instruments. Peace agreements will frequently address a variety of matters—such as regulation of power-sharing, wealth-sharing and security arrangements—of which human rights forms but one part. Some UPR recommendations highlight the human rights and humanitarian law aspects of the relevant peace agreement, mentioning free and fair elections and democracy[114] or the rights of refugees and internally displaced persons.[115] However, the majority of references simply urge compliance with the peace agreement itself. As with the 'other' treaty references discussed above, recommending states implicitly accept that such agreements are part of the human rights regime.[116]

The practice of UPR indicates that the phrase 'human rights instruments to which a state is party' has been interpreted expansively. Whilst most references to treaties are to the core UN human rights treaties (even where the treaty has not been ratified), treaties in related areas such as international criminal law and refugee law are also referred to. This may, in some part, be due to the information provided by the OHCHR prior to each review.[117] The numerous references to these other treaties suggest that they are part of the human rights regime. Given this generous interpretation of the term 'human rights instrument', it is all the more noteworthy that there are very few references to regional human rights instruments.

D. Voluntary Pledges and Commitments

Only 94 recommendations explicitly refer to a 'pledge' or 'commitment' undertaken by the state under review. This is a surprisingly low figure for two reasons. First, 100 states had been members of the Human Rights Council by the end of the second cycle of UPR,[118] with the majority making voluntary pledges regarding human rights.[119] Second, states undergoing review often make voluntary commitments in the national

112 E.g. Report of the International Commission of Inquiry on Darfur to the Secretary-General, 1 February 2005, S/2005/60, para 174.

113 *Prosecutor v Kallon and Kamara* SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, paras 45–50.

114 E.g. Niger to Guinea: 'Ensure that the upcoming elections are democratic, transparent and fair in order to allow for a definitive return by Guinea to the democratic international and regional arena, in line with the Ouagadougou Agreement of 15 January 2010': Guinea (14 June 2010) A/HRC/15/4, Rec 71.88.

115 E.g. Finland to Myanmar: 'Support the active and meaningful participation of women, "ethnic groups", internally displaced persons and refugees in the implementation of the Nationwide Ceasefire Agreement, including the national dialogue': Myanmar (23 December 2015) A/HRC/31/13, Rec 144.30.

116 E.g. Canada to Democratic Republic of Congo: 'Pursue the implementation of the peace accords with a view to stabilising and pacifying the eastern part of the Democratic Republic of the Congo and create suitable conditions to ensure and promote respect for international humanitarian law and the protection of the civilian population': Democratic Republic of Congo (4 January 2010) A/HRC/13/8, Rec 97.2.

117 See Section 5.B.

118 For a list of members of the Council, see: www.ohchr.org/EN/HRBodies/HRC/Pages/PastMembers.aspx [last accessed 1 November 2020].

119 Details of past elections (and links to voluntary pledges made) are available at: www.ohchr.org/EN/HRBodies/HRC/Pages/HRCElections.aspx [last accessed 1 November 2020].

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

reports they submit as part of the UPR process. Data from UPR Info suggests that 160 states had made 1100 such commitments during the first two UPR cycles.[120]

The recommendations referring to voluntary pledges and commitments relate to a variety of actions from ratification of treaties, to issuing standing invitations to the special procedures of the Human Rights Council, to 'uphold[ing] commitments to prevent impunity for human rights violations'.[121] Most of the recommendations are inward-looking; that is to say, they relate to a state committing to do certain things that will improve the human rights situation within its jurisdiction.

Occasionally, binding obligations under international human rights law have been reframed as voluntary commitments. For example, the Republic of Korea recommended to Yemen that it '[h]onour its voluntary commitment to submit national reports to the treaty bodies by the due date'.[122] But timely submission of state party reports to human rights treaty bodies is an obligation that arises from the human rights treaties to which the state is party.[123] By characterising timely reporting as a voluntary commitment, a binding treaty obligation is downgraded into a voluntary measure.

There does not appear to be any significant regional variation in terms of making or accepting recommendations that refer to voluntary pledges and commitments. Seventy four were accepted (79%) with no significant difference between regional groups in terms of acceptance rates. There appears to be no distinction in terms of accepting recommendations explicitly based on a formal treaty obligation (the acceptance rate for 'implementation' of treaty obligation recommendations was 73%) and those based on non-binding pledges or commitments.

E. International Humanitarian Law

Resolution 5/1 also provides that 'given the complementary and mutually interrelated nature of international human rights law and international humanitarian law, the [UPR] shall take into account applicable international humanitarian law'. As discussed above,[124] this formulation was a compromise solution following considerable debate during the negotiations on the modalities of the UPR. There was substantial opposition to the inclusion of IHL as a basis for the UPR. Despite the concerns expressed at that time, the practice of UPR demonstrates some limited engagement with IHL.

During the first two cycles of UPR, there were 120 recommendations that made a reference to IHL; this includes 39 recommendations that reference one or more IHL

120 Data available by searching the UPR Info database, supra n 6, for 'Voluntary Pledges only'.

121 Colombia (4 July 2013) A/HRC/24/6, Rec 116.71.

122 Yemen (5 June 2009) A/HRC/12/13, Rec 27. The voluntary commitment can be found in the National Report submitted in accordance with Paragraph 15(A) of the Annex to Human Rights Council Resolution 5/1 (20 February 2009) A/HRC/WG.6/5/YEM/1, 14.

123 E.g., Article 40(1) ICCPR provides that states parties 'undertake to submit reports on the measures they have adopted . . . (a) Within one year of the entry into force of the present Covenant for the States Parties concerned; (b) Thereafter whenever the Committee so requests.'

124 See Section 2.5.

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

instruments[125] and a remaining 81 that make a general reference to IHL.[126] Reference was made to the 1949 Geneva Conventions collectively (2), Geneva Convention IV (19), Additional Protocol I to the 1949 Geneva Conventions (12), Additional Protocol II to the 1949 Geneva Conventions (12), Additional Protocol III to the 1949 Geneva Conventions (4), Ottawa Convention on Anti-Personnel Landmines (3), Chemical Weapons Convention (1), Hague Regulations (1), First Protocol to the 1954 Hague Convention (1) and the Second Protocol to the 1954 Hague Convention (1).[127] Of these specific references, there is a preference for 'Geneva Law'—an unofficial term that describes the body of law that protects the victims of armed conflicts in the power of a Party to the conflict[128]—over rules of 'Hague Law' that regulate the conduct of hostilities and the means and methods of warfare. This might be due to the closer connection of Geneva Law, with its obligations of humane treatment and rules on the treatment of detainees, to human rights protections.

There are fewer recommendations referring to IHL than to the Statelessness Conventions (145), the Refugee Convention and its Protocol (144), ILO Conventions (383) and the various instruments relating to the International Criminal Court (991).[129] This is despite the inclusion of IHL as a basis of review, albeit one that should be 'taken into account'. Recommendations that do reference IHL were made to only a handful of states. Of the 32 states that received recommendations referring to IHL, 50% were made to just three states: Israel (35), Syria (14) and Somalia (11). The rest received recommendations in the single digits. All recommendations that reference the Fourth Geneva Convention and the Hague Regulations are to Israel addressing the situation in the Occupied Palestinian Territories and the Golan Heights.

The low number of references to IHL in UPR recommendations may be attributed in part to the opposition to including IHL as a basis of UPR and the view that IHL does not properly fall within the province of UPR, or indeed the work of the Human Rights Council more generally.[130] However, these reasons can only be part of the explanation. Fifty of the 120 recommendations refer to IHL without further mention of human rights protections. In fact, recommendations regarding IHL were made by some states that were opposed to its inclusion in the bases of review. For example, Australia made three recommendations referring to 'obligations under international humanitarian law'[131] and Turkey made three recommendations calling for respect for

125 In this study 'IHL instruments' is understood as those instruments that seek to regulate conduct during armed conflict and belligerent occupation—what might be termed 'Hague Law' and 'Geneva Law'. International criminal law instruments and the OP-CRC-AC have been excluded. Zhu, supra n 11, takes a broader view of what constitutes IHL.

126 E.g. Kuwait's recommendation to Iraq to '[c]ommit to abide by international humanitarian law and international law': Iraq (15 March 2010) A/HRC/14/14, Rec 27.

127 The Ottawa Convention on Anti-Personnel Landmines and the Chemical Weapons Convention are treated as IHL instruments given that they contain prohibitions on the use of certain weapons during armed conflict.

128 Sassòli, *International Humanitarian Law* (2019) at 10.

129 See Section 4.C.

130 On the latter, see Alston, Morgan-Foster and Abresch, 'The Competence of the UN Human Rights Council and its Special Procedures in relation to Armed Conflicts: Extrajudicial Executions in the "War on Terror"' (2008) 19 *European Journal of International Law* 183.

131 Iraq (15 March 2010) A/HRC/14/14, Rec 121; Angola (5 December 2014) A/HRC/28/11, Rec 134.187; Syrian Arab Republic, supra n 73, Rec 109.119.

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

IHL.[132] Both these states initially expressed the view that the Human Rights Council was not competent to engage with questions regarding IHL in the UPR.[133] In fact, with 59 states from all 5 regional groups referring to IHL in their recommendations,[134] and an additional 19 states from all 5 regional groups accepting recommendations that refer to IHL,[135] states from all regional groups have positively engaged with IHL in the UPR—both making and accepting such recommendations. This includes states that were involved in armed conflicts, such as Colombia, the Democratic Republic of the Congo, Iraq, Sri Lanka, Syria and the US.

Resolution 5/1 provides no guidance on what is to be considered *applicable* IHL. Whether this term refers to those IHL treaties to which the state under review is a party,[136] customary IHL, or only those norms that overlap with human rights protections was left open to interpretation. The practice of UPR does not shed much light on states' perceptions of 'applicable'. There are references to conventional IHL. Yet, 60% of the references call on the state under review to become a party to a treaty and so are referring to IHL instruments that are *not* applicable to the state under review.

The remainder of the references to IHL are general references. For example, Mexico called on Pakistan to '[s]trictly adhere to international human rights law and international humanitarian law and international refugee law in its fight against terrorism',[137] but it is not clear which rules of IHL are being referred to. Such recommendations may be referring to customary rules of IHL or treaty rules or both. In fact, despite the considerable body of customary IHL that is binding on all states,[138] there is only one reference to custom in the context of IHL. Sweden called on Syria to 'Protect civilians and civilian infrastructure, in accordance with international humanitarian law and customary international law, and stop its indiscriminate and aerial bombardments, including the use of barrel bombs'.[139] The recommendation was accepted.[140] This is the sole instance of customary international law—both in the context of IHL and generally—being invoked in the first two cycles of UPR. This may be due to uncertainties as to whether a particular rule forms part of customary international law and a reluctance on the part of the recommending state to engage in a debate on whether a rule has such status. It also reveals a clear preference for treaty law.

132 Somalia (11 July 2011) A/HRC/18/16, Recs 98.48 and 98.77; Syrian Arab Republic, supra n 73, Rec 110.6. See also the recommendations made by the UK to the Central African Republic and Colombia: Central African Republic (4 June 2009) A/HRC/12/2, Rec 14; Colombia (9 January 2009) A/HRC/10/82, Rec 17.

133 See Section 2.E.

134 The distribution of recommendations was: Africa: 9; Asia-Pacific: 25; EEG: 14; GRULAC: 28; WEOG: 41. Three recommendations were made by observer states.

135 These included: 10 African states; 6 Asia-Pacific states; 1 EEG state; 1 GRULAC state; and 1 WEOG state.

136 As suggested by Malaysia, supra n 46.

137 Pakistan (4 June 2008) A/HRC/8/42, Rec 25.

138 See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (2005).

139 Syrian Arab Republic, supra n 73, Rec 109.99.

140 The recommendation was accepted, although 'reservations' were expressed 'about the politicised nature of the wording and the aggressive, accusatory and provocative language in which they were expressed.' HR Council, Report of the Working Group on the Universal Periodic Review: Syrian Arab Republic, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review (13 March 2017) A/HRC/34/5/Add.1, 7.

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

F. UPR Recommendations

UPR recommendations have been referred to in 404 recommendations; with 101 references occurring in the first cycle, and the remainder in the second cycle (303).[141] The rather low number of references in the second cycle is noteworthy given that subsequent cycles of UPR 'should focus, inter alia, on the implementation of the preceding outcome'.[142] One explanation for the low number is that there is an expectation that accepted recommendations will be implemented by the state under review before its next UPR. Where such recommendations are implemented, there is simply no need to refer back to them.[143] Another, less charitable, explanation is that most states are not interested in following up on accepted recommendations in later rounds of UPR.

References to UPR recommendations in the first cycle relate to the *process* of implementation of recommendations from that cycle. There are three broad categories of recommendation. The first calls on states to ensure an inclusive process involving civil society and relevant government departments—including translating and disseminating the outcome of the UPR—when implementing recommendations. Only one such recommendation was rejected. Venezuela noted a Canadian recommendation to 'Ensure a participatory and inclusive process with civil society, including NGOs who may be critical of the government's efforts, in the follow up of UPR Recommendations'.[144] Notably, Venezuela did accept a similar recommendation from Norway.[145] The second category of recommendation is more outward-looking. States are called on to 'seek technical and financial assistance from the international community to implement the recommendations'.[146] All these recommendations were accepted. The final category of recommendation calls for a commitment to provide mid-term or periodic reports to the Council on implementation of accepted UPR recommendations. Of the six recommendations that call for such action, two were noted (by Kazakhstan and Tanzania).

Of the 303 second cycle references to UPR recommendations, 67 relate to the process of implementation and 236 refer to UPR recommendations from the first cycle. Table 4 shows a breakdown of the second type of reference.

Not all the references to UPR recommendations from the first cycle are references to 'accepted' recommendations. Tracking each reference back to the original recommendation reveals that 38% of recommendations reference a recommendation that was noted by the state under review in the first cycle.[147] This is despite the instruction that

141 A further 132 recommendations refer to a follow-up process to the UPR but do not expressly mention UPR recommendations.

142 HRC Res 5/1, para 34; HRC Dec 17/119, para II.2.

143 Kothari has noted that 'One of the defining features of the UPR process has been the robust follow-up mechanisms that have emerged throughout the reporting cycles of the UPR.' He refers, amongst other things, to UPR mid-term reports and the '[d]evelopment of matrices and tools to track the implementation status of UPR recommendations.' Kothari, 'Research Brief: The Universal Periodic Review Mid-Term Reporting Process: Lessons for the Treaty Bodies' (Geneva Academy, 2019) 3, available at: www.geneva-academy.ch/research/publications/detail/504-the-universal-periodic-review-mid-term-reporting-process-lessons-for-the-treaty-bodies [last accessed 1 November 2020].

144 Venezuela (Bolivarian Republic of) (7 December 2011) A/HRC/19/12, Rec 96.37.

145 Venezuela, supra n 144, Rec 93.19.

146 Côte d'Ivoire, supra n 72, Rec 99.101.

147 Where, despite a reference to a previous recommendation, no such recommendation was made then this has been recorded as a 'noted' recommendation. E.g., Burkina Faso recommended that Brazil should 'Continue

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

Table 4. Cycle 2 recommendations referring to 'accepted' and 'noted' cycle 1 recommendations

Regional group of state under review	Reference to an 'accepted' recommendation from first cycle		Reference to a 'noted' recommendation from first cycle	
Action in second cycle	Accepted	Noted	Accepted	Noted
Africa	37	11	13	9
Asia-Pacific	40	11	4	20
Eastern Europe	11	0	0	4
Latin America and Caribbean	14	5	9	18
Western Europe and Others	12	5	0	13
Total	114	32	26	64

'the second and subsequent cycles should focus on, *inter alia*, the implementation of accepted recommendations'.[148] States do not tend to accept such recommendations. Only 29% of these previously 'noted' recommendations are accepted. Most of these 'repeat' recommendations are made by the state that made the original recommendation in the first cycle. For example, during the first cycle of UPR Slovenia had recommended that Swaziland[149] abolish the death penalty. However, Swaziland indicated that it was 'not yet ready to accept this recommendation'.[150] Slovenia returned to this recommendation in the second UPR cycle, calling for Swaziland to 'Abolish the death penalty, as previously recommended'.[151] Once again, the recommendation was 'noted'.

Twenty-two percent of the recommendations that reference a recommendation 'accepted' in the first round of UPR are 'noted' in the second cycle. One-third of these relate to a commitment to sign, ratify or accede to an international human rights treaty. For example, in its first UPR Australia accepted recommendations to ratify OP-CAT but only 'noted' recommendations that recalled these commitments in its second UPR. There are alternative possible explanations for such behaviour. One is that states do not view acceptance of a UPR recommendation as creating a commitment to act. Another is that something changed in the state under review between the first and second UPR, such as a change of government or a change of policy. A third is that states took acceptance of UPR recommendations more seriously in the second round

with the implementation of recommendations related to the ratification of human rights international instruments'; however, no recommendations were made to Brazil in the first cycle of UPR relating to ratification of human rights instruments. See Brazil (9 July 2012) A/HRC/21/11, Rec 119.1.

148 HRC Res 16/21, Annex: Outcome of the review of the work and functioning of the United Nations Human Rights Council, para I.C.1.6 [emphasis added]. See also HRC Dec 17/119, para II.2.

149 Now Eswatini. The official documents relate to when the state was called Swaziland.

150 Report of the Working Group on the Universal Periodic Review, Swaziland, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review (6 March 2012) A/HRC/19/6/Add.1, para 11.

151 Swaziland (13 July 2016) A/HRC/33/14, Rec 109.37.

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

of UPR and so were unlikely to accept a recommendation regarding treaty ratification unless there was certainty that the recommendation could be implemented. In the case of Australia, the last explanation seems the most persuasive. Australia said that it 'is actively considering the ratification of the OPCAT' in response to the second cycle recommendations,[152] and subsequently ratified OPCAT.[153] Similarly, Somalia confirmed that in light of capacity and resource constraints it needed to 'prioritise' ratification of certain human rights instruments and therefore general recommendations regarding ratification of core human rights treaties could not be accepted.[154]

5. INTERNATIONAL 'HUMAN RIGHTS' LAW IN UPR

The negotiations on the bases of review and their use (or lack thereof) in the first two cycles of UPR provide some insights into states' perceptions of international 'human rights' law.

A. 'Other' International Law Material in UPR Recommendations

A stark finding of our analysis of UPR recommendations is that states have not limited themselves to the bases of review set out in Resolution 5/1. In the practice of UPR, states have expanded the review to include a wide range of other international law material. Remarkably, 5608 recommendations—almost 10% of all recommendations made in the first two cycles and 31% of the recommendations in our database—call for implementation of international law material not obviously captured by the bases of review. There are 3776 distinct references to *specific* materials that *prima facie* fall outside the bases of review;[155] as well as 2242 *'general* human rights' references.[156]

Of the 3776 distinct references to specific international law materials not captured by the bases of review listed in Resolution 5/1, some are to binding materials, such as international court judgments, whilst the majority are to soft law instruments, including various declarations and principles. Materials from human rights bodies are referenced, including outputs from UN treaty bodies and special procedure mandate holders, as are materials from entities that are not traditionally considered human rights bodies, such as the World Food Programme, the United Nations Development Programme and the Food and Agricultural Organization. These materials are rarely referred to in conjunction with a Resolution 5/1 basis of review. Only 213 references exist alongside a reference to a basis of review (6%). Recommendations are made to states to 'implement'

152 Australia, Addendum (19 February 2016) A/HRC/31/14/Add.1, para 5.
153 21 December 2017. See treaties.un.org/Pages/showActionDetails.aspx?objid=08000002804e0fea&clang=_en [last accessed 1 November 2020].
154 Somalia, Addendum (7 June 2016) A/HRC/32/12/Add.1.
155 Some recommendations refer to more than one international law material that is not captured by the bases of review.
156 See Section 5.D.
157 See GA Res 48/134, 20 December 1993, A/RES/48/134.
158 See GA Res 55/2, 18 September 2000, A/RES/55/2.
159 GA Res 61/295, 13 September 2007, A/RES/61/295.
160 This figure includes references to both the original (ECOSOC Res 663C (XXIV), 31 July 1957; ECOSOC Res 2076 (LXII), 13 May 1977) and updated Standard Minimum Rules (Nelson Mandela Rules) (GA Res 70/175, 8 January 2016, A/RES/70/175).
161 18 September 2008, A/HRC/RES/9/12.

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

Table 5. Five most cited international law instruments by regional group

Material referenced	Number of references	Africa	Asia-Pacific	EEG	GRULAC	WEOG	Observer
		% of references made					
Principles Relating to the Status of National Human Rights Institutions[157]	1279	28	22	9	15	26	0
Millennium Development Goals[158]	198	31	47	7	11	4	2
UN Declaration on the Rights of Indigenous Persons[159]	63	16	13	5	33	33	0
Standard Minimum Rules for the Treatment of Prisoners[160]	57	9	12	16	2	61	0
Human Rights Council Resolution 9/12 (Human Rights Voluntary Goals)[161]	45	0	0	0	100	0	0

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

these international law materials (or the actions they call for) and these have been accepted by states from all regional groups.

Table 5 shows the five most cited of these 'other' international law instruments.[162] The vast majority of the references (34%) are to the Paris Principles Relating to the Status of National Human Rights Institutions, with references to other materials being far fewer in number. However, many more materials are referenced sporadically: 50 different international instruments are referred to fewer than 10 times. So, despite their importance in their respective fields, the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials[163] are only referred to 5 times and the Guiding Principles on Internal Displacement[164] 8 times. Instruments adopted by experts, such as the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity[165] (21), and regulatory frameworks, such as the Extractive Industries Transparency Initiative[166] (3) are also referred to.

States from all regional groups make recommendations referring to these international law instruments. There are variations in terms of issues being pursued. For example, Asia-Pacific and African group states made most of the references to instruments and standards relating to development. These groups accounted for 92% of the references to the GA's Overseas Development Aid Target,[167] 78% of the references to the Millennium Development Goals and 74% of the references to the Sustainable Development Goals.[168] All of the references to Human Rights Council Resolution 9/12 (Human Rights Voluntary Goals) were made by Brazil and all but one of the 37 references to the UN Rules for the Treatment of Women Prisoners (the Bangkok Rules)[169] were made by Thailand.[170]

Materials from different sources are cited to varying degrees. There are 884 references to outputs from the UN treaty bodies. These references include occasional references to general comments (14) and concluding observations (19). The vast majority are general references to 'recommendations' for action made by treaty bodies. Given that the UN treaty bodies are mandated to provide guidance on performance of core human rights treaty obligations, these outputs have a close link to one of the bases of review: 'human rights instruments to which a state is party'. Most of the recommendations calling for implementation of treaty body outputs refer to outputs from the Committee on the Rights of the Child (214) and the Committee on the Elimination of Discrimination against Women (203). There are far fewer references to

162 Citations were counted as they were presented in recommendations: e.g., a recommendation referring to the title of an instrument contained in a GA resolution—such as the Declaration on Human Rights Defenders—was counted as a reference to the actual instrument rather than the parent resolution. This provides an accurate picture of the material states refer to in their recommendations.

163 Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August to 7 September 1990.

164 11 February 1998, E/CN/4/1998/53/Add.2.

165 'Yogyakarta Principles—Principles on the application of international human rights law in relation to sexual orientation and gender identity', March 2007.

166 See: eiti.org [last accessed 1 November 2020].

167 GA Res 2626 (XXV), 24 October 1970. There were 38 references.

168 GA Res 70/1, 25 September 2015, A/RES/70/1. There were 24 references.

169 GA Res 65/229, 21 December 2010, A/RES/65/229.

170 Switzerland made the other recommendation.

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

outputs from the Human Rights Committee (101) and the Committee on Economic, Social and Cultural Rights (69). The acceptance rates for recommendations calling for implementation of treaty body recommendations is 72%, which reflects the acceptance rate for recommendations calling for implementation of the core UN human rights treaties (73%).

There are 236 references to outputs from UN special procedures. Recommendations have focussed on implementation of outputs from thematic special procedures rather than country specific mandates. There are only 19 references to outputs from country specific mandates. This reflects the more contentious nature of the country mandates and their limited number.[171] Six recommendations referring to the work of the Special Rapporteur on the situation of human rights in Cambodia and the single recommendation referring to the Independent Expert on the situation of human rights in the Sudan were accepted. Both these mandates are concerned with capacity building and technical assistance and were established with the support of the state concerned. The remaining 12 recommendations were rejected.

There are far fewer references to resolutions, decisions and other 'recommendations' from the Human Rights Council (113), the GA (97) and the Security Council (88). The references to GA resolutions are predominantly references to resolutions regarding the abolition of the death penalty generally and directed towards those African, Asia-Pacific and GRULAC states that retain the death penalty. They tend to be rejected: only 17% of recommendations being accepted. Almost half of the references to Security Council resolutions are to Resolution 1325 on Women, Peace and Security.[172] The overall acceptance rate for recommendations referring to Security Council resolutions is 72%.

Outputs from a variety of other UN entities and specialised agencies, are also referred to, albeit less frequently. These references tend to be rather general, invoking unspecified 'recommendations' from the various bodies. States are called upon to implement 'recommendations' from the High Commissioner for Human Rights and their office (OHCHR) (42), the ILO and its supervisory bodies (24) and the UNHCR (21). There are sporadic references to outputs from other specialised agencies, including the World Health Organisation, UN Education, Scientific and Cultural Organization (UNESCO) and the Food and Agricultural Organisation (FAO).

Only two recommendations call for implementation of ICJ judgments and one recommendation calls for the implementation of an order for provisional measures. Nicaragua called for the implementation of the *Nicaragua* judgment.[173] This recommendation was noted by the US. Mexico's call for the US to implement the *Avena* judgment was accepted.[174] The Russian Federation noted the recommendation from Georgia to 'comply' with provisional measures ordered by the ICJ,[175] because it 'did not comply with the basis of the review stipulated in HRC Resolution 5/1'.[176] A further

171 See Freedman, 'The Human Rights Council', in Mégret and Alston (eds), *The United Nations and Human Rights* (2020) 233.
172 SC Res 1325, 31 October 2000, S/RES/1325 (2000).
173 ICJ Reports 1986, 14. See A/HRC/16/11, supra n 80, Rec 92.53.
174 ICJ Reports 2004, 12. See A/HRC/16/11, supra n 80, Rec 92.54.
175 ICJ Reports 2008, 353.
176 Russian Federation (5 October 2009) A/HRC/11/19, paras 54 and 86.

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

eight recommendations called upon Israel to accept and implement the Advisory Opinion in the *Wall* case.[177] Each of these was noted.

States seem to be working on the basis that limiting references to the UN Charter, the UDHR, human rights treaties and voluntary pledges and commitments overlooks numerous other materials that are relevant to improving the situation of human rights in the state under review. Failure to mention these materials would be to ignore a significant part of the picture, even though these materials do not form part of the official bases of review.

Most 'other' international law materials cited are soft law instruments. Whilst many academics and lawyers are concerned with the hard/soft law distinction—and some are critical of the very idea of soft law[178]—state delegates who make UPR recommendations are far less troubled by the distinction. The practice of UPR indicates an erosion of the hard/soft law divide. In fact, states demonstrated this willingness to overlook formal distinctions during the negotiations on the modalities of the UPR.[179] The bases of review set out in Resolution 5/1 reflect a broad range of human rights commitments undertaken by states at the international level, including a mix of both hard and soft law.

As Boyle and Chinkin have observed: 'contemporary international law is often the product of a complex and evolving interplay of instruments, both binding and non-binding, and of custom and general principles'.[180] This is reflected in the design and practice of UPR, with the notable absence of custom. Although states have broadened the bases of review in practice to include a variety of soft law instruments, customary international human rights law is almost entirely missing. States appear more comfortable with written texts, even if not binding, than with an unwritten source, even if binding.

The OHCHR compilation of UN information which feeds into each UPR is likely to account for some of the references to this 'other' material. The compilation includes, for each state under review, relevant information from the treaty bodies, special procedures, OHCHR, UN country teams, ILO committee of experts, UNESCO and UNHCR, amongst others.[181] The OHCHR compilation seems to serve as an influential document from which states draw and demonstrates the potential importance of actors who operate 'behind the scenes'.[182] At the same time, states do not limit themselves to materials included in the compilation.

177 ICJ Reports 2004, 3.

178 E.g. Klabbers, 'The Redundancy of Soft Law' (1996) 65 *Nordic Journal of International Law* 167; d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials' (2008) 19 *European Journal of International Law* 1075.

179 See Section 2.G.

180 Boyle and Chinkin, *The Making of International Law* (2007) at 210–11.

181 See e.g. Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15(b) of the annex to Human Rights resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, Bolivarian Republic of Venezuela, A/HRC/WG.6/26/VEN/2 (25 August 2016).

182 There is growing attention to the work of international civil servants, such as those in the OHCHR, who 'identify and frame issues for collective debate, set the agenda, negotiate appropriate rules and policies, partake in their implementation and monitor their advancement': Mansouri, 'International Civil Servants and Their Unexplored Role in International Law' *EJIL:Talk!* (3 October 2019). See also Baetans (ed.), *Legitimacy of Unseen Actors in International Adjudication* (2019). On UPR specifically, see Billaud, 'Keepers of the Truth: Producing "Transparent" Documents for the Universal Periodic Review' in Charlesworth and Larking, supra n 14, 63; McGaughey, 'The Role and Influence of Non-governmental Organisations in the

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

Many of the 'other' international law materials are referenced only a few times each; but the citation of a particular material indicates that at least the recommending state 'tacitly assert[s] the validity, legitimacy and relevance of the invoked human rights norm'.[183] This in turn affects future discussion of the issue, as the recommending state cannot later argue that the particular material is invalid, illegitimate or irrelevant to human rights. This is particularly important for expert adopted materials and materials drawn up by non-human rights bodies. As Baxter has noted in a different context, 'the future course of discussion, negotiation, and even agreement will not be the same as they would have been in the absence of the [material]'.[184] Over time, if more and more states reference a particular instrument, the stature of that instrument grows and it becomes a central point of reference on an issue.

One such instrument is the Paris Principles on national human rights institutions. The Paris Principles are invoked in 1279 recommendations: 990 of those recommendations were accepted (77%). It was invoked more times than all but one of the core UN human rights treaties. The number of recommendations that invoke the Paris Principles—both in absolute terms and relative to the number of recommendations that refer to individual treaties, the diversity of states that made the recommendations and accepted them, and the language of the recommendations all point to the Paris Principles having considerable influence and being an important point of reference. A confluence of factors explains the high citation figure for the Paris Principles. The Principles already have a certain weight in UPR, with 'A-status' national human rights institutions—that is, those fully compliant with the Principles—having a privileged position.[185] States are regularly encouraged to establish or strengthen a national human rights institution in line with the Principles.[186] Furthermore, mention of the Principles is an 'easy' recommendation as it is not particularly critical of a state's human rights record.

B. Breadth of Subject Matter

UPR recommendations also reveal states' perceptions of the content of *human rights* law. States invoke instruments from a variety of related fields, suggesting that they are part of the human rights regime. Whilst Resolution 5/1 contains explicit acknowledgment of the 'complementary and interrelated nature' of IHL and human rights,[187] there have been only 120 recommendations referring to IHL norms and instruments, and there have been far more references to instruments from other fields of international law.

Universal Periodic Review—International Context and Australian Case Study' (2017) 17 *Human Rights Law Review* 421.

183 Kälin, supra n 15 at 257–8. See also Kälin, supra n 17 at 33.

184 Baxter, supra n 19 at 565.

185 The OHCHR compilation of information from stakeholders contains a separate section for information from the national human rights institution of the state under review that is in 'full compliance with the Paris Principles'. Such national human rights institutions are also 'entitled to intervene immediately after the State under review during the adoption of the outcome of the review'. HRC Res 16/21, paras 9 and 13.

186 E.g. GA Res 74/156, 23 January 2020, A/RES/74/156; HRC Res 39/17, 8 October 2018, A/HRC/RES/19/17.

187 See Section 2.E.

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

International criminal law instruments are referenced frequently.[188] The invocation of these instruments confirms the 'contemporary turn to criminal law in human rights'.[189] Accountability and the fight against impunity occupy a prominent place on the human rights agenda. The obligation to investigate and prosecute certain human rights violations and the rejection of amnesties are seen as part of the human rights law mainstream.[190] Through supervision of national prosecutions, regional human rights courts have been described as exercising a 'quasi-criminal jurisdiction', constituting 'international criminal law by other means'.[191] A large part of this turn to criminal law has been the development of international criminal law institutions.[192] It is this in particular that is reflected in the practice of UPR recommendations, with 933 references to the Rome Statute of the International Criminal Court. This is more than the number of references to several core UN human rights treaties. There are additional references to the Kampala Amendments to the Rome Statute (37), the Agreement on Privileges and Immunities of the ICC (140) and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (23).

States also reference numerous ILO conventions in UPR recommendations. ILO standards and recommendations are also invoked.[193] This citation practice feeds into the debate as to whether labour rights are human rights.[194] In 1996, Leary wrote of a 'regrettable paradox', whereby 'the human rights movement and the labour movement run on tracks that are sometimes parallel and rarely meet'.[195] Today, there are far more intersections between the two.[196] One such intersection is the UPR, with recommendations containing 383 references to ILO conventions. Two ILO conventions in particular are invoked frequently. The first is ILO Convention No 189 on domestic workers, which is invoked in 149 recommendations. That convention mentions a number of international human rights instruments in its preamble and has been described as taking a 'human rights approach'.[197] Second, ILO Convention No 169 on Indigenous and Tribal Peoples is also well-represented in UPR recommendations with 122 references. UPR recommendations are informative not only for the number of references to ILO conventions, but also how they are referenced. In several instances, states that invoke the ILO conventions explicitly characterise them as human rights treaties. For example,

188 See Section 4.C.

189 Engle, 'Mapping the Shift: Human Rights and Criminal Law' (2018) 112 *ASIL Proceedings* 84, at 84.

190 See Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) 100 *Cornell Law Journal* 1069; Pinto, 'Historical Trends of Human Rights Gone Criminal', LSE Law, Society and Economy Working Papers 4/2020.

191 Huneeus, 'International Criminal Law by other Means: the Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107 *American Journal of International Law* 1. See also O'Flaherty and Higgins, 'International Human Rights Law and Criminalization' (2015) 58 *Japanese Yearbook of International Law* 45, 68, noting that human rights bodies and courts have carved out 'a significant criminal law mandate'.

192 Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) 100 *Cornell Law Journal* 1069.

193 There are 26 references to ILO 'standards' and 'recommendations'.

194 See Kolben, 'Labour Rights as Human Rights' (2010) 50 *Virginia Journal of International Law* 450; Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3 *European Labour Law Journal* 151.

195 Leary, 'The Paradox of Workers' Rights as Human Rights', in Compa and Diamond (eds), *Human Rights, Labor Rights, and International Trade* (1996) 22.

196 See Kolben, supra n 194.

197 Mantouvalou, supra n 194 at 169.

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

Ghana recommended that Lebanon '[r]atify various international human rights statutes and conventions, including the Rome Statute . . . and the ILO Conventions Nos. 87, 169 and 189'.[198]

A body of law that is closely associated with international human rights law is international refugee law. Whereas many commentators express the view that the Convention relating to the Status of Refugees is itself a human rights treaty,[199] the occasional commentator contends that it is not.[200] There are 144 references to the Convention relating to the Status of Refugees and its Protocol in UPR recommendations, as well as additional references to UNHCR conclusions, guidelines and recommendations. The view of states is that, if not specifically a human rights issue, these instruments are relevant to the enjoyment of human rights.

A closely related subject matter is the protection of stateless persons. The Convention on the Reduction of Statelessness and the Convention relating to the Status of Stateless Persons are each referenced in over 100 UPR recommendations. The relationship between statelessness and human rights law is uncertain. For example, drawing on the work of Goodwin-Gill,[201] Foster and Lambert have argued that 'statelessness as a human rights issue is . . . a concept whose time has come'.[202] They argue that instead of being seen as a narrow technical issue, which can be resolved by harmonising domestic law, statelessness should be seen as a human rights issue.[203] The practice of UPR is informative in this regard. In addition to the 145 references to the statelessness conventions, states sometimes describe the statelessness treaties as human rights treaties. For example, Ecuador recommended that the Solomon Islands 'Sign or ratify the following international human rights instruments: . . . the Convention relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness', a recommendation which was accepted.[204]

States thus include international criminal law, international labour law, international refugee law and the international law relating to stateless persons as part of the human rights law regime. States treat the boundaries between these bodies of law as fluid. Each of them is seen as relevant to the improvement of the human rights situation on

198 Report of the Working Group on the Universal Periodic Review, Lebanon (22 December 2015) A/HRC/31/5, para 132.23.

199 Edwards, 'International Refugee Law', in Moeckli, Shah and Sivakumaran (eds), *International Human Rights Law,* 3rd edn (2017) 539, at 543 ('The Refugee Convention is a human rights instrument of a particular scope'); Hathaway, *The Rights of Refugees under International Law* (2005) at 5 ('refugee law is a remedial or palliative branch of human rights law'); McAdam, *Complementary Protection in International Refugee Law* (2007) at 14 (the Refugee Convention is 'a specialist human rights treaty').

200 Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law', in Rubio-Marín (ed.), *Human Rights and Immigration* (2014) 22 ('Contrary to conventional wisdom, the Geneva Convention is not a human rights treaty in the orthodox sense, for both historical and legal reasons').

201 Goodwin-Gill, 'The Rights of Refugees and Stateless Persons', in Saksena (ed.), *Human Rights Perspective and Challenges (in 1990 and Beyond)* (1994) 378.

202 Foster and Lambert, 'Statelessness as a Human Rights Issue: A Concept Whose Time Has Come' (2016) 28 *International Journal of Refugee Law* 564, at 584.

203 Foster and Lambert, supra n 202.

204 Report of the Working Group on the Universal Periodic Review, Solomon Islands (11 July 2011) A/HRC/18/8, para 81.5; Report of the Human Rights Council on its eighteenth session (22 October 2012) A/HRC/18/2, para 372.

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

the ground,[205] and potentially even as part of human rights law themselves. IHL, on the other hand, is seen as 'complementary' and there is a relative reticence to make recommendations that explicitly refer to this body of law even though dozens of armed conflicts take place each year involving numerous states.[206]

As with the breadth of materials cited, states are likely taking their lead from the OHCHR compilation of UN information which feeds into the review. The compilation includes information on the status of ratification of the core UN human rights treaties, as well as 'other main relevant international instruments' for each state under review.[207] These instruments include the Genocide Convention, the Rome Statute, the Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, the Refugee Convention and its Protocol, the Convention Relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness, the ILO 'fundamental Conventions',[208] as well as the UNESCO Convention on Discrimination in Education.[209] The OHCHR compilation appears to serve as an influential tool for coalescing state views on what is a 'human rights' instrument.

C. The Absence of Regional Human Rights Law Instruments

Given the broad interpretation of human rights law, it is remarkable that UPR recommendations rarely refer to regional and sub-regional human rights law instruments. As seen in Section 4.C, there are only 40 references to AU treaties, 162 to Council of Europe treaties and 21 to OAS treaties. There are also relatively few references to other regional material, such as judgments of regional human rights courts, and very few references to material from outside Europe.

There are 195 references to international law material adopted by regional intergovernmental organisations and human rights bodies. This number includes 51 references to judgments from regional human rights courts. There are 36 recommendations calling for implementation of judgments from the European Court of Human Rights, which are made primarily by parties to the ECHR.[210] A further 13 recommendations call for implementation of judgments from the Inter-American Court of Human Rights,

205 HRC Res 5/1, para 4(a).

206 According to one report, at least 48 armed conflicts took place in 28 states in 2016 alone. Bellal, *The War Report: Armed Conflicts in 2016* (Geneva Academy, 2017) at 15, available at: www.geneva-academy.ch/research/publications/detail/202-the-war-report-2016 [last accessed 1 November 2020].

207 See e.g. Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, Togo (22 August 2016) A/HRC/WG.6/26/TGO/2, I.A.2.

208 These are Convention No 29 concerning Forced or Compulsory Labour; Convention No 105 concerning the Abolition of Forced Labour; Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise; Convention No 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively; Convention No 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value; Convention No 111 concerning Discrimination in Respect of Employment and Occupation; Convention No 138 concerning Minimum Age for Admission to Employment; and Convention No 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.

209 The document also includes as 'relevant' the status of ratification of the 1949 Geneva Conventions and the Additional Protocols thereto.

210 There is only one exception. Mexico called for the UK to 'comply with the rulings of the European Court of Human Rights on the cases concerning the United Kingdom': United Kingdom (6 July 2012) A/HRC/21/9, Rec 110.48.

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

and two references to judgments from the ECOWAS Community Court of Justice. However, it is not member states of these regional communities that led the call for implementation of these regional court judgments: 10 of these recommendations are from WEOG states, whilst five recommendations regarding the Inter-American Court judgments are from members of the OAS (Canada (2), Costa Rica, Ecuador and Mexico). Despite being binding on states party to the dispute, the acceptance rate for recommendations calling for implementation of regional court judgments is 67%.

The other 144 references are to other outputs from a variety of regional organisations and bodies. The acceptance rate for recommendations containing these references is 61%. The general picture is one of limited engagement with regional bodies beyond Europe. There are 105 references to outputs from European organisations, including various Council of Europe institutions, the European Union and the Organisation for Security and Cooperation in Europe (OSCE) and 86% of these are made by members of those organisations. Beyond Europe, there are 17 references to outputs from African Union institutions, 4 references to material from SADC, 13 references to outputs from OAS institutions, 2 references to Commonwealth missions, and single references to a recommendation from CARICOM, the N'Djamena Declaration, and the ASEAN Declaration on Human Rights. Regional human rights law instruments are neglected.

Although some authors suggest that regional human rights treaties are 'beyond the scope of the UPR's mandate',[211] Resolution 5/1 refers to 'human rights instruments to which a State is party'. This basis of review is broad enough to encompass regional and sub-regional human rights treaties.[212] It might be that states are of the view that the regional human rights systems are separate from the UN human rights system and therefore regional instruments should not be invoked in the UPR process. Equally, it might be that some states deliberately decide not to reference regional instruments so as not to undermine the universality of the point they are making. However, in various contexts, states,[213] the Human Rights Council,[214] and the regional human rights systems[215] have stressed the importance of improving collaboration between the regional and UN human rights systems. Certainly those states that do refer to regional human rights instruments must be of the view that such instruments do fall within the

211 Harrington, supra n 14 at 87.

212 See also Smith, African States, supra n 14 at 350.

213 E.g., as part of the treaty body strengthening process, a number of states have called for closer collaboration between the treaty bodies and regional mechanisms. See Response of Switzerland to the OHCHR questionnaire on General Assembly resolution A/Res/68/268, Bern, 28 February 2019; Costa Rica, Cuestionario relativo a la resolución 68/268 de la Asamblea General sobre el 'Fortalecimiento y mejora del funcionamiento eficaz del sistema de órganos creados en virtud de tratados de derechos humanos', adoptada el 9 de abril de 2014.

214 HRC Res 6/20, 28 September 2007, A/HRC/RES/6/20; HRC Res 12/15, 1 October 2009, A/HRC/RES/12/15; HRC Res 18/14, 14 October 2011, A/HRC/RES/18/14; HRC Res 24/19, 27 September 2013, A/HRC/RES/24/19; HRC Res 32/127, 1 October 2015, A/HRC/RES/32/127; HRC Res 34/17, 24 March 2017, A/HRC/RES/34/17.

215 E.g., one OHCHR report provides that 'the Council of Europe Human Rights Commissioner . . . intends to assist in the implementation of recommendations made by the UPR Working Group to the member States of the Council of Europe by following up on the pledges those member States made during the Review process.' Report of the Secretary-General on the workshop on regional arrangements for the promotion and protection of human rights, 24 and 25 November 2008, 28 April 2009, A/HRC/11/3, para 49.

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

ambit of the UPR. If states so desire, UPR is one way in which the connections between the UN and regional human rights systems could be improved.

D. A Body of Generalised International Human Rights Law

UPR recommendations point to the growing recognition on the part of states of a body of *generalised,* non-specific international human rights law. By this, we are *not* referring to a body of customary international human rights law or a body of customary international human rights law together with general principles of international human rights law. Schabas has observed that 'In practice, States rarely refer to the legal instruments during the Universal Periodic Review. It is as if they are applying a body of general international human rights law rather than the precise provisions of treaties and the related case law'.[216] Although our empirical analysis shows that reference to legal instruments is by no means 'rare', the application of a body of generalised international human rights law is evident from the frequent invocation of general 'standards', 'instruments', and 'norms' without specifying precisely which standards, instruments and norms are to be followed.

There are 2242 'general human rights' references in our database. These are generic references to international 'standards', 'instruments', 'legal commitments', 'norms' and 'law'. These references are not routinely made alongside a specific reference to the bases of review or other international law material. Only 4% of the total number of general human rights references are in addition to one or more bases of review, and the majority of these accompany references to IHL. However, this is an exceptional phenomenon.

The vast majority of recommendations containing general human rights references call upon states to implement or comply with international human rights law without specifying the source of the obligation or commitment. Such language could be shorthand for the obligations and commitments recognised as the bases of the UPR in Resolution 5/1 or it could be intended to go further. Either way, it points to the identification of a body of generalised, non-specific international human rights law. The indeterminate legal source of obligation has not caused significant concern for states under review: the acceptance rate for recommendations only containing these vague general human rights references is 67%.

The way in which international law materials are referenced in UPR recommendations also serves to demonstrate the recognition of a body of generalised, non-specific international human rights law. References to the outputs of treaty bodies rarely specify which outputs are being referenced, whether general comments, views, or concluding observations. Instead, references are to the 'recommendations' of treaty bodies, unspecified. This is true also of references to other international law material, such as 'recommendations' of the ILO and its supervisory mechanisms.

Reference to this body of generalised international human rights law in UPR recommendations serves to complement the work of other human rights mechanisms. One of the 'principles' of the UPR process is that it should '[c]omplement and not duplicate other human rights mechanisms, thus representing an added value'.[217] Monitoring

216 Schabas, 'The Future of the United Nations Human Rights System' in Bassiouni (ed.), *Globalisation and its Impact on the Future of Human Rights and International Criminal Justice* (2015) 119 at 120.

217 HRC Res 5/1, para 3(f).

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

compliance with particular provisions of human rights treaties is likely to encroach on the mandate of human rights treaty bodies, which are better placed to suggest what is required to perform a specific treaty obligation. Applying a body of generalised international human rights law fits with the hybrid politico-legal nature of the UPR process and the lack of international human rights law expertise on the part of some of those who are undertaking the reviews.

6. CONCLUSION

UPR has much to tell us about how states perceive international human rights law. The negotiations establishing the bases of the review provide some insights. Examining the actual practice of UPR provides a more complete picture. That fewer than one-third of the 57,685 recommendations made during the first two cycles of UPR explicitly refer to the bases of review or other international law material is remarkable. Our empirical analysis of these recommendations demonstrates how international (human rights) law has been used and from this we can draw some conclusions on states' perceptions of this body of law. Whilst we have not explored how the recommendations were made or the politics behind certain recommendations, the text of UPR recommendations has proven revealing.

States do not feel constrained by the bases of review listed in Resolution 5/1. Ten percent of all recommendations made in the first two cycles of UPR refer to international law material not listed in Resolution 5/1. Of the recommendations that refer to one or more of these other international law materials, a significant number refer to soft law. These range from recommendations of treaty bodies to principles drawn up by private expert bodies. In the practice of UPR, states do not dwell on the distinction between hard and soft law. This was foreshadowed by the negotiations on the bases of review where the distinction between hard and soft law was not a significant consideration and Resolution 5/1 refers to treaties to which the state is a party alongside voluntary commitments and pledges. Indeed, states go out of their way to refer to numerous soft law instruments that do not formally constitute part of the bases of review. The referencing of soft law is stark when compared to the number of times customary international human rights law is mentioned. Custom is mentioned in only one recommendation. States are more comfortable referring to written documents, even when they are non-binding, than they are unwritten rules, even when binding.

The notion of *human rights* law has been interpreted broadly to include related bodies of law, notably international criminal law, but also international labour law, international refugee law and international law regarding statelessness. At the same time, regional human rights law is frequently absent. There remains a division between international human rights law, of which UPR forms part, and regional human rights law. States also refer to a generalised body of human rights law in UPR recommendations: unspecified human rights 'standards', 'obligations' and 'laws' are mentioned, and general references are made to 'recommendations' of treaty bodies and other entities.

When drawing these conclusions, we are mindful that some of this practice is likely due to the way in which states perceive UPR itself. Whilst academics and lawyers are often focussed on formal distinctions between hard and soft law and discrete bodies of law, these are not crucial considerations in UPR. States do not see UPR as a strictly legal

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

process by which to enforce international human rights obligations. It is not a judicial or quasi-judicial process like those conducted by courts or treaty bodies. Rather, reviews are conducted at the inter-governmental level by diplomats and the process is one that is *informed by* international human rights law. The goal is to improve the human rights situation in the state under review and recommendations are made on everything that is relevant: whether hard law or soft law and whether it is a matter of human rights law narrowly defined or a closely related body of law. The very fact that these distinctions are set aside is significant when we consider the potential of international law to secure the enjoyment of human rights.

ACKNOWLEDGEMENTS

The authors would like to thank Başak Çali, Rosa Freedman, Marko Milanovic and Nigel White for their comments on an earlier draft. They would also like to thank Olivia Salmon for assistance with collating the database.

Downloaded from https://academic.oup.com/hrlr/article/21/2/264/6129949 by University of Melbourne user on 16 November 2023

Oxford Public International Law

Part III Civil and Political Rights, 7 Right of Self-determination—Article 1

From: The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary (3rd Edition)

Sarah Joseph, Melissa Castan

Content type: Book content
Product: Oxford Scholarly Authorities on International Law [OSAIL]
Published in print: 01 July 2013
ISBN: 9780199641949

Subject(s):

Self-determination — Development, right to — Race — Disability — Gender — Religion — Ethnicity

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 16 November 2023

(p. 153) 7 Right of Self-determination—Article 1

- Definition of Self-determination [7.03]
  - Peoples [7.06]
  - External Self-determination [7.09]
  - Internal Self-determination [7.13]
- Article 1(2) [7.19]
- Article 1(3) [7.22]
- Non-justiciability under the First Optional Protocol [7.24]
- Conclusion [7.26]

Article 1

> **1.** All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> **2.** All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefits, and international law. In no case may a people be deprived of its own means of subsistence.
>
> **3.** The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

[7.01] Article 1 is common to both the ICCPR and the International Covenant on Economic Social and Cultural Rights, highlighting the complex nature of the right of self-determination, and its importance for the achievement of all civil, political, economic, social, and cultural rights.

General Comment 12

> **¶1.** …The right of self-determination is of particular importance because its realisation is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants.

[7.02] The Committee on the Elimination of Racial Discrimination (CERD), along with the Human Rights Committee (HRC), has issued a general comment on the topic. The CERD General Recommendation is far more detailed and useful than the HRC Comment.

(p. 154) Definition of Self-determination

[7.03] The HRC has issued very little jurisprudence on the meaning of self-determination for the purposes of the ICCPR. This is partly due to its refusal to admit article 1 complaints under the First Optional Protocol [7.24]. Furthermore, its General Comment on article 1 fails to give any clear definition beyond reiteration of the express words of article 1.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 16 November 2023

General Comment 12

[7.04]

> **¶2.** Article 1 enshrines an inalienable right of all peoples as described in its paragraphs 1 and 2. By virtue of that right they freely 'determine their political status and freely pursue their economic, social and cultural development'. The article imposes on all States parties corresponding obligations. This right and the corresponding obligations concerning its implementation are interrelated with other provisions of the Covenant and rules of international law….
>
> **¶7.** In connection with article 1 of the Covenant, the Committee refers to other international instruments concerning the right of all peoples to self-determination, in particular the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970 (General Assembly Resolution 2625 (XXV)).

[7.05] The Comment obliquely refers to other 'international law' obligations, indicating the ICCPR meaning accords with the international legal meaning of self-determination.[1] The most important international law document in this respect is, as indicated in paragraph 7, General Assembly Resolution 2625, the 'Declaration on Friendly Relations'.[2] The Declaration describes the right of self-determination as 'the right of peoples to be free from alien subjugation, domination and exploitation'. However, the interpretation of 'peoples' and 'alien subjugation' remains controversial.

Peoples

[7.06] Self-determination is the collective right of 'peoples'. Various conditions or characteristics of 'peoples' have been put forward, including common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial connection, common economic life, and consisting of a certain minimum number.[3] However, no permanent, universally (p. 155) acceptable list of criteria for a 'people' exists.[4] Neither the HRC nor the CERD Committee has postulated a definition.

Gillot et al v France (932/00)

[7.07] The authors were French residents of the French colony of New Caledonia. Their complaint related to restrictions on their rights to vote in referendums, including one plebiscite in 1998 and future plebiscites from 2014 onwards, which were ultimately to determine the status of New Caledonia for the purposes of an exercise of self-determination by its peoples. The first referendum was for the purpose of deciding whether to continue the process of self-determination. The future referendums will relate to the mode of self-determination, whether by independence or other means. The impugned voting restrictions, for the purposes of these plebiscites, were described as follows by the authors:

> **¶2.5.** For the first referendum on 8 November 1998, Decree No. 98–733 of 20 August 1998 on organization of a referendum of the people of New Caledonia, as provided for by article 76 of the Constitution, determined the electorate with reference to article 2 of Act No. 88–1028 of 9 November 1988 (also determined in article 6.3 of the Noumea Accord), namely: 'Persons registered on the electoral rolls for the territory on that date and resident in New Caledonia since 6 November 1988 shall be eligible to vote.'

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 16 November 2023

¶2.6. For future referendums, the electorate was determined by the French Parliament in article 218 of the Organic Law of New Caledonia (No. 99–209) of 19 March 1999 (reflecting article 2.2 of the Noumea Accord (2)), pursuant to which:

'Persons registered on the electoral roll on the date of the referendum and fulfilling one of the following conditions shall be eligible to vote:

(a) They must have been eligible to participate in the referendum of 8 November 1998;

(b) They were not registered on the electoral roll for the referendum of 8 November 1998, but fulfilled the residence requirement for that referendum;

(c) They were not registered on the electoral roll for the 8 November 1998 referendum owing to non-fulfilment of the residence requirement, but must be able to prove that their absence was due to family, professional or medical reasons;

(d) They must enjoy customary civil status or, having been born in New Caledonia, they must have their main moral and material interests in the territory;

(e) Having one parent born in New Caledonia, they must have their main moral and material interests in the territory;

(f) They must be able to prove 20 years' continuous residence in New Caledonia on the date of the referendum or by 31 December 2014 at the latest;

(g) Having been born before 1 January 1989, they must have been resident in New Caledonia from 1988 to 1998;

(p. 156) (h) Having been born on or after 1 January 1989, they must have reached voting age on the date of the referendum and have one parent who fulfilled the conditions for participation in the referendum of 8 November 1998.

Periods spent outside New Caledonia for the performance of national service, for study or training, or for family, professional or medical reasons shall, in the case of persons previously domiciled in the territory, be included in the periods taken into consideration in order to determine domicile.'

¶2.7. The authors, who did not fulfil the above criteria, state that they were excluded from the referendum of 8 November 1998 and that they will also be excluded from referendums planned from 2014 onwards.

The case was brought under article 25, which guarantees the right to vote, as well as article 26 guaranteeing freedom from discrimination. Article 1 however was very relevant to the HRC's reasoning, even though the self-determination guarantee is not justiciable under the OP [7.24]. The HRC found that the voting restrictions in the referendums (past and future) on self-determination were not unreasonable, in light of article 1 of the ICCPR, and therefore did not breach articles 25 and 26.

¶11.2. The Committee has to determine whether the restrictions imposed on the electorate for the purposes of the local referendums of 8 November 1998 and in

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 16 November 2023

2014 or thereafter constitute a violation of articles 25 and 26 of the Covenant, as the authors maintain.…

¶13.3. In the present case, the Committee has taken note of the fact that the local ballots were conducted in the context of a process of self-determination of the population of New Caledonia. In this connection, it has taken into consideration the State party's argument that these referendums—for which the procedures were fixed by the Noumea Accord and established according to the type of ballot by a vote of Congress or Parliament—must, by virtue of their purpose, provide means of determining the opinion of, not the whole of the national population, but the persons 'concerned' by the future of New Caledonia.

¶13.4. Although the Committee does not have the competence under the Optional Protocol to consider a communication alleging violation of the right to self-determination protected in article 1 of the Covenant, it may interpret article 1, when this is relevant, in determining whether rights protected in parts II and III of the Covenant have been violated. The Committee is of the view, therefore, that, in this case, it may take article 1 into account in interpretation of article 25 of the Covenant.

¶13.5. In relation to the authors' complaints, the Committee observes, as the State party indeed confirms, that the criteria governing the right to vote in the referendums have the effect of establishing a restricted electorate and hence a differentiation between (a) persons deprived of the right to vote, including the author(s) in the ballot in question, and (b) persons permitted to exercise this right, owing to their sufficiently strong links with the territory whose institutional development is at issue. The question which the Committee must decide, therefore, is whether this differentiation is compatible with article 25 of the Covenant. The Committee recalls that not all differentiation constitutes discrimination if it is based on objective and reasonable criteria and the purpose sought is legitimate under the Covenant.

¶13.6. The Committee has, first of all, to consider whether the criteria used to determine the restricted electorates are objective.

(p. 157) ¶13.7. The Committee observes that, in conformity with the issue in each ballot, apart from the requirement of inclusion on the electoral rolls, the criteria used are: (a) for the 1998 referendum relating to the continuation or non-continuation of the process of self-determination, the condition of length of residence in New Caledonia; and (b) for the purpose of future referendums directly relating to the option of independence, additional conditions relating to possession of customary civil status, the presence in the territory of moral and material interests, combined with birth of the person concerned or his parents in the territory. It accordingly follows, as the date for a decision on self-determination approaches, that the criteria are more numerous and take into account the specific factors attesting to the strength of the links to the territory. To the length of residence condition (as opposed to the cut-off points for length of residence) for determining a general link with the territory are added more specific links.

¶13.8. The Committee considers that the above-mentioned criteria are based on objective elements for differentiating between residents as regards their relationship with New Caledonia, namely the different forms of ties to the territory, whether specific or general—in conformity with the purpose and nature of each ballot.…

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 16 November 2023

¶13.14. The Committee also has to examine whether the differentiation resulting from the above-mentioned criteria is reasonable and whether the purpose sought is lawful vis-à-vis the Covenant.…

¶13.16. The Committee recalls that, in the present case, article 25 of the Covenant must be considered in conjunction with article 1. It therefore considers that the criteria established are reasonable to the extent that they are applied strictly and solely to ballots held in the framework of a self-determination process. Such criteria, therefore, can be justified only in relation to article 1 of the Covenant, which the State party does. Without expressing a view on the definition of the concept of 'peoples' as referred to in article 1, the Committee considers that, in the present case, it would not be unreasonable to limit participation in local referendums to persons 'concerned' by the future of New Caledonia who have proven, sufficiently strong ties to that territory. The Committee notes, in particular, the conclusions of the Senior Advocate-General of the Court of Cassation, to the effect that in every self-determination process limitations of the electorate are legitimized by the need to ensure a sufficient definition of identity. The Committee also takes into consideration the fact that the Noumea Accord and the Organic Law of 19 March 1999 recognize a New Caledonian citizenship (not excluding French citizenship but linked to it), reflecting the common destiny chosen and providing the basis for the restrictions on the electorate, in particular for the purpose of the final referendum.

¶13.17. Furthermore, in the Committee's view, the restrictions on the electorate resulting from the criteria used for the referendum of 1998 and referendums from 2014 onwards respect the criterion of proportionality to the extent that they are strictly limited *ratione loci* to local ballots on self-determination and therefore have no consequences for participation in general elections, whether legislative, presidential, European or municipal, or other referendums.

¶13.18. Consequently, the Committee considers that the criteria for the determination of the electorates for the referendums of 1998 and 2014 or thereafter are not discriminatory, but are based on objective grounds for differentiation that are reasonable and compatible with the provisions of the Covenant.

¶14.1. Lastly, the authors argue that the cut-off points set for the length of residence requirement, 10 and 20 years respectively for the referendums in question, are excessive and affect their right to vote.…

(p. 158) ¶14.7. Noting that the length of residence criterion is not discriminatory, the Committee considers that, in the present case, the cut-off points set for the referendum of 1998 and referendums from 2014 onwards are not excessive inasmuch as they are in keeping with the nature and purpose of these ballots, namely a self-determination process involving the participation of persons able to prove sufficiently strong ties to the territory whose future is being decided. This being the case, these cut-off points do not appear to be disproportionate with respect to a decolonization process involving the participation of residents who, over and above their ethnic origin or political affiliation, have helped, and continue to help, build New Caledonia through their sufficiently strong ties to the territory.

The extent of the voting rights for the referendums in New Caledonia corresponded with the French government's definition of the appropriate peoples who had a right to determine the future political status of that French colony. The HRC apparently approved of that

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 16 November 2023

definition, which restricted self-determination rights to persons with a long-standing connection to the territory.

[7.08] Much contemporary scholarship on self-determination divides the right into a right of external self-determination (ESD) and a right of internal self-determination (ISD).[5] The definition of 'peoples' in terms of the ICCPR becomes less contentious if one recognizes that all peoples are entitled to some form of self-determination, though not all peoples are entitled to the most radical manifestation of the right, ESD. In this respect, a 'people' may be broadly defined as a group with a common racial or ethnic identity, or a cultural identity (which could incorporate political, religious, or linguistic elements) built up over a long period of time.[6]

External Self-Determination

CERD General Recommendation 21

[7.09]

> **¶4.** …The external aspect of self-determination implies that all peoples have the right to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination, and exploitation.

[7.10] A claim of ESD equates with a claim by a people to a certain territory.[7] ESD is exercised by maintaining existing State boundaries or changing the boundaries of existing States. The first form of ESD arises where the relevant 'self determination unit' is the population of an existing State. The latter arises where the relevant 'self determination unit' wishes to break away from an existing State. The most controversial mode of exercising ESD is by way of secession.[8] During the 1950s and 1960s, the right of secession, and indeed the notion of (p. 159) self-determination, was intertwined with the notion of decolonization.[9] However, in the post-Cold War era, a number of non-colonial peoples have successfully seceded, including the peoples of the former USSR, the former Czechoslovakia, the former Yugoslavia, Eritrea, East Timor, and South Sudan. Furthermore, the text of article 1 does not expressly confine the right on colonial peoples. Indeed, the HRC has now confirmed that the principle of self-determination, and possibly the right of secession in some instances, 'applies to all peoples, and not merely to colonised peoples'.[10]

[7.11] The right of ESD is politically controversial, as it clearly threatens the territorial integrity of States.

CERD General Recommendation 21

> **¶1.** The Committee notes that ethnic or religious groups or minorities frequently refer to the right of self-determination as a basis for an alleged right to secession….
>
> **¶6.** The Committee emphasises that, in accordance with the Declaration of the General Assembly on Friendly Relations, none of the Committee's actions shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples and possessing a government representing the whole people belonging to the territory without distinction as to race, creed or colour. In view of the Committee international law has not recognised a general right of peoples to unilaterally declare secession from a state. In this respect, the Committee follows the views expressed in the Agenda for Peace (paras. 17 et seq.), namely that a fragmentation of States may be detrimental to the protection of human rights as well as to the preservation of peace and security. This does not,

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 16 November 2023

> however, exclude the possibility of arrangements reached by free agreements of all parties concerned.[11]

[7.12] The HRC has largely avoided consensus comments on the territorial aspirations of secessionist groups within existing States Parties. Future potential candidates for secession include the Chechens, the Quebecois, and the Kosovars, though the existence of an international right of secession for such peoples would likely be opposed by, respectively, the Russian Federation, Canada, and the Federal Republic of Yugoslavia. The HRC has, however, criticized Morocco's policies regarding the Western Sahara:[12]

> **¶9.** The Committee remains concerned about the very slow pace of the preparations towards a referendum in Western Sahara on the question of self-determination, and at the lack of information on the implementation of human rights in that region. The State party should (p. 160) move expeditiously and cooperate fully in the completion of the necessary preparations for the referendum….

As the International Court of Justice has ruled that the peoples of the Western Sahara have a right of external self-determination,[13] it is not surprising that the HRC has singled out their secessionist aspirations for explicit endorsement.[14]

Internal Self-Determination

[7.13] ISD refers to the right of peoples to choose their political status within a State,[15] or to exercise a right of meaningful political participation. For example, the institution of democratic rule in South Africa constituted an exercise of ISD by the black majority in South Africa. The notion of ISD overlaps considerably with the rights guaranteed in articles 25 (right of political participation) and 27 (minority rights)[16] of the ICCPR. Indeed, Cassese describes ISD as a 'manifestation of the totality of rights embodied in the Covenant'.[17]

CERD General Recommendation 21

[7.14]

> **¶4.** …The right to self-determination of peoples has an internal aspect, ie. the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level as referred to in article 5 (c) of the International Convention on the Elimination of All Forms of Racial Discrimination. In consequence, governments are to represent the whole population without distinction as to race, colour, descent, national, or ethnic origins.
>
> **¶5.** In order to respect fully the rights of all peoples within a state, governments are again called upon to adhere to and implement fully the international human rights instruments and in particular the International Convention on the Elimination of All Forms of Racial Discrimination. Concern for the protection of individual rights without discrimination on racial, ethnic, tribal, religious, or other grounds must guide the policies of governments. In accordance with article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination and other relevant international documents, governments should be sensitive towards the rights of persons of ethnic groups, particularly their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth, and to play their part in the government of the country of which its members are citizens. Also, governments should consider, within their respective constitutional frameworks, vesting persons of ethnic or linguistic groups comprised of their

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 16 November 2023

> citizens, where appropriate, with the right to engage in such activities which are particularly relevant to the preservation of the identity of such persons or groups.

(p. 161) **[7.15]** Self-determination is therefore a complex right, entailing an 'internal' and an 'external' form. The right can be conceptualized as a sliding scale of different levels of entitlement to political emancipation, constituting various forms of ISD up to the apex of the right, the right of ESD, which vests only in exceptional circumstances.[18] Different 'peoples' are entitled to different 'levels' of self-determination.

[7.16] It is contended that a people is entitled to ESD,[19] by way of secession, when it lives under colonial[20] or neo-colonial domination,[21] or when it is so severely persecuted, and its human rights so systematically abused, that ESD is necessary to remedy such abuse, and preserve its long-term viability as a people.[22] Alternatively, peoples may reach free agreements to secede from each other,[23] as occurred when Czechoslovakia peacefully split into the Czech and Slovak Republics in 1993. Finally, peoples which are not entitled to ESD are nevertheless entitled to ISD.

[7.17] The HRC has cited article 1 in raising concerns with Israel over the expansion of settlements in the Occupied Territories, and has recommended that it 'cease all construction of settlements in' those territories.[24]

[7.18] Indigenous peoples are peoples entitled to internal self-determination. For example, the HRC has said with respect to Finland:[25]

> **¶17.** The Committee regrets that it has not received a clear answer concerning the rights of the Sami as an indigenous people (Constitution, sect. 17, subsect. 3), in the light of article 1 of the Covenant. It reiterates its concern over the failure to settle the question of Sami rights to land ownership and the various public and private uses of land that affect the Sami's traditional means of subsistence—in particular reindeer breeding—thus endangering their traditional culture and way of life, and hence their identity.
>
> (p. 162) The State party should, in conjunction with the Sami people, swiftly take decisive action to arrive at an appropriate solution to the land dispute with due regard for the need to preserve the Sami identity in accordance with article 27 of the Covenant. Meanwhile it is requested to refrain from any action that might adversely prejudice settlement of the issue of Sami land rights.

This comment also highlights the strong connection between article 1 and article 27 rights.[26]

Article 1(2)

[7.19] Article 1(2) sounds like a very important right. For example, its terms suggest that a government cannot permit mining on a people's land without its approval.[27] The right is tempered by the saving of certain 'international obligations arising out of international economic cooperation'. However, this tempering may be undone by article 47 of the Covenant,[28] which provides:

> Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilise fully their natural wealth and resources.

[7.20] Unfortunately, the HRC has shed very little light on the terms of article 1(2). Its most significant statements have come in the context of the recognition of indigenous land rights. In Concluding Observations on Canada, the HRC stated:[29]

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 16 November 2023

> **¶8.** The Committee notes that, as the State party acknowledged, the situation of the aboriginal peoples remains 'the most pressing human rights issue facing Canadians'. In this connection, the Committee is particularly concerned that the State party has not yet implemented the recommendations of the Royal Commission on Aboriginal Peoples (RCAP). With reference to the conclusion by RCAP that without a greater share of lands and resources institutions of aboriginal self-government will fail, the Committee emphasises that the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (art. 1, para. 2). The Committee recommends that decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation. The Committee also recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant.

Thus, the extinguishment and presumably the diminution of aboriginal native title rights breaches article 1(2).[30]

(p. 163) **[7.21]** The HRC has also stated with regard to Sweden:[31]

> **¶15.** The Committee is concerned at the limited extent to which the Sami Parliament can have a significant role in the decision-making process on issues affecting the traditional lands and economic activities of the indigenous Sami people, such as projects in the fields of hydroelectricity, mining and forestry, as well as the privatization of land….

Thus, indigenous persons should have real political influence over the use to which their traditional lands are put.

Article 1(3)

General Comment 12

[7.22]

> **¶6.** Paragraph 3, in the Committee's opinion, is particularly important in that it imposes specific obligations on States parties, not only in relation to their own peoples but vis-à-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination. The general nature of this paragraph is confirmed by its drafting history….The obligations exist irrespective of whether a people entitled to self-determination depends on a State party to the Covenant or not. It follows that all States parties to the Covenant should take positive action to facilitate realisation of and respect for the right of peoples to self-determination. Such positive action must be consistent with the States' obligations under the Charter of the United Nations and under international law: in particular, States must refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination….

[7.23] Article 1(3) is unusual as it imposes duties on States with regard to persons outside their jurisdiction, indeed even if those people are within the jurisdiction of another State Party.[32] This goes beyond the standard obligation in article 2(1) to respect and ensure the Covenant's rights to persons *within* the jurisdiction.[33] States Parties are expected to take positive measures to 'promote' rights of self-determination where they have been denied. Such measures may include the termination of diplomatic relations with States that deny self-determination rights.[34] States must, however, conform to the UN Charter, and not

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 16 November 2023

'interfere in the internal affairs of other States', and are therefore prohibited from using force to assist an oppressed peoples to achieve self-determination in a foreign State.[35]

(p. 164) Non-justiciability under the First Optional Protocol

[7.24] Despite the undoubted importance of article 1, the HRC has paradoxically decided that it is not justiciable under the First Optional Protocol.

Kitok v Sweden (197/85)

This case involved a complaint about denial of reindeer husbandry rights to the author, a member of the Sami people of northern Scandinavia, in alleged breach of, *inter alia*, article 1.[36] The HRC ruled the article 1 complaint inadmissible in the following terms:

> **¶6.3.** …the Committee observed that the author, as an individual, could not claim to be the victim of a violation of the right of self-determination, enshrined in article 1 of the Covenant. Whereas the Optional Protocol provides a recourse procedure for individuals claiming that their rights have been violated, article 1 … deals with rights conferred upon peoples, as such.…

The *Kitok* decision in respect of the non-justiciability of article 1 has been followed in numerous cases, including *Ominayak v Canada* (167/84),[37] *Marshall v Canada* (205/86),[38]*Mahuika v New Zealand* (547/93),[39] and *Poma Poma v Peru* (1457/06).[40]

It is regrettable that the HRC has adopted such a narrow interpretation of the 'victim' requirement in the Optional Protocol[41] so as to preclude article 1 complaints, thus depriving victims of article 1 violations of a valuable measure of international recourse.[42] Certain complaints could probably have been more successful if the authors had been permitted to rely on article 1 rather than the Covenant's individual rights. For example, the authors in *Bordes and Temeharo v France* (645/95) unsuccessfully complained that French nuclear tests in the vicinity of their islands breached their rights to life and family life [3.45]. Perhaps a complaint under article 1, as the tests were conducted without the consent of the islanders and may have severely harmed the natural environment, would have been more viable.

[7.25] In *Diergaardt v Namibia* (760/97), the authors contended that the political power of their group, the Rehoboth Basters, had been reduced by the division of their 'traditional' self-governing territory between two regions, reducing the Basters to a minority within two areas, rather than a majority within one. The contention that the reduction of political power for the group (of ethnic Rehoboth Basters within Namibia) violated article 25 (which guarantees a right to effective (p. 165) political participation) foundered due to the individual nature of that right [22.05]. *Diergaardt* is also an example of a complaint that more clearly raised collective article 1 rights rather than individual justiciable rights. However, it was in any case unlikely that the HRC would have declared Namibia's constitutional arrangements contrary to article 1 when those arrangements were adopted in furtherance of the article 1 rights of the Namibian peoples, who had long been denied self-determination by South Africa [22.06].

Conclusion

[7.26] Article 1 jurisprudence under the ICCPR has been brief and disappointing. It is time for the HRC to issue more significant contributions to the law surrounding this most important of rights. Its ability to do so would be enhanced if it was to drop its narrow approach regarding the non-justiciability of the right under the Optional Protocol. It is also

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 16 November 2023

recommended that the Committee on Economic Social and Cultural Rights issue a General Comment on common article 1.

Footnotes:

[1] However, see D McGoldrick, *The Human Rights Committee* (Clarendon Press, 1993), 248 .

[2] H Hannum, 'Rethinking Self-Determination' (1993) 34 *Virginia Journal of International Law* 1, 14. The CERD General Recommendation 21 on Self-Determination also endorses the Declaration on Friendly Relations at para 3.

[3] See R McCorquodale, 'Self-Determination: A Human Rights Approach' (1994) 43 *ICLQ* 857, 866, n 52, and R White, 'Self-Determination: Time for a Re-Assessment?' (1981) 28 *Netherlands International Law Review* 147, 163, n 52, quoting a report by the International Commission of Jurists, *The Events in East Pakistan* (ICJ, 1972), 70.

[4] McCorquodale, 'Self-Determination: A Human Rights Approach', 865; M Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' (1994) 43 *ICLQ* 241, 261.

[5] See eg McCorquodale, 'Self-Determination: A Human Rights Approach', 863, and M Pomerance, *Self-Determination in Law and Practice* (Martinus Nijhoff Publishers, 1982), 37–42.

[6] S Joseph, 'Resolving Conflicting Claims of Territorial Sovereignty and External Self-Determination, Part 1' (1999) 3(1) *International Journal of Human Rights* 40, 42–5.

[7] L Brilmayer, 'Secession and Self-Determination: A Territorial Interpretation' (1991) 16 *Yale Journal of International Law* 177.

[8] The Declaration on Friendly Relations specifies other modes: free association or integration with another independent State.

[9] *Western Sahara Advisory Opinion* [1975] ICJ Rep 12, 37. See also G Simpson, 'The Diffusion of Sovereignty: Self-determination in the Post-Colonial Age' (1996) 32 *Stanford Journal of International Law* 255, 265, and R McCorquodale, 'South Africa and the Right of Self-Determination' (1994) 10 *South African Journal on Human Rights* 4, 6. See also CERD General Recommendation 21, para 4 [7.09].

[10] Concluding Comments on Azerbaijan (1994) UN doc CCPR/C/79/Add.38, para 6.

[11] The 'Agenda for Peace' was issued in 1992 by Secretary General Boutros Boutros Ghali (1992) UN doc A/47/277-S/24111.

[12] (1999) UN doc CCPR/C/79/Add.113.

[13] *Western Sahara Advisory Opinion* [1975] ICJ Rep 12.

[14] See also Concluding Observations on Morocco (2004) UN doc CCPR/CO/82/MAR, para 8; United States of America (2006) UN doc CCPR/C/USA/CO/3/Rev.1, para 37; Panama (2008) UN doc CCPR/C/PAN/CO/3, para 21.

[15] McCorquodale, 'Self-Determination: A Human Rights Approach', 864.

[16] See generally Ch 24.

[17] A Cassese, *Self-Determination of Peoples* (Cambridge University Press, 1995).

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 16 November 2023

18 F Kirgis Jr, 'The Degrees of Self-Determination in the United Nations Era' (1994) 88 *American Journal of International Law* 304, 306, and B Kingsbury, 'Claims by Non-State Groups in International Law' (1992) 25 *Cornell International Law Journal* 481, 503.

19 See generally on situations where peoples should be recognized as having a right of ESD, S Joseph, 'Resolving Conflicting Claims of Territorial Sovereignty and External Self-Determination, Part 1', and S Joseph, 'Resolving Conflicting Claims of Territorial Sovereignty and External Self-Determination, Part 2' (1999) 3(2) *International Journal of Human Rights* 49.

20 See [7.10].

21 Post-Second World War invasions can be termed 'neo-colonial situations', and have rarely been recognized as valid by the international community. See eg regarding the Indonesian invasion of East Timor, GA Res 3485 (XXX) and SC Res 384 (1975). See, regarding the Chinese invasion of Tibet, GA Res 1723/16 (20 December 1961). See eg regarding the Israeli Occupied Territories, UN doc A/RES/ES-7/2, GAOR, 7th Emergency Session, Supp 1, 3 (1980). See, regarding the Turkish invasion of northern Cyprus, SC Res 353 (1974), SC Res 440 (1978), and SC Res 541, 18 November 1983. See also S Joseph, 'Resolving Conflicting Claims of Territorial Sovereignty and External Self-Determination, Part 2', 52–3.

22 Numerous commentators have recognized a right of 'remedial ESD' such as L Buchheit, *Secession: The Legitimacy of Self-Determination* (Yale University Press, 1978), 220, and White, 'Self-Determination: Time for a Re-Assessment?', 160. Its existence is also implied by the Declaration on Friendly Relations, which guarantees territorial integrity only to States which are 'conducting themselves in compliance with the principles of equal rights and self-determination of people'. See also CERD General Recommendation 21, para 6 [7.11].

23 See eg CERD General Recommendation 21, para 6 [7.11].

24 See Concluding Observations on Israel (2010) UN doc CCPR/C/ISR/CO/3, para 16.

25 (2004) UN doc CCPR/CO/82/FIN; see also Concluding Observations on Chile (2007) UN doc CCPR/C/CHL/CO/5, para 19.

26 See [24.02] and [24.03].

27 See, in this respect, [24.27]ff.

28 McGoldrick, *The Human Rights Committee*, 15 and 251.

29 (1999) UN doc CCPR/C/79/Add.105.

30 The CERD Committee found the diminution of native title rights in breach of the CERD Convention, as they were racially discriminatory, in Concluding Comments on Australia (1999) UN doc CERD/C/54/Misc.40/Rev.2. As to the nature of self-determination and its relationship with economic and social aspects of subsistence, see SJ Anaya, *Indigenous People and International Law* (Oxford University Press, 1996).

31 Concluding Observations on Sweden (2002) UN doc CCPR/CO/74/SWE. See also [24.27]ff for the OP cases where indigenous peoples have made (largely unsuccessful) complaints about alleged infringement of their cultural rights arising from the use of land.

32 McGoldrick, *The Human Rights Committee*, 253. See also Ch 4, on territorial limits to a State Party's responsibility.

33 McGoldrick, *The Human Rights Committee*, 253.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 16 November 2023

34 In the 1980s, before the advent of Concluding Comments, individual HRC members questioned State Party representatives regarding relations with Israel (due to its occupation of Palestinian territories) and South Africa (due to its apartheid system); McGoldrick, *The Human Rights Committee*, 251–2.

35 See J Crawford, *The Creation of States in International Law* (Clarendon Press, 1979), 114–18. Note that no general doctrine of unilateral humanitarian intervention has yet been formally accepted in international law: see eg B Simma, 'NATO, the UN, and the Use of Force: Legal Aspects' (1999) 10 *European Journal of International Law* 1.

36 See, on the art 27 aspect of this complaint, [24.27].

37 At para 13.3. Though the Lubicon Lake Band could be termed a 'people' for the purposes of art 1, only individuals, rather than peoples, have standing under the OP: see [3.10]–[3.13].

38 At para 5.1 (also known as *Mikmaq Tribal Society v Canada*).

39 At para 9.2.

40 At para 6.3.

41 See also [3.11]ff.

42 Cassese, *Self-Determination of Peoples*, persuasively argues for a more liberal interpretation of the Optional Protocol in this regard at 141–6 and 345–6.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 16 November 2023

EXTRATERRITORIALITY OF HUMAN RIGHTS TREATIES

On the eve of the planned U.S. invasion of Haiti, responding to an appeal from the International Committee of the Red Cross to apply international humanitarian law, the United States stated that

> [i]f it becomes necessary to use force and engage in hostilities, the United States will, upon any engagement of forces, apply all of the provisions of the Geneva Conventions and the customary international law dealing with armed conflict.
>
> Further, the United States will accord prisoner of war treatment to any detained member of the Haitian armed forces. Any member of the U.S. armed forces who is detained by Haitian forces must be accorded prisoner of war treatment.[1]

The agreement of September 18, 1994, negotiated in Port-au-Prince between President Jimmy Carter and General Raoul Cédras, and its acceptance by the Aristide government, led to the consent-based, nonviolent, hostilities-free entry of U.S. forces and their peaceful deployment. In such circumstances, the Geneva Conventions on the Protection of Victims of War of August 12, 1949, are not, strictly speaking, applicable.[2] Nevertheless, the U.S. forces have stated that, although persons they have detained in Haiti are detainees, not POWs, they have been accorded POW treatment in terms of the third Geneva Convention.[3] This attitude deserves to be commended because the Geneva Convention ensures humane treatment and judicial guarantees.

Of course, the readiness to apply the Geneva Conventions, formally or by analogy, should come as no surprise. It is axiomatic that the law of war or international humanitarian law obligates members of the armed forces of a state regardless of whether they operate in or outside the territory of that state. The object of this essay is to draw attention to the fact that some human rights treaties have a similar extraterritorial effect; in particular, the obligations of the United States to ensure respect for the pertinent provisions of the International Covenant on Civil and Political Rights (Political Covenant)[4] apply to the treatment of persons in Haiti under the authority and power of U.S. forces—and thus, in terms of Article 2 of the Political Covenant, under the "jurisdiction" of the United States.[5] It is

[1] U.S. Permanent Mission in Geneva, Diplomatic Note to the International Committee of the Red Cross (Sept. 19, 1994) (on file with author).

[2] Common Article 2. *See, e.g.*, Convention Relative to Treatment of Prisoners of War, Aug. 12, 1949, 6 UST 3316, 75 UNTS 135 (Geneva Convention No. III). *See also* COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 22–23 (Jean de Preux ed., 1960). *See generally* Richard R. Baxter, *The Duties of Combatants and the Conduct of Hostilities (Law of The Hague), in* UNESCO, INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 93, 93–103 (1988).

[3] Larry Rohter, *Legal Vacuum in Haiti Is Testing U.S. Policy*, N.Y. TIMES, Nov. 4, 1994, at A32.

[4] Dec. 16, 1966, 999 UNTS 171 (entered into force for the United States Sept. 8, 1992). The fact that Haiti is also a party to the Political Covenant creates a favorable political environment for its application by U.S. forces in Haiti.

[5] The U.S. declaration that the provisions of the Covenant are non-self-executing has no effect on the international obligations of the United States to respect the Covenant. For a survey of U.S. case law concerning the applicability abroad of U.S. constitutional guarantees, see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §721 (1987). *But see* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990). For a critique of *Verdugo*, see Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AJIL 444, 491–93 (1990).

https://doi.org/10.2307/2203895 Published online by Cambridge University Press

important to point this out because Haiti is the first major exercise of authority in a foreign country by U.S. forces since the U.S. ratification of the Political Covenant.

The extraterritorial reach of the Political Covenant needs to be explained. Article 2(1) of the Covenant provides that each party "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant." The legislative history of Article 2(1) does not support a narrow territorial construction.[6] The leading study by Professor Buergenthal, now a member of the United Nations Human Rights Committee, argues that Article 2(1) should be read so that each party would have assumed the obligation to respect and ensure the rights recognized in the Covenant both "to all individuals within its territory" *and* "to all individuals subject to its jurisdiction."[7] This interpretation has almost never been questioned and has long ceased to be the preserve of scholars; it has obtained the imprimatur of the Human Rights Committee and UN rapporteurs.

Aligning the Covenant with the Optional Protocol, which speaks (in Art. 1(1)) only of persons subject to the jurisdiction of the state, the Committee in its general comments on Article 2 asserted that states are obligated to ensure rights to all "individuals under their jurisdiction."[8] In its recent general comment on Article 27, the Committee referred to Article 2(1) as applying to all individuals "within the territory *or* under the jurisdiction of the state."[9] In its most recent general comment, on Article 41 of the Covenant, the Committee asserted in broad and categorical terms that "[t]he intention of the Covenant is that the rights contained therein should be ensured to all those under a State's party's jurisdiction."[10] In examining the report of Iraq under Article 40, the Committee expressed "particular concern" over the failure of the report to address the events in Kuwait under Iraqi occupation, "given Iraq's clear responsibility under international law for the observance of human rights during its occupation of that country."[11]

In some cases, the Committee took a similar position in adopting views under the Optional Protocol. In one case, for example, it stated that Article 2(1) does not imply that the state party concerned cannot be held accountable for violations of rights under the Covenant that its agents commit upon the territory of another state, whether with the acquiescence of that state or in opposition to it.[12] It

[6] During the discussion of the words "within its jurisdiction," which were proposed by the United States, the view was expressed that "a State should not be relieved of its obligations under the covenant to persons who remained within its jurisdiction merely because they were not within its territory." MARC J. BOSSUYT, GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 53 (1987).

[7] Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations, in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 72, 74 (Louis Henkin ed., 1981). *Contra* Dietrich Schindler, *Human Rights and Humanitarian Law,* 31 AM. U. L. REV. 935, 939 (1982).

[8] *See* UN Doc. HRI/GEN/1/Rev.1, at 4 (1994). For a discussion of the scope *ratione loci* of the Political Covenant, see THEODOR MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS 106–09 (1986).

[9] UN Doc. CCPR/C/21/Rev.1/Add.5, para. 4 (1994) (emphasis added).

[10] UN Doc. CCPR/C/21/Rev.1/Add.6, at 4, para. 12 (1994) (unedited text).

[11] Report of the Human Rights Committee, UN GAOR, 46th Sess., Supp. No. 40, para. 652, UN Doc. A/46/40 (1991). *See also id.*, paras. 625, 636, 640.

[12] Saldías de López v. Uruguay, UN GAOR, 36th Sess., Supp. No. 40, at 176, 182, UN Doc. A/36/40 (1981).

https://doi.org/10.2307/2203895 Published online by Cambridge University Press

emphasized that "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."[13] In a recent case, in discussing a party's obligations with regard to its own territory, the Committee spoke simply of "threats . . . to the personal liberty and security of non-detained individuals within the State party's jurisdiction,"[14] without mentioning territory at all.

Invoking previous practice of the Human Rights Committee, Walter Kälin, special rapporteur of the Commission on Human Rights on Kuwait under Iraqi occupation, categorically asserted that Iraq was responsible in Kuwait for complying with its obligations under the Covenant, without regard to the nationality of the victims or, because of the nonreciprocal character of those obligations, whether or not the victims' governments were parties to it.[15]

Not all the provisions of the Political Covenant are by their nature intended for extraterritorial application. Such fundamental principles as the prohibition of the arbitrary taking of life, the duty of humane treatment of persons in detention, the prohibition of inhuman or degrading treatment or punishment, and essential due process must always be respected. Some provisions, however, obviously do not lend themselves to extraterritorial application and the application of others may have to be adapted to the circumstances. Implementation in Haiti of the due process provisions in Article 14 of the Covenant, for example, must take into account the detaining state's (the U.S.) lack of a civilian judiciary in Haiti,[16] the absence of a functioning Haitian judiciary, and the need to apply Haitian criminal law to most of the offenses implicated in the detentions.[17]

The Political Covenant imposes treaty constraints not only on U.S. armed forces abroad, but also on civilian agents and officials exercising power and authority, especially in law enforcement. If U.S. agents abducted persons abroad and brought them to the United States for trial, they would violate, in addition to other applicable rules of international law, the country's treaty obligations under the Political Covenant.[18]

In view of the purposes and objects of human rights treaties, there is no a priori reason to limit a state's obligation to respect human rights to its national territory.

[13] *Id.* at 183. The European Commission of Human Rights similarly interpreted Article 1 ("The High Contracting Parties shall secure to everyone within their jurisdiction the rights . . .") of the European Convention on Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 UNTS 221, with regard to the obligations of Turkey in occupied Cyprus. Cyprus v. Turkey, App. Nos. 6780/74, 6950/75, 2 Eur. Comm'n H.R. Dec. & Rep. 125, 136 (1975), *summarized in* MERON, *supra* note 8, at 107 n.73. *See also* HARITINI DIPLA, LA RESPONSABILITÉ DE L'ETAT POUR VIOLATION DES DROITS DE L'HOMME 45–51 (1994).

[14] Mojica v. Dominican Republic, UN Doc. CCPR/C/51/D/449/1991, para. 5.4 (1994). *See also* Kindler v. Canada, Communication No. 470/1991, Report of the Human Rights Committee, UN GAOR, 48th Sess., Supp. No. 40 (pt. II), at 138, para. 6.2, UN Doc. A/48/40 (Part II).

[15] Walter Kälin, Report on the situation of human rights in Kuwait under Iraqi occupation, UN Doc. E/CN.4/1992/26, paras. 58–59. On this question, see Theodor Meron, *Prisoners of War, Civilians and Diplomats in the Gulf Crisis,* 85 AJIL 104, 106–07 (1991). *See generally* Theodor Meron, *Applicability of Multilateral Conventions to Occupied Territories,* 72 AJIL 542 (1978).

[16] The Covenant assumes that the same state party is responsible for the executive and the judiciary.

[17] The Security Council resolutions authorizing the U.S. intervention contain no guidance as to the applicable criminal law.

[18] For a trenchant critique of United States v. Alvarez-Machain, 112 S.Ct. 2188 (1992), see Louis Henkin, *Will the U.S. Supreme Court Fail International Law?,* ASIL NEWSLETTER, Aug.–Sept. 1992, at 1. *See also* Lowenfeld, *supra* note 5; Andreas F. Lowenfeld, *Kidnaping by Government Order: A Follow-up,* 84 AJIL at 712.

https://doi.org/10.2307/2203895 Published online by Cambridge University Press

Where agents of the state, whether military or civilian, exercise power and authority (jurisdiction, or de facto jurisdiction) over persons outside national territory, the presumption should be that the state's obligation to respect the pertinent human rights continues.[19] That presumption could be rebutted only when the nature and the content of a particular right or treaty language suggest otherwise.[20]

Sadly, in *Sale v. Haitian Centers Council, Inc.*[21] the Supreme Court took a wholly different approach to the territorial scope of the Convention Relating to the Status of Refugees,[22] stating that

> a treaty cannot impose uncontemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent. Because the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit such actions.[23]

In *Sale,* pursuant to a presidential executive order, the Coast Guard intercepted vessels on the high seas that were transporting undocumented aliens to the United States and returned them to Haiti without first determining whether the aliens qualified as refugees, a determination to which they would have been entitled had the interdiction on the high seas not taken place. Most of the provisions of the Refugee Convention, in contrast to those of the Political Covenant, may be primarily territorial in character, in the sense that they apply to claimants who have reached the soil of the state of asylum. But—keeping in mind Article 33 of the Refugee Convention—when a state undertakes to exercise its jurisdiction to enforce its laws on the high seas by returning potential asylum seekers to the country they are fleeing, the Convention, and not only its spirit (as the Court suggested), is breached. As regards such an expansion of the state's jurisdiction to enforce its laws, the Court's comment on the territoriality of the Convention is, I submit, beside the point. I agree with Professor Henkin's persuasive critique of the Court's decision.[24] In the eyes of the international community, and the UN High

[19] Recent (and even the earlier European Convention on Human Rights, see *supra* note 13) human rights treaties avoid the tangled language of the Political Covenant and are indisputably addressed to the protection of all individuals that may fall under the jurisdiction of the state party. The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 39/46 (Dec. 10, 1984), UN GAOR, 39th Sess., Supp. No. 51, at 197, UN Doc. A/39/51 (1985), requires a state to take certain steps to prevent acts of torture "in any territory under its jurisdiction" (Art. 2(1)). The Convention on the Rights of the Child, GA Res. 44/25 (Nov. 20, 1989), UN GAOR, 44th Sess., Supp. No. 49, at 167, UN Doc. A/44/49 (1989), requires states to respect and ensure certain rights "to each child within their jurisdiction" (Art. 2(1)). The American Convention on Human Rights, Nov. 22, 1969, OEA/Ser.K/XVI.1.1, doc.70, rev.1, corr.1 (1970), *reprinted in* 1 THE INTER-AMERICAN SYSTEM, pt. II at 51 (F. V. García-Amador ed., 1983), addresses rights of all persons "subject to [the] jurisdiction [of states parties]" (Art. 1(1)).

See generally LEA BRILMAYER, JUSTIFYING INTERNATIONAL ACTS 29 (1989).

[20] Walter Kälin argued that the International Covenant on Economic, Social and Cultural Rights was binding on Iraq in Kuwait during the occupation: "[no] provision of the Covenant limits its application to the territory of States parties. . . . [A] State party remains bound by the Covenant if it occupies the territory of another State and exercises there de facto State power." Kälin, *supra* note 15, at 14.

[21] 113 S.Ct. 2549 (1993).

[22] July 28, 1951, 189 UNTS 137.

[23] 113 S.Ct. at 2565.

[24] "It is incredible," he wrote, "that states that had agreed not to force any human being back into the hands of his/her oppressors intended to leave themselves—and each other—free to reach out beyond their territory to seize a refugee and to return him/her to the country from which he sought to escape." Louis Henkin, *Notes from the President,* ASIL NEWSLETTER, Sept.–Oct. 1993, at 1.

https://doi.org/10.2307/2203895 Published online by Cambridge University Press

Commissioner for Refugees, the decision of the Supreme Court leaves the nation in violation of customary international law and its treaty obligations.

Bona fide interpretation of human rights treaties by the administration and the courts is called for, in accordance with their object and purpose of promoting human rights, even where such interpretation leads to the extraterritoriality of humanitarian obligations of the United States. The established jurisprudence of the Human Rights Committee provides clear guidance and should discourage a narrow territorial construction of the Political Covenant.[25]

Narrow territorial interpretation of human rights treaties is anathema to the basic idea of human rights, which is to ensure that a state should respect human rights of persons over whom it exercises jurisdiction. Because it holds effective power in Haiti, the United States must respect its obligations under the Covenant. Fortunately, the administration has not advanced the claim that it is not obligated to respect its obligations under the pertinent human rights treaties with regard to the land territory of Haiti.

THEODOR MERON*

HAITI AND THE VALIDITY OF INTERNATIONAL ACTION

In December 1990, after decades of dictatorship, the Haitian people overwhelmingly elected Jean-Bertrand Aristide as President. Every aspect of the election was monitored by international organizations and confirmed as "free and fair."[1] Within months, the army, an ill-trained force of some five thousand men, seized power, expelled Aristide, and brutally suppressed popular protest. The Organization of American States and the United Nations Security Council condemned the coup and its aftermath and ordered economic sanctions to dislodge the military. The sanctions failed. On July 31, 1994, the Security Council, acknowledging the gravity of the situation and recognizing that an "exceptional response" was required, passed Resolution 940, authorizing military action.[2] The legality and wisdom of Resolution 940 has been criticized on the following grounds.

• *Internal human rights violations do not constitute "threats to the peace," the UN Charter's contingency for coercive action.* In Haiti, that bridge was long since crossed. The Council's decision to apply economic sanctions—an action that is

[25] The United States will, of course, be subject to the Committee's scrutiny of its annual reports under Article 40 and in case of complaints lodged by other state parties under Article 41, which it has accepted.

* I am grateful to Professors Thomas Buergenthal, Louis Henkin and Andreas Lowenfeld for their suggestions.

[1] On international monitoring of the Haitian election of December 16, 1990, see Georges A. Fauriol, *Inventing Democracy: The Elections of 1990, in* THE HAITIAN CHALLENGE: U.S. FOREIGN POLICY CONSIDERATIONS 53, 57 (Georges A. Fauriol ed., 1993); INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, ANNUAL REPORT, 1990–91, at 468, OEA/Ser.L/V/II.79, rev.1 (1991). For U.S. reaction and assessment, see Howard W. French, *Haitians Overwhelmingly Elect Populist Priest to the Presidency,* N.Y. TIMES, Dec. 17, 1990, at A1; *Haiti's Choice, and Father Aristide's,* N.Y. TIMES, Dec. 18, 1990, at A24; *Haiti's First Freely Elected Leader,* WASH. POST, Dec. 20, 1991, at A23. On international election monitoring in general, see W. Michael Reisman, *International Election Observation,* 4 PACE U. Y.B. INT'L L. 1 (1992).

[2] SC Res. 940 (July 31, 1994), *reprinted in* N.Y. TIMES, July 31, 1994, at A6.

https://doi.org/10.2307/2203895 Published online by Cambridge University Press

Human Rights.[37] Consisting of a preamble and thirty articles, it provided succinct formulations of a catalogue of fundamental rights. The treaty and measures of implementation would wait another eighteen years. In 1966, the General Assembly approved two international covenants, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, as well as an Optional Protocol providing for individual petitions alleging violations of civil and political rights.[38]

In June 1947, John P. Humphrey of the United Nations Secretariat prepared an initial draft bill of rights as a basis for debate within the Commission on Human Rights. His forty-eight-article text was derived from a detailed study of national constitutional provisions. A document of several hundred pages was prepared, collating the formulations of rights in the national constitutional law of the United Nations member states.[39] It did not even look at the legal culture and traditions of countries without written constitutions, in particular the United Kingdom and some other members of the Commonwealth like Canada, Australia, and New Zealand. Thus, for example, no account was taken of the English Bill of Rights. There was no suggestion that this was an attempt to codify human rights norms under international law. The idea that such norms existed would have been hotly contested. To the extent that any source of international law was involved, the Secretariat draft of the Universal Declaration might be said to have been influenced by 'general principles of law'.[40]

Today, it would not be uncommon in negotiations of an international treaty, particularly one dealing with human rights, for delegates to refer to customary international law. But there were virtually no such references during the drafting of the Universal Declaration of Human Rights in 1946, 1947, and 1948. In the Third Committee of the General Assembly the Belgian delegate, Fernand Dehousse, made a formal statement 'on the Legal Significance of the Declaration'. He said that some of the principles in the Universal Declaration 'would only repeat rules already in the customary law of nations and were, in consequence, recognised in unwritten international law. The act of inscribing them in an international declaration could not deprive these rules of the binding character they already possessed'. Although without any specification, he explained that '[o]ther principles which would be included in the declaration did not belong to customary international

[37] Universal Declaration of Human Rights, A/RES/217 (III).

[38] International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights, A/RES/2200 (XXI).

[39] Drafting Committee on an International Bill of Human Rights, International Bill of Rights Documented Outline, E/CN.4/AC.1/3/Add.1.

[40] Michael O'Boyle and Michelle Lafferty, 'General Principles and Constitutions as Sources of Human Rights Law', in Dinah Shelton, ed., *The Oxford Handbook of International Human Rights Law*, Oxford: Oxford University Press, 2013, pp. 194–221, at p. 198.

Downloaded from https://academic.oup.com/book/39904/chapter/340150337 by University of Melbourne user on 18 March 2024

law and the fact of their inclusion in an international declaration would certainly not make them obligatory'.[41]

The only other mention of customary law during the drafting of the Universal Declaration related to the principle of legality and the non-retroactivity of criminal law. The concern was not whether some or all of the norms in the Declaration were customary in nature but rather whether such a thing as international crimes could be said to exist. Dehousse of Belgium stated: 'International law included an extremely important customary section which it was essential to take into account.'[42] Radevanovic of Yugoslavia said that 'from the penal point of view, international law had not been codified; it was based on custom.'[43] Finally, René Cassin of France 'confirmed that his delegation understood by "international law", positive law, both customary and written.'[44]

Shortly after the adoption of the Declaration, Hersch Lauterpacht was critical of Dehousse's comments on its legal significance, insisting that prior to adoption of the Charter of the United Nations, 'apart from the precarious doctrine of humanitarian intervention, international law considered these matters to be within the exclusive domestic jurisdiction of the state'.[45] Lauterpacht examined various theories of the legal status of the Declaration, notably the argument that it codified 'general principles of law' and that it was an authoritative interpretation of the Charter of the United Nations. He made only a single, and exceedingly dismissive, reference to customary international law as a possible basis for attributing legal force to the Universal Declaration: 'The student of international law may find it difficult to subscribe to the view that it is a rule of customary international law that, to mention some of the least controversial pronouncements of the Declaration, "everyone has the right to life, liberty and security of person" (Art. 3 of the Declaration); or that "no one shall be held in slavery or servitude" (Art. 4); or that "no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment" (Art. 5).'[46] Lauterpacht also rejected the thesis that the provisions of the Universal Declaration might constitute binding legal rules as 'general principles of law recognised by civilised nations', which is the formulation in Article 38(1)(c) of the Statute of the International Court of Justice. He conceded that '[t]he Declaration

[41] Summary Record of the hundred and eighth meeting [of the Third Committee of the General Assembly], 20 October 1948, *Official Records of the General Assembly*, Third Session, 1948, p. 200.
[42] Summary Record of the hundred and sixteenth meeting [of the Third Committee of the General Assembly], 29 October 1948, *Official Records of the General Assembly*, Third Session, 1948, p. 270.
[43] Ibid., p. 272.
[44] Ibid., p. 275.
[45] Hersch Lauterpacht, 'The Universal Declaration of Human Rights', (1948) 25 *British Yearbook of International Law* 354, at p. 365. Also: Hersch Lauterpacht, *International Law and Human Rights*, London: Stevens and Sons, 1950, p. 407.
[46] Hersch Lauterpacht, 'The Universal Declaration of Human Rights', (1948) 25 *British Yearbook of International Law* 354, pp. 364–365.

Downloaded from https://academic.oup.com/book/39904/chapter/340150337 by University of Melbourne user on 18 March 2024

gives expression to what, in the fullness of time, ought to become principles of law generally recognised and acted upon by States Members of the United Nations'.[47]

Writing decades later, John Humphrey, who headed the Secretariat of the Commission on Human Rights for two decades starting in 1947, claimed that from the time of its adoption he subscribed to the view that the Universal Declaration of Human Rights constituted a codification of customary law, but he added that he could not 'remember anyone in 1948 who shared my views'.[48] Nor is there any evidence of anyone else remembering that Humphrey held the view. 'That substantial portions of the Universal Declaration of Human Rights, adopted in 1948, eventually might become customary international law, and therefore binding on all states, was beyond the comprehension and vision of all but a few of the participants',[49] wrote Richard Lillich nearly fifty years after the Declaration's adoption.

There was certainly a debate in 1948 about the legal status of the Declaration but, according to the record, apart from the isolated comment by the Belgian delegate cited above, claims about customary law did not figure in the conversations. Many delegations felt deceived that the Declaration was to proceed to adoption without an accompanying binding treaty, for which the text was far from ready. They were therefore somewhat contemptuous of the Declaration, treating it as a pale and inadequate substitute for the Covenant that they had been promised. One of the most eloquent voices for this view was Hersch Lauterpacht. He said bluntly that '[n]ot being a legal instrument, the Declaration would appear to be outside international law. Its provisions cannot properly be the subject-matter of legal interpretation.'[50] Humphrey was furious with Lauterpacht, but he wrote much later that it was 'only fair' to note that Lauterpacht's comments were made 'shortly after the adoption of the Declaration, before it began to have any real impact and before the subtle processes began to work which would make it part of the customary law of nations'.[51]

More than a decade after the Declaration's adoption, Egon Schwelb, then Deputy Director of the Division of Human Rights of the United Nations Secretariat, spoke at the annual meeting of the American Society of International Law on the influence of the Universal Declaration in national and international law. He said 'that while the substance of most, though by no means all, of the provisions of the Declaration may well be said to be identical with general principles of law recognised by civilised nations, the proposition that the Declaration is a codification of

[47] Hersch Lauterpacht, *International Law and Human Rights*, London: Stevens and Sons, 1950, p. 408.

[48] John P. Humphrey, *Human Rights and the United Nations: A Great Adventure*, Dobbs Ferry, NY: Transnational Publishers, 1984, p. 65.

[49] Richard Lillich, 'The Growing Importance of Customary International Human Rights Law', (1996) 25 *Georgia Journal of International and Comparative Law* 1, at p. 1.

[50] Hersch Lauterpacht, 'The Universal Declaration of Human Rights', (1948) 25 *British Yearbook of International Law* 354, at p. 369. Along similar lines, Josef L. Kunz, 'The United Nations Declaration of Human Rights', (1949) 43 *American Journal of International Law* 316, at p. 321: 'it is not law'.

[51] John P. Humphrey, *Human Rights and the United Nations: A Great Adventure*, Dobbs Ferry, NY: Transnational Publishers, 1984, p. 74.

Downloaded from https://academic.oup.com/book/39904/chapter/340150337 by University of Melbourne user on 18 March 2024

these general principles is not warranted'.[52] Schwelb provided many compelling examples of the influence of the Declaration, citing its role in treaty-making and in constitutional law, but he did not mention customary international law. Schwelb appeared to discount any claim to a relationship of the Universal Declaration with customary international law.

The inescapable conclusion is that in 1948, when the Universal Declaration of Human Rights was adopted, there was little or no customary international law of human rights. It even seems audacious to contend that it was 'emerging' or 'crystallising'. Rather, the Universal Declaration launched a process that proceeded along two strands: the detailed codification of international human rights law in the many treaties and other instruments that it spawned directly or indirectly, and the gradual and less tangible appearance of state practice and *opinio juris* leading, some years later, to the establishment of a corpus worthy of being described as customary international law.

B. The debate about customary human rights law emerges

It was only in the mid-1960s that judges, academic lawyers, and activists began to speak of the customary law of human rights. When the Universal Declaration was adopted by the General Assembly, in 1948, there was some expectation that the Covenant would arrive a year or perhaps two later. But the work dragged on. In 1951, the General Assembly decided to split the draft Covenant, whose content closely tracked the Universal Declaration, into two separate instruments, based upon the nature of the rights that they contained. In 1954, the Commission on Human Rights submitted texts of the draft covenants on civil and political rights and on economic, social, and cultural rights for consideration by the General Assembly. The negotiations continued for more than a decade and the two Covenants were only adopted in 1966. It took another ten years before the thirty-five ratifications necessary for their entry into force were obtained.

There was understandable frustration about the pace of adoption and entry into force of these missing components of the international bill of rights. This provoked consideration of other pathways to the development of human rights law, stimulating interest in the potential of customary international law. In 1965, Humphrey Waldock, the British judge at the European Court of Human Rights and later at the International Court of Justice, wrote that the Universal Declaration of Human Rights was clothed 'in the character of customary international law'.[53] Nobel Peace

[52] Egon Schwelb, 'The Influence of the Universal Declaration of Human Rights on International and National Law', (1959) 53 *Proceedings of the American Society of International Law* 217, at p. 218.

[53] Humphrey Waldock, 'Human Rights in Contemporary International Law and the Significance of the European Convention', (1965) 11 *International and Comparative Law Quarterly Supplementary Publication* 1, p. 15.

Downloaded from https://academic.oup.com/book/39904/chapter/340150337 by University of Melbourne user on 18 March 2024

Prize laureate Seán MacBride wrote in the *UNESCO Courier*, on the twentieth anniversary of the adoption of the Universal Declaration, that 'there is a growing view among international lawyers that some of its provisions, which are justiciable, now form part of customary international law … The Universal Declaration does now represent in written form the basis for the law of nations, the laws of humanity and the dictates of the public conscience as accepted in the twentieth century.'[54] The language was borrowed from the preambles of the two Hague Conventions on the laws and customs of war. The same year, a conference of non-governmental organisations adopted the 'Montreal Statement', affirming that the 'Universal Declaration of Human Rights ... has over the years become part of customary international law'.[55] In the same vein, but without an explicit claim about customary international law, the Declaration of Tehran, adopted by the 1968 International Conference on Human Rights, said that the Universal Declaration 'constitutes an obligation for members of the international community'.[56]

Recognition that human rights had entered the domain of customary international law received important judicial recognition in 1966 from Judge Kōtarō Tanaka of the International Court of Justice. Referring to Article 38(1)(b) of the Statute of the Court, Judge Tanaka said although customary law had traditionally developed as part of an historical process over a long period of time, the establishment of the League of Nations and the United Nations had brought changes. 'In the contemporary age of highly developed techniques of communication and information, the formation of a custom through the medium of international organisations is greatly facilitated and accelerated; the establishment of such a custom would require no more than one generation or even far less than that', he wrote.[57] Judge Tanaka said that '[t]he method of the generation of customary international law is in the stage of transformation from being an individualistic process to being a collectivistic process'.[58] He concluded that a norm prohibiting racial discrimination had emerged through an 'accumulation of authoritative pronouncements' in the form of resolutions, trust territory agreements, and above all the Universal Declaration of Human Rights.

In 1976, John Humphrey wrote that '[i]n the more than a quarter of a century since its adoption, however, the Declaration has been invoked so many times both within and without the United Nations that lawyers now are saying that, whatever the intention of its authors may have been, the Declaration is

[54] Seán MacBride, 'The New Frontiers of International Law', *UNESCO Courier*, January 1968, p. 26.
[55] 'Montreal Statement of the Assembly for Human Rights', (1968) 9 *Journal of the International Commission of Jurists* 94, at p. 95.
[56] Final Act of the International Conference on Human Rights, Tehran, 22 April to 13 May 1968, A/CONF.32/41, para. 2.
[57] *South West Africa, Second Phase, Judgment, ICJ Reports 1966*, Dissenting opinion of Judge Tanaka, p. 293.
[58] Ibid., p. 294.

Downloaded from https://academic.oup.com/book/39904/chapter/340150337 by University of Melbourne user on 18 March 2024

now part of the customary law of nations and therefore is binding on all states'.[59] Humphrey added, in a footnote: 'This claim is applicable only to those provisions that are justiciable. Philosophical assertions, such as those set forth in article 1, are not justiciable.'[60] Louis Sohn described the Declaration as 'a binding instrument in its own right'.[61] In 1980, Myres McDougal, Harold Lasswell, and Lung-chu Chen discussed 'the evolution of the Universal Declaration of Human Rights from its first status as mere common aspiration to its present wide acceptance as authoritative legal requirement',[62] concluding that it constituted 'established customary international law, having the attributes of *jus cogens* and constituting the heart of a global bill of rights'.[63] Writing in 1982, although he would later adjust his position,[64] Philip Alston said there was 'a large and growing body of evidence' favouring the claim that at least the first twenty-one articles of the Declaration were part of customary law.[65] Oscar Schachter, without invoking the Declaration as such, described the 'hard core' of human rights as being part of customary international law.[66] Frederic L. Kirgis wrote that 'the Universal Declaration of Human Rights has come to be regarded as an authoritative articulation of customary international law, at least with respect to the most fundamental human rights, no matter how widespread or persistent the nonconforming state conduct may be'.[67] In the early 1990s, several distinguished Scandinavian scholars stated that 'plentiful evidence of general and specific practice by the international community and its components has led several statesmen and scholars to conclude that the UDHR constitutes binding law as international custom in accordance with article 38 of the Statute of the International Court of Justice'. They acknowledged that other writers had suggested 'that at least many of the rights spelled out in the UDHR have emerged as rules of customary law'.[68] And a decade later,

[59] John P. Humphrey, 'The International Bill of Rights: Scope and Implementation', (1976) 17 *William and Mary Law Review* 527, at p. 529 (internal references omitted).

[60] Ibid., fn. 13.

[61] Louis B. Sohn, 'The Human Rights Law of the Charter', (1977) 12 *Texas International Law Journal* 129, at p. 133. See also: Louis B. Sohn, 'John A. Sibley Lecture: The Shaping of International Law', (1978) 8 *Georgia Journal of International and Comparative Law* 1, at pp. 18–22; Louis B. Sohn, 'The New International Law: Protection of the Rights of Individuals Rather than States', (1982) 32 *American University Law Review* 1, at p. 17.

[62] Myres S. McDougal, Harold Lasswell, and Lung-Chu Chen, *Human Rights and World Public Order*, New Haven: Yale University Press, 1980, p. 272.

[63] Ibid., p. 274.

[64] A '*volte face*' that Richard Lillich described as 'passing strange': Richard Lillich, 'The Growing Importance of Customary International Human Rights Law', (1996) 25 *Georgia Journal of International and Comparative Law* 1, at p. 11, fn. 61.

[65] Philip Alston, 'The Universal Declaration at 35: Western and Passée or Alive and Universal', (1982) 31 *ICJ Review* 60, at p. 69.

[66] Oscar Schachter, 'International Law in Theory and Practice: General Course in Public International Law', (1982) 178-V *Receuil des cours* 21, at pp. 333–342.

[67] Frederic L. Kirgis, 'Custom on a Sliding Scale', (1987) 81 *American Journal of International Law* 146, 147–148.

[68] 'Introduction', in Asbjørn Eide, Gudmunder Alfredsson, Göran Melander, Lars Adam Rejof, and Allan Rosas, eds., *The Universal Declaration of Human Rights: A Commentary*, Oslo: Scandinavian

Downloaded from https://academic.oup.com/book/39904/chapter/340150337 by University of Melbourne user on 18 March 2024

in the early 2000s, Manfred Nowak wrote of the Universal Declaration that '[n]o doubt some of its provisions, such as the prohibition of torture and slavery, today enjoy the status of customary international law, yet despite certain legal opinions to the contrary, it is still doubtful whether the Declaration as a whole can be considered as having achieved this status'.[69]

C. American lawyers and alien torts

In the early 1980s, creative human rights lawyers in the United States invoked an ancient and essentially dormant piece of legislation, the Alien Torts Claims Act or the Alien Tort Statute, adopted in the aftermath of the Revolutionary War. The Statute authorises a civil action by an alien for a tort 'committed in violation of the law of nations'. At the time, the United States had a dismal record of ratification of human rights conventions, so there was little in the way of treaties to which to turn as a source of applicable international law. Customary international law provided an answer, to the extent that its existence could be demonstrated and its content ascertained. The United States Court of Appeals for the Second Circuit upheld the admissibility of a claim based upon the prohibition of state-sponsored torture under customary international law: 'Having examined the sources from which customary international law is derived the usage of nations, judicial opinions and the works of jurists we conclude that official torture is now prohibited by the law of nations.'[70] The Court noted that '[t]his prohibition has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights'.[71] Subsequently, cases decided under the Alien Tort Claims Statute by American courts found that other human rights violations were also prohibited by the law of nations including cruel, inhuman, or degrading treatment,[72] arbitrary detention,[73] summary execution or murder,[74] enforced disappearance,[75] and genocide.[76] But United States courts also declined to make similar findings

University Press, 1992, pp. 7–8. Along the same lines: 'Introduction', in Gudmunder Alfredsson and Asbjørn Eide, eds., *The Universal Declaration of Human Rights, A Common Standard of Achievement*, The Hague/Boston/London: Martinus Nijhoff, 1999, pp. xxxi–xxxii.

[69] Manfred Nowak, *Introduction to the International Human Rights Regime*, Leiden/Boston: Martinus Nijhoff, 2003, p. 76.
[70] *Filártiga v. Peña-Irala*, 630 F.2d 876, 885 (2d Cir. 1980) (internal references omitted).
[71] Ibid.
[72] *Xuncax v. Gramajo*, 886 F.Supp. 162, 185–189 (D. Mass. 1995).
[73] *Fernandez v. Wilkinson*, 505 F.Supp. 787, 798 (D. Kan. 1980).
[74] *Forti v. Suarez-Mason*, 672 F.Supp. 1531, 1542 (N.D. Cal. 1987).
[75] *Forti v. Suarez-Mason*, 694 F.Supp. 707, 709–711 (N.D. Cal. 1988).
[76] *Xuncax v. Gramajo*, 886 F.Supp. 162, 187, n. 35 (D. Mass. 1995).

Downloaded from https://academic.oup.com/book/39904/chapter/340150337 by University of Melbourne user on 18 March 2024

Convention on the Rights of the Child, which declares that 'every child has the inherent right to life'.[19]

There have been three reservations to Article 6 of the International Covenant on Civil and Political Rights, of which two, by Norway[20] and Pakistan,[21] have been withdrawn. The United States reserved the right, 'subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman)'.[22] The two interpretative declarations concerning Article 6, by Ireland[23] and Thailand,[24] have been withdrawn. With respect to the Convention on the Rights of the Child, there are a few reservations and declarations concerning family planning and related issues.[25] The broad general reservations formulated by some States do not appear to be addressed to the right to life as such, but rather to aspects of its interpretation.[26] Thus, the reservations and declarations to the right to life provision in the Covenant and the Convention on the Rights of the Child do not challenge the right in such a way as to raise questions about its customary nature.

Nothing in the Universal Periodic Review materials raises any doubt that States that are not party to the Covenant or to the Arab Charter question whether they

Punishment and Eradication of Violence against Women, 'Convention of Belem do Para', OASTS 61, art. 4(a).

[19] Convention on the Rights of the Child, (1990) 1571 UNTS 3, art. 6(1).

[20] C.N.188.1972.TREATIES-7 ('with regard to the obligation to keep accused juvenile persons and juvenile offenders segregated from adults'), C.N.298.1979.TREATIES-9.

[21] C.N.405.2010.TREATIES-17, (2011) 2786 UNTS 97 ('the provisions of [article 6] shall be so applied to the extent that they are not repugnant to the Provisions of the Constitution of Pakistan and the Sharia laws'), C.N.604.2011.TREATIES-41.

[22] C.N.250.1992.TREATIES-14. On the reservation by the United States, see *Domingues v. United States*, Case No. 12.285, Report No. 62/02, Merits, 22 October 2002, paras. 61–62.

[23] C.N.344.1989.TREATIES-2/17/4 ('Pending the introduction of further legislation to give full effect to the provisions of paragraph 5 of Article 6, should a case arise which is not covered by the provisions of existing law, the Government of Ireland will have regard to its obligations under the Covenant in the exercise of its power to advise commutation of the sentence of death.'), C.N.112.1994.TREATIES-2.

[24] C.N.381.1996.TREATIES-8 (' … though in theory, sentence of death may be imposed for crimes committed by persons below eighteen years, but not below seventeen years of age, the Court always exercises its discretion under Section 75 to reduce the said scale of punishment, and in practice the death penalty has not been imposed upon any person below eighteen years of age. Consequently, Thailand considers that in real terms it has already complied with the principles enshrined herein'), C.N.356.2012.TREATIES-IV.4. See the discussion of Thailand's declaration in *Domingues v. United States*, Case 12.285, Report No. 62/02, Merits, 22 October 2002, para. 59.

[25] China, C.N.92.1992.TREATIES-6 ('[T]he People's Republic of China shall fulfil its obligations provided by article 6 of the Convention under the prerequisite that the Convention accords with the provisions of article 25 concerning family planning of the Constitution of the People's Republic of China and in conformity with the provisions of article 2 of the Law of Minor Children of the People's Republic of China.'); France, Luxembourg, C.N.85.1994.TREATIES-1 (' … that this Convention, particularly article 6, cannot be interpreted as constituting any obstacle to the implementation of the provisions of … legislation relating to the voluntary interruption of pregnancy'); Tunisia, C.N.32.1992.TREATIES-2 (' … that the Preamble to and the provisions of the Convention, in particular article 6, shall not be interpreted in such a way as to impede the application of Tunisian legislation concerning voluntary termination of pregnancy.').

[26] General Comment 24, Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under art. 41 of the Covenant, CCPR/C/21/Rev.1/Add.6, para. 10, fn. 3.

Downloaded from https://academic.oup.com/book/39904/chapter/340152202 by University of Melbourne user on 18 March 2024

have an obligation to respect and protect the right to life. Confirmation can be found in many of the reports by these States to the Human Rights Council.[27]

The right to life has been described as 'the supreme right'[28] and 'the most fundamental of the rights'.[29] The Human Rights Council's Special Rapporteur on extrajudicial, summary, or arbitrary executions has spoken of 'the supremacy and non-derogability of the right to life under both treaty and customary international law'.[30] According to the Special Rapporteur, '[w]henever a State is responsible for an unlawful killing, international law requires reparations in the form of compensation and/or satisfaction. This obligation is based in general customary international law.'[31] The list of customary norms in the Third Restatement of the American Law Institute included 'the murder or causing the disappearance of individuals'. The accompanying Comment explained that 'it is a violation of international law for a state to kill an individual other than as lawful punishment pursuant to conviction in accordance with due process of law, or as necessary under exigent circumstances, for example by police officials in line of duty in defence of themselves or of other innocent persons, or to prevent serious crime'.[32]

In its General Comment on reservations, the Human Rights Committee said that customary international law prohibited arbitrary deprivation of life.[33] This was reformulated, in more detail, in its third General Comment on the right to life. The Committee said reservations were not allowed 'to the prohibition against arbitrary deprivation of life of persons and to the strict limits provided in Article 6

[27] Bhutan, National report, A/HRC/WG.6/33/BTN/1, para. 7; China, National report, A/HRC/WG.6/17/CHN/1, paras. 44–47 and National report, A/HRC/WG.6/4/CHN/1, paras. 42–44; Fiji, National report, A/HRC/WG.6/20/FJI/1, para. 8; Kiribati, National report, A/HRC/WG.6/35/KIR/1, para. 75 and Views on conclusions, A/HRC/15/3/Add.1, para. 46; Micronesia, Report of the Working Group, A/HRC/16/16, paras. 8, 21; Nauru, National report, A/HRC/WG.6/10/NRU/1, paras. 16, 18–19, 28 and National report, A/HRC/WG.6/23/NRU/1, para. 27; St Kitts and Nevis, National report, A/HRC/WG.6/10/KNA/1, para. 8; Saint Lucia, National report, A/HRC/WG.6/10/LCA/1, para. 17 and Report of the Working Group, A/HRC/31/16, para. 18; Saudi Arabia, National report, A/HRC/WG.6/17/SAU/1, para. 57; Singapore, National report, A/HRC/WG.6/11/SGP/1, para. 22; Solomon Islands, National report, A/HRC/WG.6/11/SLB/1, para. 24; South Sudan, National report, A/HRC/WG.6/11/SDN/1, para. 123; Tuvalu, National report, A/HRC/WG.6/3/TUV/1, para. 33; United Arab Emirates, National report, A/HRC/WG.6/29/ARE/1, para. 13 and National report, A/HRC/WG.6/29/ARE/2, p. 3.

[28] General Comment 36, art. 6: right to life, CCPR/C/GC/36, para. 2.

[29] *Elgizouli (Appellant) v. Secretary of State for the Home Department (Respondent)*, [2020] UKSC 10, para. 14 (per Lady Hale).

[30] Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions, Christof Heyns, A/HRC/23/47, para. 36. Also Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions, Christof Heyns, A/HRC/20/22, para. 41; Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions, Christof Heyns, A/HRC/17/28, para. 43.

[31] Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions, Philip Alston, A/HRC/14/24, para. 56.

[32] Restatement (Third) of the Foreign Relations Law of the United States, St. Paul, MN: American Law Institute, 1987, para. 702 and Comment, para. f.

[33] General Comment 24, Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under art. 41 of the Covenant, CCPR/C/21/Rev.1/Add.6, para. 8.

Downloaded from https://academic.oup.com/book/39904/chapter/340152202 by University of Melbourne user on 18 March 2024

with respect to the application of the death penalty'.[34] It wrote that the right to life has 'crucial importance both for individuals and for society as a whole. It is most precious for its own sake as a right that inheres in every human being, but it also constitutes a fundamental right whose effective protection is the prerequisite for the enjoyment of all other human rights and whose content can be informed by other human rights.'[35]

There is also support for viewing the right to life as a norm of *jus cogens*.[36] The Inter-American Commission on Human Rights has said that the right to life had 'attained the status of customary, and indeed peremptory, norms of international law'.[37] The African Commission on Human and Peoples' Rights has described the right to life as a norm of customary law[38] and of *jus cogens*.[39] The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia said that the 'inherent right to life' was a norm of customary international law.[40] The Human Rights Committee has explained that although not all the rights that are non-derogable under Article 4 of the International Covenant on Civil and Political Rights are *jus cogens*, the right not to be arbitrarily deprived of life was a peremptory norm. The International Law Commission did not include the right to life in the draft list of *jus cogens* norms that it adopted in 2019,[41] although some members of the Commission supported its inclusion.[42]

The right to life has both positive and negative dimensions. The negative aspect is the obligation of the State not to deprive arbitrarily persons within its jurisdiction of their lives. The positive aspect requires that States take measures to protect human life, including both the enactment of appropriate legislation and its effective enforcement. In making homicide a crime and ensuring that killings are investigated and, where appropriate, prosecuted, the State ensures the protection of the right to life. It is difficult to go beyond general principles in this respect because national legislation varies considerably, at least at the technical level. Where killings are either ignored by the authorities or, even worse, deliberately sheltered

[34] General Comment 36, art. 6: right to life, CCPR/C/GC/36, para. 68.
[35] Ibid., para. 2.
[36] General Comment 29, art. 4: Derogations during a State of Emergency, CCPR/C/21/Rev.1/Add.11, para. 11.
[37] *Mario Alfredo Lares-Reyes et al. v. United States*, Case 12.379, Report No. 19/02, 27 February 2002, para. 46, fn. 23; *Victims of the Tugboat '13 de Marzo' v. Cuba*, Case 11.436, Report 47/96, 16 October 1996, para. 79.
[38] *Noah Kazingachire, John Chitsenga, Elias Chemvura, and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v. Zimbabwe*, No. 295/04, 12 October 2013, para. 137.
[39] General Comment 3 on the African Charter on Human and Peoples' Rights: The right to life (art. 4), para. 5.
[40] *Prosecutor v. Blaškić* (IT-94/14-A), Judgment, 29 July 2004, para. 143; *Prosecutor v. Kordić and Čerkez* (IT-95-14/2-A), Judgment, 17 December 2004, para. 106.
[41] Report of the International Law Commission, Seventy-first session (29 April–7 June and 8 July–9 August 2019), A/74/10, p. 274; Fourth report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur, A/CN.4/727, paras. 128–130.
[42] A/CN.4/SR.3462, p. 4 (Bogdan Aurescu); A/CN.4/SR.3462, p. 11 (Carlos Argüello Gómez).

Downloaded from https://academic.oup.com/book/39904/chapter/340152202 by University of Melbourne user on 18 March 2024

discussion in this study. For example, the 1959 Declaration highlighted the right of the child to adequate nutrition, housing, medical care, and education. The Convention on the Rights of the Child guarantees freedom of expression, of religion, and of association and peaceful assembly. To the extent that there is any special dimension to these rights required by the status of the child it may be the principle that '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration', enshrined in Article 3(1) of the Convention on the Rights of the Child.[132] According to the Human Rights Committee, 'the principle that in all decisions affecting a child, its best interests shall be a primary consideration, forms an integral part of every child's right to such measures of protection as required by his or her status as a minor, on the part of his or her family, society and the State'.[133] Judge Pinto de Albuquerque of the European Court of Human Rights described the principle of the best interests as one of customary international law.[134] Although not referring explicitly to customary law, the Grand Chamber of the European Court has spoken of 'a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance'.[135]

International human rights treaties are mainly directed at the obligations of the States Parties, but they may also impose obligations or duties on individuals. As the Universal Declaration makes explicit, '[e]veryone has duties to the community in which alone the free and full development of his personality is possible'.[136] The Convention on the Rights of the Child declares that 'both parents have common responsibilities for the upbringing and development of the child' and that '[p]arents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child'.[137] There have been no reservations to the provision, providing confirmation for its universal recognition as a norm of customary international law. The State has obligations to ensure that parental duties are entrenched in laws that are enforced. States are also required to 'render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children'.

[132] Convention on the Rights of the Child, (1990) 1571 UNTS 3, art. 3(1).
[133] *Bakhtiyari et al. v. Australia*, no. 1069/2002, Views, 6 November 2003, CCPR/C/79/D/1069/2002, para. 9.7; *D.T. et al. v. Canada*, no. 2081/2011, Views, 15 July 2016, CCPR/C/117/D/2081/2011, para. 7.10.
[134] *X. v. Latvia* [GC], no. 27853/09, 26 November 2013, Concurring opinion of Judge Pinto de Albuquerque.
[135] *Strand Lobben et al. v. Germany* [GC], no. 37283/13, § 204, 10 September 2019.
[136] Universal Declaration of Human Rights, A/RES/217 (III), art. 29(1).
[137] Convention on the Rights of the Child, (1990) 1571 UNTS 3, art. 18(1).

Downloaded from https://academic.oup.com/book/39904/chapter/340153295 by University of Melbourne user on 18 March 2024

Six States Parties have formulated reservations or declarations respecting Article 16 of the Convention on the Rights of the Child.[191]

Taken as a whole, these materials provide very strong confirmation for recognition of the right to protection against interference with privacy, family, home, and correspondence as a norm of customary international law.

Article 17 of the International Covenant on Civil and Political Rights and several of the other treaties proscribe interference that is either 'arbitrary' or 'unlawful'. It appears that 'arbitrary' refers to interference by the State, through legislation or government action. 'Unlawful', on the other hand, expresses the horizontal obligation requiring the State to protect individuals from interference by others. The Human Rights Committee has explained that '[t]he term "unlawful" means that no interference can take place except in cases envisaged by the law. Interference authorised by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.'[192] The Human Rights Committee has said that the notion of 'arbitrariness' is not to be equated with 'against the law'. Rather, it must 'be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality'.[193]

1. Protection of privacy

The right to privacy protects that particular area of individual existence and autonomy that does not touch upon the sphere of liberty and privacy of others. According to the Human Rights Committee, privacy 'refers to the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone'.[194] Privacy protects the special, individual qualities of human existence such as a person's manner of appearance and

[191] Algeria, C.N.135.1993.TREATIES-4 (' … shall be applied while taking account of the interest of the child and the need to safeguard its physical and mental integrity'); Holy See, C.N.112.1990.TREATIES-4 ('that it interprets the Articles of the Convention in a way which safeguards the primary and inalienable rights of parents, in particular insofar as these rights concern … privacy (Article 16)'); Indonesia, C.N.245.1990.TREATIES-9, since withdrawn, C.N.147.2005.TREATIES-1 (application of art. 16 'in conformity with its constitution'); Kiribati, CN.478.1995.TREATIES-11 (' … a child's rights as defined in the Convention, in particular the rights defined in [article 16] shall be exercised with respect for parental authority, in accordance with the I-Kiribati customs and traditions regarding the place of the child within and outside the family'); Mali ('The Government of the Republic of Mali declares that, in view of the provisions of the Mali Family Code, there is no reason to apply article 16 of the Convention.'); Poland, C.N.116.1991.TREATIES-4 (similar to Kiribati reservation).

[192] General Comment 16, art. 17 (Right to privacy), A/43/40, Vol. I, p. 181, para. 2.

[193] General Comment 35, art. 9 (Liberty and security of person), CCPR/C/GC/35, para. 12, cited in the context of the right to privacy in *A.B. v. Canada*, no. 2387/2014, Views, 15 July 2016, CCPR/C/117/D/2387/2014, para. 8.7.

[194] *Coeriel et al. v. the Netherlands*, no. 453/1991, Views, 31 October 1994, CCPR/C/52/D/453/1991, para. 10.2; *G. v. Australia*, no. 2172/2012, Views, 17 March 2017, CCPR/C/119/D/2172/2012, para. 7.2.

Downloaded from https://academic.oup.com/book/39904/chapter/340153804 by University of Melbourne user on 18 March 2024

The only State that does not have a treaty obligation recognising the right of 'individuals and bodies' to establish and direct schools is the United States of America. Its reports to the Human Rights Council have only addressed issues that concern public educational institutions.[150] Nevertheless, private education at all levels is very highly developed in the United States. The United States is a signatory to the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child and is therefore obliged to refrain from acts which would defeat their object and purpose.[151]

There is therefore much evidence, essentially based upon the universality of treaty provisions, to confirm that the right of parents to choose the education they wish for their children is recognised under customary law, subject of course to respecting the progressive objectives of education. The right of 'individuals and bodies' to establish and direct educational institutions also seems to be customary in nature although there is no suggestion that the implementation is entitled to rely upon public funds.

* * *

Conclusions. Everyone has the right to universal primary education that is compulsory and free of charge. The right must be recognised without any discrimination based on race, gender or other grounds. Education shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace. Parents have the right to participate in decisions about the education that their children receive.

E. Cultural rights

Within the overall scheme of international human rights law, cultural rights are a neglected category. They are sometimes dropped altogether in the peculiarly abbreviated but not uncommon references to 'socioeconomic rights'. That they be included in the Universal Declaration of Human Rights apparently results from an American suggestion: 'Among the categories of rights which the United States suggests should be considered is the right "to enjoy minimum standards of economic, social and cultural wellbeing"'.[152] The Universal Declaration of Human Rights addresses cultural rights in a single provision, Article 27, which is composed of two paragraphs. The first concerns participation in cultural life, enjoyment of the arts,

[150] United States of America, National report, A/HRC/WG.6/9/USA/1, paras. 47–49; United States of America, National report, A/HRC/WG.6/22/USA/1, paras. 30–32, 37, 103–104.
[151] Vienna Convention on the Law of Treaties, (1980) 1155 UNTS 31, art. 18(a).
[152] United States Proposals Regarding an International Bill of Rights, E/CN.4/4, p. 2.

Downloaded from https://academic.oup.com/book/39904/chapter/340155005 by University of Melbourne user on 18 March 2024

and benefiting from scientific advancement. The second is directed at protection of the intellectual property of a scientific, literary, or artistic nature. Cultural rights are also relevant to the right to education. Article 24 of the Universal Declaration, which provides a right to rest and leisure, serves the purpose of facilitating participation in culture and the arts. The principles in Article 27 of the Universal Declaration find a more elaborate expression in Article 15 of the International Covenant on Economic, Social and Cultural Rights. Furthermore, Article 27 of the International Covenant on Civil and Political Rights protects the right of members of minority groups to enjoy their culture. Cultural rights are also addressed in the regional human rights treaties.[153]

Although Article 27 of the Universal Declaration is obviously the template, there is great variation in the formulations of the right to culture in human rights treaties. The diversity of texts contributes in two ways to the identification of customary international law: it tends to confirm that the protection of cultural life is entrenched within custom and it provides a broad range of elements and approaches that may then be taken into consideration in the interpretation and application of the customary norm. For example, the International Convention for the Elimination of All Forms of Racial Discrimination protects the right 'to equal participation in cultural activities'.[154] Somewhat differently, the Convention for the Elimination of All Forms of Discrimination against Women enshrines a right 'to participate fully in recreational activities, sports and all aspects of cultural life'.[155] The Charter of Fundamental Rights of the European Union 'recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life'.[156] Pursuant to the International Covenant on Civil and Political Rights, members of ethnic, religious, and linguistic minorities shall not be denied the right 'to enjoy their own culture'.[157]

The Convention on the Rights of the Child provides for the right of the child 'to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts'.[158] The most detailed provision in the specialised treaties is found in the Convention on the Rights of Persons with Disabilities under the heading 'Participation in cultural life, recreation, leisure and sport'. Persons with disabilities are entitled 'to take part on an equal basis with others in cultural life'. This involves access to cultural materials, television programmes,

[153] Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, OASTS 69, art. 14; Arab Charter on Human Rights, art. 42; African Charter on Human and Peoples' Rights, (1986) 1520 UNTS 271, art. 17(1).

[154] International Convention on the Elimination of All Forms of Racial Discrimination, (1969) 660 UNTS 195, art. 5(e)(vi).

[155] Convention on the Elimination of All Forms of Discrimination against Women, (1981) 1249 UNTS 13, art. 13(c).

[156] Charter of Fundamental Rights of the European Union, OJ C 326/391, art. 25.

[157] International Covenant on Civil and Political Rights, (1976) 999 UNTS 171, art. 27; Convention on the Rights of the Child, (1990) 1571 UNTS 3, art. 30.

[158] Convention on the Rights of the Child, (1990) 1571 UNTS 3, art. 31.

Downloaded from https://academic.oup.com/book/39904/chapter/340155005 by University of Melbourne user on 18 March 2024

films, theatre, museums, libraries and tourism services, cultural monuments, and measures enabling them 'to have the opportunity to develop and utilise their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society'.[159]

The International Covenant on Economic, Social and Cultural Rights presents a succinct formulation: 'The States Parties to the present Covenant recognise the right of everyone: (a) To take part in cultural life . . . '.[160] In its General Comment on the subject, the Committee on Economic, Social and Cultural Rights said that the expression 'cultural life' referred to culture 'as a living process, historical, dynamic and evolving, with a past, a present and a future'.[161] The Committee explained that culture 'encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives'.[162] The Committee has insisted that 'cultures have no fixed borders. The phenomena of migration, integration, assimilation and globalisation have brought cultures, groups and individuals into closer contact than ever before, at a time when each of them is striving to keep their own identity'.[163]

There are no reservations to Article 15 of the International Covenant on Civil and Political Rights, Article 31 of the Convention on the Rights of the Child, and Article 30 of the Convention on the Rights of Persons with Disabilities.[164] Accordingly, every Member State of the United Nations is a party to one of the cultural rights provisions and most are parties to at least two of them. The one exception, the United States of America, is not a party to any of the three treaties. This is quite ironic as it was the United States that first proposed the inclusion of a cultural rights provision in the International Bill of Rights, as explained above. The Universal Periodic Review materials provide no insight into its position concerning cultural rights under international law. The United States is a signatory to

[159] Convention on the Rights of Persons with Disabilities, (2008) 2515 UNTS 3, art. 30.

[160] International Covenant on Economic, Social and Cultural Rights, (1976) 993 UNTS 3, art. 15(1)(a).

[161] General Comment 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/21, para. 11.

[162] Ibid., para. 13. See also the thematic reports of the Special Rapporteur on cultural rights, A/HRC/14/36, A/HRC/31/59.

[163] General Comment No. 21. Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/21, para. 41.

[164] Malaysia has a declaration to art. 30 of the Convention on the Rights of Persons with Disabilities that confirms its recognition of the right to culture, C.N.488.2010.TREATIES-19: 'Malaysia recognises the participation of persons with disabilities in cultural life, recreation and leisure as provided in article 30 of the said Convention and interprets that the recognition is a matter for national legislation.'

Downloaded from https://academic.oup.com/book/39904/chapter/340155005 by University of Melbourne user on 18 March 2024

all three of the treaties and is therefore obliged to refrain from acts that would defeat their object and purpose.[165]

States that are not parties to the International Covenant on Economic, Social and Cultural Rights sometimes refer to the subject in reporting to the Human Rights Council as part of the Universal Periodic Review. For example, Tonga told the Council that although it had not ratified the Covenant, its principles were incorporated within national law and include the right to take part in cultural life.[166] Myanmar reported that '[e]very citizen shall, in accord with the law, have the rights to freely develop literature, culture, arts, customs and tradition they cherish'.[167] Some States appear to view the right to culture as being directed to the protection of their traditional culture[168] or those of ethnic minorities.[169] But this only reflects the more general pattern in the Universal Periodic Review, which is to ignore the right to participate in cultural life, although there are some exceptions.[170]

Cultural heritage receives special protection under international humanitarian law and international criminal law.[171] According to the Special Rapporteur in the field of cultural rights, the prohibition of acts of deliberate destruction of cultural heritage of major value for humanity is a norm of customary international law.[172] Article 4 of the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage declares the 'duty of ensuring the identification, protection, conservation, presentation and transmission to future generations' with respect to buildings and monuments of cultural heritage, defined as being 'outstanding universal value from the point of view of history, art or science'.[173]

Taken as a whole, these materials confirm the customary legal status of the right to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

The Special Rapporteur in the field of cultural rights of the Human Rights Council has identified several clusters that are protected by the right to

[165] Vienna Convention on the Law of Treaties, (1980) 1155 UNTS 31, art. 18(a).

[166] Tonga, National report, A/HRC/WG.6/29/TON/1, para. 22, National report, A/HRC/WG.6/15/TON/1, para. 139 and Report of the Working Group, A/HRC/38/5, para. 7.

[167] Myanmar, National report, A/HRC/WG.6/10/MMR/1, para. 34.

[168] Nauru, National report, A/HRC/WG.6/10/NRU/1, paras. 108–110.

[169] Malaysia, National report, A/HRC/WG.6/4/MYS/1/Rev.1, paras. 47–51.

[170] Cuba, National report, A/HRC/WG.6/4/CUB/1, paras. 45–46, National report, A/HRC/WG.6/30/CUB/1, paras. 104–109; China, National report, A/HRC/WG.6/17/CHN/1, para. 39; Tajikistan, National report, A/HRC/WG.6/12/TJK/1, paras. 172–177; Korea (DPRK), National report, A/HRC/WG.6/19/PRK/1, paras. 68–70; Mongolia, National report, A/HRC/WG.6/9/MNG/1, paras. 48–50.

[171] Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, (1956) 249 UNTS 215; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I, Cambridge: Cambridge University Press, 2005, pp. 127–138; Rome Statute of the International Criminal Court (2002) 2187 UNTS 689, arts. 8(2)(b)(ix), 8(2)(e)(ix).

[172] Report of the Special Rapporteur in the field of cultural rights, A/HRC/31/59, para. 59, citing Francesco Francioni and Federico Lanzerini, 'The Destruction of the Buddhas of Bamiyan and International Law', (2003) *14 European Journal of International Law* 619, at p. 635.

[173] Convention Concerning the Protection of the World Cultural and Natural Heritage.

Downloaded from https://academic.oup.com/book/39904/chapter/340155005 by University of Melbourne user on 18 March 2024

protection and promotion of human rights does not seem to be disputed. Article 28 of the Universal Declaration of Human Rights states that '[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised'. A human right to peace may prove important, for example, by facilitating a balancing of the competing interests of justice for victims and the resolution of armed conflict in circumstances where amnesty is required in order to reach a peace agreement.[19] In contrast with other 'peoples' rights' or 'third generation rights', such as the right to a healthy environment and the right to development, the right to peace has little resonance in the Universal Periodic Review materials.[20]

* * *

Conclusions. The elements that are necessary in order to affirm the recognition of a human right to peace under customary international law are probably insufficient.

B. Healthy environment

The right to enjoyment of a safe, clean, healthy, and sustainable environment does not appear in the Universal Declaration of Human Rights and the two International Covenants. The African Charter on Human and Peoples' Rights declares: 'All peoples shall have the right to a general satisfactory environment favourable to their development.'[21] The Arab Charter on Human Rights includes 'the right to a healthy environment' under the general rubric of an adequate standard of living.[22] The Charter of Fundamental Rights of the European Union contains a provision entitled 'Environmental protection': 'A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.'[23] The Additional Protocol to the American Convention on Human Rights affirms that '[e]veryone shall have the right to live in a healthy environment and to have access to basic public services' and that States Parties are to 'promote the protection, preservation, and improvement of the environment'.[24]

According to the Human Rights Council, more than 100 States have recognised some form of a right to a healthy environment in international agreements, their constitutions, legislation, or policies.[25] Initiatives aimed at the adoption of

[19] See, for example, *Massacres of El Mozote and nearby places v. El Salvador,* Judgment (Merits, reparations, and costs), 25 October 2012, Series C, No. 252, Concurring opinion of Judge Diego García-Sayán.
[20] Cuba, in United States of America, Report of the Working Group, A/HRC/16/11, para. 92.215.
[21] African Charter on Human and Peoples' Rights, (1986) 1520 UNTS 271, art. 24.
[22] Arab Charter of Human Rights, art. 38.
[23] Charter of Fundamental Rights of the European Union, OJ C 326/391, art. 37.
[24] Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, OASTS 69, art. 11.
[25] Human rights and the environment, A/HRC/RES/37/8, PP 17.

Downloaded from https://academic.oup.com/book/39904/chapter/340155350 by University of Melbourne user on 18 March 2024

an additional protocol to the European Convention on Human Rights on the subject have not come to fruition, but that may be explained by the view that the Convention is already sufficient to address the issue.[26]

Aspects of environmental protection have been developed in the case law and other materials of international human rights courts and treaty bodies, relying upon the right to life[27] and the right to privacy.[28] In its third General Comment on the right to life, the Human Rights Committee explained that '[e]nvironmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life'. It said that obligations under international environmental law should inform an understanding of the right to life: 'Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States Parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors'. This requires the adoption of measures to ensure sustainable use of natural resources and the development and implementation of substantive environmental standards. States must provide notification to other States about 'natural disasters and emergencies and cooperate with them, provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach'.[29]

The Inter-American Court of Human Rights has identified 'an undeniable relationship between the protection of the environment and the realization of other human rights, in that environmental degradation and the adverse effects of climate change affect the real enjoyment of human rights'.[30] It has emphasised the special importance of the relationship between a healthy environment and human rights in cases that deal with territorial rights of indigenous and tribal peoples, where the protection of natural resources is essential.[31] For the Inter-American

[26] Recommendation 1885 (2009), Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment; Reply adopted by the Committee of Ministers on 8 July 2009 at the 1063rd meeting of the Ministers' Deputies, CM/AS(2009)Rec1862 final, para. 9; Opinion of the CDDH on Recommendation 1883 (2009), The challenges posed by climate change and Recommendation 1885 (2009) Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment, DH-DEV(2010)03, Appendix III, para. 3.

[27] *Teitiota v. New Zealand*, no. 2728/2016, Views, 24 October 2019, CCPR/C/127/D/2728/2016; Cabo Verde, Concluding observations, CCPR/C/CPV/CO/1/Add.1, paras. 17–18.

[28] *López Ostra v. Spain*, 9 December 1994, §§ 58–60, Series A no. 303-C; *Fägerskiöld v. Sweden* (dec.), no. 37664/04, 26 February 2008; *Galev et al. v. Bulgaria* (dec.), no. 18324/04, 29 December 2009; *Di Sarno et al. v. Italy*, no. 30765/08, § 113, 10 January 2012.

[29] General Comment 36, art. 6: right to life, CCPR/C/GC/36, para. 62.

[30] *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity: interpretation and scope of articles 4(1) and 5(1) in relation to articles 1(1) and 2 of the American Convention on Human Rights*, Advisory Opinion OC-23/17, Series A, No. 23, 15 November 2017, para. 47. Also *Kawas Fernández v. Honduras*, Judgment (Merits, reparations, and costs), 3 April 2009, Series C, No. 196, para. 148.

[31] Ibid. Also *Yakye Axa Indigenous Community v. Paraguay*, Judgment (Merits, reparations, and costs), 17 June 2005. Series C, No. 125, para. 137; *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment (Merits, reparations, and costs), 29 March 2006. Series C, No. 146, para. 118; *Saramaka*

Downloaded from https://academic.oup.com/book/39904/chapter/340155350 by University of Melbourne user on 18 March 2024

Commission on Human Rights, 'several fundamental rights require, as a necessary precondition for their enjoyment, a minimum environmental quality, and are profoundly affected by the degradation of natural resources'.[32] Similarly, the African Commission on Human and Peoples' Rights has noted the significance of economic and social rights to the extent that 'the environment affects the quality of life and the safety of the individual'.[33]

Many submissions to the Human Rights Council in the course of the Universal Periodic Review address the question of climate change and its impact upon human rights.[34] Some speak explicitly of a human right to a clean and healthy

People v. Suriname, Judgment (Preliminary objections, merits, reparations, and costs), 28 November 2007, Series C, No. 172, paras. 121 and 122; *Kaliña and Lokono Peoples v. Suriname*, Judgment (Merits, reparations, and costs), Series C, No. 309, 25 November 2015, para. 173.

[32] *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources—Norms and jurisprudence of the inter-American human rights system*, 30 December 2009, OEA/Ser.L/V/II, Doc. 56/09, para. 190.

[33] *Social and Economic Rights Centre (SERAC) and Centre for Economic and Social Rights (CESR) v. Nigeria*, No. 155/96, Decision, 27 October 2001, para. 51.

[34] Algeria, in Guyana, Report of the Working Group, A/HRC/15/14, paras. 33, 69.24; Australia, in Maldives, Report of the Working Group, A/HRC/16/7, para. 63; Azerbaijan, in Tuvalu, Report of the Working Group, A/HRC/24/8, para. 55 and in Maldives, Report on the Working Group, A/HRC/16/7, para. 45; Bahrain, in Comoros, Report of the Working Group, A/HRC/12/16, para. 23; Bangladesh, in Bhutan, Report of the Working Group, A/HRC/42/8, para. 91; Barbados, in Vanuatu, Report of the Working Group, A/HRC/41/10, para. 55; Bhutan, National report, A/HRC/WG.6/33/BTN/1, paras. 59–70, 163 and Report of the Working Group, A/HRC/42/8, paras. 9, 22, 155; Bolivia, in United States of America, Report of the Working Group, A/HRC/16/11, para. 92.222; Brazil, in Solomon Islands, Report of the Working Group, A/HRC/18/8, para. 38 and Tuvalu, Report of the Working Group, A/HRC/39/8, paras. 16, 43; Brunei Darussalam, Report of the Working Group, A/HRC/13/14, para. 16; Canada, in Micronesia, Report of the Working Group, A/HRC/16/16, para. 28 and in Nauru, Report on the Working Group, A/HRC/17/3, para. 79.84; Chad, National report, A/HRC/WG.6/31/TCD/1, paras. 34–38; China, in Guyana, Report of the Working Group, A/HRC/15/14, para. 37 and Kiribati, Report of the Working Group, A/HRC/15/3, para. 35; Chile, in Kiribati, Report of the Working Group, A/HRC/15/3, para. 53 and Solomon Islands, Report of the Working Group, A/HRC/18/8, para. 58; Comoros, National report, A/HRC/WG.6/18/COM/1, paras. 103–110, National report, A/HRC/WG.6/32/COM/1, paras. 29–37, Report of the Working Group, A/HRC/26/11, para. 29 and Report of the Working Group, A/HRC/41/12, para. 8; Costa Rica, in Nauru, Report of the Working Group, A/HRC/31/7, para. 73; Cuba, in Kiribati, Report of the Working Group, A/HRC/15/3, para. 29 and Guyana, Report of the Working Group, A/HRC/15/14, para. 36; Djibouti, in Nauru, Report of the Working Group, A/HRC/31/7, para. 85.53; Ecuador, in Solomon Islands, Report of the Working Group, A/HRC/18/8, para. 81.34; Ethiopia, National report, A/HRC/WG.6/33/ETH/1, paras. 37–38; Fiji, in Bhutan, Report of the Working Group, A/HRC/42/8, paras. 128, 158.52 and Brunei Darussalam, Report of the Working Group, A/HRC/42/11, paras. 47, 121.107; Finland, in Maldives, Report of the Working Group, A/HRC/16/7, para. 100.124; Georgia, in Micronesia, Report of the Working Group, A/HRC/31/4, para. 48; Ghana, in Tuvalu, Report of the Working Group, A/HRC/39/8, para. 101.72; Guyana, Views on conclusions, A/HRC/15/14/Add.1, para. 18 and Report of the Working Group, A/HRC/15/14, paras. 10, 31; Haiti, in Saint Lucia, Report of the Working Group, A/HRC/31/10, para. 88.121 and Tuvalu, Report of the Working Group, A/HRC/39/8, para. 101.69; Hungary, in Micronesia, Report of the Working Group, A/HRC/16/16, para. 45 and Saint Vincent and the Grenadines, Report of the Working Group, A/HRC/18/15, para. 46; Iceland, in Vanuatu, Report of the Working Group, A/HRC/41/10, para. 74; India, in Maldives, Report on the Working Group, A/HRC/16/7, para. 39; Indonesia, in Kiribati, Report of the Working Group, A/HRC/15/3, para. 59 and Nauru, Report of the Working Group, A/HRC/31/7, para. 85.54; Ireland, in Solomon Islands, Report of the Working Group, A/HRC/18/8, para. 34; Israel, in Nauru, Report on the Working Group, A/HRC/17/3, para. 69; Italy, in Solomon Islands, Report of the Working Group, A/HRC/32/14, para. 71; Jamaica, in Tuvalu, Report of the Working Group, A/HRC/39/8, para. 101.73; Kenya, National report, A/HRC/WG.6/8/KEN/1, para. 99; Kiribati, National report, A/HRC/WG.6/35/KIR/1, paras. 17–19, 47–49, 66–68, 83–84 and Report

Downloaded from https://academic.oup.com/book/39904/chapter/340155350 by University of Melbourne user on 18 March 2024

environment.[35] Many of them do not recognise a right to a healthy environment as such but nor do they reject the idea that issues of climate change and environmental protection belong within the protection of human rights. Even the United

of the Working Group, A/HRC/15/3, paras. 19–21, 44; Korea (ROK), in Tuvalu, Report of the Working Group, A/HRC/39/8, para. 101.108 and Tonga, Report of the Working Group, A/HRC/38/5, para. 93.25; Laos, National report, A/HRC/WG.6/8/LAO/1, para. 72; Maldives, National report, A/HRC/WG.6/9/MDV/1/Rev.1, para. 137.138 and in Nauru, Report of the Working Group, A/HRC/31/7, para. 35; Malaysia, in Comoros, Report of the Working Group, A/HRC/12/16, paras. 39, 44; Mauritius, in Nauru, Report on the Working Group, A/HRC/17/3, para. 68; Mexico, in Comoros, Report of the Working Group, A/HRC/12/16, para. 29 and Tuvalu, Report of the Working Group, A/HRC/39/8, para. 74; Micronesia, National report, A/HRC/WG.6/23/FSM/1, paras. 13, 92–100, National report, A/HRC/WG.6/9/FSM/1, paras. 96–101 and Report of the Working Group, A/HRC/31/4, para. 16; Mongolia, National report, A/HRC/WG.6/9/MNG/1, paras. 21–26; Morocco, in Kiribati, Report of the Working Group, A/HRC/15/3, para. 58 and Maldives, in Nauru, Report of the Working Group, A/HRC/31/7, para. 37; Mozambique, in Comoros, Report of the Working Group, A/HRC/41/12, para. 74; Myanmar, in in Solomon Islands, Report of the Working Group, A/HRC/32/14, paras. 83, 99.55; Namibia, in Nauru, Report of the Working Group, A/HRC/31/7, para. 38 and Micronesia, Report of the Working Group, A/HRC/31/4, para. 56; Nauru, Report of the Working Group, A/HRC/31/7, para. 82, Report on the Working Group, A/HRC/17/3, para. 24, and Views on conclusions, A/HRC/17/3/Add.1, paras. 38, 46; Nepal, in Tuvalu, Report of the Working Group, A/HRC/39/8, para. 77; New Zealand, in Vanuatu, Report of the Working Group, A/HRC/12/14, para. 38; Nicaragua, in Tuvalu, Report of the Working Group, A/HRC/24/8, para. 28; Pakistan, in Samoa, Report of the Working Group, A/HRC/33/6, para. 62; Niger, National report, A/HRC/WG.6/10/NER/1, paras. 80–86; Qatar, National report, A/HRC/WG.6/19/QAT/1, para. 11; Palau, Report of the Working Group, A/HRC/18/5, para. 12; Papua New Guinea, National report, A/HRC/WG.6/11/PNG/1, paras. 82–83; Philippines, in Kiribati, Report of the Working Group, A/HRC/15/3, paras. 60, 66.82 and Nauru, Report of the Working Group, A/HRC/31/7, para. 85.56; Poland, in Palau, Report of the Working Group, A/HRC/18/5, para. 31; Portugal, in Report of the Working Group, A/HRC/41/12, para. 79; Saint Lucia, National report, A/HRC/WG.6/23/LCA/1, para. 59 and Report of the Working Group, A/HRC/31/10, para. 83; Saint Vincent and the Grenadines, Report of the Working Group, A/HRC/18/15, paras. 16, 63; Samoa, Report of the Working Group, A/HRC/18/14, para. 25.26; Seychelles, in Vanuatu, Report of the Working Group, A/HRC/41/10, para. 32; Sierra Leone, in Nauru, Report of the Working Group, A/HRC/31/7, paras. 51, 85.58; Slovenia, in Vanuatu, Report of the Working Group, A/HRC/41/10, para. 34; Solomon Islands, National report, A/HRC/WG.6/11/SLB/1, paras. 39, 57–59, Report of the Working Group, A/HRC/18/8, paras. 7, 24 and in Nauru, Report of the Working Group, A/HRC/31/7, para. 85.55; Singapore, Views on conclusions, A/HRC/32/17/Add.1, para. 36 and in Tuvalu, Report of the Working Group, A/HRC/24/8, para. 32; Slovakia, in Tuvalu, Report of the Working Group, A/HRC/24/8, para. 39; Somalia, in Comoros, Report of the Working Group, A/HRC/26/11, para. 110.98; Spain, in Kiribati, Report of the Working Group, A/HRC/15/3, para. 34 and Maldives, in Nauru, Report of the Working Group, A/HRC/31/7, para. 54; Sudan, in Report of the Working Group, A/HRC/41/12, para. 90; Tanzania, National report, A/HRC/WG.6/12/TZA/1, para. 75; Thailand, in Micronesia, Report of the Working Group, A/HRC/16/16, para. 61.73; Timor Leste, in Micronesia, Report of the Working Group, A/HRC/31/4, para. 24; Togo, in Tuvalu, Report of the Working Group, A/HRC/39/8, para. 87; Tonga, Report of the Working Group, A/HRC/38/5/Add.1, para. 2; Trinidad and Tobago, in Nauru, Report of the Working Group, A/HRC/31/7, para. 57; Turkey, in Maldives, Report of the Working Group, A/HRC/16/7, para. 65; Tuvalu, National report, A/HRC/24/8 A/HRC/WG.6/3/TUV/1, paras. 3, 42, 56–57, 75, Report of the Working Group, A/HRC/24/8, paras. 6, 9–11 and National report, A/HRC/WG.6/30/TUV/1, paras. 81–83, 88; Uganda, National report, A/HRC/WG.6/12/UGA/1, paras. 90–91 and in Eritrea, Report of the Working Group, A/HRC/26/13, para. 122.198; Ukraine, in Tonga, Report of the Working Group, A/HRC/38/5, para. 82; United Kingdom, in Micronesia, Report of the Working Group, A/HRC/31/4, para. 25; Uruguay, in Saint Vincent and the Grenadines, Report of the Working Group, A/HRC/18/15, para. 47; Vanuatu, Report of the Working Group, A/HRC/12/14, para. 9; Venezuela, in Micronesia, Report of the Working Group, A/HRC/31/4, para. 28 and in United States of America, Report of the Working Group, A/HRC/16/11, para. 92.51; United States of America, National report, A/HRC/WG.6/22/USA/1, paras. 109–112, Views on Conclusions, A/HRC/30/12/Add.1, para. 12 and in Micronesia, Report of the Working Group, A/HRC/16/16, para. 31; Viet Nam, in Bhutan, Report of the Working Group, A/HRC/42/8, para. 83.

[35] Benin, National report, A/HRC/WG.6/14/BEN/1, para. 57; Comoros, National report, A/HRC/WG.6/18/COM/1, paras. 103–110; Cuba, in Tuvalu, Report of the Working Group, A/HRC/39/8,

Downloaded from https://academic.oup.com/book/39904/chapter/340155350 by University of Melbourne user on 18 March 2024

States addresses environmental issues in its Universal Periodic Review reports.[36] The large number of States that express concern about these issues at the Human Rights Council demonstrates not only their importance but also the strength of opinion that these are matters falling within the scope of human rights obligations. This is all the more impressive given the relative silence of international human rights treaties on the subject. Micronesia, in its National report to the Human Rights Council, explained that '[c]limate change has dramatically impacted not only the people's right to life, food, water, property, quality standard of living, and self-determination, but also the survival of a cultural heritage and patrimony of Micronesians'.[37] Tuvalu stated that '[t]he increasing frequency in which effects of climate change had been felt [had] been well documented worldwide. Those effects threatened the full and effective enjoyment by Tuvaluans of their rights to life, water and sanitation, food, health, housing, self-determination, culture and development.'[38] Ireland underscored 'the need for the international community to address the human rights dimensions of climate change'.[39] Samoa described 'the impact of climate change on the enjoyment of human rights of Samoans' as affecting food security, the right to water, access to health, the right to life, the right to an adequate standard of living, and freedom of movement, due to internal displacements.[40] Canada commended Maldives for its efforts 'to promote human rights internationally, particularly human rights and climate change'.[41] Bhutan said that although its commitments to global agreements on the environment and climate change 'would remain steadfast', it was concerned that 'global actions were inadequate to prevent further global temperature rises'.[42] It related climate change to the right to health, where the impact 'was becoming visible with the emergence of new patterns of vector-borne diseases, such as malaria, dengue, chikungunya

para. 101.71; Tanzania, National report, A/HRC/WG.6/12/TZA/1, para. 31; Morocco, National report, A/HRC/WG.6/13/MAR/1, para. 66; Andorra, National report, A/HRC/WG.6/9/AND/1, paras. 1, 87–89 and Report of the Working Group, A/HRC/16/8, para. 7; Lesotho, National report, A/HRC/WG.6/8/LSO/1, para. 9; Central African Republic, National report, A/HRC/WG.6/17/CAF/1, para. 14; Mongolia, National report, A/HRC/WG.6/9/MNG/1, para. 21; Senegal, National report, A/HRC/WG.6/31/SEN/1, para. 5; Ethiopia, National report, A/HRC/WG.6/33/ETH/1, para. 37; Uganda, National report, A/HRC/WG.6/12/UGA/1, paras. 90–91; Côte d'Ivoire, National report, A/HRC/WG.6/33/CIV/1, para. 47; Kazakhstan, National report, A/HRC/WG.6/7/KAZ/1, paras. 111–117; Lebanon, National report, A/HRC/WG.6/9/LBN/1, para. 4; Indonesia, in Kiribati, Report of the Working Group, A/HRC/15/3, para. 59; Solomon Islands, National report, A/HRC/WG.6/11/SLB/1, para. 39; Kuwait, National report, A/HRC/WG.6/8/KWT/1, p. 21; India, National report, A/HRC/WG.6/13/IND/1, para. 8.

[36] United States of America, National report, A/HRC/WG.6/36/USA/1, para. 71.
[37] Micronesia, National report, A/HRC/WG.6/9/FSM/1, para. 97.
[38] Tuvalu, Report of the Working Group, A/HRC/39/8, para. 16.
[39] Tuvalu, Report of the Working Group, A/HRC/24/8, para. 73.
[40] Samoa, Report of the Working Group, A/HRC/18/14, para. 66.
[41] Maldives, Report of the Working Group, A/HRC/16/7, para. 54.
[42] Bhutan, Report of the Working Group, A/HRC/42/8, para. 22.

Downloaded from https://academic.oup.com/book/39904/chapter/340155350 by University of Melbourne user on 18 March 2024

and water-borne diseases'.[43] Tonga 'continues to grapple with the ever-increasing threats of climate change that have recently brought an onslaught of more severe and more frequent natural disasters'.[44] Germany said it was 'working towards a comprehensive approach to addressing climate change in collaboration with United Nations agencies and other countries'.[45]

The Human Rights Council has recognised that 'while the human rights implications of environmental damage are felt by individuals and communities around the world, the consequences are felt most acutely by those segments of the population that are already in vulnerable situations'.[46] It has also noted 'the particular vulnerability of children to the effects of environmental harm, including to air pollution, water pollution, climate change, exposure to chemicals, toxic substances and waste, and loss of biodiversity, and that environmental harm may interfere with the full enjoyment of a vast range of the rights of the child'.[47]

Decades ago, the International Law Commission described as *jus cogens* obligations 'of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas'.[48] In 1991, the Commission identified wilful and severe damage to the environment as a crime against the peace and security of mankind.[49] But in 2019, it opted not to include this in its list of peremptory norms, following considerable debate on the subject.[50] Special Rapporteur Dire Tladi noted that despite 'the importance of the subject matter and the catastrophic consequence that could result from the destruction of the environment', he thought there was 'little evidence of the required "acceptance and recognition of the international community of States as a whole" that the environmental norms (or some of them) have acquired peremptory status, notwithstanding this empirical fact of the importance of environmental rules for the very survival of humanity and the planet'.[51]

* * *

Conclusions. There is compelling evidence for a human right to a safe, clean, healthy, and sustainable environment under customary international law.

[43] Bhutan, National report, A/HRC/WG.6/19/BTN/2, para. 43.
[44] Tonga, Views on conclusions, A/HRC/38/5/Add.1, para. 2.
[45] Germany, Report of the Working Group, A/HRC/39/9, para. 153.
[46] Human rights and the environment, A/HRC/RES/37/8, PP 11.
[47] Ibid., PP 15.
[48] *Yearbook … 1976*, Vol. II (Part 2), pp. 95–96.
[49] *Yearbook … 1991*, Vol. II (Part 2), p. 107.
[50] A/CN.4/SR.3461, p. 9 (Charles Jalloh); A/CN.4/SR.3459, p. 20 (Marja Lehto); A/CN.4/SR.3460, p. 7 (Nilüfer Oral); A/CN.4/SR.3460, p. 16 (Hussein Hassouna); A/CN.4/SR.3462, p. 12 (Carlos Arguëllo Gomez).
[51] Fourth report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur, A/CN.4/727, para. 136.

Downloaded from https://academic.oup.com/book/39904/chapter/340155350 by University of Melbourne user on 18 March 2024

OXFORD PUBLIC INTERNATIONAL LAW

Max Planck Encyclopedias of International Law

Intergenerational Equity

Edith Brown Weiss

Content type: Encyclopedia entries
Product: Max Planck Encyclopedias of International Law [MPIL]
Module: Max Planck Encyclopedia of Public International Law [MPEPIL]
Article last updated: April 2021

Subject(s):

Indigenous peoples — Equality before the law — Right to food — Water — Nationality of individuals — Sustainable development — Natural resources — Equitable principles — Customary international law — Intertemporal law

Published under the auspices of the Max Planck Institute for Comparative Public Law and International Law under the direction of Professor Anne Peters (2021–) and Professor Rüdiger Wolfrum (2004–2020).

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

A. Concept

1. General Remarks

1 The principle of intergenerational equity states that every generation holds the Earth in common with members of the present generation and with other generations, past and future. The principle articulates a concept of fairness among generations in the use and conservation of the environment and its natural resources (see also → *Conservation of Natural Resources*; → *Environment, International Protection*). The principle is the foundation of → *sustainable development*. It has also been applied to cultural resources and to economic and social problems. It could have even broader application, such as to the use of force and military operations.

2. Source of the Principle

2 The principle of intergenerational equity has deep roots in diverse cultural and religious traditions, including the Judeo-Christian, Islamic, and Asian non-theistic traditions. It has roots in Islamic law, the common law, civil law traditions, African customary law, and Native American traditional law, among others.

3 In international law, the principle builds upon the use of equity, initially formulated by Aristotle and elaborated by Grotius, who treated equity as addressing those cases not covered by the universal law (see also → *Equity in International Law*). In the twentieth century, equity was often cited as synonymous with being 'just' or with 'justice', as articulated by the → *International Court of Justice (ICJ)* in the → *North Sea Continental Shelf Cases* and in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case. Especially in the latter half of the twentieth century, equity was invoked in international law as a basis upon which to provide standards for allocating and sharing resources and for distributing the burdens of caring for the resources and the environment in which they are found. This use of equity provides a foundation for a principle of intergenerational equity.

3. Content of the Principle

(a) Definition of Future Generations

4 The term 'future generations' refers to all those generations that do not exist yet. The present generation refers to all those people who are living today. The present generation encompasses multiple generations among those living today, but they are treated collectively as the present generation.

(b) Elements of the Principle

5 The principle of intergenerational equity is a foundation for the concept of sustainable development. The World Commission on Environment and Development, which preceded the 1992 Rio Conference on Environment and Development, defined sustainable development 'as meeting the needs of the present without compromising the ability of future generations to meet their own needs' (Our Common Future at 8). This general language has been repeated in many different legal documents. It reflects concerns expressed in the earlier Stockholm Declaration on the Human Environment (→ *Stockholm Declaration [1972] and Rio Declaration [1992]*).

6 There is no binding international legal instrument that defines the elements of the principle of intergenerational equity. A review of juridical writings and legal instruments indicates that the core of the principle is that while the present generation has a right to use the Earth and its natural resources to meet its own needs, it must pass the Earth on to future generations in a condition no worse than that in which it was received so that future

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

generations may meet their own needs. This generally applies both to the diversity of the resources and to the quality of the environment.

7 The proposed Global Pact for the Environment, drafted by 100 international legal experts under the coordination of *Le club des juristes* provides in Art. 4, Intergenerational Equity, that '[i]ntergenerational Equity shall guide decisions that may have an impact on the environment. Present generations shall ensure that their decisions and actions do not compromise the ability of future generations to meet their own needs'.

8 In the 1980s, Brown Weiss identified a principle of intergenerational equity in which all generations hold the Earth in common as a trust. People are both beneficiaries entitled to use the environment and its resources, and at the same time trustees (or stewards or custodians) with an obligation to pass it on in no worse condition on balance than that in which it was received. This theory articulated three elements of intergenerational equity: nondiscriminatory access to the Earth and its resources; comparable options (as reflected in the diversity of resources); and comparable quality in the environment. These elements apply to both natural and cultural resources and lead to a suite of intergenerational strategies. The elements of the principle met four criteria: that they neither authorize unreasonable exploitation by the present generation nor impose unreasonable burdens on it; that they not require predicting the values of future generations and provide flexibility to future generations to achieve their own goals; that they be reasonably clear in application to foreseeable situations; and that they be generally shared by different cultural traditions and acceptable to different economic and political systems. In August 2013, the Report of the United Nations Secretary-General on Intergenerational Solidarity and the Needs of Future Generations recognized the 'fundamental principle of intergenerational equity' and noted that it included three elements: conservation of options; conservation of quality; and conservation of access (→ *United Nations, Secretary-General*).

9 The concept of comparable options rests on the assumption that future generations are more likely to survive and attain their goals if they have a variety of options for addressing their problems and opportunities. Conserving the diversity of natural and cultural resources will provide future generations with a robust and flexible heritage through which they can achieve their own well-being. The concept of comparable quality requires that on balance the quality of the natural and cultural environment be at least in no worse condition than that in which it was received. Trade-offs will be inevitable in implementing this element. Both the obligations to provide comparable options and comparable quality are part of the core obligation to pass on the environment in no worse condition than that in which it was received. The element of access gives the present generation a reasonable, non-discriminatory right of access to natural and cultural resources to use for its own benefit, and the obligation to pass on at least a minimal level or improved conditions of access.

10 Not all activities that harm the environment raise intergenerational issues. Noise pollution and surface water pollution, for example, need not raise intergenerational issues. However, disposal of wastes whose impact cannot be contained either spatially or over time, particularly toxic contamination of ground water and lakes, nuclear contamination of the oceans (→ *Nuclear Waste Disposal*), climate change from human activities (see also → *Climate, International Protection*), depletion of the ozone layer through chemical pollutants (see also → *Ozone Layer, International Protection*), rapid extinction of species (see also → *Biological Diversity, International Protection*; → *Endangered Species, International Protection*), destruction of tropical forests sufficient to affect biodiversity in the region significantly (see also → *Forests, International Protection*), loss of soils, and destruction of gene banks, do raise important intergenerational issues. The principle of

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

intergenerational equity applies to these and many other problems and leads to prescriptive actions.

11 It could be argued that it is not possible to know the interests of future generations and that by trying to protect those interests, the present generation is imposing its values upon them. The response is that all actions that we take today inherently affect the well-being of future generations. The elements of the principle of intergenerational equity are intended to ensure that future generations inherit a robust environment, which is resilient to dramatic changes, and that they have diverse options through which to pursue their own values.

(c) Relationship of Intergenerational Equity and Intragenerational Equity

12 There is general agreement that there are severe problems of equity among people living today. The equity problems are addressed in the concept of intragenerational equity, ie equity among peoples today. The quest for intergenerational equity requires that intragenerational equity issues be addressed. In practice, the two kinds of equity are joined, because poor communities cannot be expected to fulfil intergenerational obligations if they are not able to meet basic needs today. There is also a conceptual link between equity today and the principle of intergenerational equity. However, there is no consensus as to the nature of the linkage. One view is that they are two separate concepts, that intragenerational equity is meaningful only when it is defined, and that there is no agreement on its definition. Another view is that the broad concept of equity encompasses both intragenerational and intergenerational equity. Yet another is that the principle of intergenerational equity encompasses intragenerational equity as an integral element. Under this last view, as future generations become living generations, they assume the rights and obligations inherent in intergenerational equity. This defines intragenerational equity, for the same postulates of comparable access, options, and quality owed to future generations apply among people living today. While there may be general agreement on the basic elements of a principle of intergenerational equity, there is not yet general agreement on the definition of intragenerational equity and on its legal status, though all agree on its importance.

(d) Relationship of Rights and Obligations

13 The principle of intergenerational equity creates responsibilities on the part of the present generation towards future generations. There is controversy as to whether the principle of intergenerational equity also conveys rights. Do future generations have rights, with correlative obligations in the present generation? A right is an interest that is juridically protected and always associated with a duty. A duty is not always associated with a right. In the context of future generations, if we were to follow the philosophers Austin and Kelsen, the obligations of the present generation to future generations constitute obligations or duties for which there are no correlative rights, because determinate persons to whom the right attaches do not exist yet. The rights of future generations may be more nearly analogous to → *group rights* that protect interests held in common. They represent valued interests that attach to future generations, and that representatives of future generations can protect. The 1997 → *United Nations Educational, Scientific and Cultural Organization [UNESCO]* Declaration on the Responsibilities of the Present Generations towards Future Generations (‘UNESCO Responsibilities Declaration’) speaks only of the present generation having the responsibility to ensure that ‘the needs and interests of present and future generations are fully safeguarded’ (Art. 1 UNESCO Responsibilities Declaration). The 1988 Goa Guidelines on Intergenerational Equity, drafted under the auspices of the → *United Nations University (UNU)*, refer both to ‘rights and obligations’,

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

and recognize a ‘complementarity’ (see Brown Weiss [1989] 294) between recognized → *human rights* and intergenerational rights.

14 Intergenerational rights could be viewed as part of international human rights law. While international human rights agreements have not yet explicitly referenced rights of future generations, their rights could arguably be encompassed within the specific rights guaranteed in particular instruments. Economic, social, and cultural rights embodied in international covenants could be regarded as articulating the rights of both present and future generations. Rights to food, water, and similar elements might be read as implicitly recognizing the rights of future generations (see also → *Food, Right to, International Protection*; → *Water, Right to, International Protection*). In 2010, the United Nations General Assembly (‘UNGA’) and the United Nations Human Rights Council explicitly recognized a right to safe drinking water (→ *United Nations, General Assembly*; → *United Nations Commission on Human Rights/United Nations Human Rights Council*). The right carries both the obligation of the present generation to ensure that individuals have access to safe drinking water today and the obligation to ensure that future generations also have access to safe drinking water when a future generation is born and becomes a present one.

15 There is increasing recognition that a right to environment exists as part of international human rights law, although some controversy about this remains (→ *Clean and Healthy Environment, Right to, International Protection*). If a right exists, one issue is whether it should be regarded as a basic human right and individual right, or as a collective right in the nature of economic, social, and cultural rights. A right to environment implicitly includes rights of both present and future generations. The increasingly rapid loss of biological diversity and the degradation of the natural environment threaten human rights for both present and future generations. In March 2015, the → *United Nations (UN)* appointed a Special Rapporteur on human rights and the environment (→ *Special Rapporteurs of Human Rights Bodies*). The → *Human Rights Committee* affirmed in 2018 that ‘environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life’ (UN HRC ‘General Comment No 36: Article 6 of the International Covenant on Civil and Political Rights: Right to Life’ [30 October 2018] UN Doc CCPR/C/GC/36). In July 2019, the UN Special Rapporteur on human rights and the environment reported to the UNGA that ‘a safe climate is a vital element of the right to a healthy environment and is absolutely essential to human life and well-being’ (UNGA ‘Report of the Special Rapporteur on the Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment’ [15 July 2019] UN Doc A/74/161).

16 The *Advisory Opinion OC-23/17 on the Environment and Human Rights* by the → *Inter-American Court of Human Rights (IACtHR)* in 2017 found for the first time an autonomous human right to environment in Art. 26 American Convention on Human Rights (→ *American Convention on Human Rights [1969]*; → *Advisory Opinion: Inter-American Court of Human Rights [IACtHR]*; → *Advisory Opinions*).

4. Related Principles and Concepts

17 As noted earlier, the principle of intergenerational equity provides a foundation for sustainable development. The 1992 Rio Declaration on Environment and Development (‘Rio Declaration’) developed the legal principles to carry out sustainable development. It recognized ‘the integral and interdependent nature of the Earth, our home’ (Preamble Rio Declaration). Art. 5 International Union for Conservation of Nature (‘IUCN’) Draft International Covenant on Environment and Development (‘IUCN Draft Covenant’) recognizes the principle of intergenerational equity and refers to it as ‘an essential foundation of all international law relating to environmental protection and to the concept

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

of sustainable development' (Commentary to Art. 5 IUCN Draft Covenant). Thus, the procedural and substantive duties that have been articulated to ensure sustainable development may be regarded as implementing the principle of intergenerational equity.

18 The doctrine of the → *common heritage of mankind* anticipates a need to address obligations related to commonly held environments. The doctrine was first mentioned in 1935 (*domaine public universel qui informe le patrimoine commun de l'Humanité*), but was not further developed and promoted until after 1950, when scholars began to stress its relevance to common environments, such as → *outer space*. In 1967, it was enunciated as applicable to the deep seabed resources in the oceans (see also → *International Seabed Area*). As the debates concerning the → *law of the sea* revealed, there is no consensus on the doctrine. While the common heritage of mankind is related to intergenerational equity in the sense that both address environments held among generations, it has generally been limited in application to areas such as outer space and oceans, and involves different content than the principle of intergenerational equity. The 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage ('World Heritage Convention') refers to 'world heritage of mankind' in its Preamble, a different formulation, which suggests its relevance to cultural and to natural heritage more broadly (→ *World Natural Heritage*).

19 A related concept of 'common concern of humankind' emerged in the 1990s. The concept has a temporal dimension in that it implicitly extends beyond today to the future. The Convention on Biological Diversity refers in its Preamble to the conservation of biological diversity as a 'common concern of humankind', though the concept is not defined. The United Nations Framework Convention on Climate Change ('UNFCC') refers to this concept in the first sentence of its Preamble, acknowledging 'that change in the Earth's climate and its adverse effects are a common concern of humankind'. The 2015 Paris Agreement further defines the concept in its Preamble, stating that climate change is a common concern of humankind and that parties 'should, when taking action to address climate change, respect … their respective obligations on human rights … and intergenerational equity'. In more recent scholarship, 'common concern of humankind' has been applied to ocean governance as a way to achieve sustainable development, and to freshwater resources. The concept may be a doctrine, with broader applications.

20 The principle of → *common but differentiated responsibilities*, articulated in the Rio Declaration, could also be regarded as related to a principle of intergenerational equity to the extent that historical actions affect the allocation and timing of responsibilities owed to present and future generations. The principle has been important in deliberations regarding such long-term issues as climate change and depletion of the ozone layer. The UN Framework Convention on Climate Change ('UNFCCC') and 2015 Paris Agreement refer to this principle. The Paris Agreement is to 'be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances' (Art. 2). Pursuant to this principle, the agreement calls for national determined contributions for controlling greenhouse gas emissions and includes provisions aimed to implement the principle.

21 Similarly, the principle of intergenerational equity is related to a principle of → *community interest*, since the community may be defined as extending over time into other generations. The principle of intergenerational equity may also be associated with an emerging principle of solidarity, since intergenerational equity implicitly rests upon

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

solidarity among generations (see also → *Solidarity Rights [Development, Peace, Environment, Humanitarian Assistance]*).

5. Difference from the Doctrine of Intertemporal Law

22 The principle of intergenerational equity should not be confused with the very different doctrine of → *intertemporal law* in international law. Intertemporal law primarily relates to the legal criteria for the validity of actions in the present to the legal criteria in the past in order to judge the validity of claims. As enunciated in the → *Palmas Island Arbitration* and by the → *Institut de Droit International*, the determination of whether specific acts are valid should be made in light of the law at the time of their creation. However, rights that are acquired in a valid manner may be lost if they are not maintained in a way consistent with the changes in international law. In public international law, the intertemporal doctrine has been applied to territorial claims, to certain rules of → *customary international law*, and to several aspects of → *treaties*. In → *private international law*, the intertemporal doctrine is reflected in rules governing conflict of laws.

B. Status in International Law

23 The principle of intergenerational equity has deep historical roots, but has been widely referenced and discussed only within the last few decades.

1. Treaties and Other Legal Instruments

24 Since the mid-1940s, States have frequently indicated concern for future generations in their legal documents and have often included provisions in treaties and in declarations (→ *Declaration*) that are intended to protect and enhance the welfare of both present and future generations. The 1945 → *United Nations Charter* provides: 'We the peoples of the United Nations, determined to save succeeding generations from the scourge of war' (Preamble UN Charter).

25 Concern in international law for future generations in relation to the environment and natural resources has a long history. The agreements early in the twentieth century for the conservation of certain species of → *marine mammals*, such as the 1911 Convention respecting Measures for Preservation and Protection of Fur Seals in the North Pacific Ocean, the 1931 Convention for the Regulation of Whaling, the subsequent 1946 Washington International Convention for the Regulation of Whaling, and related agreements reflect a concern with ensuring sustainable harvesting, and thus with ensuring that these animals exist for future generations (→ *Whaling*). There are also early agreements for protecting birds, such as the 1902 Convention for the Protection of Birds Useful to Agriculture, the 1900 London Convention for the Protection of Wild Animals, Birds and Fish in Africa, the 1916 Canada-United States Convention for the Protection of Migratory Birds, and the 1936 Mexico-United States Convention for the Protection of Migratory Birds and Game Mammals (see also → *Migratory Species, International Protection*).

26 Among regional agreements, the 1940 Washington Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, the 1968 African Convention on the Conservation of Nature and Natural Resources, and the much later 1985 Association of Southeast Asian Nations Agreement on the Conservation of Nature and Natural Resources (→ *Association of Southeast Asian Nations [ASEAN]*), also reflect concern with ensuring the robustness of nature for future generations. Important multilateral environmental agreements concluded in the 1960s and 1970s are concerned with protection of endangered species, wild animals, → *wetlands*, and marine ecosystems (→ *Environment, Multilateral Agreements*; see also → *Marine Environment, International Protection*). These agreements look towards conserving the resources for present and future generations.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

Agreements covering pollution of the oceans, regional seas, or fresh water are also concerned with ensuring that the resources are robust for both present and future generations.

27 At least three treaties in the 1970s explicitly include language protecting the natural and/or cultural resources for future generations: the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, the 1973 Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora, and the World Heritage Convention. References to future generations appear in the 1992 UNFCCC (Preamble; Art. 3.1) and the 1992 Convention on Biological Diversity (Preamble; Art. 2). The 1992 UN Economic Commission for Europe ('UNECE') Convention on the Protection and Use of Transboundary Watercourses and International Lakes ('UNECE Convention') provides that in implementing the measures called for in the Convention, 'the Parties shall be guided by the following principles: … (c) Water resources shall be managed so that the needs of the present generation are met without compromising the ability of future generations to meet their own needs' (Art. 2 (5) UNECE Convention). The 1994 UN Convention to Combat Desertification asserts in its preamble the parties' determination 'to take appropriate action in combating desertification … for the benefit of present and future generations'. The 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention; see also → *Access to Information on Environmental Matters*) notes in its Preamble that every person has the duty to protect and improve the environment for present and future generations. The 2015 Paris Agreement declares in its preamble that parties 'should, when taking action to address climate change, respect, promote and consider their respective obligations on … intergenerational equity'. The 2017 Treaty on the Prohibition of Nuclear Weapons, which entered into force on 22 January 2021, highlights in its preamble that nuclear weapons 'pose grave implications for human survival, the environment, … and the health of current and future generations'.

28 There are hundreds of other legal instruments, many of which reference the interests of future generations. The foremost early legal instrument is the 1972 Stockholm Declaration. The Preamble proclaims that '[t]o defend and improve the human environment for present and future generations has become an imperative goal for mankind' (Preamble Stockholm Declaration para. 6). Furthermore, the Declaration provides that '[m]an has the fundamental right to freedom, equality and adequate conditions for life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations' (Principle 1 Stockholm Declaration). The Stockholm Declaration explicitly addresses future generations and the environment. It provides that '[t]he natural resources of the Earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate' (Principle 2 Stockholm Declaration). The 1982 UN World Charter for Nature 'reaffirms' that 'man must … use natural resources in a manner which ensures the preservation of the species and ecosystems for the benefit of present and future generations' (Preamble UN Charter for Nature). In 1992, the Rio Declaration, the Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, and → *Agenda 21* reference future generations, with Agenda 21 acknowledging the proposal to appoint a guardian for future generations (Agenda 21 para. 38.45). The 1995 IUCN Draft Covenant on Environment and Development explicitly enunciates a principle of intergenerational equity. In 1997 UNESCO adopted a Declaration on the Responsibilities of the Present Generations Towards Future Generations.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

The Declaration in part grew out of the Cousteau Society initiative for a Bill of Rights for Future Generations.

29 In 2001, the Cousteau Society formally presented to the UN Secretary-General its Bill of Rights for Future Generations in the form of a draft UNGA Resolution and a petition with more than nine million signatures supporting the document. In 2012, the zero draft of the outcome document prepared by governments for the Rio + 20 Conference in Rio de Janeiro included a call for the creation of a High Commissioner for Future Generations. The UN Secretary-General's report in 2013 on Intergenerational Solidarity and the Needs of Future Generations affirmed the principle of intergenerational equity and considered a proposed High Commissioner for Future Generations and other institutional options. *Le club des juristes* Draft Global Pact for the Environment in June 2017 included an Art. 4, entitled Intergenerational Equity, which provides that '[i]ntergenerational equity shall guide decisions that may have an impact on the environment. Present generations shall ensure that their decisions and actions do not compromise the ability of future generations to meet their own needs'. UNGA Resolution 72/277 of 10 May 2018 'Towards a Global Pact for the Environment' established an Ad-Hoc Open-Ended Working Group, which in its recommendations to the UNGA listed 'reinforc[ing] the protection of the environment for present and future generations' as the first objective guiding the work (UNGA Res 73/333 [30 August 2019] UN Doc A/RES/73/333 Annex).

2. Judicial Application

(a) International Court of Justice Opinions

30 The ICJ has not explicitly referenced the principle of intergenerational equity as a legal basis for the resolution of a dispute before the Court. However, the ICJ has referred to future generations, and some concurring and dissenting opinions, particularly by the late Judge Christopher Weeramantry and current Judge Antônio Augusto Cançado Trindade, have invoked it (→ *Separate Opinion: International Court of Justice [ICJ]*).

31 On 8 July 1996, the ICJ issued its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, in which the ICJ explicitly referred to the interests of future generations (see also → *Nuclear Weapons Advisory Opinions*; → *Advisory Opinion: International Court of Justice [ICJ]*). It noted that 'it is imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular … their ability to cause damage to generations to come' (at 244). Judge Weeramantry, in his dissenting opinion, wrote that 'this Court … must, in its jurisprudence, pay due recognition to the rights of future generations … [T]he rights of future generations have passed the stage when they were merely an embryonic right struggling for recognition. They have woven themselves into international law through major treaties, through juristic opinion and through general principles of law recognized by civilized nations' (at 455). The principle of intergenerational equity was raised and referenced in a concurring opinion in the 1993 → *Maritime Delimitation between Greenland and Jan Mayen Case (Denmark v Norway)*, in which Judge Weermantry noted that equity could provide a basis for considering future generations, citing In Fairness to Future Generations (at 242). The dissenting opinions of Judges Weeramantry and Palmer in the 1995 *Nuclear Tests (New Zealand v France)* (see also → *Nuclear Tests Cases*) also discussed intergenerational equity. In this case, Judge Palmer quoted that 'each generation is both a custodian or trustee of the planet for future generations and a beneficiary of its fruits' and '[t]his imposes obligations upon us to care for the planet and gives us certain rights to use it' (at 114). Judge Weeramantry wrote that the 'principle of intergenerational equity' was 'an important and rapidly developing principle of contemporary environmental law' (at 341). The principle was implicitly raised in the subsequent 1997 ICJ → *Gabčíkovo-Nagymaros Case (Hungary/Slovakia)* Judgment,

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

which discussed risks for present and future generations from the dam on the Danube River (at 140).

32 In the case → *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judge Cançado Trindade observed in his Separate Opinion that ‘[n]owadays, in 2010, it can hardly be doubted that the acknowledgment of inter-generational equity forms part of conventional wisdom in international environmental law’ (para. 122). In another Separate Opinion in the 2014 case → *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* he concluded that ‘inter-generational equity marks presence nowadays in a wide range of instruments of international environmental law, and indeed of contemporary public international law’ (para. 47). In both cases, Judge Cançado Trindade devoted an entire section of his opinion to the principle of intergenerational equity. Further, the term appears 81 times in the *Pulp Mills* case and 35 times in the *Whaling in the Antarctic* case. The ICJ’s Judgment in the latter cited the preamble of the International Convention for the Regulation of Whaling, concluding that it ‘recognizes “the interest of nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks”’ (para. 56).

33 In September 2019, a draft resolution was circulated to United Nations Mission Offices in New York proposing that in light of the climate crisis, the UNGA request an Advisory Opinion from the ICJ on ‘the obligations of States under international law to future generations to protect the rights of current and future generations against the adverse effects of climate change’ (Workshop on a Climate Change Advisory Opinion by the International Court of Justice, Normandy Chair for Peace [last updated 6 May 2020] <https://chairpeace.hypotheses.org/180> [accessed 7 April 2021]). While some United Nations Mission Offices considered the proposal favorably, the resolution was not introduced into the UNGA.

(b) The Inter-American Court of Human Rights

34 The IACtHR has also referenced the interests of future generations in the → *Mayagna (Sumo) Awas Tingni Community v Nicaragua Case*, involving the rights of indigenous communities (see also → *Indigenous Peoples*). While the IACtHR’s decision referred to the communities’ relations to the land as necessary to ‘preserve their cultural legacy and transmit it to future generations’ (at para. 149), the Joint Separate Opinion of three of the judges addressed the intertemporal dimension more fully and explicitly. The judges noted that ‘we relate ourselves … in time, with other generations (past and future), in respect of which we have obligations’ (Opinion of Judge Cançado Trindade, Pacheco-Gómez, and Abreu-Burelli para. 10). Footnote 6 to this part of the opinion references works on future generations and international law. In *Advisory Opinion OC-23/17*, recognizing that the right to a healthy environment is a human right, the Court stated that ‘the right to a healthy environment constitutes a universal value that is owed to both present and future generations’ (para. 59).

(c) The UN Committee on the Rights of the Child

35 A group of youth petitioned the UN → *Committee on the Rights of the Child (CRC)* under the Third Optional Protocol to the Convention on the Rights of the Child alleging violations of the Convention due to governmental failures to address the climate crisis. The petition considered the applicability of international legal principles, including the principal of intergenerational equity.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

(d) National and Local Court Decisions

36 Increasingly national and lower courts in more than 20 States have looked to a principle of intergenerational equity. The number of judgments concerned with intergenerational equity started to increase significantly in 2004 and has accelerated in recent years (Brown Weiss [2018] 247–49). Courts have used intergenerational equity for two purposes. The first is for procedural matters, such as to grant standing to children as representative of future generations or to toll a statute of limitations for actions that cause significant harm to future generations. The second use is for its substantive content. The judicial decisions come within four major categories: natural resources, pollution, administrative challenges to project construction, and challenges to mineral exploitation, especially to mining permits. More recently, the principle has been raised in climate related cases.

37 For the procedural use of intergenerational equity, the seminal case is *Oposa v Secretary of the Department of Environment and Natural Resources (Factoran)*, 1993, in which the Supreme Court of the Philippines granted standing to a group of children as representative of themselves and of future generations in bringing a claim against the Environment and Natural Resources Department to seek cancellation of timber license agreements and a ban on the approval of new ones. The Philippine Supreme Court noted that 'the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for generations to come' (at para. 22). The right of the people to a balanced and healthful ecology is found in Art. II Section 16 Constitution of the Philippines.

38 The judicial decisions that have referred to intergenerational equity substantively have occurred primarily in courts in Africa, Latin America, South Asia, Asia, and recently in Hungary. In an early case in Africa *Waweru v Kenya* in March 2006, the High Court of Kenya explicitly applied the principle of intergenerational equity to a case involving water pollution from the disposal of waste water and sewage. After referring to the principle, the court noted that 'intergenerational equity obligates the present generation to ensure that health, diversity and productivity of natural resources are maintained or enhanced for the benefit of future generations' (at 13).

39 In Brazil, the High Court handed down five decisions between 2005 and 2011 that emphasized the constitutional duty to protect the environment for future generations (STJ REsp No 745.363/PR [20 September 2007]; STJ REsp No 650.728 [23 October 2007]; STJ REsp No 604.725 [21 June 2005]; STJ REsp No 1.120.117 [10 November 2009]) . In a case involving the protection of mangrove swamps in Brazil, the Superior Court of Justice noted the legal duty to preserve the threatened ecosystem and equated its destruction and deprivation of use to future generations to that of the theft of chattel (STJ REsp No 650.728 [23 October 2007] at 13–14).

40 In India, the → *Supreme Court of India* has recognized intergenerational equity in two recent mining cases. In 2014, in a mining case in the Indian state of Goa, the Indian Supreme Court, referencing intergenerational equity, required as a condition of permits to mine iron ore that a trust fund be established for the benefit of future generations (*Goa Foundation v Union of India and Others* [21 April 2014] at 39). As of February 2020, approximately $70 million had been deposited in the Goa Iron Ore Permanent Fund. In November 2013, prior to the establishment of the Permanent Fund, the Supreme Court ordered the creation of a Committee of Experts to conduct an expert analysis to find an appropriate ceiling for the annual excavation of iron ore in Goa, so as to ensure resources are exploited over an appropriate period of time. The Court directed that the committee keep 'in mind the principles of sustainable development and intergenerational equity'. On 2 August 2017, the Supreme Court of India issued an historic judgment in a large-scale mining case in Odisha, in which the Court specifically discussed the principle of

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

intergenerational equity and required the Government to develop an updated mineral policy. In February 2019, the Government of India issued a new National Mineral Policy, which contained for the first time a section entitled ‘Intergenerational Equity’ and established an Inter-Ministerial body to institutionalize a mechanism to ensure sustainable mining ‘keeping in mind the principles of sustainable development and intergenerational equity …’ (National Minerals Policy 2019 <https://mines.gov.in/> [accessed 7 April 2021]).

41 In Colombia, the Supreme Court of Justice held in 2018 that the Colombian government had not effectively tackled the problem of deforestation in the Amazon, despite international commitments and legislation on the subject. In its judgment, the Court ordered the Presidency of the Republic, the Ministry of Environment and Sustainable Development, and the Ministry of Agriculture and Rural Development to formulate an Intergenerational Pact for the Life of the Colombian Amazon (*Dejusticia v Colombia* [5 April 2018] at 49). The Court discussed intergenerational equity, and noted that ‘[i]n terms of intergenerational equity, the transgression is obvious [because of] the forecast of temperature increase…; future generations, including children who brought this action, will be directly affected, unless we presently reduce the deforestation rate to zero’ (ibid 37).

42 In a landmark decision in 2020, the → *Constitutional Court of Hungary (Magyarország Alkotmánybírósága)* annulled many of the 2017 amendments of the Hungarian Act No XXXVII of 2009 on the Forest, Forest Protection and Forest Management on the grounds that they violated the Fundamental Law of Hungary (*Decision No 14/2020 (VII.6)*). The Fundamental Law in Art. P refers to the obligation to preserve the country’s natural resources and cultural artifacts for the benefit of future generations. The Court noted that the State manages this common heritage as the trustee for future generations. The Hungarian Ombudsman for Future Generations brought the case to the Constitutional Court.

43 Increasingly, claimants are bringing cases to try to force Governments to take more action to combat climate change or to try to hold fossil fuel and other companies accountable for not addressing the dangers of fossil fuels for climate change. These cases implicitly, if not explicitly, relate to future generations. A summary of several of these cases follows.

44 In the Netherlands, the Urgenda Foundation brought suit on behalf of present and future generations against the Dutch government for failing to take adequate measures to reduce emission of greenhouse gases. The District Court in The Hague held that the government was breaching its duty of care and acting unlawfully by aiming to reduce emissions of greenhouse gas by less than 25% compared with the 1990 emission levels by 2020 (at 5.1). It noted that the principle of fairness required the State to ensure that the costs of climate change be reasonably distributed between present and future generations (at 4.76). The Hague Court of Appeal upheld the District Court’s judgment in 2018 without addressing standing for future generations (at 19). In December 2019, the Supreme Court upheld the lower court decision on the basis of human rights obligations and ordered the Government to reduce GHG emissions by 25% of 1990 levels by 2020 (*Urgenda Foundation v Netherlands* [2019] at 2–3). Similar complaints were filed against the governments of France and Germany in 2018 and 2019 (*Friends of the Earth Germany, Association of Solar Supporters and Others v Germany* [2018]; *Notre Affaire à Tous and Others v France* [2018]; *Commune de Grande-Synthe v France* [2019]).

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

45 In the United States (‘US’), 21 youth plaintiffs brought the case *Juliana v United States*, alleging that the United States Government was knowingly neglecting to mitigate against the future catastrophic effects of climate change, in violation of the plaintiffs’ due process rights to life, liberty, and property and against the US public trust doctrine. From the intergenerational perspective, the plaintiffs’ argument that the Government’s inaction violated the public trust doctrine was significant, for it would extend the public trust doctrine from navigable waters to the atmosphere. The District Court refused to dismiss the case, recognizing the importance of climate stability for present and future generations (at 1264). In January 2020, however, the Federal Court of Appeals dismissed the case.

46 Other lawsuits have been brought in Uganda, Pakistan, and India, alleging that government failure to take sufficient action to combat climate change breaches a public trust doctrine. In *Maria Khan and Others v Federation of Pakistan and Others*, filed in 2018 by a coalition of women on their behalf and that of future generations, and *Pandey v India*, filed in 2017, the applications directly reference the principle of intergenerational equity. In *Leghari v Federation of Pakistan,* the Lahore High Court Green Bench found that the Government’s failure to address climate change violated plaintiff’s constitutional rights to life and dignity. The opinion invoked intergenerational equity and precautionary principles (see → *Precautionary Approach/Principle*). In April 2021, the Supreme Court of Pakistan upheld the banning of new permits and expansion of existing ones for cement plants in an ecologically sensitive area, and applied the principle of intergenerational equity in the context of climate justice (*DG Khan Cement Co Ltd v Government of Punjab through its Chief Secretary, Lahore* para. 19*)*.

47 Environmental courts and tribunals, which operate separately from a country’s judicial bodies, represent another increasingly important forum for the use of intergenerational equity. Many countries have now established such courts. As of 2016, 44 countries had 1,200 environmental courts and tribunals, a sharp increase from the 350 documented in 2009 (Pring and Pring [2016]). In some countries, the environmental courts have disposed of many cases and have applied intergenerational equity. India’s statute for its environmental courts encompasses implementing intergenerational equity as a basis for decisions. The experience with environmental courts illustrates the growing importance and relevance of intergenerational equity to environmental judgments at local levels.

48 One of the most striking developments is that constitutions of more and more countries now include provisions relating to future generations and the environment. Many provide only for obligations to future generations, but some also reference rights. Several refer only to protecting cultural legacy. The number of countries adopting such constitutional provisions has risen significantly in the last few decades. As of 1990, only 12 States had constitutions with specific provisions for future generations. As of 2019, the constitutions of at least 55 states do so, with 50 referring to environmental obligations to future generations. Some examples include the South African Constitution, which states that ‘[e]veryone has the right … to have the environment protected, for the benefit of present and future generations …’ (Art. 24), and the Brazilian Constitution which holds that ‘[t]he Government and the community shall have the duty to defend and preserve [the environment] for present and future generations’ (Art. 225). Bhutan’s Constitution refers to both future generations and intergenerational equity, stating that ‘[e]very Bhutanese is a trustee of the Kingdom's natural resources and environment for the benefit of the present and future generations and it is the fundamental duty of every citizen to contribute to the protection of the natural environment, conservation of the rich biodiversity of Bhutan and prevention of all forms of ecological degradation …’ and that the Parliament ‘may enact environmental legislation to ensure sustainable use of natural resources and maintain intergenerational equity …’ (Art. 5). The number of countries adopting such provisions increased after the 1992 Rio Conference on Environment and Development. The

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

Constitutional references implicitly recognize the importance of intergenerational equity and provide a basis for cases to be brought based upon these constitutional guarantees.

3. Parliamentary and Governmental Implementation

49 Governmental institutions that explicitly consider future generations have emerged within the last few decades. They are still relatively few in number. The Network of Institutions for Future Generations, which was established in 2014 following an international conference in Budapest, lists a variety of national institutions that have been established to protect the interests of future generations. One significant development has been the creation in several countries of an Ombudsman for Future Generations attached to the national parliament (see also → *Ombudsperson*). In 2001, the Knesset, Israel's parliamentary body, established a Commission on Future Generations with a Knesset Commissioner for Future Generations to assess bills of particular relevance for future generations, advise members of the Knesset, and present recommendations on issues of special relevance to future generations. Although the mandate was broad, the Commission in practice focused primarily on protecting children, as embodying interests of future generations. The Commission was abolished in 2007 for political and budgetary reasons. In November 2007, the Hungarian Parliament created an Ombudsman for Future Generations, who could review legislation, advising on impacts for future generations, and intervene in litigation to protect future generations. When the Parliament created the Office of the Commissioner for Fundamental Rights in 2011, the Ombudsman became a Deputy Commissioner with the authority to advise whether to institute proceedings *ex officio* or to go to the Constitutional Court on any matter that may affect future generations. The Deputy Commissioner has to 'monitor the enforcement of the interests of future generations' (Office of the Commissioner for Fundamental Rights of Hungary 'About the Office' <https://www.ajbh.hu/en/web/ajbh-en/about-the-office> [accessed 7 April 2021]).

50 Other initiatives similar to the creation of an Ombudsman for Future Generations have been implemented. In France, in 1993, at the urging of the late Jacques-Yves Cousteau, the government established a Council for the Rights of Future Generations. The Council addressed nuclear power issues before it lapsed following Cousteau's resignation as the Council's president in 1995 to protest France's decision to resume nuclear testing in the Pacific. In March 2015, the National Assembly of Wales passed a widely heralded bill with the title 'Well-being of Future Generations' (Well-being of Future Generations [Wales] Act 2015 [2015 anaw 2]). The legislation established the position of Future Generations Commissioner for Wales to 'act as a guardian of the ability of future generations to meet their needs, and encourage public bodies to take greater account of the long-term impact of the things that they do' (Art. 18). The Commissioner has the responsibility to review the extent to which public bodies are doing so. The 2014 Constitution of Tunisia created the Authority for Sustainable Development and the Rights of Future Generations, an independent constitutional institution (Art. 129). Under Art. 7 of Tunisia's Draft Organic Law on the Authority for Sustainable Development and the Rights of Future Generations of 2018 'the Authority shall be consulted on: draft laws relating to economic, social and environmental issues, [and] national and regional development plans …' (European Commission for Democracy through Law 'Tunisia: Opinion on the Draft Organic Law on the Authority for Sustainable Development and the Rights of Future Generations' [24 June 2019] CDL-AD(2019)013 para. 61).

51 Some parliaments have created special committees to consider the effects of their actions on future generations. Finland has been at the forefront of this approach by establishing in 1991 a parliamentary Committee for the Future, which is composed of members of Parliament representing different political parties. The Committee for the Future considers implications of specific developments for the future, submits reports on

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

them, and analyses policies of other parliamentary committees that affect the future. The United Kingdom set up an All Party Parliamentary Group for Future Generations to identify ways to include concern for future generations in policy-making. The German Bundestag established a Parliamentary Advisory Council on Sustainable Development to serve as the advocate of long-term responsibility in the political process and to structure policy for future generations. Within the European Union, countries have considered establishing a Committee for Future Generations within the Assembly, though they have not done so.

4. International Consideration of Intergenerational Equity

52 Within the last decade, international attention has increasingly focused on what impact we are having on the future and on issues of intergenerational equity. In part this is a product of the Intergovernmental Panel on Climate Change ('IPCC') reports, which indicate that we are likely facing a serious climate crisis, which could result in devastating impacts on the future. In October 2013, the high-level international Oxford Martin Commission for Future Generations issued its *Now for the Long Term,* which is a broad-ranging report identifying challenges and making recommendations. One recommendation is to build shared global norms and values. The World Economic Forum has established a Global Future Council, which looks to establishing a network of councils addressing specific issues of the future. A growing number of → *non-governmental organizations* are concerned with the future and intergenerational equity, including the long-standing World Future Council and the Mary Robinson Foundation for Climate Justice. The latter has proposed a high-level Global Guardian for Future Generations within the United Nations system. The 2018 Nelson Mandela Peace Summit Political Declaration called for the United Nations 'to explore means to systematically consider the needs of present and future generations within its decision-making processes' (Political Declaration adopted at the Nelson Mandela Peace Summit [24 September 2018] <https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_18_5885> [accessed 7 April 2021]).

C. Concluding Observations

53 The problems facing our planet today are inherently intergenerational. Climate change may be the most visible, because it can only be addressed effectively in an intergenerational framework. But other new technologies also inherently bring challenges for the interests of future generations, including synthetic biology and artificial intelligence. Moreover we are increasingly aware that our planet is a shared space and that actions in one region or even one locality can have broad effects elsewhere and affect the well-being of future generations. As governments address the complexities of climate change and of new technological challenges, they will be making choices that have profound effects upon the robustness and integrity of the Earth. In our kaleidoscopic world, not only governments, but also the private sector, non-governmental organizations, local communities, other institutions, and individuals are important actors, whose actions can affect the well-being of future generations. This means that the norm of intergenerational equity needs to be considered in decision-making. The principle of intergenerational equity embodies this norm and provides a means to give fairness to both present and future generations. Youth today are at the forefront in pressing for ways to ensure a robust future. The principle of intergenerational equity offers a means for doing so.

Select Bibliography

World Commission on Environment and Development (GH Brundtland ed) *Our Common Future* (OUP Oxford 1987).

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

E Brown Weiss *In Fairness to Future Generations*: *International Law, Common Patrimony and Intergenerational Equity* (United Nations University Tokyo 1989; French: Editions Sang de la terre Paris 1993; Spanish: Ediciones Mundi-Prensa Madrid 1999; Japanese: Nippon Hyoronsha Tokyo; Chinese: 2001).

E Brown Weiss 'Our Rights and Obligations to Future Generations for the Environment' (1990) 84 AJIL 198–206.

A D'Amato 'Do We Owe a Duty to Future Generations to Preserve the Global Environment?' (1990) 84 AJIL 190–98.

L Gündling 'Our Responsibility to Future Generations' (1990) 84 AJIL 207–12.

TM Franck *Fairness in International Law and Institutions* (Clarendon Press Oxford 1995).

E Agius and S Busuttil (eds) *Future Generations and International Law* (Earthscan Publications London 1998).

C Redgwell *Intergenerational Trusts and Environmental Protection* (Manchester University Press Manchester 1999).

JV DeMarco 'Law for Future Generations: The Theory of Intergenerational Equity in Canadian Environmental Law' (2004) 15 Journal of Environmental Law and Policy 1–46.

JC Tremmel (ed) *Handbook of Intergenerational Justice* (Edward Elgar Publishing Cheltenham 2006).

L Collins 'Environmental Rights for the Future? Intergenerational Equity in the EU' (2007) 16(3) Reciel 321–31.

L Collins 'Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance' (2007) 30(1) Dalhousie Law Journal 79–140.

R Bifulco *Diritto e generazioni future* (Franco Angeli Rome 2008).

BH Weston 'Climate Change and Intergenerational Justice: Foundational Reflections' (2008) 9 Vermont Journal of Environmental Law 375–430.

A Benjamin 'We, the Judges, and the Environment' (2012) 29 Pace Environmental Law Review 582–91.

DP Ramos Jr *Meio Ambiente e Conceito Jurídico de Futuras Gerações* (Juruá Editora Juvevê 2012).

Oxford Martin Commission for Future Generations *Now for the Long Term* (Oxford University Oxford 2013).

LG Ferrer Ortega *Los derechos de las futuras generaciones desde la perspectiva del derecho internacional: el principio de equidad intergeneracional* (Universidad Nacional Autónoma de México Mexico 2014).

P Lawrence *Justice for Future Generations: Climate Change and International Law* (Elgar Cheltenham 2014).

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

G Pring and C Pring *Environmental Courts & Tribunals: A Guide for Policy Makers* (UNEP Nairobi 2016).

E Brown Weiss 'Establishing Norms in a Kaleidoscopic World: General Course on Public International Law' (2018) 396 RdC 37–415.

World Future Council Guarding Our Future: How to Include Future Generations in Policy Making (2018) <https://www.worldfuturecouncil.org/guarding-our-future/> (accessed 7 April 2021).

E Brown Weiss 'Intergenerational Equity in a Kaleidoscopic World' (2019) 49(1) EnvtlPolyL 3–11.

T Cottier S Lalani and C Siziba (eds) *Intergenerational Equity: Environmental and Cultural Concerns* (Brill Nijhoff 2019).

Select Documents

African Convention on the Conservation of Nature and Natural Resources (done 15 September 1968, entered into force 16 June 1969) 1001 UNTS 3.

American Convention on Human Rights (signed 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (Pact of San José).

ASEAN Agreement on the Conservation of Nature and Natural Resources (9 July 1985) (1985) 15 EnvtlPolyL 64.

Bill of Rights for Future Generations <https://www.cousteau.org/> (accessed 7 April 2021).

CCK Construtora e Incorporadora LTDA Superior Tribunal de Justiça [Superior Court of Justice of Brazil] (Brasília 26 August 2010) Recurso Especial no 302.906/SP (2d Panel), Relator: Min. Antonio Herman Benjamin (26 August 2010) (Brazil).

Climate Change Litigation Databases <http://www.climatecasechart.com/> (accessed 7 April 2021).

Common Cause v Union of India and Others Supreme Court of India (2 August 2017) 9 SCC 499.

Constitute 'The World's Constitutions to Read, Search and Compare' <https://www.constituteproject.org> (accessed 7 April 2021).

Continental Shelf (Tunisia/Libyan Arab Jamahiriya) [1982] ICJ Rep 18.

Convention between the Congo Free State, France, Germany, Great Britain, Italy, Portugal and Spain for the Preservation of Wild Animals, Birds, and Fish in Africa (signed 19 May 1900) (1899–1900) 188 CTS 418.

Convention between the United States and Canada for the Protection of Migratory Birds (done 16 August 1916, entered into force 7 December 1916) 39 Stat 1702, US TS 628.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

Convention between the United States of America and Mexico for the Protection of Migratory Birds and Game Mammals (done 7 February 1936, entered into force 15 March 1937) 50 Stat 1311, 178 LNTS 309, US TS 912.

Convention for the Protection of Birds Useful to Agriculture (done 19 March 1902, entered into force 6 December 1906) (1902) 191 CTS 91.

Convention for the Protection of the World Cultural and Natural Heritage (done 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151.

Convention for the Regulation of Whaling (done 24 September 1931, entered into force 16 January 1935) 155 LNTS 349.

Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (done 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (Aarhus Convention).

Convention on Biological Diversity (done 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79.

Convention on International Trade in Endangered Species of Wild Fauna and Flora (opened for signature 3 March 1973, entered into force 1 July 1975) 993 UNTS 243.

Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere (done 12 October 1940, entered into force 30 April 1942) 161 UNTS 193.

Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (adopted 29 December 1972, entered into force 30 August 1975) 1046 UNTS 138.

Convention on the Protection and Use of Transboundary Watercourses and International Lakes (with Annexes) (done 17 March 1992, entered into force 6 October 1996) 1936 UNTS 269.

Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

Convention Respecting Measures for the Preservation and Protection of Fur Seals in the North Pacific Ocean (done 7 July 1911, entered into force 15 December 1911) (1911) 214 CTS 80.

Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (done 14 October 1994, entered into force 26 December 1996) 1954 UNTS 3.

Decision No 14/2020 (VII.6 AB) Constitutional Court of Hungary (9 June 2020) <https://hunconcourt.hu/> (accessed 26 April 2021).

Dejusticia v Colombia Corte Suprema de Justicia de Colombia [Supreme Court of Justice of Colombia] (Bogotá 5 April 2018) STC 4360-2018.

Friends of the Earth Germany, Association of Solar Supporters and Others v Germany Complaint (22 November 2018) <http://blogs2.law.columbia.edu/climate-change-

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20181122_Not-Available_complaint-1.pdf> (accessed 3 May 2021).

DG Khan Cement Co Ltd v Government of Punjab Through Its Chief Secretary, Lahore, Supreme Court of Pakistan (15 April 2021) CP1290-L/2019.

Gabčíkovo-Nagymaros Project (Hungary/Slovakia) [1997] ICJ Rep 7.

Global Pact for the Environment (Draft 24 June 2017), available at <https://www.iucn.org/sites/dev/files/content/documents/draft-project-of-the-global-pact-for-the-environment.pdf> (accessed 7 April 2021).

Goa Foundation v Union of India and Others Supreme Court of India (21 April 2014) 435 SCC 2012.

Grande-Synthe *La Ville de Grande-Synthe conteste le plan climatique national pour insuffisance* <http://www.ville-grande-synthe.fr> (accessed 7 April 2021).

H Carlos Schneider S/A Commércio e Indústria e Outro v Ministério Público Federal Superior Tribunal de Justiça [Superior Court of Justice of Brazil] (Brasília 23 October 2007) Recurso Especial no 650.728/SC (2d Panel).

International Convention for the Regulation of Whaling (done 2 December 1946, entered into force 10 November 1948) 161 UNTS 72.

International Union for Conservation of Nature *Draft International Covenant on Environment and Development: Implementing Sustainability* (5th edn IUCN Gland 2015).

Juliana v United States United States Court of Appeals (9th Circuit) (17 January 2020) Case No 18-36082 DC, No 6:15-cv-01517-AA.

Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226.

Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) (Dissenting Opinion of Judge Weeramantry) [1996] ICJ Rep 429.

Leghari v Federation of Pakistan Lahore High Court (25 January 2018) Case WP No 25501/2015.

Maria Khan and Others v Federation of Pakistan and Others Lahore High Court (14 February 2019) Application No 8960 of 2019.

Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway) [1993] ICJ Rep 38.

Mayagna (Sumo) Awas Tingni Community v Nicaragua IACtHR Series C No 79 (31 August 2001).

Ministério Público Federal v Ogata Superior Tribunal de Justiça [Superior Court of Justice of Brazil] (Brasília 14 October 2008) Recurso Especial no 840.918/DF (2d Panel) Relator: Min. Eliana Calmon (Majority Opinion of Min. Antonio Herman Benjamin) (14 October 2008) (Brazil).

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

Motta v UNIÃO Superior Tribunal de Justiça [Superior Court of Justice of Brazil] (Brasília 10 November 2009) Recurso Especial no 1.109.778/SC (2d Panel) Relator: Min. Antonio Herman Benjamin (10 November 2009) (Brazil).

Netherlands v Urgenda Foundation Gerichtshof Den Haag [The Hague Court of Appeal] (9 October 2018) Case No 200.178.245/01 ECLI:NL:GHDHA:2018:2591.

Netherlands v Urgenda Foundation Hoge Raad der Nederlanden [Supreme Court of the Netherlands] (The Hague 20 December 2019) Case No 19/00135 ECLI:NL:HR:2019:2006.

North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) [1969] ICJ Rep 3.

Notre Affaire à Tous and Others v France Tribunal Administratif de Paris [Paris Administrative Court] (3 February 2021) Nos 1904967, 1904968, 1904972, 1904976/4-1 <http://paris.tribunal-administratif.fr/content/download/179360/1759761/version/1/file/1904967190496819049721904976.pdf> (accessed 7 April 2021).

Oposa v Secretary of the Department of Environment and Natural Resources (Factoran) Supreme Court of the Philippines (Manila 30 July 1993) (1994) 33 ILM 173.

Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (adopted 19 December 2011, entered into force 14 April 2014) UN Doc A/RES/66/138, Annex.

Pandey v India National Green Tribunal India (New Delhi 25 March 2017) Application No 187/2017.

Public Prosecutor's Office v H Carlos Schneider S/A Comércio e Indústria and Others Superior Tribunal de Justiça [Superior Court of Justice of Brazil] (Brasília 2010) Special Appeal No 650.728 - SC.

Pulp Mills on the River Uruguay (Argentina v Uruguay) (Separate opinion of Judge Cançado Trindade) [2010] ICJ Rep 135.

Pulp Mills on the River Uruguay (Argentina v Uruguay) [2010] ICJ Rep 14.

Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France) *Case* [1995] ICJ Rep 288.

Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France) *Case (Dissenting Opinion of Judge Weeramantry)* [1995] ICJ Rep 288.

Request Made by the State of Colombia concerning State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity (Advisory Opinion OC-23/17) IACtHR Series A No 23 (15 November 2017).

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

Saachi and Others v Argentina and others Communication to the Committee on the Rights of the Child (23 September 2019) <https://childrenvsclimatecrisis.org/wp-content/uploads/2019/09/2019.09.23-CRC-communication-Sacchi-et-al-v.-Argentina-et-al.pdf> (accessed 7 April 2021).

STJ REsp No 604.725/PR (2d Panel) Relator: Min. Castro Meira, 21 June 2005 (Brazil).

STJ REsp No 745.363/PR (1st Panel) Relator: Min. Luiz Fux, 20 September 2007 (Brazil).

STJ REsp No 650.728 (2d Panel) Relator: Min. Herman Benjamin, 23 October 2007 (Brazil).

STJ REsp No 1.120.117/AC (2d Panel) Relator: Min. Eliana Calmon, 10 November 2009 (Brazil).

Treaty on the Prohibition of Nuclear Weapons (done 9 August 2017, entered into force 22 January 2021) C.N.478.2020.TREATIES-XXVI.9 (Depositary Notification).

UN Commission on Sustainable Development 'Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development' (Geneva 26–28 September 1995) (United Nations New York 1996).

UN Conference on Environment and Development 'Agenda 21' (12 August 1992) UN Doc A/CONF.151/26/Rev.1 (vol I), 9.

UN Conference on Environment and Development 'Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests' (14 June 1992) UN Doc A/CONF. 151/26/Rev.1 (vol I), 480.

UN Conference on Environment and Development 'Rio Declaration on Environment and Development' (14 June 1992) UN Doc A/CONF.151/26/Rev.1 (vol I), 3.

UN Conference on the Human Environment 'Declaration of the United Nations Conference on the Human Environment' (16 June 1972) UN Doc A/CONF.48/14/Rev.1, 3 (Stockholm Declaration).

UNESCO 'Declaration on the Responsibilities of the Present Generations Towards Future Generations' (done 12 November 1997) <http://www.unesco.org/> (accessed 7 April 2021).

UNFCCC COP 'Paris Agreement' (adopted 12 December 2015, entered into force 4 November 2016) COP Decision 1/CP.21, Annex, UN Doc FCCC/CP/2015/10/Add.1, 21.

UNGA 'Report of the Secretary-General: Intergenerational Solidarity and the Needs of Future Generations' (15 August 2013) UN Doc A/68/322.

UNGA 'Report of the Special Rapporteur on the Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (15 July 2019) UN Doc A/74/161.

UNGA 'Report of the World Commission on Environment and Development: Our Common Future' (4 August 1987) UN DOC A/42/427 Annex (Brundtland Report).

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

UNGA Res 37/7 ‘World Charter for Nature’ (28 October 1982) GAOR 37th Session Supp 51, 17.

United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

United Nations University ‘Goa Guidelines on Intergenerational Equity’ in E Brown Weiss *In Fairness to Future Generations*: *International Law, Common Patrimony and Intergenerational Equity* (United Nations University 1989) 293–94.

Urgenda Foundation v Netherlands Rechtbank den Haag [The Hague District Court] (24 June 2015) Case No C/09/456689 / HA ZA 13-1396 ECLI:NL:RBDHA:2015:7145.

Waweru, Mwangi (joining) and others v Kenya High Court of Kenya (2 March 2006) Misc Civil App No 118 of 2004.

Whaling in the Antarctic (Australia v Japan: New Zealand Intervening) [2014] ICJ Rep 226.

Whaling in the Antarctic (Australia v Japan: New Zealand Intervening) (Separate Opinion of Judge Cançado Trindade) [2014] ICJ Rep 348.

World Conservation Union/Commission on Environmental Law ‘Draft International Covenant on Environment and Development’ (3rd edn IUCN Gland 2004).

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2023. All Rights Reserved.
Subscriber: University of Melbourne; date: 18 March 2024

7

Due Diligence in International Environmental Law

A Fine-grained Cartography

Jorge E. Viñuales

Downloaded from https://academic.oup.com/book/39708/chapter/350384935 by University of Melbourne user on 04 February 2024

1. Introduction

It is the fate of duties—as of other norms—deliberately formulated in a broad and open-ended manner to cause some malaise among lawyers, who expect them to have sufficient normative density to be defined not only in *concreto* but also in *abstracto*. The duty requiring states to exercise due diligence so as to avoid causing 'significant' harm to the environment, is no exception to the fate of broad duties. Circumscribing its contours in *abstracto* is a difficult exercise, not because one cannot comment on it but because such commentary—to be of some value—must try to accurately reflect the practical operation of the norm, which in turn requires the surveying of a range of contexts where the norm 'operates', both in adjudication and elsewhere. Two main inquiries can be conducted in this regard.

First, one can discuss the conceptual limits arising from the very formulation of the duty, as it appears in treaties, soft-law instruments, and judicial and quasi-judicial decisions, as well as other authorities. This first inquiry focuses on: (i) identifying the norms from which this duty arises; (ii) determining who are the duty-bearers; (iii) who are the correlative right-holders; (iv) what type of action/inaction is covered by the duty, (v) what outcome it seeks to govern; and (vi) what the outer limits of the duty are. Secondly, one can focus on the 'degree' of due diligence, namely what makes the targeted behaviour 'duly' diligent: (i) the choice of means in discharging this duty; (ii) with the level of diligence depending on the time, the type of activity and the capacity of the state in question; and (iii) the scope of the duty, which encompasses both the adoption of relevant measures and their proactive enforcement.

In this chapter I conduct both inquiries in order to clarify the normative requirements arising from this duty with respect to environmental protection. My purpose is to provide a fine-grained analysis of the materials, rather than focusing on the broad implications of due diligence for environmental protection. The chapter

Jorge E. Viñuales, *Due Diligence in International Environmental Law* In: *Due Diligence in the International Legal Order*. Edited by: Heike Krieger, Anne Peters, and Leonhard Kreuzer, Oxford University Press (2020). © The Several Contributors.
DOI: 10.1093/oso/9780198869900.003.0007.

first seeks to distil from a number of old precedents several significant features relating to both inquiries (section 2). I then turn to the post-1945 law of environmental protection to clarify the due diligence duty from the two aforementioned perspectives (section 3). In conclusion, I make some observations about the wider implications of the fine-grained inquiry conducted in this chapter (section 4).

2. A Tale of Two Precedents

2.1 The Characterisation of Due Diligence in the Alabama Arbitration

The 1872 *Alabama Claims* arbitration is known for providing an authoritative statement on several rules of international law and also represents a prominent illustration of the benefits of international arbitration, even in a highly political dispute between two major powers.[1] In the specific context of due diligence, the reasoning of the arbitration court provided four important considerations that are still relevant today, including for action/inaction relating to environmental protection. The first consideration was that:

> the 'due diligence' referred to in the first and third of the said rules [Article VI of the compromis] ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfil the obligations of neutrality on their part.[2]

In casu, the court noted that the circumstances were such that the UK was held to 'all possible solicitude for the observance of the rights and duties involved in the proclamation of neutrality',[3] or in other words to the highest level of due diligence. This observation is important for at least three reasons. First, it links due diligence to 'risk', which is different from actual damage. Secondly, the degree of diligence is not static; it varies with the level of risk (no sliding scale of diligence is envisaged on the basis of a state's capabilities and resources, although this was argued by counsel for the US). Thirdly, the duty of due diligence, however demanding (in this case

[1] The place of this arbitration in discussions of due diligence in international environmental law has been overshadowed by references to the *Trail Smelter* arbitration. This neglect also concerns other areas of international law. As noted in the chapter by Helmut Aust/Prisca Feihle on 'Due Diligence in the History of the Codification of the Law of State Responsibility', chapter 3 of this book, section 2.1, it is often thought that due diligence emerged from the codification work of the law on state responsibility. On the history of the concept, see Giulio Bartolini, 'The Historical Roots of the Due Diligence Standard', chapter 2 of this book, section 2.

[2] *Alabama Claims of the United States of America against Great Britain*, Decision of 14 September 1872, vol. XXIX, UNRIAA, 125-134, 129.

[3] Ibid., 130.

Downloaded from https://academic.oup.com/book/39708/chapter/350384935 by University of Melbourne user on 04 February 2024

the court set the bar to the highest 'possible solicitude'), does not amount to strict liability. In fact, the court found that for some specific vessels manufactured in the UK, the latter had met the requirements of due diligence, despite the occurrence of undesirable results. None of these points are obvious, even today, and they are all significant for international environmental law as it presently operates.

A second consideration arising from this case is the significance of representations by the aggrieved state (the US representative had informed the UK government that vessels were being built for possible use in the Civil War), which should have triggered 'in due time' at least some 'effective' measures of prevention. Thus, action by a possibly aggrieved state (a state at risk), although not a requirement, may catalyse the duty of due diligence or, more specifically, may at the very least be instrumental in setting the time for action.

A third consideration is the fact that subsequent measures could have cured the initial negligence, although the UK failed to take such action or did so in a manner 'so imperfect as to lead to no result, and therefore cannot be considered sufficient to release Great Britain from the responsibility already incurred'.[4] The latter point suggests that the duty of due diligence is a continuous rather than a discreet one: due diligence must be constantly exercised. This is important from a litigation perspective.

As a fourth and final consideration, the formulation of the due diligence rule in Article VI of the compromis makes it clear that a state's failure to effectively control the actions of 'all persons within its jurisdiction' may be a breach of the duty of due diligence. This simple point is significant because it clearly covers the actions of private persons and makes due diligence relevant for extraterritorial situations, much like in today's discussions of human rights extraterritoriality and their link to environmental principles. The duty of due diligence therefore finds a solid basis in the *Alabama Claims* arbitration. Its contribution to the clarification of the duty of due diligence thus warrants comparison with the *Trail Smelter* case, at the very least to highlight areas of convergence and divergence.

2.2 From *Alabama* to *Trail Smelter*

It must be mentioned that the *Alabama* precedent was invoked before the *Trail Smelter* tribunal and duly noted by it.[5] Significantly, the latter tribunal recognised the *Alabama* decision as the start of a relevant line of precedents—although it eventually relied on the domestic practice of Switzerland and the US, as both were federal systems and had faced disputes among 'quasi-sovereign' entities. This was

[4] Ibid., 130.
[5] *Trail Smelter Arbitration*, Decisions of 16 April 1938 and 11 March 1941, vol. III, UNRIAA, 1905-1982, 1963.

Downloaded from https://academic.oup.com/book/39708/chapter/350384935 by University of Melbourne user on 04 February 2024

possible because Article VI of the compromis specifically required the tribunal to apply 'the law and practice followed in dealing with cognate questions in the United States of America as well as international law and practice'. In a famous and often-quoted statement, the tribunal held that it:

> finds that the *above decisions, taken as a whole*, constitute an adequate basis for its conclusions, namely, that, under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[6]

If, among 'the above decisions, taken as a whole', one is to include international decisions, the only explicitly identified precedent of unquestionable authority is indeed the *Alabama* decision. On this point, there is a clear convergence between the two decisions.

Further convergence can be found in that states may be responsible for allowing private parties to use their territory in harmful ways, irrespective of any attribution inquiry. The relevant conduct of the state is indeed its own inaction, not the action of the private person. Two other points of convergence are the reference to the notifications by the aggrieved state, although the *Trail Smelter* decision does not attach any significant relevance to this point, and, much more importantly, the continuous character of the duty of due diligence, which is formulated in the *Trail Smelter* decision in terms that are so advanced[7] that they could be considered progressive even for an international tribunal deciding a dispute today. The drawback is that the content of due diligence is not spelt out in general terms and remains embedded in, indeed consubstantial with, the technical specifications—akin to the modern 'standards'—provided by the tribunal and cannot be detached from them.

There is, however, some divergence between the two decisions, in that the *Trail Smelter* award provides, quite unexpectedly, a more limited statement of the duty of due diligence. First, unlike the *Alabama* decision, the *Trail Smelter* award makes no explicit reference to the possibility of curing a breach through subsequent action. The attempts of the smelter to manage the initial complaints from farmers in Washington are mentioned as part of the factual record, but the award does not derive any legal principle from them. Secondly, and more significantly, the rule stated in the *Trail Smelter* case concerns actual 'damage' and not any damage but 'material' damage.[8] Thus, the regime set out in the award, which is the embodiment of the

[6] Ibid., 1965 (emphasis added).
[7] The tribunal indeed set up a provisional regulatory regime and then a permanent one to be implemented by Canada, with the explicit possibility of adjusting the system if the circumstances (or their scientific understanding) changed. See ibid., 1966.
[8] Ibid., 1980 (emphasis added).

Downloaded from https://academic.oup.com/book/39708/chapter/350384935 by University of Melbourne user on 04 February 2024

diligence due by Canada in this case, is aimed only at preventing 'material' damage, not any damage, let alone risk. By contrast, the *Alabama* rule is not confined to damage but encompasses 'risk' as well. That was a result of the circumstances of the case, which were so serious as to require 'all possible solicitude' from the UK. But a similar argument can be made for ultra-hazardous activities such as the generation of nuclear energy or the production of highly toxic substances, in that due diligence is not only 'required' from the state where the operations take place but also 'actionable'—namely it can be legally and specifically demanded—by potentially affected states irrespective of the occurrence of damage. Such is the rule in Article 3 of the 2001 International Law Commission's Articles on Prevention: '[the] State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimise the risk thereof'.[9] The commentary of this provision expressly relies on the *Alabama* case.

The basic conclusion to be drawn from the foregoing paragraphs is that both the *Alabama* arbitration and the *Trail Smelter* case remain relevant, even today, to a proper understanding of the broad parameters of the duty of due diligence (formulation of the duty) and the finer-grained questions of degree (degree of due diligence). Together, they 'unpack' most of the issues and set a broad perimeter within which the more recent instruments, cases, and commentary unfold. In the next section I focus on the post-1945 international law, paying particular attention to the case law of the last decade, which has made an important contribution to the clarification of due diligence.

3. The Duty of Due Diligence in Contemporary International Environmental Law

3.1 Preliminary Observations

Against the backdrop set by the *Alabama* and *Trail Smelter* precedents, subsequent developments have added further specificity (particularly regarding the operation of due diligence in an 'environmental' context), together with further elaboration of elements that were only flagged in those precedents and, last but not least, also some new elements not foreseen at the time. The two precedents nevertheless remain authoritative.

With these clarifications in mind, I now turn to the two different inquiries identified in the introduction. For each of them, the discussion relies on a combined assessment of the two aforementioned precedents and of more recent developments.

[9] United Nations, International Law Commission (ILC), Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, A/RES/56/82, 12 December 2001.

Downloaded from https://academic.oup.com/book/39708/chapter/350384935 by University of Melbourne user on 04 February 2024

3.2 First Inquiry: Formulation of the Duty

3.2.1 Due Diligence and the Prevention Principle

In the context of environmental protection, the formulation of the duty of due diligence largely overlaps with the formulation of the principle of prevention provided in Principle 2 of the Rio Declaration on Environment and Development:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[10]

To state that due diligence 'largely' overlaps with the principle of prevention implies that there are differences. I would like to state these differences in a form that is not merely a conceptual elaboration of these two norms but one that is practically relevant.

The first difference stems from the broader scope of the duty of due diligence, which applies to several types of harm and risk other than environmental harm or risk thereof (as emphasised in the *Alabama* arbitration). The second difference is that the duty to prevent environmental harm (the prevention principle) concerns—as we recall from the *Trail Smelter* arbitration—only harm of a certain magnitude ('material' harm[11] or 'significant' harm[12] or risk of thereof.[13] By contrast, the duty of due diligence is not similarly limited and, hence, action/inaction that results in harm or risk to the environment but which is below the threshold of significance required to trigger a breach of the prevention principle remains governed by (and could potentially constitute a breach of) the duty of due diligence. That much can be learnt from the *Alabama* arbitration, where due diligence is not limited by either upper or lower bounds in the magnitude of harm or risk.[14] This is not a purely theoretical point. By way of illustration, a state may be required or entitled, under the duty of due diligence, to take precautionary measures even in

[10] United Nations, General Assembly, Rio Declaration on Environment and Development, A/CONF.151/26, 13 June 1992, Rev.1; On prevention, see Leslie-Anne Duvic-Paoli/Jorge E. Viñuales, 'Principle 2: Prevention', in Jorge E. Viñuales (ed.), *The Rio Declaration on Environment and Development: A Commentary* (Oxford: OUP 2015), 107–138; Leslie-Anne Duvic-Paoli, *The Prevention Principle in International Environmental Law* (Cambridge: CUP 2018).

[11] *Trail Smelter* (n. 5), 1980.

[12] See ILC, Prevention Articles 2001 (n. 9), art. 2(a); ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, ICJ Reports 2010, 14, para. 101.

[13] ILC, Prevention Articles 2001 (n. 9), art. 3.

[14] *Alabama Claims* (n. 2), 129.

Downloaded from https://academic.oup.com/book/39708/chapter/350384935 by University of Melbourne user on 04 February 2024

the absence of scientific certainty as to the existence of risk of significant harm.[15] Such a requirement/justification would not flow from the prevention principle, which only operates when there is risk. Nor would it flow, at least in the absence of an applicable treaty, from the precautionary approach/principle, whose customary grounding is still debated.[16] It would derive instead from the duty of due diligence, which is unquestionably grounded in general international law since at least the period of the *Alabama* arbitration and has a scope that is not limited to the risk of 'significant' environmental harm. The latter does not mean that any harm or risk thereof may be subject to the duty of due diligence (this sort of 'absolute integrity' theory was early on discarded by international tribunals[17]) but only that this duty is not necessarily subject to the same definition of 'significance' or of 'risk' as the prevention principle.

Aside from these two differences, however, the operation of due diligence and prevention in an environmental context overlap. They do so to a point that the duty of due diligence must be considered as defining the 'responsibility to ensure', as stated in Principle 2 of the Rio Declaration, in a form of articulation similar to that identified in other contexts.[18] Thus, as far as environmental protection is concerned, the duty of due diligence rests upon the prevention principle, which finds expression in several other norms that I have analysed elsewhere.[19]

3.2.2 Duty-bearers

With respect to the duty-bearers of these two articulated norms, one can identify three situations. First, it is well established that states are subject to both the prevention principle and the duty of due diligence, and all the authorities mentioned in this chapter analyse the situation of states as duty-bearers. Secondly, there is some authority for the proposition that at least some international organisations that have been entrusted with, and have effectively taken up, the discharge of some state activities (for example the regulation of fisheries) are likewise subject to the duty of due diligence.[20] It is unclear whether the 'degree' of due diligence expected

[15] See ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS Reports 2011, paras 125-135, particularly paras 131 and 135.

[16] See Pierre-Marie Dupuy/Jorge E. Viñuales, *International Environmental Law* (Cambridge: CUP 2nd ed. 2018), 70–73.

[17] See *Lake Lanoux Arbitration (Spain v. France)*, Decision of 16 November 1957, vol. XII, UNRIAA, 281-317.

[18] See ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, 226, para. 25.

[19] See, e.g., Jorge E. Viñuales, 'The Rio Declaration on Environment and Development: Preliminary Study', in Jorge E. Viñuales (ed.), *The Rio Declaration on Environment and Development: A Commentary* (Oxford: OUP 2015), 1–64; Duvic-Paoli/Viñuales, 'Principle 2' 2015 (n. 10); Jorge E. Viñuales, 'Protección Ambiental en el Derecho Consuetudinario Internacional', *Revista Española de Derecho Internacional* 69/2 (2017), 71–91.

[20] ITLOS, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, ITLOS Reports 2015, 4, para. 168.

Downloaded from https://academic.oup.com/book/39708/chapter/350384935 by University of Melbourne user on 04 February 2024

from such organisations could in all points be equated with that of states, given the fact that enforcement of such delegated powers remains, both legally and practically, fully in the hands of states. But this is something that relates to the second inquiry, namely that concerning the degree of due diligence, rather than the broad parameters of the duty of due diligence.[21] Thirdly, a range of other subjects of international law—from peoples, to indigenous, tribal, and other groups, as well as a wide variety of individuals (from multinational companies to physical persons)—could potentially be subject to the duty of due diligence and the prevention principle as they arise from international law. There is much disagreement about this point and the matter is not settled.[22] That said, the logic that should guide any consideration on this point is the same as for states and international organisations, namely that it is not merely the formal but the effective ability of such subjects to discharge the duty that is decisive. This point must not be misunderstood: with regards to the duty of due diligence, one must distinguish between matters of *formulation* and matters of *degree*. Peoples, groups, corporations, and individuals are, by their very definition, capable of discharging certain duties. Hence, it would technically (as a matter of formulation) be entirely possible to subject them to a duty of due diligence, which would be sufficient to settle matters of formulation. Matters of degree, however, present a different set of difficulties, which will be discussed later.[23]

3.2.3 Right-holders

The question of duty-bearers must be clearly distinguished from that of the correlative question of right-holders, which is far more complex. It must be noted that it is conceptually possible for a duty and, specifically, for the duty of due diligence to be owed to both an object (the environment, which is not, as such, a right-holder) and a subject, who may or may not have a correlative right (for example future generations). For the protection of these kinds of objects and subjects, the main avenue would be the active discharge by the duty-bearers of the duty of due diligence. To the extent that failure to satisfactorily discharge such a duty can be claimed, this would only be possible through the exercise of a right—whether substantive or procedural—by a right-holder. Thus, I will focus here on right-holders. Another clarification is that an obligation whose duty-bearers are mainly (albeit not only) states might entail correlative rights for both states and/or other subjects. Such is the case, for example, for the human rights obligations of states which are

[21] See below section 3.3.

[22] See the ongoing discussions on the possibility to adopt a Global Pact for the Environment: United Nations General Assembly Resolution 'Towards a Global Pact for the Environment', A/72/L.51, 10 May 2018, which would broaden the definition of 'duty-bearer'. Indeed, the Draft Project for a Global Pact for the Environment contains, in art. 2, a duty of care arising for 'every State or international institution, every person, natural or legal, public or private'.

[23] See below section 3.3.

Downloaded from https://academic.oup.com/book/39708/chapter/350384935 by University of Melbourne user on 04 February 2024

specifically correlative to the rights of individuals. As noted earlier, the duty of due diligence has a broader scope than the prevention principle because it concerns not only the duty to prevent significant environmental harm or risk thereof but also other types of harm or risks thereof.[24]

This difference has practical importance. It means that there are two categories of rights and right-holders 'relevant' for the discharge of the duty of due diligence in the context of environmental protection: those rights arising technically from the prevention principle (category 1) and those other rights arising from either the broader due diligence duty or from other obligations that present a similar symbiosis with the prevention principle (category 2). The distinction is also important because the exercise of the rights encompassed by category 2 may expand the measure of protection afforded to other subjects (again, future generations) or to an object (the environment as such) who are not right-holders, as compared to the protection that could be claimed through the exercise of rights arising technically from the prevention principle only (category 1).

It is useful, therefore, to discuss category 2 first. This category includes a wide range of rights, none of which arise technically from the prevention principle, but whose object is 'relevant' for—that is, tends towards a similar goal as—the rights technically arising from the prevention principle. For example, the rights of access to environmental information, participation in environmental decision-making, and access to justice are certainly relevant to press state authorities to behave diligently with respect to the prevention of environmental harm, but individuals cannot rely solely on the principle of prevention to base their request for such access or participation. This point can be generalised. For example, freedom of speech and freedom of association are certainly relevant in order for civil society to press state authorities to behave diligently with respect to environmental protection, but they do not arise technically from the prevention principle itself. Such relevant rights have their own right-holders, which are not defined by the prevention principle. They are, however, relevant for the discharge of the duties arising from the prevention principle, not only because they aim for a similar or convergent goal but also, in a more technical manner (systemic integration), which will be explained by reference to category 1.

Moving now to category 1, it encompasses those rights (and right-holders) that arise specifically from the prevention principle. In order to clarify them, an additional distinction is needed between those rights that are *specifically* exigible and those which are only *generally* exigible.[25] The best way to explain the

[24] See above section 3.2.1.

[25] Unfortunately, there is no English term capable of fully translating this notion. Approximate English terms include: 'due', 'payable', or 'chargeable'. In French, 'exigible' is generally understood to mean that an existing (binding) obligation falls due and its specific discharge can thereafter be required at any time by the right-holder. An obligation may be 'binding' or 'due' without yet being 'ripe'. The terms 'payable' and 'chargeable' are closer to 'exigible' but they suggest that only sums of money (not specific performance) are concerned.

Downloaded from https://academic.oup.com/book/39708/chapter/350384935 by University of Melbourne user on 04 February 2024

difference is with an example. The prevention principle, like the duty of due diligence, entails rights upon potentially affected states to require the state of origin of an activity to exercise due diligence to ensure that no significant harm to the environment (or risk thereof) is generated. But such rights do not entitle potentially affected states to require this or that specific measure. Thus, if a government conducts a cost-benefit analysis on a bill or a proposed regulation taking into account only the likely impact on the territory of the state of origin and not on other potentially affected states, then such other states will be entitled to demand that the state of origin exercises general due diligence but not, for example, the specific procedural measure of expanding the cost-benefit analysis. The selection of specific measures to exercise due diligence remains the purview of the state of origin.[26] In rare cases, a third party will identify the specific measures that must be adopted by the state of origin (as was the case in the *Trail Smelter* award, which is very progressive on this point). More often such measures will be defined by treaty, but neither the prevention principle nor the duty of due diligence entitles the right-holders to require the adoption of specific measures by the state of origin. These measures are only *generally* exigible, with two exceptions under which certain measures are *specifically* exigible.

There are two obligations that have been jurisprudentially considered to be technical expressions of the prevention principle[27] and that entail correlative rights to specifically demand the adoption of certain measures: namely the conduct of an environmental impact assessment and notification and consultation in certain specific cases. These rights are held by potentially affected and possibly other states and, unlike the broader right to demand the exercise of due diligence, they are *specifically* exigible, that is, they provide a legal basis to demand from the state of origin the adoption of not just a measure of its own choosing but a specific measure defined internationally. They operate in the same way as a treaty norm requiring a specific measure.

Importantly, the specification of the remaining areas (beyond the two specifically exigible measures mentioned earlier) of generally exigible due diligence is not entirely unconstrained. Whether the state of origin has exercised its discretion in the choice of relevant means can be reviewed by a tribunal (e.g., the partial cost-benefit analysis referred to above would be subject to review) and such an assessment would normally rely—pursuant to the principle of systemic integration[28]—on

[26] ILC, Prevention Articles 2001 (n. 9), comment to art. 3, paras 9, 11 and 12: referring to the *Alabama* case where the court rejected the proposition of the UK that 'due diligence' was a national standard; see also ICJ, *Pulp Mills* (n. 12), para. 205: where the ICJ suggests that the content of a component of the duty of care, namely the customary obligation to conduct an environmental impact assessment, would be left to states.

[27] ICJ, *Pulp Mills* (n. 12), paras 101–102, 144–146, 204; ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Construction of a Road in Costa Rica along the River San Juan (Nicaragua v. Costa Rica)*, Judgment of 16 December 2015, ICJ Reports 2015, 665, para. 104.

[28] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, art. 31(3)(c).

Downloaded from https://academic.oup.com/book/39708/chapter/350384935 by University of Melbourne user on 04 February 2024

other 'relevant' norms applicable between the parties. For example, the degree of diligence could be assessed in the light of the rights of access to environmental information, participation in environmental decision-making, and access to justice, or of the human rights of the individuals in foreign states who are affected by the action/inaction of the state of origin.

At this stage, the question regarding the correlative right-holders of the prevention principle and the duty of due diligence can receive a general, albeit still incomplete, answer: technically, the correlative right-holders of the prevention principle are states; but other 'relevant' right-holders, whose rights do not technically arise from the prevention principle, include states and other subjects of international law, depending on the nature of the relevant right. A fuller examination of this question cannot be provided here as it would essentially require a survey, an inventory, and a characterisation of a range of obligations and correlative rights. I should, however, mention the specific case of the right to an environment of a certain quality.

I have examined in another context the articulation between the right to an environment of a certain quality, which is still under development, and the prevention principle.[29] In the present development of international law, the most appropriate understanding of the role of this right is as a 'relevant' right pursuing a purpose that is similar (and indeed very close) to that of the prevention principle. This right could and should in my view be relied upon to interpret the degree of due diligence *generally* exigible from a state. There are some subtleties relating to the spatial scope of operation of the two norms,[30] but their normative articulation would not be affected by them.

3.2.4 Type of Conduct Covered

The next parameter of the duty relates to the type of action/inaction. Against the background of the previous discussion, this question is less complex. Any action/inaction by the duty-bearer (states, international organisations, and possibly other subjects of international law) that may generate significant environmental harm or risk thereof in another state or an area beyond its national jurisdiction (and possibly also within the territory or the jurisdiction of the negligent state) is governed

[29] See Jorge E. Viñuales, 'A Human Rights Approach to Extraterritorial Environmental Protection? An Assessment', in Nehal Bhuta (ed.), *The Frontiers of Human Rights: Extraterritoriality and its Challenges* (Oxford: OUP 2016), 177–221.

[30] Indeed, the prevention principle concerns harm to the environment of other states and beyond national jurisdiction (with an interrogation mark for harm to the environment of the state of origin), whereas the right to an environment of a certain quality (healthy, safe, clean, and/or generally satisfactory) concerns harm that happens in the territory of the state where the person is located (with some additional developments needed for an extraterritorial application of this right, which would make it spatially convergent with the scope of the prevention principle). See the account of extraterritoriality in an environmental context provided in ibid., 218–219, which has been followed by the Inter-American Court of Human Rights in its Advisory Opinion of 15 November 2017, OC-23/18, IACtHR (Ser. A), No. 23.

Downloaded from https://academic.oup.com/book/39708/chapter/350384935 by University of Melbourne user on 04 February 2024

by the duty of due diligence. The only two issues that may require further clarification relate to the acts of private parties and the continuous nature of the action/inaction. However, as mentioned earlier, it seems abundantly clear, since at least the *Alabama* arbitration, that it is the inaction or deficient action of the state itself, as an enabler of the private action, that is governed by the duty of due diligence.

As for the continuous nature of the action/inaction, the main distinction is between the requirements of the duty, which are continuous, and the action/inaction at stake, which does not need to be. The continuous character of the duty[31] is entirely compatible with punctual, and hence discontinuous, interventions. For example, if the authorities are informed of an imminent private initiative and, although they may have not yet taken any action, they specifically intervene to stop the initiative or keep it under control, the continuous requirements of the duty would be met even if they then discontinue the regulatory intervention, as long as they remain generally vigilant.

3.2.5 Outcomes Governed by the Duty

The outcomes that the duty seeks to govern have also been elaborated upon in the previous discussion. Four clarifications are needed for the parameters of the duty to be understood. First, the *Alabama* precedent and the 2001 ILC Articles on Prevention have made clear that the outcome to be prevented is not only a materially negative outcome ('damage' or 'harm') but also the 'risk' thereof, even if the negative outcome does not in fact materialise. The mere generation of 'risk' may be sufficient to trigger the correlative rights identified earlier.

Secondly, unlike the bare duty of due diligence, in the context of environmental protection, only damage, harm, or risk of a certain magnitude ('material' or 'significant') is governed by the prevention principle. I will not attempt to define what is deliberately not defined in the norm—and likely even beyond the possibility of being abstractly defined—but my earlier comment regarding the use of 'relevant' norms to clarify the scope of the prevention principle is also applicable here. The fact that the outcome may amount to a breach of another—distinct but related ('relevant')—norm may either render the harm 'significant' or may be an important indication that such is the case.[32] By contrast, damage, harm, or risk which is not 'material' or 'significant' is not governed by the prevention principle. This point must not be misunderstood. Indeed, such a statement may only be correct retrospectively, once the negative outcome has indeed materialised and is deemed 'immaterial' or 'non-significant', or after a diligent 'risk' assessment has led to the conclusion that any potential damage or harm would be below the threshold of

[31] On the continuous character of the duty see above section 2.1.

[32] See e.g., ECtHR, *Budayeva and others v. Russia*, Judgment of 29 September 2008, Applications No. 15339/02, 21166/02, 20058/02, 11673/02, and 15343/02, paras 128–137; PCA, *South China Sea Arbitration (Republic of the Philippines v. People's Republic of China)*, PCA Case No. 2013-19, Award of 12 July 2016, paras 962–966.

Downloaded from https://academic.oup.com/book/39708/chapter/350384935 by University of Melbourne user on 04 February 2024

significance. In the latter case, such an assessment would remain subject to a more conclusive (retrospective) assessment of damage or harm. If instead of adopting a retrospective perspective, one adopts a prospective one, any potential outcome remains governed by the duty of due diligence and therefore triggers the correlative rights. Hence, the importance of procedural steps in this context. Even if the outcome places the action/inaction outside the scope of the prevention principle, such action/inaction may remain governed by other norms. For example, the polluter-pays principle requires states to adopt domestic measures for polluters to internalise (that is, to 'bear') the costs they have lawfully caused. In other cases, the action/inaction may not be in breach of the prevention principle and, yet, it may be in breach of another 'relevant' norm (for example obligations requiring public participation).

Thirdly, a difficult question concerns the boundary between 'risk' and outcomes that do not amount to risk. Despite the conceptual difficulties in distinguishing the two, the insurance industry has found the distinction sufficiently solid to build a business around it. Risk, in this context, requires a reliable probability ('high' or 'small', but reliable as opposed to volatile) of a negative outcome. In the absence of any of these two elements (reliable probability and negative outcome), the situation is one of 'uncertainty', which is beyond the scope of prevention and falls under that of precaution.[33]

Fourthly, as noted earlier, the most widely accepted formulation of the prevention principle refers to 'damage to the environment of other states or of areas beyond the limits of national jurisdiction'[34] without explicitly referring to an outcome that would affect only the state of origin. This apparently minor point is systemically important, and I will discuss it in the last section of this chapter. For present purposes, I should only observe that currently there is some authority for the proposition that the prevention principle applies to environmental harm in general, irrespective of where it occurs.[35]

3.2.6 Outer Boundary of the Duty

The final parameter for the formulation of the duty of due diligence in an environmental context relates to its outer boundary. Here again, the *Alabama* precedent provides normative guidance. Whether one uses conceptual categories such as

[33] See Jorge E. Viñuales, 'Legal Techniques for Dealing with Scientific Uncertainty in Environmental Law', *Vanderbilt Journal of Transnational Law* 42 (2010), 437–503; Antônio Augusto Cançado Trindade, 'Principle 15: Precaution', in Jorge E. Viñuales (ed.), *The Rio Declaration on Environment and Development: A Commentary* (Oxford: OUP 2015), 403–428.

[34] See United Nations, Declaration of the United Nations Conference on the Human Environment, A/CONF 48/14/Rev.1, 16 June 1972, principle 21; United Nations, General Assembly, Rio Declaration, 13 June 1992 (n. 10), principle 2.

[35] See ITLOS, *Responsibilities and Obligations in the Area Opinion* (n. 15), paras 142–148; ITLOS, *Request for Advisory Opinion* (n. 20), paras 111, 120; ITLOS, *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana v. Côte d'Ivoire)*, Order of 25 April 2016, Case no. 23, paras 68–73; PCA, *South China Sea Arbitration* (n. 32), para. 940.

Downloaded from https://academic.oup.com/book/39708/chapter/350384935 by University of Melbourne user on 04 February 2024

obligations of means versus obligations of result,[36] fault versus strict (or objective) liability, or some other category, the outer limit of the duty is clear: the mere occurrence of damage is not enough for a breach. This conclusion was reached in the *Alabama* decision in connection with some specific vessels[37] as well as in the 2016 *South China Sea Arbitration* with respect to some specific instances of environmental damage.[38] But more than the mere adoption of measures is required: states must proactively seek to enforce such measures.[39] Thus, this parameter could be conceptually clarified by reference to three stages: the adoption of measures; the enforcement of measures; and the occurrence of the negative outcome. The outer boundary of the duty is located between the second and the third stages.

3.3 Second Inquiry

3.3.1 Overview

The broad parameters of the duty of due diligence in the context of environmental protection thus defined, the second inquiry comes closer to the legal topography and focuses on matters of 'degree' of diligence. This inquiry is difficult because any conclusion relating to the 'degree' of due diligence should have sufficient legal grounding in the relevant authorities. Based on the materials surveyed, which are largely representative of the state of international law on this question, three main criteria have been recognised as capable of graduating the degree of diligence.

3.3.2 Gravity of the Outcome

This question arose already in the *Alabama* case. During the proceedings, counsel for the US had argued that both the gravity of the potential outcome and the 'dignity and strength of the power which is to exercise [the duty]' had to be taken into account in setting the standard of diligence. The tribunal only retained the first criterion,[40] although it did not reject the second. The gravity of the outcome resulting from negligence seems to be the main criterion graduating the level of the due diligence required.[41] But the second criterion mentioned by the US has also received some attention, although not in the manner envisioned at the time of *Alabama*.

[36] ICJ, *Pulp Mills* (n. 12), para. 187; ITLOS, *Responsibilities and Obligations in the Area Opinion* (n. 15), para. 110; ITLOS, *Request for Advisory Opinion* (n. 20), para. 129.

[37] *Alabama Claims* (n. 2), 132 (discussion relating to the vessel 'Retribution').

[38] PCA, *South China Sea Arbitration* (n. 32), paras 972–975. See further ICJ, *Pulp Mills* (n. 12), para. 187; ITLOS, *Responsibilities and Obligations in the Area Opinion* (n. 15), para. 110; ILC, Prevention Articles, 2001 (n. 9), commentary to art. 3, para. 7.

[39] ICJ, *Pulp Mills* (n. 12), para. 197; ITLOS, *Responsibilities and Obligations in the Area Opinion* (n. 15), paras 115 and 239; ILC, Prevention Articles, 2001 (n. 9), commentary to art. 3, para. 10.

[40] *Alabama Claims* (n. 2), 129.

[41] The 'degree of care required is proportional to the degree of risk involved in the business', ILC, Prevention Articles, 2001 (n. 9), commentary to art. 3, para. 18; ITLOS, *Responsibilities and Obligations in the Area Opinion* (n. 15), para. 117.

Downloaded from https://academic.oup.com/book/39708/chapter/350384935 by University of Melbourne user on 04 February 2024

3.3.3 Capabilities

What could be referred to as the 'capabilities' criterion has featured prominently in discussions about differentiation in international environmental law.[42] It has also been expressly addressed in the advisory opinion of the International Tribunal for the Law of the Sea's Seabed Chamber on the *Responsibility of States Sponsoring Activities in the Area*.[43] In this opinion, the Chamber concluded that 'general provisions concerning the responsibilities and liability of the sponsoring state apply equally to all sponsoring states, whether developing or developed',[44] and that the rationale is to prevent 'states of convenience', that is, states where companies could register themselves to benefit from less demanding requirements. However, the opinion then noted that there may be some variations in the implementation of certain regulations that expressly rely on the precautionary approach. The formulation of the precautionary approach in Principle 15 of the Rio Declaration expressly allows for this approach to be applied by states 'according to their capabilities'. In the context of prevention, the commentary to Article 3 of the ILC Prevention Articles specifically states that:

> The economic level of States is one of the factors to be taken into account in determining whether a State has complied with its obligation of due diligence. But a State's economic level cannot be used to dispense the State from obligation under the present articles.[45]

This somewhat elliptical comment may be understood as stating that all states are subject to the duty of due diligence (they are duty-bearers from the perspective of the duty's formulation) but the degree of due diligence that must be displayed varies. Even under this understanding, the ILC Articles on Prevention would be inconsistent with the conclusion of the Seabed Chamber, at least as a general matter, because the Seabed Chamber's conclusion concerns the specific norms at stake in that case.

The question remains unsettled in the case law, but the need to account for the capabilities of the state in question seems to me unavoidable. The real issue, in my view, is not *whether* such differences can be taken into account but *how* exactly to do so. To take an extreme example, a state whose administrative capabilities have been almost entirely neutralised as a result of civil war or a natural catastrophe could not be expected to duly and regularly follow every detail concerning activities within its territory that may result in environmental harm. But

[42] For an overview of the debate over 'common but differentiated responsibilities', see Philippe Cullet, 'Principle 7: Common but Differentiated Responsibilities', in Jorge E. Viñuales (ed.), *The Rio Declaration on Environment and Development: A Commentary* (Oxford: OUP 2015), 229–244.

[43] ITLOS, *Responsibilities and Obligations in the Area Opinion* (n. 15), paras 158–159.

[44] Ibid., para. 158.

[45] ILC, Prevention Articles, 2001 (n. 9), commentary to art. 3, para. 13.

Downloaded from https://academic.oup.com/book/39708/chapter/350384935 by University of Melbourne user on 04 February 2024

that may or may not mean that the level of due diligence expected from it is lower. The legal construction of the situation could be that although there is a violation of due diligence, such a violation is justified (for example through the operation of a circumstance precluding wrongfulness). Alternatively, it could be that due diligence depends on the specific circumstances in which the duty is to be discharged and not on the level of development of the state. Still another possibility would be to adjust the duty of due diligence on the grounds that the prevention principle, like the precautionary approach, admits different degrees arising from the reference—in Principle 2 of the Rio Declaration (unlike Principle 21 of the Stockholm Declaration)—to a state's 'own environmental and developmental policies'. Because these and other understandings are equally possible, the question remains unsettled.

3.3.4 Historical Circumstances

The third criterion is related to the previous one. It makes the degree of due diligence dependent on the specific moment in history in which it is assessed. As noted by the Seabed Chamber:

> The content of 'due diligence' obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that 'due diligence' is a variable concept. *It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge.*[46]

Thus stated, changes 'over time' are a proxy for a 'range of circumstances' that are normally expected to change over time, including the dominant scientific understanding of the risks associated with a given activity, the saturation of certain environmental media (even if the scientific understanding remains fundamentally similar), the public perception of a problem (for example changes in the degree of tolerance), and variations in the scale of the activity with implications for the environment.

It is not unreasonable to include in such circumstances the varying capabilities of all states and thereby (possibly) of only some states that are more (less) advanced in dealing with a given risk. All in all, this criterion, despite its solid recognition in the case law, must be handled with great care so as to prevent it from becoming a 'Trojan horse' for illegitimate (ideological) choices.

[46] ITLOS, *Responsibilities and Obligations in the Area Opinion* (n. 15), para. 117 (emphasis added).

Downloaded from https://academic.oup.com/book/39708/chapter/350384935 by University of Melbourne user on 04 February 2024

4. Conclusion: Due Diligence and the Evolution of International Environmental Law

The cartography of due diligence outlined in this chapter is, above all, an effort aimed at conceptual clarification. Yet, focusing on the textured details of due diligence, however modest the exercise may initially seem, provides a solid basis to chart in actual practice the evolution of the broader international law of environmental protection. I would like to conclude this chapter with some observations emerging from practice. The evolution of due diligence in the context of environmental protection shows two fundamental transformations in the very texture of international law.

First, if the duty of due diligence was initially a legal safeguard against the possibility that a negligent exercise of sovereignty may result in harm to the interests of other states (both the *Alabama* and the *Trail Smelter* arbitrations illustrate this conception), it has since undergone a fundamental transformation requiring the protection of the environment per se, irrespective and even against the interests (if narrowly conceived) of states. This transformation can be traced, in great detail, in the incremental steps made from one case to the other, over time, particularly since the mid 1990s. I have analysed the footprints of this transformation in some detail elsewhere.[47] The key consideration is that due diligence must be exercised to prevent significant environmental damage, harm, or risk thereof, irrespective of whether it may occur. The spatial extension to areas beyond national jurisdiction was stated already in Principle 21 of the 1972 Stockholm Declaration, but it remained unrecognised by the case law until the famous paragraph 29 of the International Court of Justice's 1996 advisory opinion on the *Legality of Nuclear Weapons*.[48] That change, which has since been confirmed by the court and other international tribunals,[49] left open the question of environmental protection in the state of origin of the harmful or risky activity. If due diligence and prevention are about environmental protection per se, one would expect the duty to apply even within that state's own territory and jurisdiction.[50] Significantly, that would leave absolutely no doubt that the value protected is the environment and not the interest of a state in its territory. As noted earlier in this chapter, there is now some authority for the proposition that the environment must be protected irrespective of where it is located, even in disputed

[47] See Jorge E. Viñuales, 'The Contribution of the International Court of Justice to the Development of International Environmental Law', *Fordham International Law Journal* 32 (2008), 232–258.

[48] ICJ, *Legality of Nuclear Weapons Opinion* (n. 18), para. 29: 'The Court also recognises that the environment is not an abstraction but represents the living space, the quality of life, and the very health of human beings, including posterity. The existence of the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now part of the corpus of international law relating to the environment.'

[49] For an overview of the case law, see Duvic-Paoli/Viñuales, 'Principle 2' 2015 (n. 10).

[50] Ibid., 119.

Downloaded from https://academic.oup.com/book/39708/chapter/350384935 by University of Melbourne user on 04 February 2024

areas. No case raising a direct clash between the prevention principle and the interests of the territorial state has been decided on by an international court or tribunal. Recognising that states have a due diligence duty to protect their own environment would have repercussions for other imbricated questions, including the identification of the correlative right-holders (Is it any other state, or the international community, or the environment as such, whose interests would be represented by a state or the international community, itself represented by a certain body? Or future generations, also appropriately represented? Or simply individuals, as a result of their human rights?). The inclusion of individuals in the list offers a proxy answer to this question. What I called in my discussion of right-holders 'other relevant norms', such as human rights provisions,[51] are already being used in very clear and practical terms to provide some measure of protection to the environment within a state's own territory and beyond.

Secondly, the transformation of the duty of due diligence from a norm protecting state interests to one protecting the environment per se offers a window into a broader transformation of the structure of international law from a horizontal system into an increasingly vertical one,[52] where some values receive greater objective protection, even if such protection does not reach the level of peremptory norms. The evolution of due diligence is certainly not the only instance of this transformation. Others include the questions of crimes of state, peremptory norms, obligations erga omnes and aggravated responsibility.

The overall point arising from the two foregoing observations, with the many conceptual problems they raise, is simple but important. The need for theory arises from a close, patient, and modest examination of actual practice. Such practical grounding, whether it is the practice of international courts and tribunals or some other parcel of reality, is perhaps the only guarantee that theoretical inquiry will be more than a mere self-referential game.

[51] See above section 3.2.3.

[52] From the perspective of domestic law categories, this transition would make international law less reliant on the form of private law (as once argued by Hersch Lauterpacht) and more on public law categories. See Anne Peters, 'Transnational Law Comprises Constitutional, Administrative, Criminal and Quasi-private Law', in Pieter Bekker/Rudolf Dolzer/Michael Waibel (eds), *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (Cambridge: CUP 2010), 154–173.

Downloaded from https://academic.oup.com/book/39708/chapter/350384935 by University of Melbourne user on 04 February 2024

10
Due Diligence in International Climate Change Law

Lavanya Rajamani[*]

1. Introduction

Climate change, characterised as the 'defining issue of our age',[1] is a complex, polycentric, and seemingly intractable policy challenge.[2] The international community has been grappling with this challenge since the late 1980s. During this time parties have negotiated three instruments—the 1992 Framework Convention on Climate Change (FCCC),[3] the 1997 Kyoto Protocol,[4] and the 2015 Paris Agreement[5]—countless decisions of parties, and several political agreements. They have also engaged in considerable innovation and experimentation in response to evolving geo-political imperatives, increasing scientific certainty, and gathering popular and political salience.

The 1992 FCCC lays out a broad framework, and guiding principles to regulate climate change; the 1997 Kyoto Protocol establishes binding substantive obligations of result (Greenhouse Gas (GHG) mitigation targets and timetables for developed countries); and the 2015 Paris Agreement lays down procedural obligations, and obligations of conduct, in relation to GHG mitigation and transparency for all parties. The evolution of the climate change regime from the 1997 Kyoto Protocol to the 2015 Paris Agreement charts a course from narrow coverage (of

[*] I am grateful to the editors of this book for their helpful feedback, to Jutta Brunnée for her incisive comments that have fundamentally shaped the contours of this chapter, and to Bhuvanyaa Vijay for her excellent research assistance.

[1] United Nations Secretary General Ban Ki-moon, 'Opening Remarks at 2014 Climate Summit', 23 September 2014, available at: https://www.un.org/sg/en/content/sg/speeches/2014-09-23/opening-remarks-2014-climate-summit (accessed 18 June 2019).

[2] See generally Daniel Bodansky/Jutta Brunnée/Lavanya Rajamani, *International Climate Change Law* (Oxford: OUP 2017), 1–34.

[3] United Nations Framework Convention on Climate Change (FCCC), 9 May 1992, 1771 UNTS 107.

[4] Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, 2303 UNTS 162.

[5] United Nations, FCCC, Decision 1/CP.21: Adoption of the Paris Agreement in the Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015, 29 January 2016, FCCC/CP/2015/10/Add.1, Annex.

Lavanya Rajamani, *Due Diligence in International Climate Change Law* In: *Due Diligence in the International Legal Order*. Edited by: Heike Krieger, Anne Peters, and Leonhard Kreuzer, Oxford University Press (2020). © The Several Contributors.
DOI: 10.1093/oso/9780198869900.003.0010.

Downloaded from https://academic.oup.com/book/39708/chapter/350385923 by University of Melbourne user on 18 March 2024

a limited number of developed countries) and deep (stringent) commitments to broad (universal) coverage and shallow commitments.

As the regime has evolved, parties have embraced, with ever greater conviction, procedural obligations, and obligations of conduct, thus privileging greater flexibility and autonomy for all parties and permitting increased dynamism in the regime. The emphasis on procedural obligations, and obligations of conduct, and the expanding terrain of flexibility and autonomy for states, has created greater scope for 'due diligence' to play a role in international climate change law. Obligations of conduct and 'due diligence' are closely linked,[6] in that due diligence—characterised as an 'obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result'[7] provides the standard of conduct for such obligations. Due diligence potentially has differing normative quality and functions depending on the context.[8] In the context of international climate change law, due diligence depending on the specific treaty provision from which it emerges could be a normative expectation,[9] an obligation,[10] or a standard. In so far as these treaty provisions and the rules developed thereunder provide specific benchmarks to guide the normative expectation or obligation of due diligence from parties, they contribute to creating a standard for due diligence in the climate change regime. Thus, for instance, the 2018 Paris Rulebook[11] elaborates the Paris Agreement's procedural obligations and obligations of conduct, from which the normative expectation of due diligence emerges, and in so doing contributes towards a due diligence standard for states.

The turn towards procedural obligations (and away from substantive obligations) and towards obligations of conduct (and away from obligations of result) in the climate change regime places considerable demands on due diligence to deliver on the ambition and goals of the climate change regime. The extent to which it will do so depends, in part, on the extent to which a rigorous standard for due diligence is progressively developed, internalised, and implemented. The Paris Rulebook took a first step in this direction, but there is considerable discretion and constructive ambiguity, as we will see, in these rules, which leaves room for further concretisation of the due diligence standard in the climate change regime.

[6] ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS Reports 2011, 10, para. 111; drawing on ICJ, *Pulp Mills on the River Uruguay Case (Argentina v. Uruguay)*, Judgment of 20 April 2010, ICJ Reports 2010, 14, para. 187.

[7] Ibid., ITLOS Seabed Disputes Chamber, para. 110.

[8] Anne Peters/Heike Krieger/Leonard Kreuzer, 'Due Diligence in the International Legal Order: Dissecting the Leitmotif of Current Accountability Debates', chapter 1 of this book, section 4.

[9] See, e.g., Paris Agreement, 2015 (n. 5), art. 4.2.

[10] See, e.g., Kyoto Protocol, 1997 (n. 4), art. 3.2.

[11] The full set of decisions agreed to in Katowice is available at: https://unfccc.int/process-and-meetings/the-paris-agreement/paris-agreement-work-programme/katowice-climate-package (accessed 18 June 2019).

Downloaded from https://academic.oup.com/book/39708/chapter/350385923 by University of Melbourne user on 18 March 2024

There are numerous primary rules in international climate change law. These include both substantive and procedural obligations, and obligations of conduct that engage due diligence ('best efforts') in delivering results, and obligations of result that require delivery of results. This chapter first identifies the central substantive and procedural obligations, and obligations of conduct and result, in international climate change law. These obligations provide the normative framework for the exercise of due diligence by states in addressing climate change. This chapter next addresses the nature and extent—the standard—of due diligence required of states in international climate change law. There are numerous factors influencing the nature and extent of due diligence required of states in international climate change law. These include: the objective, purpose, and goals of the climate change regime; the discretion permitted to parties in the climate change regime; differentiation in the climate change regime; the nature and degree of harm that would be suffered in the absence of due diligence; and, good faith. Each of these will be explored in turn. This chapter concludes with reflections on the promise and perils of relying on due diligence to deliver on the ambition of the climate change regime.

A few caveats. This chapter only explores key obligations of conduct, and due diligence, in relation to GHG mitigation commitments, rather than in relation to adaptation and the provision of support, to which due diligence requirements could also apply. And, finally, this chapter explores specific elements of due diligence captured in international climate change law, while assuming that elements arising in general international law and international environmental law, apply in tandem, but are covered in other chapters.

2. The Normative Framework for Due Diligence in International Climate Change Law

Due diligence acquires specific content in different areas of international regulation, including through multilateral environmental agreements in international environmental law.[12] The relevant agreements in the international climate change regime are the 1992 FCCC, 1997 Kyoto Protocol, and the 2015 Paris Agreement.

2.1 Framework Convention on Climate Change (FCCC) (1992)

The 1992 FCCC puts in place the framework for climate change regulation. It identifies principles central to addressing climate change, including the principle of common but differentiated responsibilities, and establishes both substantive and

[12] International Law Association (ILA), Study Group on Due Diligence in International Law, Second Report, 12 July 2016.

Downloaded from https://academic.oup.com/book/39708/chapter/350385923 by University of Melbourne user on 18 March 2024

procedural obligations[13] and obligations of conduct and of result,[14] some of which apply to all parties, and others to developed countries alone.

The FCCC Article 4.1 identifies substantive obligations for 'all Parties', as for instance to formulate and 'implement' national and regional programmes to mitigate climate change and facilitate adaptation to climate change. It also identifies several procedural obligations for all states. FCCC Article 4.1 requires 'all Parties' to develop and submit national inventories of their GHGs; communicate information related to implementation of their GHG mitigation and adaptation programmes; and take climate change considerations into account, to the extent feasible, in their relevant social, economic, and environmental policies. Further, FCCC Article 4.1 requires parties to 'cooperate' in relation to adaptation to the impacts of climate change; technology development, application, and transfer; conservation and enhancement of sinks of GHGs; scientific and technological research;[15] and education, training, and public awareness.[16] These substantive and procedural obligations apply to 'all Parties' but parties are allowed to take 'into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances' in fulfilling their obligations.[17]

FCCC Article 12, a key procedural obligation, requires 'each Party' to provide information on national inventories 'to the extent its capacities permit', and efforts to implement the Convention and achieve its objective. The phrase 'to the extent its capacities permit' introduces flexibility into the performance of these obligations. Moreover, this obligation is explicitly differentiated in its application in that the frequency of submissions differs for developed, developing, and least developed countries. The Conference of Parties has since adopted decisions containing detailed guidance on national communications from developed and developing countries, including on the extent of flexibilities permitted.[18]

[13] For a full and fascinating exposition on this under-theorised area see Jutta Brunnée, 'Procedure and Substance in International Environmental Law', *Recueil des Cours de l'Académie de Droit International de la Haye* 405 (2020), 77–240.

[14] For a clarificatory discussion on obligations of conduct and result see Pierre-Marie Dupuy, 'Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility', *European Journal of International Law* 10 (1999), 371–385, at 375.

[15] See also FCCC, 1992 (n. 3), art. 5.

[16] Ibid., art. 6.

[17] Ibid., art. 4.1 chapeau.

[18] See, e.g., United Nations, FCCC, Decision 4/CP.5: Guidelines for the preparation of national communications by Parties included in Annex I to the Convention, Part II: UNFCCC reporting guidelines on national communications, FCCC/CP/1999/6/Add.1, 2 February 2000, 8; United Nations, FCCC, The Marrakesh Accords, Decision 22/CP.7: Guidance for the preparation of the information required under Article 7 of the Kyoto Protocol, FCCC/CP/2001/13/Add.3, 21 January 2002, 14.

Downloaded from https://academic.oup.com/book/39708/chapter/350385923 by University of Melbourne user on 18 March 2024

The 2010 Cancun Agreements enhanced the frequency[19] as well as review of these reports.[20]

These FCCC obligations, whether substantive and procedural, whether applicable uniformly to 'all Parties' or differently to different groups of parties, are obligations of result, in that, the obligation is to submit national inventories and provide information on implementation, not merely to 'exercise best possible efforts' to do so.

In addition to these FCCC obligations applicable to 'all Parties', the FCCC contains a substantive obligation, characterised as a 'quasi-target',[21] requiring each developed country, listed in Annex I, to take policies and measures on GHG mitigation 'with the aim of returning individually or jointly' to their 1990 levels of GHGs.[22] This substantive obligation to take policies and measures on GHG mitigation is matched with an obligation of conduct in relation to these policies and measures in that developed countries are required to 'aim' to return to their 1990 levels of GHG emissions, and thus are obliged to exercise best possible efforts to reach this level rather than obliged to achieve it.[23]

2.2 Kyoto Protocol (1997)

The Kyoto Protocol establishes substantive GHG mitigation obligations, collective and individual, for developed countries set to timetables,[24] backed by procedural obligations in relation to reporting and review,[25] and a compliance system.[26] These GHG mitigation obligations are internationally negotiated rather than nationally determined, and are thus prescriptive, but the Protocol provides flexibility to parties in how they meet their targets, in particular by permitting them to use market

[19] United Nations, FCCC, Decision 1/CP.16: The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, FCCC/CP/2010/7/Add.1, 15 March 2011, paras 40 and 60 requiring biennial reports from developed countries and biennial update reports from developing countries, respectively.

[20] Ibid., para. 63 establishing international consultations and analysis of biennial reports from developing countries, and paras 44 and 46 establishing international assessment and review of GHG emissions and removals related to targets of developed countries.

[21] Daniel Bodansky, 'The United Nations Framework Convention on Climate Change: A Commentary', *Yale Journal of International Law* 18 (1993), 451–558.

[22] FCCC, 1992 (n. 3), art. 4.2(a), (b).

[23] See Christina Voigt, 'State Responsibility for Climate Change Damage', *Nordic Journal of International Law* 77 (2008), 1–22, at 6; see also, Benoit Mayer, 'Obligations of Conduct in the International Law on Climate Change: A Defence', *Review of European, Comparative and International Environmental Law* 27 (2018), 130–140, at 134.

[24] Kyoto Protocol, 1997 (n. 4), art. 3.

[25] Ibid., arts 5, 7, 8; elaborated through a series of decisions taken by the Conference of Parties, see United Nations, FCCC, The Marrakesh Accords, Decisions 2-24/CP.7, FCCC/CP/2001/13/Add.1-3, 21 January 2002.

[26] Kyoto Protocol, 1997 (n. 4), art. 18; United Nations, FCCC, The Marrakesh Accords, Decision 24/CP.7: Procedures and mechanisms relating to compliance under the Kyoto Protocol, FCCC/CP/2001/13/Add.3, 21 January 2002, 64.

Downloaded from https://academic.oup.com/book/39708/chapter/350385923 by University of Melbourne user on 18 March 2024

mechanisms.[27] These obligations, substantive and procedural, are obligations of result in that parties are obliged to deliver, whether in relation to GHG mitigation or reporting obligations, rather than exercise best possible efforts to do so. In relation to GHG mitigation targets, this is underscored by the requirement placed on developed countries to make 'demonstrable progress' by 2005 in achieving their targets,[28] and in the consequences identified in the Marrakesh Accords for non-compliance with the established targets.[29]

2.3 Paris Agreement (2015)

The climate regime took a decisive turn towards procedural obligations in the 2015 Paris Agreement. This turn can be sourced to several political and design considerations. The Kyoto Protocol's GHG mitigation targets did not cover either developing countries that were excluded from mitigation commitments or the United States that had rejected the Kyoto Protocol in 2001. As such, the Kyoto Protocol's first commitment period targets covered just 24% of 2010 global GHG emissions,[30] and its second commitment period, which attracted even fewer countries, covers less than 12% of 2012 global GHG emissions.[31] Most developing countries, however, were reluctant to undertake substantive obligations of result, and most developed countries, in particular the US, were keen to ensure parity in the legal character of commitments across developed and developing countries. These developments were matched by a gathering momentum towards greater autonomy and flexibility for all countries. The choice before parties was to 'level up' GHG commitments for all countries to Kyoto-style substantive obligations of result or 'level down' commitments for all countries to the procedural obligations (to submit mitigation actions) and obligations of conduct (in achieving these self-selected mitigation actions) developing countries had under the Cancun Agreements. Given the momentum towards greater autonomy and flexibility for states, levelling down commitments to procedural obligations, and obligations of conduct, proved the more politically palatable option.

The central obligation relating to GHG mitigation in the Paris Agreement, contained in Article 4.2, is a procedural obligation applicable to all parties. Each party is to 'prepare, communicate and maintain' successive nationally determined contributions (NDC) that it intends to achieve. Parties are also obliged to 'pursue domestic mitigation measures, with the aim of achieving the objectives of such

[27] Kyoto Protocol, 1997 (n. 4), arts 6, 12, 17.
[28] Ibid., art. 3.2.
[29] FCCC, Marrakesh Accords, Decision 24/CP.7: Procedures/mechanisms relating to compliance under Kyoto Protocol, 2002 (n. 26), Annex, Section XV, para. 5.
[30] Igor Shishlov/Romain Morel/Valentin Bellassen, 'Compliance of the Parties to the Kyoto Protocol in the First Commitment Period', *Climate Policy* 16 (2016), 768–782.
[31] This includes the emissions share of Australia, Belarus, EU-28, Iceland, Kazakhstan, Norway, Switzerland, Ukraine in 2010, excluding LULUCF. See World Resources Institute (WRI), 'CAIT Climate Data Explorer', 2019, available at: https://cait.wri.org/ (accessed 18 June 2019).

Downloaded from https://academic.oup.com/book/39708/chapter/350385923 by University of Melbourne user on 18 March 2024

contributions'. The obligation to communicate an NDC is a binding procedural obligation of result, in that parties are obliged ('shall') to submit such NDCs in the stipulated timeframe. The obligation to pursue domestic measures with the aim of achieving the objectives of the NDC is a binding substantive obligation in that parties are obliged ('shall') to pursue domestic measures. However parties are required only to 'aim' at achieving the objectives of their NDCs through their domestic measures, and not obliged to meet the objectives, targets, or goals identified in their NDCs. This is an obligation of conduct, an obligation to exercise best efforts,[32] and is subject to due diligence requirements.[33]

Article 4.2 is set against the backdrop of Article 3, a cross-cutting provision, that requires 'all Parties' 'to undertake and communicate ambitious efforts' and places an expectation on parties that their 'efforts' 'will represent a progression over time (…)'. These are both substantive ('undertake') and procedural ('communicate'), and obligations of conduct ('efforts'), leaving discretion to parties in relation to the nature of these 'efforts' and how these will represent a 'progression' over time. This too demands 'due diligence' from states. The expectation of 'progression' is complemented with an expectation that NDCs will reflect a party's 'highest possible ambition', their 'common but differentiated responsibilities in light of different national circumstances',[34] and 'leadership' from developed countries.[35]

These normative expectations albeit framed in predictive ('will') rather than mandatory ('shall') language, exercise considerable normative pull on parties, and perform multiple functions. In relation to the procedural obligation identified in Article 4.2 to 'prepare, communicate and maintain' NDCs, these expectations import substantive and qualitative elements into what on the face of it appears to be a purely procedural obligation. In framing and implementing their NDCs, parties must factor in these substantive expectations. In relation to the obligation of conduct identified in Article 4.2 to pursue domestic measures with the aim of meeting the objectives of the NDCs, these expectations provide regime-specific markers for due diligence.[36] The domestic measures parties undertake in order to meet the objectives of their NDCs are also expected to factor in these expectations, and the extent to which they do so will determine the extent to which they have demonstrated due diligence.

It is worth noting, however, that these terms—'progression', 'highest possible ambition', and 'leadership'—are neither defined nor explained in the Paris Agreement

[32] See Lavanya Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics', *International and Comparative Law Quarterly* 65 (2016), 493–514; Daniel Bodansky, 'The Legal Character of the Paris Agreement', *Review of European, Comparative and International Environmental Law* 25 (2016), 142–150; Ralph Bodle/Sebastian Oberthür, 'The Legal Form of the Paris Agreement and Nature of its Obligations', in Daniel Klein/María Pía Carazo/Meinhard Doelle/Jane Bulmer/Andrew Higham (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford: OUP 2017), 91–103.

[33] See also Mayer, 'Obligations of Conduct in the International Law of Climate Change' 2018 (n. 23), 130–140.

[34] Paris Agreement, 2015 (n. 5), art. 4.3.

[35] Ibid., art. 4.4.

[36] I am grateful to Jutta Brunnée for pointing this out to me.

Downloaded from https://academic.oup.com/book/39708/chapter/350385923 by University of Melbourne user on 18 March 2024

or the 2018 Paris Rulebook, and thus lend themselves to a range of possible interpretations. The Paris Rules require parties to provide information when submitting their NDCs on how they have addressed the normative expectations of progression, highest possible ambition, common but differentiated responsibilities and leadership from developed countries.[37] In the process of negotiating the Katowice rules, a direct trade-off surfaced between the level of detail in the rules, and the autonomy that states enjoy. The more detailed the rules the less discretion states have, and vice versa. For instance, to the extent that parties are able to elaborate a benchmark against which 'progression' or 'highest possible ambition' can be measured, states have less autonomy to define these for themselves. Many parties therefore resisted detailed prescriptive rules to operationalise the Paris Agreement, preferring instead to leave the constructive ambiguity in the Paris Agreement's terms untouched, or to use discretionary language, in effect leaving operational choices and details to states. As a result, the Rules privilege self-identified benchmarks for 'progression', 'highest possible ambition', and 'leadership', and self-justified and self-serving narratives around the extent to which parties have complied with these. In general, the more detailed and prescriptive the rules, the more concrete the standard for due diligence. Paradoxically, however, the more concrete the standard for due diligence in the regime, the less pivotal the normative expectation of due diligence is in guiding state behaviour. If the rules are concrete, parties have little option but to comply with them, yet it is where there is discretion or leeway, that the expectation of due diligence can be most influential in disciplining it.

The multiple functions that particular provisions play, as discussed above, hints at another interesting dimension of the Paris Agreement—there is dynamic interplay between procedural obligations and substantive obligations, between obligations of result and obligations of conduct (with corresponding due diligence requirements). Parties are required to provide information with their NDCs to facilitate the clarity, transparency, and understanding of their NDCs,[38] to account for their NDCs,[39] and to provide information necessary to track progress made in implementing and achieving their NDCs.[40] These are obligations of result, not conduct, in that parties are obliged to provide the information required, and to account for their NDCs, not merely to exercise their best efforts to do so. However, these obligations complement the obligation of conduct parties have to adopt domestic measures aimed at meeting the objectives of their NDCs. This obligation of conduct parties have is a central defining element of the Paris Agreement. The

[37] United Nations, FCCC, Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on the third part of its first session, held in Katowice from 2 to 15 December 2018, Decision 4/CMA.1: Further guidance in relation to the mitigation section of decision 1/CP.21, Advance version, FCCC/PA/CMA/2018/3/Add.1, 19 March 2019, 11, Annex I, para. 6.
[38] Paris Agreement, 2015 (n. 5), art. 4.8.
[39] Ibid., art. 4.13.
[40] Ibid., art. 13.7.

Downloaded from https://academic.oup.com/book/39708/chapter/350385923 by University of Melbourne user on 18 March 2024

informational requirements placed on parties in relation to their NDCs improves the quality of the knowledge base that, in turn, will help the regime determine if parties are exercising their best efforts to meet the objectives of their NDCs.

The Paris Agreement, and the Paris Rulebook, relies on procedural obligations, obligations of conduct, normative expectations, and good faith to take the place of substantive obligations of result. The normative expectation of due diligence, by giving life to the obligations of conduct, shaping expectations that parties will deliver on their NDCs, and bolstering good faith, finds its place in the interstices of the normative architecture of international climate change law.

3. Factors that Influence the Nature and Extent of Due Diligence Required of States in International Climate Change Law

The nature and extent of due diligence required of states varies across different areas of international law, and in differing contexts.[41] As the International Tribunal for the Law of the Sea (ITLOS) noted in the *Seabed Mining Advisory Opinion*, '"due diligence" is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity.'[42] In the field of international climate change law, the nature and extent of due diligence required from states is influenced and shaped by several factors, including the factors outlined in the following.

3.1 Objective, Purpose, and Goals of the Climate Change Regime

The objective, purpose, and goals of the climate change regime have been progressively crystallised from FCCC Article 2 to Paris Agreement Article 2. Article 2.1 Paris Agreement, identifies the goal of '[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, …'. This long-term temperature goal builds on the FCCC objective (FCCC Article 2) of 'prevent[ing] dangerous anthropogenic interference with the climate system' by setting out, in terms of avoided temperature rise, the limits of what is 'dangerous'. It further builds on the FCCC objective by indicating, in terms of avoided

[41] ILA, Study Group on Due Diligence, Second Report 2016 (n. 12).

[42] ITLOS, *Responsibilities and Obligations in the Area Opinion* (n. 6), para. 117. For a discussion of the link between risk and due diligence in the context of the *Alabama Claims* case, see Jorge E. Viñuales, 'Due Diligence in International Environmental Law', chapter 7 of this book, section 2.1.

Downloaded from https://academic.oup.com/book/39708/chapter/350385923 by University of Melbourne user on 18 March 2024

temperature, the level at which concentrations of GHGs in the atmosphere must be stabilised.[43] In order to achieve the long-term temperature goal, Article 4.1 requires parties to 'aim' to reach global peaking of GHG emissions as soon as possible, and to undertake 'rapid reductions' thereafter so as to achieve a balance between GHG emissions by sources and removals by sinks—popularly characterised as 'net zero'—in the second half of this century.

The purpose of the Paris Agreement, expressed in Article 2, is not limited to the long-term temperature goal. Article 2.1 lit. b) sets 'long term goals' for adaptation and resilience, and Article 2.1 lit. c) calls for financial flows to be reoriented, consistent with mitigation and adaptation objectives.

The FCCC, the Kyoto Protocol, and the Paris Agreement require parties to report on, and to varying degrees be accountable for, taking policies, measures, and actions in line with the objective, purpose, and goals of the regime. FCCC Article 12.1 lit. c), referred to earlier, requires parties to communicate information the party considers relevant to achieving the objective of the Convention. Kyoto Protocol Article 7 requires parties to incorporate in their national communications information demonstrating compliance with their GHG targets. Paris Agreement Article 14 establishes a global stock take to 'assess the collective progress towards achieving the purpose' of the Paris Agreement. These provisions seek to instil transparency and accountability for aligning national actions, policies, and commitments with the goals of the climate change regime. Such provisions, among other context-setting provisions,[44] suggest that the nature and extent of due diligence required of states must be guided by the objective, purpose, and goals of the climate change regime.

3.2 Discretion Permitted to Parties in the Climate Change Regime

The international climate change negotiations, politically divisive and deeply discordant as they are, have often reached agreement by establishing primary rules that permit parties considerable discretion in application. This is a cross-cutting feature of the climate change regime, and extends across substantive and procedural obligations, as well as obligations of conduct and result. For instance, the chapeau of FCCC Article 4.1 permits parties to 'tak[e] into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances (…)'. Other FCCC provisions qualify requirements placed on parties with terms such as 'to the extent feasible'[45]

[43] Jacob Werksman/Lavanya Rajamani, 'The Legal Character and Operational Relevance of the Paris Agreement's Temperature Goal', *Philosophical Transactions A* 376 (2018).
[44] See, e.g., Paris Agreement, 2015 (n. 5), preambular recital 3, arts 3, 4.1.
[45] FCCC, 1992 (n. 3), art. 4.1(f).

Downloaded from https://academic.oup.com/book/39708/chapter/350385923 by University of Melbourne user on 18 March 2024

and 'to the extent its capacities permit'.[46] Paris Agreement provisions also contain such qualifications, in particular the term 'as appropriate'.[47] Discretion is also available to developed countries in the manner of performance of their commitments. For instance, in relation to their FCCC commitments on technology, a substantive obligation of conduct, developed countries are required to take 'all practicable steps', 'as appropriate'.[48] And, in relation to their Kyoto commitments to implement policies and measures, developed countries are permitted to choose these 'in accordance with its national circumstances'.[49]

More broadly, the climate change regime has evolved from a more to less prescriptive regime. The Kyoto targets were internationally negotiated and subject to obligations of result while the Paris Agreement's NDCs are self-selected, and subject to obligations of conduct in relation to their objectives. The Paris Agreement's normative expectations in relation to these self-selected contributions ('progression', 'highest possible ambition', and 'leadership') serve to provide regime-specific markers for the due diligence parties must exercise in relation to their contributions. Any assessment of the due diligence required of states thus must be guided not just by the discretion permitted to states more broadly in the climate change regime, but also the elaborate tapestry of normative expectations placed on states.[50]

3.3 Differentiation in the Climate Change Regime

The International Law Commission recognises that one of the factors in determining the standard of due diligence required of a state is its 'economic level' or capacity, but notes however that 'a State's economic level cannot be used to dispense the State from obligation under the present Articles'.[51] Differentiation in the climate change regime, however, is a many-headed beast, and is based not just on disparities in economic levels but also on differences in relation to responsibilities for causing climate harm. Arguably, the standard of due diligence in relation to specific obligations of conduct placed on a state in the international climate change regime is shaped by the distinctive content that differentiation has acquired in the climate change regime.

[46] Ibid., art. 12.1(a).
[47] See, e.g., Paris Agreement, 2015 (n. 5), arts 5.1, 7.9, 8.3.
[48] FCCC, 1992 (n. 3), art 4.5.
[49] Kyoto Protocol, 1997 (n. 4), art. 2.1(a).
[50] See Christina Voigt, 'The Paris Agreement: What Is the Standard of Conduct for Parties?', *Questions of International Law* 26 (2016), 17–28, in relation to 'highest possible ambition'.
[51] United Nations, Report of the International Law Commission (ILC) on the work of its fifty-third session, 23 April–1 June and 2 July–10 August 2001, Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, UN GAOR 56th Sess., Supp. No. 10, A/56/10, 2001, art. 3, para. 13.

Downloaded from https://academic.oup.com/book/39708/chapter/350385923 by University of Melbourne user on 18 March 2024

The standard of due diligence in the climate change regime is shaped by the resources and capacities that states have. The climate regime has, since its inception, recognised the vast disparities between developed and developing countries, and differentiated between them with respect to implementation. This takes the form of differentiation in relation to stringency or timing of implementation, such as delayed compliance schedules,[52] permission to adopt subsequent base years,[53] delayed reporting schedules,[54] flexibility in implementation,[55] and softer approaches to non-compliance;[56] and, provisions that differentiate among countries in relation to assistance, i.e., commitments to provide, and eligibility to receive, financial[57] and technological assistance.[58] Such flexibilities and support for developing countries form a fundamental part of the normative architecture of the climate change regime, and thus shape the standard of due diligence required of states in relation to obligations of conduct in the climate regime.

The standard of due diligence in the climate change regime is also, arguably, shaped by the different contributions of states to climate harm. The principle of common but differentiated responsibilities and respective capabilities, the principled basis for differentiation in the climate change regime, differentiates between states both in relation to capacities ('respective capabilities') as well as to contributions to climate harm ('responsibilities').[59] If the differentiation authorised by this principle were solely due to differences in capacities, then the use of the term 'respective capabilities' would be superfluous.[60] Thus the climate regime contains differentiation between developed and developing countries in relation to the central obligations of the regime. The FCCC's GHG stabilisation targets,[61] and the Kyoto Protocol's GHG mitigation targets,[62] apply to developed countries alone. And although the Paris Agreement, by deft sleight of hand, introduced self-differentiation in relation to mitigation, and thus side-stepped the issue of prescriptive differentiation in central obligations, it recognised the importance of the Common but Differentiated Responsibilities and Respective Capabilities (CBDRRC) principle, and the 'leadership' role of developed countries.[63] Article 2.2, a cross-cutting provision, states that the Paris Agreement 'will be implemented to reflect equity and the

[52] See, e.g., Kyoto Protocol, 1997 (n. 4), art. 3.5.
[53] See, e.g., FCCC, 1992 (n. 3), art. 4.6.
[54] Ibid., art. 2.5.
[55] See, e.g., Paris Agreement, 2015 (n. 5), art. 13.2.
[56] See, e.g., FCCC, Marrakesh Accords, Decision 24/CP.7: Procedures/mechanisms relating to compliance under Kyoto Protocol, 21 January 2002 (n. 26).
[57] See, e.g., Paris Agreement, 2015 (n. 5), arts 9.1, 9.3; FCCC, 1992 (n. 3), art. 4.3.
[58] See, e.g., Paris Agreement, 2015 (n. 5), art. 10.6.
[59] This is disputed, however, see for a full discussion Lavanya Rajamani, 'Common but Differentiated Responsibilities', in Ludwig Krämer/Emanuela Orlando (eds), *Principles of Environmental Law: Elgar Encyclopedia of Environmental Law series* (Cheltenham: Edward Elgar, vol. VI, 2018), 291–302.
[60] This interpretation is bolstered by FCCC, 1992 (n. 3), recital 3.
[61] Ibid., arts 4.2(a), (b).
[62] Kyoto Protocol, 1997 (n. 4), art. 3.
[63] Paris Agreement, 2015 (n. 5), arts 4.4, 4.1.

Downloaded from https://academic.oup.com/book/39708/chapter/350385923 by University of Melbourne user on 18 March 2024

principle of common but differentiated responsibilities and respective capabilities, in light of different national circumstances'. The qualification of the CBDRRC principle by a reference to 'national circumstances' introduced in the Paris Agreement, introduces a dynamic element to the interpretation of the principle—as national circumstances evolve, so too will the common but differentiated responsibilities of states.[64] However, this clause does not seek to shift the bases for differentiation in the climate change regime. Thus differentiation based on contributions to environmental harm, is also, arguably, part of the normative architecture of the climate change regime, and influences the standard of due diligence in relation to the obligations of conduct it contains.

It could be argued that while differences in contributions to climate harm may affect the responsibilities states have, it should not shape the standard of conduct that states have in fulfilling those responsibilities. Two responses may be offered to this intuitively attractive argument. First, this assumes that the conduct of a state in assuming an NDC is distinguishable from its conduct in fulfilling it. However, both the NDCs parties' take on, and the effort that parties will make to implement their NDCs will be shaped by their national circumstances, constraints, and priorities. These circumstances, include their contributions to climate harm. The extent to which states prioritise climate concerns over other pressing concerns such as poverty eradication, and the resources they will devote to implementation of NDCs, will be driven, even if not expressly, by their respective contributions to climate harm, and their perceptions of fairness. Second, the resources and capacities states have are directly linked to their GHG emissions.[65] The lines between assuming NDCs and fulfilling them, and between capacities and contributions to climate harm are drawn in the sand. Both capacities and contributions to climate harm thus shape the standard of due diligence required of states in relation to the obligations of conduct in the climate regime.

If the standard of due diligence, thus influenced, were to be applied to the obligation of conduct in Paris Agreement Article 4.2, the efforts of developing countries in meeting the objectives of their NDCs would be judged both in relation to their capacities as well as their relative contributions to climate harm. There are of course considerable operational challenges in doing so. There are many different ways of assessing contributions of parties to climate harm (cumulative, per capita etc.), and many different time frames that are plausibly argued as relevant (1850 onwards, 1990 onwards etc.). Each of these yields a different set of considerations in relation to burden sharing among states. For instance, cumulative emissions between 1850 and 2012 for Annex I countries is about 2.3 times that of non-Annex I countries,[66]

[64] See Rajamani, 'Ambition and Differentiation' 2016 (n. 32), 493–514.

[65] See Gail Cohen/João Tovar Jalles/Prakash Loungani/Ricardo Marto, 'The Long-Run Decoupling of Emissions and Output: Evidence from the Largest Emitters', *IMF Working Papers* 18/56, 13 March 2018.

[66] CO_2 emissions from Annex I countries from 1850 to 2014 are 957,536 $MtCO_2$ and from non-Annex I are 421,357 $MtCO_2$. For data for Cumulative Total CO_2 Emissions Excluding Land-Use Change and Forestry from 1850 to selected years to 2014, see WRI, 'CAIT Climate Data Explorer' 2019 (n. 31).

Downloaded from https://academic.oup.com/book/39708/chapter/350385923 by University of Melbourne user on 18 March 2024

and per capita CO_2 emissions for most developing countries, for instance, India's at 1.8 tons, remains significantly below the US average of 15.7 tons, and even that of the EU's at 6.9 tons.[67] Yet, developing country emissions are now 60% of the total global CO_2 emissions.[68] China's economy alone has grown more than ten-fold since 1990[69] and its emissions have quadrupled. Arriving at a subjective standard of due diligence for a particular state will first require an assessment of which factors, time frames, and approaches are relevant, and next, how these translate into a tailor-made standard for that state. These operational difficulties, however, do not detract from the interpretative forces that help determine the standard of due diligence in the climate change regime.

The pervasive and cross-cutting differentiation in favour of developing countries in the climate regime is thus a critical factor in determining the nature and extent of due diligence required of parties in relation to obligations of conduct such as in Paris Agreement's crucial Article 4.2.[70] However, it is worth factoring in that there has been a gradual dilution of differentiation in favour of developing countries over time, and thus the demands of due diligence in specific contexts should be progressively interpreted as more demanding. For instance, in relation to transparency, the Katowice rules phase in uniform reporting requirements on developed and developing countries in 2024,[71] and although it allows each developing country to determine if it needs flexibility in the application of a particular provision, developing countries are required to clarify their capacity constraints, and provide time-frames for improvements.[72] These rules ensure that over time the need for differentiation is diluted, the number of countries that avail special treatment declines,[73] and there is a push over time towards higher standards for developing countries.

More broadly, given the cross-cutting and pervasive nature of differentiation in the climate change regime, it could be argued that the regime reflects a highly contextual standard for due diligence. Admittedly the general rule is that 'if the primary rule does not explicitly concede a lesser expectation of due diligence from

[67] Jos Olivier/Jeroen Peters, 'Trends in Global CO_2 and Total Greenhouse Gas Emissions: 2018 Report', The Hague: PBL Netherlands Environmental Assessment Agency, 2018, available at: https://www.pbl.nl/sites/default/files/cms/publicaties/pbl-2018-trends-in-global-co2-and-total-greenhouse-gas-emissons-2018-report_3125.pdf (accessed 18 June 2019).

[68] Total CO_2 emissions from Annex I countries for 2014 are 12,927 $MtCO_2$ and from non-Annex I are 20,288 $MtCO_2$. See WRI, 'CAIT Climate Data Explorer' 2019 (n. 31).

[69] 'GDP by Country, Statistics from the World Bank, 1960–2017: China' available at: https://knoema.com/mhrzolg/gdp-statistics-from-the-world-bank?country=China (accessed 17 June 2019).

[70] ILA, Study Group on Due Diligence, Second Report 2016 (n. 12).

[71] United Nations, FCCC, Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on the third part of its first session, held in Katowice from 2 to 15 December 2018, Decision 18/CMA.1: Modalities, procedures and guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement, FCCC/PA/CMA/2018/3/Add.2, Advance version, 19 March 2019, 18, para. 3.

[72] Ibid., para. 6.

[73] Ibid., Annex, Section I. C, para. 6.

Downloaded from https://academic.oup.com/book/39708/chapter/350385923 by University of Melbourne user on 18 March 2024

developing states, an objective international standard is to be preferred'.[74] However, in the case of the climate change regime, even in the absence of explicit differentiation in a particular rule, the presence of cross-cutting provisions that recognise the need for differentiation in the implementation of the entire agreement render even facially neutral provisions, subject to differentiation. There are two such cross-cutting provisions in the Paris Agreement: Article 2.2 on the CBDRRC principle, discussed above; and Article 4.1 that qualifies the net-zero goal for parties with the phrase, 'on the basis of equity and in the context of sustainable development and efforts to eradicate poverty'.

3.4 The Nature and Degree of Harm that Would Be Suffered in the Absence of Due Diligence

In determining the due diligence required of states, the nature and degree of harm that would be suffered in the absence of due diligence by states or the 'risks involved in the activity'[75] are relevant factors. The International Law Commission notes that the standard for due diligence should be 'appropriate and proportional to the degree of risk of the transboundary harm'.[76] This builds on the *Alabama Claims* decision that due diligence ought to be exercised in 'exact proportion to the risks'.[77] The 'risks involved in the activity' also engage the precautionary principle, which falls within the scope of due diligence.[78] The ITLOS *Seabed Mining Advisory Opinion*, indeed, found the precautionary approach to be 'an integral part of the general obligation of due diligence'.[79] Viñuales explains that the duty of due diligence in relation to environmental harm is broader than the prevention principle in that it is not limited to harm of a certain magnitude (material harm or significant harm), rather even harm falling below this threshold of magnitude is governed by the duty of due diligence.[80] In a similar vein, Brunnée argues that, 'due diligence provides a bridge between the duty to prevent environmental harm, and the proposition that, even in the absence of "full scientific certainty", states must take precautionary measures to "prevent environmental degradation"'.[81] These elements

[74] ILA, Study Group on Due Diligence, Second Report 2016 (n. 12), 19; ITLOS, *Responsibilities and Obligations in the Area Opinion* (n. 6), para. 230.

[75] ITLOS, *Responsibilities and Obligations in the Area Opinion* (n. 6), para. 117.

[76] ILC, Draft Articles, 2001 (n. 51), commentary to art. 3, para. 11.

[77] *Alabama Claims of the United States of America against Great Britain*, Award of 14 September 1872, UNRIAA 29, 124–134, 129. See discussion by Viñuales, 'International Environmental Law', chapter 7 of this book, section 2.1.

[78] See discussion on scope of due diligence being broader than the prevention principle, by Viñuales, 'International Environmental Law', chapter 7 of this book, section 3.2.1.

[79] ITLOS, *Responsibilities and Obligations in the Area Opinion* (n. 6), para. 131.

[80] Ibid.

[81] Jutta Brunnée, 'ESIL Reflection Procedure and Substance in International Environmental Law Confused at a Higher Level?', *European Society of International Law Reflections*, vol. 5, issue 6 (June 2016), available at: https://esil-sedi.eu/?p=1344 (accessed 18 June 2019).

Downloaded from https://academic.oup.com/book/39708/chapter/350385923 by University of Melbourne user on 18 March 2024

of due diligence in general international law apply to the climate change regime's obligations of conduct. The risks of climate change far exceed the threshold of significant harm, and there is ever-increasing scientific certainty as to the existence of risk of significant harm.

The Intergovernmental Panel on Climate Change finds in its Fifth Assessment Report that 'the warming of the climate system is "unequivocal" ',[82] and in its Special Report on 1.5°C that 'human activities are estimated to have caused approximately 1.0°C of global warming above pre-industrial levels.'[83] The Intergovernmental Panel on Climate Change notes that 'many of the observed changes are unprecedented over decades to millennia'.[84] These changes 'have caused impacts on natural and human systems on all continents and across all oceans',[85] and, '[c]ontinued emission of [GHGs] will cause further warming and (…) increase[e] the likelihood of severe, pervasive and irreversible impacts'.[86] The Special Report on 1.5°C stresses that there are 'robust differences' in impacts between global warming of 1.5°C and 2°C.[87] The risks of 'irreversible' impacts is higher at higher levels of temperature increase.[88]

The enormous risk of potentially irreversible climate impacts at temperatures above 1.5°C suggests a correspondingly high standard of due diligence. But what role can a high standard of due diligence play in the context of the current wholly inadequate NDCs from parties?[89] The United Nations Environment Programme 2018 Emissions Gap Report finds that 'pathways reflecting current NDCs imply global warming of about 3°C by 2100, with warming continuing afterwards'.[90] And, that '[i]f the emissions gap is not closed by 2030, it is very plausible that the goal of a well-below 2°C temperature increase is also out of reach'.[91]

Admittedly, the duty of diligence, however demanding, does not amount to 'strict liability', and notwithstanding full exercise of due diligence, undesirable

[82] Intergovernmental Panel on Climate Change (IPCC), Synthesis Report of the IPCC Fifth Assessment Report (AR5), 'Climate Change 2014', 2014, available at: https://www.ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf, 2, SPM 1.1 (accessed 18 June 2019).

[83] Intergovernmental Panel on Climate Change, 'Global Warming of 1.5ºC', Summary for Policy Makers, 2018, available at: https://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf, 6 (accessed 18 June 2019).

[84] Intergovernmental Panel on Climate Change, Working Group I, 'Climate Change 2013: The Physical Science Basis', 2013, available at: http://www.climatechange2013.org/images/report/WG1AR5_SPM_FINAL.pdf, 4 (accessed 18 June 2019).

[85] IPCC, 2014 (n. 82), 6, para. SPM 1.3.

[86] Ibid., 8, para. SPM 2.

[87] IPCC, 2018 (n. 83), 9, para. B.1.

[88] Ibid., paras B.2.2, B.4.2.

[89] United Nations, FCCC, Synthesis report on the aggregate effect of INDCs, FCCC/CP/2016/2, 2 May 2016; United Nations, United Nations Environment Programme, Emissions Gap Report, 27 November 2018, available at: https://www.unenvironment.org/resources/emissions-gap-report-2018 (accessed 18 June 2019).

[90] UNEP, Emissions Gap Report 2018, 27 November 2018 (n. 89), Executive Summary, available at: https://wedocs.unep.org/bitstream/handle/20.500.11822/26879/EGR2018_ESEN.pdf?sequence=10, 4 (accessed 18 June 2019).

[91] Ibid.

Downloaded from https://academic.oup.com/book/39708/chapter/350385923 by University of Melbourne user on 18 March 2024

consequences may ensue.[92] However, the risk of calamitous climate impacts implies a high standard of due diligence for parties in arriving at their NDCs and implementing them, further bolstering the normative expectation of progression and highest possible ambition placed on parties in relation to their NDCs. It is only this that will reflect fealty to the letter and the spirit of the Paris Agreement.

3.5 The Expectation of Good Faith

A final factor influencing the standard of due diligence required of states in the international climate change regime is the expectation of good faith. The International Law Association notes that '[a] State cannot be considered to have acted diligently when the State has acted in bad faith or has knowingly refused to take any measures whatsoever'.[93]

Good faith, implicit in all treaties, generates expectations in relation to performance of treaty obligations that permeate through the entire climate change regime.[94] So for instance, although NDCs under the Paris Agreement are not subject to obligations of result, there is a good faith expectation that parties, will, nevertheless, take all appropriate steps—given the objective of the Paris Agreement and the risks involved in runaway climate change—to the extent their resources and capacities permit, to achieve their self-selected contributions. This expectation is bolstered by the Katowice rules identifying the information necessary to track the progress made by parties in implementing and achieving their NDCs.[95]

4. Conclusion

Due diligence assumes particular significance in the context of the emerging climate regime that is built on procedural obligations, obligations of conduct, normative expectations, and good faith. This regime places considerable demands on the norms of due diligence to deliver on the ambition and goals of the climate change regime. While due diligence offers some promise in this regard, obligations of conduct, and the requirements of due diligence that these place on states, cannot be asked to perform a task that only stringent substantive obligations of result can.

The exercise of due diligence in relation to the obligations of conduct in the climate change regime, in conjunction with rigorous implementation of the full gamut

[92] See discussion by Viñuales, 'International Environmental Law', chapter 7 of this book, section 2.1.
[93] ILA, Study Group on Due Diligence, Second Report 2016 (n. 12).
[94] ILA, Committee on Legal Principles Relating to Climate Change, Declaration of Legal Principles relating to Climate Change, Resolution 2/2014, arts 8, 9.
[95] FCCC, Decision 18/CMA.1: Modalities/procedures/guidelines for transparency framework under Article 13 of the Paris Agreement, 19 March 2019 (n. 71), Annex, Section I. C.

Downloaded from https://academic.oup.com/book/39708/chapter/350385923 by University of Melbourne user on 18 March 2024

of provisions of the climate change regime, does offer promise. The ambitious objective, purpose and goals of the climate regime, and the calamitous harm that will be suffered in the absence of due diligence demands a high standard of due diligence from states. Admittedly, the climate regime builds on self-determination—a central, defining and unifying feature of the Paris Agreement—and to varying degrees permits parties discretion, differentiation, and flexibility in their application. These could create a pull towards a standard of due diligence in relation to the fulfilment of their NDCs that is subjective, self-selected, and self-justified. However, there is progressive dilution of differentiation in the climate regime, and some forms of differentiation have the potential to assist parties in meeting their commitments. Much will depend on state practice that will emerge in the coming years, and the extent to which states engage in good faith interpretation and application of the standard for due diligence in international climate change law. To the extent that parties can be held (and/or hold themselves) to a high standard of due diligence in the discharge of their obligations of conduct under the climate regime, it may trigger an ever-increasing cycle of ambitious action, which could eventually meet the goals of the climate regime.

Downloaded from https://academic.oup.com/book/39708/chapter/350385923 by University of Melbourne user on 18 March 2024

Exhibit ZZC

712

No cover image available

The Oxford Handbook of International Environmental Law (2nd edn)

Lavanya Rajamani (ed.), Jacqueline Peel (ed.)

https://doi.org/10.1093/law/9780198849155.001.0001

Published: 2021 **Online ISBN:** 9780191883460 **Print ISBN:** 9780198849155

Search in this book

CHAPTER

45 Human Rights

John H. Knox

https://doi.org/10.1093/law/9780198849155.003.0045 Pages 784–C45.S15

Published: 08 December 2021

Abstract

This chapter examines the relationship between human rights and the environment, which has developed through the adoption and interpretation of many different national constitutions and laws, human rights treaties, and multilateral environmental agreements (MEAs). The development of what might be called 'environmental human rights law' has occurred in three main channels. First, efforts to achieve recognition of a human right to a healthy environment, while ineffective at the UN, have achieved widespread success at the national and regional levels. Second, some multilateral environmental instruments have incorporated human rights norms, especially rights of access to information, public participation, and remedy. Third, human rights tribunals and other monitoring bodies have 'greened' human rights law by applying a wide range of human rights to environmental harm. The chapter explains each of these paths of development before sketching potential lines of further development through recognition of the rights of nature and of future generations.

Keywords: international environmental law, human rights, right to life, right to health, access to information, access to justice

Subject: Environment and Energy Law, International Law, Law

Series: Oxford Handbooks

Collection: Oxford Handbooks Online

I. Introduction

Linkages between environmental protection and human rights depend on two premises: (a) the full enjoyment of many human rights, including the rights to life, health, and an adequate standard of living, depends on an environment that is healthy for human beings; and (b) the exercise of human rights, including the rights to information, participation in governance, and access to justice, helps to ensure that individuals and communities can advocate for and achieve satisfactory levels of environmental protection.

Downloaded from https://academic.oup.com/edited-volume/41336/chapter/352410885 by University of Melbourne user on 19 March 2024

In principle, this interdependent relationship between human rights and the environment could be recognized through inclusion of a right to a healthy environment in a global declaration or treaty. However, the 1948 Universal Declaration of Human Rights and the two International Covenants on human rights[1] preceded the modern environmental movement, and later efforts to persuade the United Nations (UN) to recognize the right have not been successful. Although Principle 1 of the 1972 Stockholm Declaration comes close to stating the right explicitly, the UN has declined to extend or even repeat its language.

The absence of a globally recognized human right to a healthy environment has not prevented the evolution of rights-based approaches to environmental protection, but it has meant that the evolution has occurred without the benefit of an overarching international legal framework or agreed normative touchstone. Instead, the relationship of human rights and the environment has developed through the adoption and
p. 785 interpretation of many different national constitutions and laws, human rights treaties, and ↳ multilateral environmental agreements. Remarkably, this disparate set of sources has produced a relatively consistent set of norms.

The development of what might be called 'environmental human rights law' has occurred in three main channels. First, efforts to achieve recognition of a human right to a healthy environment, while ineffective at the UN, have achieved widespread success at the national and regional levels. Second, some multilateral environmental instruments have incorporated human rights norms, especially rights of access to information, public participation, and remedy. Third, human rights tribunals and other monitoring bodies have 'greened' human rights law by applying a wide range of human rights to environmental harm.

The following sections explain each of these paths of development. A concluding section describes recent signs that the approaches are converging, and sketches potential lines of further development through recognition of the rights of nature and of future generations.[2]

II. Recognition of the Human Right to a Healthy Environment

That environmental degradation interferes with the full enjoyment of human rights is not a new insight. In 1968, when the UN General Assembly decided to convene the first international environmental conference, it expressed concern about the effects of 'the continuing and accelerating impairment of the quality of the human environment ... on the condition of man, his physical, mental and social well-being, his dignity and his enjoyment of basic human rights'.[3] Four years later, the nations participating in the conference stated, in the Stockholm Declaration, that the natural as well as the human-made environment is essential to human well-being 'and to the enjoyment of basic human rights—even the right to life itself'.[4]

The recognition that a healthy environment is necessary to human well-being leads naturally to the idea that humans have a human right to a healthy environment, as they have human rights to other interests of fundamental importance to human dignity, freedom, and equality. So it is unsurprising that the first principle of the Stockholm Declaration refers to the 'right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being'.[5]

p. 786 What may be more surprising is that the UN has never elaborated, or even repeated, this recognition, despite several opportunities to do so. The 1987 report of the World Commission on Environment and Development (the Brundtland Commission), which urged the international community to adopt sustainable development as a goal, presented legal principles drafted by an experts group, the first of which declared that 'all human beings have the fundamental right to an environment adequate for their health and well-being'.[6] However, the 1992 UN Conference on Environment and Development did not include this language in the Rio Declaration.[7] Neither did later conferences on sustainable development in Johannesburg in 2002 and Rio de Janeiro in 2012. Similarly, in 1994 an independent expert on the Sub-Commission on Prevention

Downloaded from https://academic.oup.com/edited-volume/41336/chapter/352410885 by University of Melbourne user on 19 March 2024

of Discrimination and Protection of Minorities, a subsidiary body to the UN Human Rights Commission, presented draft principles on human rights and the environment that included 'the right to a secure, healthy and ecologically sound environment', but the Commission did not adopt the draft declaration.[8]

In contrast, the right has been widely recognized at the regional and national levels. In 1981, the African Charter on Human and Peoples' Rights became the first human rights treaty to include an environmental right, stating that 'all peoples' have the right to 'a general satisfactory environment favourable to their development'.[9] The 1988 San Salvador Protocol to the 1969 American Convention on Human Rights includes the right of everyone 'to live in a healthy environment' in its list of economic, social, and cultural rights.[10] The Aarhus Convention, concluded ten years later under the auspices of the UN Economic Commission for Europe, states in its first article that parties shall guarantee rights of information, participation, and remedy in environmental matters '[i]n order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being'.[11]

Recognition of the right has progressed even more rapidly and extensively at the national level. Beginning
p. 787 in the 1970s and continuing steadily to the present, at least 100 ↳ states have adopted explicit constitutional rights to a healthy environment.[12] Other countries have included the right in national legislation. In all, more than 150 countries have recognized the right in their constitutions or other national legislation, through judicial interpretation of other constitutional rights, or through ratification of regional agreements. Although some states have done little or nothing to implement it, courts in many countries apply the right as a basis for, among other things, reviewing government actions with environmental effects, protecting rights of information and participation, imposing substantive standards, and ordering legal remedies for environmental harm.[13]

III. Incorporation of Human Rights Norms in Multilateral Environmental Agreements

Multilateral environmental agreements almost never refer to human rights explicitly. The principal exception is the Paris Agreement of 2015, whose preamble states that 'Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of Indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity'. Although the preambular language does not have operational effect, it may help to spur governments to pay greater attention to human rights in their responses to climate change.[14]

More often, environmental instruments include language that implicitly reflects and supports human rights norms, especially rights of access to information, public participation, and effective remedies.[15] The most important global instrument in this respect is the 1992 Rio Declaration, Principle 10 of which states:

> Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning
> p. 788 the environment that is held by public authorities, ↳ including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Downloaded from https://academic.oup.com/edited-volume/41336/chapter/352410885 by University of Melbourne user on 19 March 2024

Two regional agreements codify the Principle 10 access rights and define the obligations of states in more detail. The Aarhus Convention, which has forty-seven parties in Europe and central Asia, sets out detailed requirements that its parties: provide environmental information (defined broadly) on request; update and disseminate environmental information; provide for public participation in environmental decision-making; and ensure that members of the public have access to legal remedies for failures to provide environmental information and facilitate public participation.[16] Its compliance committee, composed of independent experts, receives communications from members of the public, issues findings, and makes recommendations.[17]

In 2018, Latin American and Caribbean countries adopted the Escazú Agreement, which also includes detailed provisions requiring that its parties: ensure the public's right of access to environmental information; collect and disseminate environmental information; provide for public participation in environmental decision-making, and ensure access to remedies in relation not only to information and public participation, but also to 'any other decision, action or omission that affects or could affect the environment adversely or violate laws and regulations related to the environment'.[18]

The Escazú Agreement also requires each party to guarantee a 'safe and enabling environment for persons, groups and organizations that promote and defend human rights in environmental matters'.[19] The Conference of the Parties, at its first meeting, will determine the rules of a committee to support implementation and compliance.[20]

Although there is no global equivalent to the regional agreements implementing Principle 10, many multilateral environmental agreements encourage or require their parties to provide access to information and/or promote public participation on specified topics within the scope of the agreements.[21] In addition, in
p. 789 2010, the UN ↳ Environment Programme (UNEP) Governing Council adopted guidelines for national legislation implementing access to information, public participation, and access to justice in environmental matters.[22]

The 1992 Convention on Biological Diversity (CBD) provides linkages to a different set of human rights norms, concerning the Indigenous and tribal rights described in the following section.[23] The CBD encourages its parties to respect, preserve, and maintain Indigenous and traditional knowledge, innovations, and practices relevant for the conservation and sustainable use of biological diversity, to promote their wider application with the approval and involvement of the holders, and to encourage the equitable sharing of the benefits arising from their utilization.[24] It also urges the parties to protect and encourage the customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.[25] In 2010, the parties to the CBD adopted the Nagoya Protocol, which provides for 'the prior informed consent or approval and involvement of indigenous and local communities' in relation to access to traditional knowledge associated with genetic resources, and requires that its parties take steps to ensure that the benefits arising from utilization of genetic resources and traditional knowledge are shared in a fair and equitable way with the communities concerned.[26]

IV. Application of Human Rights Law to Environmental Issues

Much of the development of environmental human rights law has occurred through the application by human rights bodies of existing rights, such as rights to life and health, to environmental issues. Although the development has occurred in many different forums, construing different human rights sources, it has resulted in a coherent set of norms. In addition, international instruments set out Indigenous and tribal rights, many of which directly relate to the environment.

Downloaded from https://academic.oup.com/edited-volume/41336/chapter/352410885 by University of Melbourne user on 19 March 2024

p. 790

A. Indigenous and Tribal Rights Relating To the Environment

The two most important sources of Indigenous and tribal rights relating to the environment are International Labour Organisation Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries, and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).[27] The ILO Convention has twenty-three parties, most of which are in Latin America. While not legally binding in itself, UNDRIP has been generally accepted by states as setting benchmark standards in relation to Indigenous rights,[28] and has influenced human rights bodies in their application of other treaties to Indigenous and tribal peoples.[29]

Both ILO Convention No 169 and UNDRIP provide that states must recognize and protect the rights of Indigenous peoples to the lands, territories, and resources that they have traditionally owned, occupied, or used, including those to which they have had access for their subsistence and traditional activities.[30] The ILO Convention provides that states have obligations to consult with Indigenous and tribal peoples when considering measures that may affect them directly, before undertaking or permitting any programmes for the exploration or exploitation of resources pertaining to their lands or territories, and when considering their capacity to alienate their lands or territories or otherwise transfer their rights outside their own community.[31] UNDRIP takes an important further step, stating that the free, prior, and informed consent of Indigenous peoples is necessary before the adoption or implementation of any laws, policies, or measures that may affect them, and in particular before the approval of any project affecting their lands, territories, or resources, including the extraction or exploitation of mineral, water, or other resources, or the storage or disposal of hazardous materials.[32]

UNDRIP also states that Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands, territories, and resources, and to receive assistance
p. 791 from states for such conservation and protection.[33] ↳ ILO Convention No 169 requires states to safeguard the rights of the peoples concerned to the natural resources pertaining to their lands, including their right to participate in the use, management, and conservation of these resources.[34]

The ILO Convention provides that states must ensure that the peoples concerned shall, wherever possible, participate in the benefits of exploration or exploitation of mineral or sub-surface resources pertaining to their lands and shall receive fair compensation for any damages which they may sustain as a result of such activities.[35] More generally, UNDRIP indicates that states must provide for just and fair redress for harm resulting from any activities affecting their lands, territories, or resources, particularly in connection with the development, utilization, or exploitation of mineral, water, or other resources, and 'appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact'.[36] They have the right to restitution or, if this is not possible, compensation for their lands, territories, and resources that have been taken, used, or damaged without their consent.[37]

B. 'Greening' Human Rights

1. Regional human rights tribunals

Several regional instruments recognize the human right to a healthy (or satisfactory) environment, as noted above, but only the African Charter makes the right reviewable by a tribunal or other monitoring body.[38] Instead, regional bodies in Africa, the Americas, and Europe have applied other human rights, including the rights to life, health, private and family life, and property, to environmental issues. The regional human rights systems include courts with the authority to issue decisions that legally bind the state parties, as well as commissions and other expert bodies able to review complaints but not issue binding decisions.

Downloaded from https://academic.oup.com/edited-volume/41336/chapter/352410885 by University of Melbourne user on 19 March 2024

a) African Commission and African Court on Human and Peoples' Rights

The most important environmental decision in the African system is *Social and Economic Rights Action Centre v Nigeria*, a case involving massive oil pollution in the Niger delta region by a consortium of the Nigerian government and Royal Dutch Shell.[39] The African Commission on Human and Peoples' Rights (AComHPR)
p. 792 found that the ↳ exploitation violated the human rights of the Ogoni people living in the delta, including their rights to health and to a satisfactory environment, which are protected by Articles 16 and 24 of the African Charter. The Commission stated that Nigeria had duties to take 'reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources', and that compliance with the 'spirit' of Articles 16 and 24 'must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicizing environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities'.[40]

Other important environmental decisions from the African system include *Centre for Minority Rights Development et al v Kenya*[41] and *African Commission on Human and Peoples' Rights v Kenya*,[42] in which the commission and the court (ACtHPR), respectively, held that the actions of a government concerning protected areas must respect and protect the rights of Indigenous peoples living there.[43]

b) European Court of Human Rights

The European Court of Human Rights (ECtHR) has developed an extensive environmental jurisprudence since 1994.[44] The pathbreaking decision was *López Ostra v Spain*, in which the court held that severe environmental pollution could violate the right to respect for private and family life protected by Article 8 of the 1950 European Convention on Human Rights. The court stated that even when pollution does not seriously endanger the health of a claimant, it may give rise to a positive duty on the state to take reasonable and appropriate measures to secure her rights.[45]

In subsequent cases under Article 8, the court has distinguished between substantive and procedural obligations. With respect to the former, it has emphasized that states have wide discretion (or 'margin of appreciation') and has given near-dispositive weight to whether they followed their own domestic standards.[46] However, the court has adopted more specific procedural requirements, which require states to
p. 793 assess the effects of proposed activities that cause environmental harm and infringe human rights, ↳ to make environmental information public, and to allow the individuals concerned to have access to judicial remedies, especially if 'they consider that their interests or their comments have not been given sufficient weight in the decision-making process'.[47]

The court has also applied Article 2 of the European Convention, which protects the right to life, to environmental threats. The court has long held that Article 2 imposes positive as well as negative duties—that is, obligations on states to protect against threats to the right to life, not just to refrain from infringing the right directly. In the environmental context, the court has held that states must establish legislative and administrative frameworks that effectively deter threats to the right to life, including by regulating the licensing and supervision of hazardous and industrial activities and by providing the public information about such activities and natural disasters such as floods and mudslides.[48] If loss of life nevertheless results, states must conduct independent and impartial investigations and punish breaches as appropriate.[49]

The court may issue judgements for damages, but it may not invalidate laws. However, its decisions influence domestic courts that are able to apply the protections of the Convention more directly. A notable recent example is the 2019 decision of the Supreme Court of the Netherlands that Articles 2 and 8 impose a

Downloaded from https://academic.oup.com/edited-volume/41336/chapter/352410885 by University of Melbourne user on 19 March 2024

duty on the Dutch government to protect against the serious risk of loss of life and disruption of family life threatened by climate change, and that the government violated this duty by not striving to reduce greenhouse gas emissions at least 25% from 1990 levels by the end of 2020.[50]

c) European Committee for Social Rights

The European Committee for Social Rights oversees the 1961 European Social Charter, which sets out economic, social, and cultural rights. The committee has interpreted the right to health in the Charter to include the right to a healthy environment.[51] Among other things, the committee has held that states must take specific measures to prevent air pollution, including by informing and educating the public about environmental problems, introducing threshold values for emissions, measuring air quality, monitoring health risks, and enforcing standards once adopted.[52] In setting standards, states should take into account the norms and guidelines set by national and international bodies.[53]

p. 794

d) Inter-American Commission and Court of Human Rights

Many of the important decisions in the Inter-American human rights system have involved Indigenous and tribal peoples. The Inter-American Court has stated that their right to property under the American Declaration and American Convention[54] includes the lands that they have traditionally occupied and the natural resources that they have traditionally used, because the lands and resources are necessary for their physical and cultural survival.[55] Drawing on ILO Convention No 169 and UNDRIP, the court has held that states have obligations to delimit and title the ownership of the lands traditionally occupied by Indigenous and tribal peoples, consult with them regarding any proposed concessions or other activities that may affect their lands and natural resources, ensure that no concession will be issued without a prior environmental and social impact assessment, and guarantee that they receive a 'reasonable benefit' from any such plan if approved.[56] Regarding large-scale development or investment projects that would have a major impact within the territory of Indigenous or tribal peoples, the state may only proceed if it obtains 'their free, prior, and informed consent, according to their customs and traditions'.[57]

More recently, in response to a request by Columbia seeking clarification of the application of the American Convention to environmental harm, the Inter-American Court issued a far-reaching Advisory Opinion on human rights and the environment.[58] Among other things, the opinion indicates that the responsibility of states under the American Convention extends to actions within their territory or control that cause transboundary environmental harm, and that the rights to information, public participation, and access to justice are integral to the rights of life and personal integrity in the environmental context.[59]

2. UN human rights bodies

UN treaty bodies have applied human rights to environmental issues in the course of their oversight of states' compliance with the major human rights treaties, including the 1966 International Covenant on
p. 795 Economic, Social and Cultural Rights (ICESCR) ↳ and the International Covenant on Civil and Political Rights (ICCPR).[60] Treaty bodies do not have the authority to issue binding decisions, but through their general comments, assessments of country reports, and decisions in response to individual communications, they have indicated that environmental harm interferes with the enjoyment of human rights and that states have obligations to protect against such harm.[61]

The Human Rights Council (HRC), the main UN intergovernmental human rights body, has also examined environmental issues, including through its Universal Periodic Review programme, in which it reviews the human rights records of every UN member state, and in a series of resolutions calling attention to the effects of climate change on human rights.[62] In addition, the Council has appointed independent experts,

Downloaded from https://academic.oup.com/edited-volume/41336/chapter/352410885 by University of Melbourne user on 19 March 2024

often called special rapporteurs, with mandates to examine human rights in particular areas. Many of these experts, including the special rapporteurs on Indigenous peoples, human rights defenders, toxic substances, and the right to food, have issued reports applying human rights norms to specific environmental issues.[63]

In 2012, the Human Rights Council appointed an independent expert with a mandate to study the human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment.[64] The present author received the mandate and prepared a series of reports mapping how human rights bodies have applied human rights norms to environmental issues.[65] In 2015, the Council renewed the mandate for another three years, changed the title of the mandate-holder to special rapporteur, and requested that he
p. 796 promote the realization of the obligations.[66] To that end, he prepared 'Framework ↳ Principles on Human Rights and the Environment' that summarize the human rights obligations relating to the environment.[67] In 2018, the Council took note with appreciation of the report presenting the Framework Principles and renewed the mandate for another three years.[68]

C. The Framework Principles on Human Rights and the Environment

The Framework Principles and their accompanying commentary do not purport to create new obligations under human rights law; rather, they reflect the application of existing obligations in the environmental context, as stated in international instruments and by the tribunals and other human rights bodies described above. The report presenting the Principles states that while not all governments have formally accepted all of these norms, their coherence is 'strong evidence of the converging trends towards greater uniformity and certainty in the understanding of human rights obligations relating to the environment'.[69]

The Framework Principles describe procedural obligations of states, including: to respect and protect the rights to freedom of expression, association, and peaceful assembly in relation to environmental matters; to provide for environmental education and public awareness; to provide public access to environmental information; to require the prior assessment of the possible environmental and human rights impacts of proposed projects and policies; to provide for and facilitate public participation in decision-making related to the environment; and to provide for access to effective remedies for violations of human rights and domestic laws relating to the environment.[70]

The Framework Principles also outline human rights obligations relating to substantive standards. As noted above, human rights bodies have held that states have discretion in determining the appropriate levels of environmental protection, taking into account the need to balance the goal of preventing all environmental harm with other social goals. However, the establishment and implementation of appropriate levels of environmental protection must always comply with obligations of non-discrimination, and there is a strong presumption against retrogressive measures in relation to the progressive realization of economic, social, and cultural rights. Other factors that human rights bodies have taken into account in assessing substantive environmental standards include whether the government has taken into account relevant international
p. 797 standards, such as those promulgated by the World Health Organization.[71] Once adopted, states ↳ must monitor and effectively enforce compliance with the standards by private actors as well as governmental authorities.[72] With respect to global or transboundary environmental harm that adversely affects human rights, states have obligations of international cooperation.[73]

The obligations of states under human rights law to prohibit discrimination and to ensure equal and effective protection against discrimination apply to the equal enjoyment of human rights relating to the environment. States therefore have obligations, among others, to protect against environmental harm that results from or contributes to discrimination, to provide for equal access to environmental benefits and to ensure that their actions relating to the environment do not themselves discriminate.[74] In addition, states

Downloaded from https://academic.oup.com/edited-volume/41336/chapter/352410885 by University of Melbourne user on 19 March 2024

must take additional steps to protect the rights of those who are particularly vulnerable to or at risk from environmental harm, including environmental human rights defenders and Indigenous peoples.[75]

V. Conclusion

As the three strands of the law of human rights and the environment mature, they increasingly take note of and converge with one another. As noted above, in 2015, the Paris Agreement became the first global environmental agreement to refer explicitly to human rights. The Conference of the Parties to the CBD has adopted guidelines on environmental and social assessment and on consultation with Indigenous peoples and local communities.[76] The Escazú Agreement on procedural access rights, adopted in 2018, provides that 'each Party shall guarantee the right of every person to live in a healthy environment and any other universally-recognized human right related to the present Agreement'.[77] And in 2018, UNEP announced a new 'environmental rights initiative' to support realization of human rights related to the environment.[78]

Conversely, human rights bodies are increasingly referring to international environmental norms. In its 2017 Advisory Opinion, the Inter-American Court of Human Rights indicated that the duties of states in relation to the rights of life and personal integrity must take into account international environmental principles, including the duty to prevent significant environmental harm, the precautionary principle, and
p. 798 the duty of international cooperation.[79] Similarly, the Human Rights Committee, the ↳ treaty body overseeing the ICCPR, stated in 2018 that 'Obligations of States parties under international environmental law should ... inform the contents of article 6 of the Covenant [on the right to life], and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law'.[80]

Efforts are again underway to convince the UN to recognize the human right to a healthy environment. In 2017, France proposed a Global Pact for the Environment whose first article would recognize the right of every person 'to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment'.[81] The UNGA responded to the proposal by creating an ad hoc open-ended working group to discuss possible gaps in international environmental law.[82] In 2018, the outgoing and incoming UN special rapporteurs on human rights and the environment urged the UNGA to recognize the right through a resolution or a treaty such as the Global Pact.[83]

Finally, two potential further lines of development of rights-based approaches to environmental protection should be noted: rights of nature, and rights of future generations.

Legal recognition of rights of nature has long been proposed as a way to protect the intrinsic value of the environment and its components,[84] which an approach focused only on *human* rights may ignore.[85] In recent years, some states have incorporated natural rights in national constitutions, laws, and judicial decisions.[86] At the international level, no treaty explicitly protects rights of nature, and the ECtHR has refused to derive such rights from the European Convention.[87] However, the Inter-American Court recently stated that the American Convention includes an implicit right to a healthy environment that protects environmental components such as forests and rivers, even in the absence of evidence of harm to human
p. 799 life and health.[88] It seems likely that as more ↳ facets of the human dependence on healthy ecosystems become clearer, advocates will increase their efforts to employ human rights norms to protect biodiversity.[89]

International environmental agreements and declarations on sustainable development often emphasize the importance of protecting future generations,[90] in accordance with the Brundtland Commission's famous definition of sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[91] However, international law has

Downloaded from https://academic.oup.com/edited-volume/41336/chapter/352410885 by University of Melbourne user on 19 March 2024

done little to define the rights of future generations or the obligations of states to them. One potential avenue for further development in this respect may be to clarify the current human rights of children and youth in relation to the long-term but foreseeable future effects of climate change.[92]

Bibliography

Sumudu Atapattu, *Human Rights Approaches to Climate Change* (Routledge 2016)
Google Scholar Google Preview WorldCat COPAC

David Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2012)
Google Scholar Google Preview WorldCat COPAC

John Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (CUP 2018)
Google Scholar Google Preview WorldCat COPAC

James May and Erin Daly, *Global Environmental Constitutionalism* (CUP 2015)
Google Scholar Google Preview WorldCat COPAC

Notes

1 1966 International Covenant on Civil and Political Rights (ICCPR); 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR).

2 See Chapters 14 and 20, 'Earth Jurisprudence' and 'Equity', in this volume.

3 UNGA Res 2398(XXIII), 'Problems of the human environment' (3 December 1968) UN Doc A/RES/2398(XXIII).

4 UN, 'Report of the United Nations Conference on the Human Environment' (5-16 June 1972) UN Doc A/CONF.48/14/Rev.1, 3, ch 1—'Declaration of the United Nations Conference on the Human Environment'.

5 Ibid, principle 1.

6 World Commission on Environment and Development, *Our Common Future* (OUP 1987).

7 *Report of the United Nations Conference on Environment and Development* (UN 1993) vol I, annex I—'Rio Declaration on Environment and Development'.

8 'Human Rights and the Environment—Final report prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur' (6 July 1994) UN Doc E/CN.4/Sub.2/1994/9, 74, annex I—'Draft principles on human rights and the environment', principle 2. See Neil Popović, 'In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment' *Columbia Human Rights Law Review*, 27/2 (1996): 487.

9 art 24.

10 art 11.1.

11 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, art 1. Two other regional instruments, the 2004 Arab Charter on Human Rights and the 2012 Association of Southeast Asian Nations (ASEAN) Human Rights Declaration (adopted 18 November 2012) <https://asean.org/asean-human-rights-declaration/> accessed 22 January 2020, each include the right to a 'healthy' (Arab Charter, art 38) or 'safe, clean and sustainable' (ASEAN Declaration, para 28(f)) environment as an element of the right to an adequate standard of living.

12 See David Boyd, 'Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment' in John Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (CUP 2018) 17. About two-thirds of the constitutional provisions refer to health; alternative formulations include rights to a clean, safe, favourable, or wholesome environment.

13 See generally David Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2012); James May and Erin Daly, *Global Environmental Constitutionalism* (CUP 2015).

14 See Lavanya Rajamani, 'Human Rights in the Climate Regime: From Rio to Paris and Beyond' in Knox and Pejan (n 12) 236.

15 See Chapter 21, 'Public Participation', in this volume.

16 arts 4–9.

Downloaded from https://academic.oup.com/edited-volume/41336/chapter/352410885 by University of Melbourne user on 19 March 2024

17 The committee may make recommendations to the Meeting of the Parties and, with the permission of the party concerned, directly to the party; see Decision I/7, 'Review of Compliance' (2 April 2004) UN Doc ECE/MP.PP/2/Add.8, annex.
18 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, arts 5–8. The agreement was opened for signature in September 2018, and it entered into force in April 2021.
19 art 9.
20 art 18.
21 See eg 1992 UN Framework Convention on Climate Change (UNFCCC), art 6(a); Paris Agreement, art 12; 1994 Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, arts 3(a), 16; 1998 Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, art 15.2; 2001 Stockholm Convention on Persistent Organic Pollutants, arts 7.2, 10.1; 2013 Minamata Convention on Mercury, art 18.1.
22 UNEP, 'Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters' (26 February 2010); see UNEP, *Putting Rio Principle 10 into Action: An Implementation Guide* (2015).
23 See Chapters 32 and 42, 'Wildlife' and 'Indigenous Peoples', in this volume.
24 art 8(j).
25 art 10(c).
26 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, arts 5, 7.
27 UNGA Res 61/295, 'United Nations Declaration on the Rights of Indigenous Peoples' (2 October 2007) UN Doc A/RES/61/295.
28 The UNGA resolution adopting UNDRIP received only four negative votes, from Australia, Canada, New Zealand, and the United States, each of which later reversed its position and indicated support for the declaration.
29 See eg *Kichwa Indigenous People of Sarayaku v Ecuador* (Judgement of 27 June 2012 on Merits, Reparations, Costs) IACtHR Ser C No 245 [187], [215] (Kichwa case); 'Report of the Committee on the Elimination of Racial Discrimination' (28 November 2010) UN Doc A/64/18 (country report on Guatemala) para 40(11); 'Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people' (4 September 2009) UN Doc A/64/338, para 48.
30 ILO 169, arts 14–15; UNDRIP, arts 26–27.
31 arts 6, 15, 17.
32 arts 19, 29.2, 32.2.
33 art 29.1.
34 art 15.1.
35 art 15.2.
36 art 32.3.
37 art 28.
38 Neither the Arab Charter nor the ASEAN Declaration creates an oversight body for any of its rights; the reference to most right in art 1 of the Aarhus Convention is not reviewable by its compliance committee; and the rights in the San Salvador Protocol are not subject to review by the Inter-American Commission or Court of Human Rights.
39 *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v Nigeria*, AComHPR (2001) Communication No 155/96.
40 Ibid [52], [53].
41 *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*, AComHPR (2009) Communication No 276/03.
42 ACtHPR (26 May 2017) No 006/2012.
43 See Lilian Chenwi, 'The Right to a Satisfactory, Healthy, and Sustainable Environment in the African Regional Human Rights System' in Knox and Pejan (n 12) 59.
44 See Council of Europe, *Manual on Human Rights and the Environment* (2nd edn, 2012).
45 (1994) 16798/90 [51].
46 See eg *Hatton v UK* (Judgement) Grand Chamber ECtHR (8 July 2003) Application no 36022/97 [99]–[104].
47 *Taskin and Ors v Turkey* (2004) ECtHR, 46117/99 [119].
48 See *Öneryildiz v Turkey* (2004) ECtHR, 48939/99 (improper maintenance of municipal rubbish tip); *Brincat and others v Malta* (2014) ECtHR, 60908/11 (workplace exposure to asbestos); *Kolyadenko v Russia* (2012) ECtHR, 17423/05 (flash flood); *Budayeva v Russia* (2008) ECtHR, 15339/02 (mudslide).
49 See Manual on Human Rights and the Environment (n 44) 38–39 (summarizing jurisprudence).
50 *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda* (Judgement of 20

Downloaded from https://academic.oup.com/edited-volume/41336/chapter/352410885 by University of Melbourne user on 19 March 2024

December 2019) No 19/00135, ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands) (Urgenda Foundation case).

51 *Marangopoulos Foundation for Human Rights v Greece* (2006) No 30/2005 [200] (Marangopoulos case); *International Federation for Human Rights (FIDH) v Greece* (2013) No 72/2011 [49] (FIDH case).

52 Marangopoulos case (n 51) [203].

53 FIDH case (n 51) [148].

54 American Declaration of the Rights and Duties of Man (adopted 2 May 1948), art XXIII; 1969 American Convention on Human Rights, art 21.

55 See eg Kichwa case (n 29); *Case of the Saramaka People v Suriname* (Judgement of 28 November 2007 on Merits, Reparations and Costs) IACtHR Ser C No 172 [121]–[122] (Saramaka People case); *Indigenous Community Yakye Axa v Paraguay* (Judgement of 17 June 2005 on Merits, Reparations and Costs) IACtHR Ser C No 142 [143]; *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Judgement of 31 August 2001 on Merits, Reparations and Costs) IACtHR Ser C No 79 [148]-[149].

56 Saramaka People case (n 55) [129].

57 Ibid [134].

58 *State Obligations in Relation to the Environment* (Advisory Opinion) IACtHR (2017) OC-23/17 (State Obligations in Relation to the Environment case); see Maria Banda, 'Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights' *American Society of International Law Insights*, 22/6 (2018).

59 State Obligations in Relation to the Environment case (n 58) [101], [211]–[241]; see also Chapter 27, 'Judicial Development', in this volume.

60 Unusually among UN human rights treaties, the 1989 Convention on the Rights of the Child includes an explicit reference to the environment: it requires its parties to pursue full implementation of children's right to health by taking measures, among others, to combat disease and malnutrition through 'the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution' (art 24.2(c)).

61 See eg Human Rights Committee, 'General Comment No 36 [on the right to life]' (30 October 2018) UN Doc CCPR/C/GC/36, paras 26, 62; Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 15: The right to water' (20 January 2003) UN Doc E/C.12/2002/11, paras 10, 21, 23; CESCR, 'General Comment No. 14: The right to the highest attainable standard of health' (11 August 2000) UN Doc E/C.12/2000/4, paras 4, 11, 15, 34.

62 See eg HRC Res on 'Human rights and climate change': 10/4 (25 March 2009); 18/22 (30 September 2011); 29/15 (2 July 2015); 38/4 (5 July 2018).

63 See eg James Anaya, 'Report of the Special Rapporteur on the rights of indigenous peoples: Extractive industries operating within or near indigenous territories' (11 July 2011) UN Doc A/HRC/18/35; Michel Forst, 'Report of the Special Rapporteur on the situation of human rights defenders' (3 August 2016) UN Doc A/71/281 (environmental human rights defenders); Baskut Tuncak, 'Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes' (2 August 2016) UN Doc A/HRC/33/41 (effect of pollution and toxics on children); Hilal Elver, 'Report of the Special Rapporteur on the right to food' (24 January 2017) UN Doc A/HRC/34/48 (pesticides).

64 HRC Res 19/10, 'Human Rights and the Environment' (12 March 2012).

65 See John Knox, 'Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: Mapping Report' (30 December 2013) UN Doc A/HRC/25/53.

66 HRC Res 28/11, 'Human Rights and the Environment' (26 March 2015).

67 John Knox, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (24 January 2018) UN Doc A/HRC/37/59, annex (Framework Principles).

68 David Boyd succeeded to the mandate on 1 August 2018.

69 Framework Principles (n 67) para 9.

70 Ibid, principles 5–10, paras 10–30.

71 Ibid, principle 11, paras 31–32.

72 Ibid, principle 12, paras 34–35.

73 Ibid, principle 13, paras 36–39.

74 Ibid, principle 3, paras 7–9.

75 Ibid, principles 4, 14–15, paras 10–11, 40–53.

76 See Elisa Morgera, 'Dawn of a New Day? The Evolving Relationship between the Convention on Biological Diversity and International Human Rights Law' *Wake Forest Law Review*, 53/1 (2018): 101.

77 Escazú Agreement, art 4.1.

78 UNEP, 'UN Launches Environmental Rights Initiative', *UN News* (6 March 2018).

79 State Obligations in Relation to the Environment case (n 58) [127]–[210].

80 General Comment No 36 (n 61) para 62.

Downloaded from https://academic.oup.com/edited-volume/41336/chapter/352410885 by University of Melbourne user on 19 March 2024

81 Le Club des Juristes, 'Toward a Global Pact for the Environment' (White Paper, September 2017) 45.

82 UNGA Res 72/277 'Towards a Global Pact for the Environment' (14 May 2018) UN Doc A/RES/72/277.

83 UNGA, 'Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (19 July 2018) UN Doc A/73/188, paras 46–48.

84 Christopher Stone, 'Should Trees Have Standing? Toward Legal Rights for Natural Objects' *Southern California Law Review*, 45/2 (1972): 450.

85 Günther Handl, 'Human Rights and Protection of the Environment: A Mildly 'Revisionist' View' in Antônio Trindade (ed), *Derechos Humanos, Desarrollo Sustentable y Medio Ambiente* (Instituto Interamericano de derechos 1995) 117, 138.

86 See eg *Constitución de la República del Ecuador* (2008), art 71; *Ley Marco de la Madre Tierra y Desarrollo Integral para Vivir Bien* (Framework Law of Mother Earth and Integral Development for Living Well), Law No 300 (2012) (Bolivia); Te Urewera Act 51 of 2014 (New Zealand); *Mohd. Salim v State of Uttarakhand & Others* (20 March 2017) Uttarakhand High Court (India) PIL 126/2014.

87 *Kyrtatos v Greece* (22 May 2003) ECtHR, 41666/98, para 52.

88 State Obligations in Relation to the Environment case (n 58) [62].

89 See John Knox, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (19 January 2017) UN Doc A/HRC/34/49.

90 See eg Rio Declaration (n 7) principle 3; UNFCCC, art 3.1; CBD, preamble.

91 *Our Common Future* (n 6) ch 2, para 1.

92 See Urgenda Foundation case (n 50) [37]; *Future Generations v Ministry of the Environment* (2018) Colombia Supreme Court; *Juliana v United States* (2016) District Court of Oregon, 217 F.Supp.3d 1224, reversed and remanded (2020) 9th Circuit Court of Appeals, 947 F.3d 1159.

Downloaded from https://academic.oup.com/edited-volume/41336/chapter/352410885 by University of Melbourne user on 19 March 2024

particular, L. Henkin, *The Age of Rights* (New York: Columbia University Press, 1990), p. 19; N. S. Rodley, 'Human Rights and Humanitarian Intervention: The Case Law of the World Court', *International and Comparative Law Quarterly*, 38 (1989), at 321, esp. 333; T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989); L. B. Sohn, 'The Human Rights Law of the Charter', *Texas International Law Journal*, 12 (1977), 129 at 132–4; H. Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law', *Georgia Journal of International and Comparative Law*, 25 (1995–6), 287). To be established, custom in principle requires both consistent identifiable State practice and evidence of a belief of States that compliance is required under international law (*opinio juris sive necessitatis*). The classic definition is that adopted by the International Court of Justice in the *North Sea Continental Shelf Cases* (*Federal Republic of Germany* v. *Denmark* and *Federal Republic of Germany* v. *Netherlands)* (I.C.J. Reports 1969, 44, para. 77):

> Not only must the acts concerned amount to settled practice, but they must also be such or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The states concerned must therefore feel that they are conforming to what amounts to their legal obligation. The frequency or even habitual character of the acts is not in itself enough.

It has been argued, however, that, in the field of human rights, evidence of custom could be based on the resolutions of the UN General Assembly and statements made within other international organizations, demonstrating a clear commitment of the international community towards certain values, while inconsistent State practice on the other hand would not be an obstacle to the identification of such custom. For instance, the fact that the universal periodic review performed by the UN Human Rights Council takes as a reference, in the review of each State, not only the Charter of the United Nations but also the Universal Declaration of Human Rights, as well as the human rights instruments to which a State is party (appendix to the Human Rights Council Resolution 5/1 'Institution-building of the United Nations Human Rights Council' (18 June 2007): see, further, Chapter 10), provides at least an indication of the expectation of the international community that all States should comply with a basic corpus of human rights as contained in the UDHR, whichever treaties they have ratified. Some authors have gone so far as to suggest that State 'practice', for the purposes of custom determination in the field of human rights, is composed of official declarations and participation in the negotiation of human rights instruments, as well as of incorporation of human rights within the national legal orders. Consider, for instance, the attitude adopted by the 1987 *Restatement (Third) of the Foreign Relations Law of the United States* (for an exposé of the background assumptions underlying this position, see the Hague Academy course of Oscar Schachter: O. Schachter, 'International Law in Theory and Practice: General Course in Public International Law', *Recueil des cours*, 178 (1982-V), 2 at 333–42), or the position expressed by Theodor Meron:

American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (St. Paul, Minn.: American Law Institute Publishers, 1987)

[§701, n. 2] Practice accepted as building customary human rights law includes: virtually universal adherence to the United Nations Charter and its human rights provisions, and virtually universal and frequently reiterated acceptance of the Universal Declaration of Human Rights even if only in principle; virtually universal participation of states in the preparation and adoption of international agreements recognizing human rights principles generally, or particular rights; the adoption of human rights principles by states in regional organizations in Europe, Latin America, and Africa . . . general support by states for United Nations resolutions declaring, recognizing, invoking, and applying international human rights principles as international law; action by states to conform their national law or practice to standards or principles declared by international bodies, and the incorporation of human rights provisions, directly or by reference, in national constitutions and law; invocation of human rights principles in national policy, in diplomatic practice, in international organization activities and actions; and other diplomatic communications or action by states reflecting the view that certain practices violate international human rights law, including condemnation and other adverse state reactions to violations by other states.

[Applying this criterion, the *Restatement* concludes in §702 that:] A state violates international law if, as a matter of state policy, it practices, encourages, or condones (a) genocide (b) slavery or slave trade (c) the murder or causing the disappearance of individuals (d) torture or other cruel, inhuman or degrading treatment or punishment (e) prolonged arbitrary detention (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights.

Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989), p. 93

[T]he initial inquiry must aim at the determination whether, at a minimum, the definition of the core norm claiming customary law status and preferably the contours of the norm have been widely accepted. In this context my own preferred indicators evincing customary human rights are, first, the degree to which a statement of a particular right in one human rights instrument, especially a human rights treaty, has been repeated in other human rights instruments, and second, the confirmation of the right in national practice, primarily through the incorporation of the right in national laws . . . It is, of course, to be expected that those rights which are most crucial to the protection of human dignity and of the universally accepted values of humanity, and whose violation triggers broad condemnation by the international community, will require a lesser amount of confirmatory evidence.

Essentially, two arguments have been put forward in favour of this position. First, it can be said that the 'practice' of a State towards its own population (the rights of which it is the purpose of the international human rights regime to protect) would be difficult if not impossible to ascertain for practical reasons (violations committed by a State within its

borders frequently go unnoticed), so that customary international law could only be determined, not by reference to how States actually behave, but by the justifications they provide for the way they behave: in this view, 'even massive abuses do not militate against assuming a customary rule as long as the responsible author state seeks to hide and conceal its objectionable conduct instead of justifying it by invoking legal reasons' (C. Tomuschat, *Human Rights between Idealism and Realism* (Oxford: Oxford University Press, 2003), p. 34). Second, this view about the identification of practice as building customary human rights law is also related to the fact that States have no subjective interest in other States complying with their human rights obligations, except in those rare instances where the rights of the nationals of the first States are at stake. As a result, there is little State practice on the basis of which to identify the formation of a custom, since most instances of human rights violations do not give rise to protests by other States of the international community (O. Schachter, 'International Law in Theory and Practice: General Course in Public International Law', *Recueil des cours*, 178 (1982-V), at 334).

Thus, a 'modern' view of custom has gained some acceptance in the field of human rights (for a discussion, see M. Akehurst, 'Custom as a Source of International Law', *British Yearbook of International Law* (1974–5), 1 *et seq.*; L. Henkin, 'Human Rights and State "Sovereignty"', 25 *Georgia Journal of International Law* 37 (1995–6)). This view presents itself as a substitute to the classical view as reflected in Article 38(1) of the Statute of the International Court of Justice. In the 'modern' approach, State 'practice' in the usual sense of 'behaviour' is less determinative than authoritative statements made by governments or intergovernmental bodies. This turn is favoured in part by a general identity crisis of custom as a source of international law. It has been encouraged by well-intentioned authors, eager to provide human rights law with a standing in customary law which would compensate for what was perceived in the 1970s and 1980s as the lack of enthusiasm of States in the ratification of human rights treaties. However, this 'modern' view results in distorting the classical notion of custom in such a way that the notion is barely even recognizable under its new disguise. Philip Alston and Bruno Simma have also argued that it may be ideologically biased towards the recognition of certain particular human rights as forming part of customary international law. The result of the 'new' approach, it turns out, which emphasizes deduction from statements instead of induction from State behaviour, is that those civil and political rights which are recognized in US constitutional law and which the United States invokes against other States are included, while other rights, equally essential and whose status is identical within the international bill of rights, are excluded. These authors therefore suggest that a certain 'sub-conscious chauvinism' may be at work – for instance, in the list of human rights recognized as customary international law in the *Restatement*. They ask whether 'any theory of human rights law which singles out race but not gender discrimination, which condemns arbitrary imprisonment but not capital punishment for crimes committed by juveniles or death by starvation and which finds no place for a right of access to primary health care, is not flawed in terms both of the theory of human rights and of United Nations doctrine' (B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles', 12 *Australian Yearbook of International Law* 82

The dissatisfaction with the substitution of a 'modern' view of custom to the 'traditional' view has led, in turn, to two reactions. One part of the doctrine has sought to accommodate the competing claims of the 'traditional' and the 'modern' views of custom. Thus, for instance, Frederic Kirgis has put the requirements of State practice and *opinio juris*, which compete to influence the emergence of custom, on a sliding scale: whereas, at one end of the scale, highly consistent State practice should suffice to establish the existence of *opinio juris*, conversely and at the other end, strong indications that there exists a consensus among States about the unacceptability of certain forms of behaviour may establish custom, even if State practice is inconsistent (F. Kirgis, 'Custom on a Sliding Scale', *American Journal of International Law*, 81 (1987), 146; see also, for other attempts in this direction, J. Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case', *Oxford Journal of Legal Studies*, 16 (1996), 85 and A. E. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', *American Journal of International Law*, 95 (2001), 757). But, alternatively, we may turn to other arguments in order to ground human rights law in general international law. The most promising avenue in this direction, and the one preferred by P. Alston and B. Simma, is to identify human rights as general principles of international law.

(c) Human rights as general principles of law

This means of recognizing the Universal Declaration of Human Rights as a source of legal obligations is encouraged by the approach adopted by the International Court of Justice itself. The Court has refrained from stating that the Declaration as such, in the totality of its articles, should be considered as customary international law. But it did refer to the Declaration on a number of occasions, albeit always with respect to a specific right and without always clarifying the source of the authority of the Declaration. For instance, alluding to the prohibition of arbitrary arrest or detention stipulated in Article 9 of the Universal Declaration of Human Rights, it stated in the *Tehran Hostages* case that 'Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights' (*United States Diplomatic and Consular Staff in Tehran* (*United States* v. *Iran*) (*merits*) (I.C.J. Reports 1980, at 42). The language referring to such 'fundamental principles' is not new. Already in the *Corfu Channel* case, the Court mentioned 'obligations ... based ... on certain general and well-recognized principles', among which it mentioned what it labelled 'elementary considerations of humanity' (*Corfu Channel Case* (*United Kingdom of Great Britain and Northern Ireland–Albania*) (I.C.J. Reports 1949, 4 at 22)). In the Advisory Opinion it delivered on the issue of *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, it referred to 'the principles underlying the Convention' as 'principles which are recognized by civilized nations as binding on States, even without any conventional obligation' (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Reports 1951, 19 (28 May 1951)). Almost identical language may be found in later cases. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear*

> it is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity'... that the Hague and Geneva Conventions have enjoyed a broad accession. Further, these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law. (I.C.J. Reports 1996, 226, at 257 (para. 79))

Similarly, in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), the Court had mentioned the 'fundamental general principles of humanitarian law' as the source of obligations for the defendant State (I.C.J. Reports 1986, 14, at 113–14). The *Case Concerning East Timor* (*Portugal* v. *Australia*) similarly referred to the 'principle' of self-determination as 'one of the essential principles of contemporary international law' (I.C.J. Reports 1995, 90, at 102 (para. 29)).

Although these statements refer, for the most part, to otherwise unspecified 'principles of international law' rather than to the 'general principles of law recognized by civilized nations' mentioned by Article 38(1)(c) of the Statute of the International Court of Justice, they nevertheless have been interpreted as implying that human rights should qualify among the latter principles, and thus as forming part of general international law (see B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles', cited above, at 102–8; T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989), at p. 88). Indeed, enthusiastic as they are about the grounding of international human rights law in customary international law, the reporters of the *Restatement (Third) of the Foreign Relations of the United States* note that 'there is a willingness to conclude that prohibitions [against human rights violations] common to the constitutions or laws of many states are general principles that have been absorbed into international law' (para. 701 n. 1). This conclusion also may be seen to follow from the fact that the Universal Declaration of Human Rights has been implemented, or even sometimes almost literally reproduced, in a large number of bills of rights in the world (H. Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law', *Georgia Journal of International and Comparative Law*, 25 (1995–6), 287, at 351–2).

(d) The significance of human rights as part of general international law

Does it matter that international human rights have their source both in general public international law, and in specific treaties concluded at universal or regional level? The expansion of the membership of States in international human rights treaties particularly in the 1990s – the Convention on the Rights of the Child has achieved almost universal ratification and treaties such as the two 1966 Covenants or the International Convention for the Elimination of All Forms of Discrimination against Women have also been very widely ratified – may have created the impression that the controversy about how solid the foundations of human rights law are in general international law, as opposed to treaty law, is not worth the efforts of legal doctrine today, as it might have been in the 1980s. We should resist this impression, however. First, we are far from having achieved universal ratification for all human rights treaties. Second, ratifications by States may be accompanied by reservations about specific rights or about the scope of application of the treaty:

grounding the guarantees of the treaty in customary international law or in other sources of general international law may serve to overcome such restrictions. Third, it is increasingly acknowledged that States are not the only addressees of human rights law. As subjects of international law, international organizations are bound by general international law (see further on this issue, Chapter 2, section 4), and some authors believe this could be extended to transnational corporations (see Chapter 4, section 3): in order to impose human rights obligations on such private non-State actors, these obligations must have their source elsewhere than in treaties, which as a rule only States may ratify. The view that human rights treaties merely embody, in treaty form, pre-existing obligations of States – which have their source in customary international law or in the general principles of law, and which are not at the disposal of States – also has guided the approach of human rights bodies on the question of the denunciation of human rights treaties and of State succession, especially after the dismantling of the former Soviet Union or of the former Federal Republic of Yugoslavia, and the separation of Czechoslovakia into two distinct entities. Box 1.6 discusses this issue.

Box 1.6 The continuity of human rights obligations

On 5 March 1993, the Commission on Human Rights adopted Resolution 1993/23, entitled 'Succession of States in respect of International Human Rights Treaties', in which it encouraged successor States to confirm officially that they continued to be bound by obligations under relevant international human rights treaties and urged those that had not yet done so to ratify or to accede to those international human rights treaties to which the predecessor States had not been parties. It also adopted Resolution 1994/16 of 25 February 1994, in which it emphasized the special nature of the treaties aimed at the protection of human rights and reiterated its call to successor States which had not yet done so to confirm that they continued to be bound by obligations under international human rights treaties. Probably emboldened by these resolutions, the Human Rights Committee expressed the following views on the question of denunciation of the International Covenant on Civil and Political Rights, as well as on the question of State succession:

Human Rights Committee, General Comment No. 26, *Continuity of Obligations* (8 December 1997) (CCPR/C/21/Rev.1/Add. 8/Rev.1)

1. The International Covenant on Civil and Political Rights does not contain any provision regarding its termination and does not provide for denunciation or withdrawal. Consequently, the possibility of termination, denunciation or withdrawal must be considered in the light of applicable rules of customary international law which are reflected in the Vienna Convention on the Law of Treaties. On this basis, the Covenant is not subject to denunciation or withdrawal unless it is established that the parties intended to admit the possibility of denunciation or withdrawal or a right to do so is implied from the nature of the treaty.

2. That the parties to the Covenant did not admit the possibility of denunciation and that it was not a mere oversight on their part to omit reference to denunciation is demonstrated by the fact that article 41(2) of the Covenant does permit a State party to withdraw its acceptance of the competence of the Committee to examine inter-State communications by filing an

CHAPTER I

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ITS HISTORY, IMPACT AND JURIDICAL CHARACTER

PROF. JOHN P. HUMPHREY*

A. HISTORY OF THE UNIVERSAL DECLARATION

The catalyst to which we owe the Universal Declaration of Human Rights and indeed much of the new international law of human rights which has so radically changed the theory and practice of the law of nations[1] was the gross violations of human rights that were committed in and by certain countries during and immediately before the Second World War. For it was these atrocities that fostered the climate of world opinion which made it possible for the San Francisco Conference to make the promotion of respect for human rights and fundamental freedoms "for all without distinction as to race, sex, language or religion" one of the pillars on which the United Nations was erected and a stated purpose of the Organization.[2] It was on these foundations that the new international law of human rights was built.

There are seven specific references in the Charter to human rights and freedoms but nowhere does it catalogue or define them. A few delegations to the Conference, including the Chilean, Cuban and Panamian delegations sponsored provisions which would have had the Charter guarantee the protection of specified rights; and Panama even urged the incorporation of a bill of rights; but none of these proposals were accepted. Largely as a result of an energetic lobby conducted by certain American non-governmental organizations,[3] however, the Conference did include in the Charter an article 68 by which the Economic and Social Council was instructed to set up a commission for the promotion of human rights; and although there was no mention in the article of such a mandate it was

* Former Director of the United Nations Division of Human Rights.

[1] See Humphrey, "The International Law of Human Rights in the Middle Twentieth Century" in Bos (ed.) *The Present State of International Law* (Kloner, 1973) p. 75 *et seq.*

[2] Article I of the Chapter.

[3] See Humphrey, "The U.N. Charter and the Universal Declaration of Human Rights" in Luard (ed.) *The International Protection of Human Rights* (London, 1967) p. 40 *et seq.*

generally understood that this commission would draft an international bill of rights.[4]

One of the first acts of the Economic and Social Council was to set up this commission with an explicit mandate to prepare, amongst other things, a draft bill.[5] Before, however, the new Commission on Human Rights could act on this mandate, an attempt was made by Panama in the General Assembly to have the draft which it had sponsored at San Francisco adopted as a resolution of the Assembly. Had it succeeded the history of the human rights programme in the United Nations would have been different; but the attempt was defeated, largely by the efforts of Eleanor Roosevelt, a member of the United States delegation, whom everyone expected would become the first chairman of the Human Rights Commission.

The most important business of the Commission when it met under Mrs. Roosevelt's chairmanship in its first regular session on 27 January, 1947, was to make arrangements for the drafting of the bill. No decision had yet been taken as to its form. There were several possibilities which were discussed in a Secretariat working paper; it could be drafted as a resolution of the General Assembly – in effect a declaration – but this would only have the force of a recommendation and would not be binding in international law; it could be a multilateral convention binding on all states which ratified it (an option which, the Secretariat prophetically added, might involve delays) or there could be an amendment to the Charter which if adopted would make the bill part of the fundamental law of the United Nations, in effect the solution that had been rejected at San Francisco. Although the Australian and Indian delegations strongly advocated a convention, the great majority of the governments represented at this first session of the Commission favoured a declaration, and it was in that form that the first draft, the so-called Secretariat Outline,[6] was prepared. It was only at its second session that the Commission decided to draft a bill in three parts: a declaration, a multilateral convention (soon known as the Covenant and later as the Covenants after the General Assembly decided that there would

[4] In the speech with which he closed the Conference President Truman said that "under the Charter we have good reason to expect the framing of an international bill of rights acceptable to all the nations involved." United States Department of State Bulletin, vol. xiii, no. 314, p. 5.

[5] ECOSOC Resolution 1/5 of 16 February, 1946. It may be noted that the council did not adopt the recommendation of the United Nations Preparatory Commission that the work of the commission also be directed to "any matters within the field of human rights considered likely to impair the general welfare or friendly relations between nations".

[6] U.N. Document E/CN/AC.1/3. This draft is reproduced as Annex A of document E/CN.4/21 and also in the *Yearbook on Human Rights* for 1947 (United Nations, Lake Success, 1949) at p. 484.

be two conventions) and measures of implementation.

The Commission made no attempt at its first session to draft the declaration, but it did appoint a committee consisting of its chairman (Mrs. Roosevelt of the United States), its vice-chairman (P.C. Chang of China) and its rapporteur (Charles Malik of the Lebanon) to prepare a first draft. This Committee of three held only one meeting– a tea-party really in Mrs. Roosevelt's Washington Square apartment on the Sunday following the adjournment of the Commission – and soon found itself without a mandate. Nor did it draft any articles, partly because Chang and Malik – two of the most brilliant men ever to sit on the Human Rights Commission and who would later be among the principal architects of the International Bill of Rights – were poles apart philosophically and could seldom agree on anything; but the committee did ask the Director of the Human Rights Division in the Secretariat to prepare a draft declaration. He eventually did so but not until after the Commission's arrangements were upset by the Economic and Social Council when somewhat tardily the Soviet Union realized that these arrangements effectively excluded it from any role in the early drafting process. The issue was resolved when on 24 March Mrs. Roosevelt informed the president of the Council that she was appointing a new drafting committee of eight members of the Commission: Australia, Chile, China, France, the Lebanon, the United States, the United Kingdom and the Soviet Union. Strictly speaking she had no legal right to change a decision of the Commission in a matter on which it had been explicit; but her solution was realistic and politically acceptable and it was approved by the Council which also instructed the Secretariat to prepare a 'documented outline' of the Bill, a confirmation in effect of the mandate it had received from the committee of three except that whereas that committee had asked for a draft declaration the Council was now calling for a documented outline which could have been interpreted as meaning a simple list of rights. In fact the so-called Outline was a draft declaration.[7] This draft, which was based on a number of drafts that had been prepared by a number of individuals and organizations,[8] contained forty-eight short

[7] The work of the Secretariat was later described by the late Nobel laureate, René Cassin, as not being capable of use in oral debate. See his *La Pensée et l'Action.* He uses substantially the same language in an article, *Quelques souvenirs sur la Déclaration universelle de 1948, Revue de Droit contemporain* (15e année, no. 1/1968) p. 3 *et seq. "C'est pourquoi",* he writes, *"je fus chargé par mes collègues de rédiger, sous ma seule responsabilité, un premier avant-projet".* This statement is patently wrong as the record shows. See *infra.* Nowhere does Cassin mention that there existed a Secretariat draft.

[8] They included a draft by Gustavo Gutierrez (which had probably inspired the draft Declaration of the Duties and Rights of the Individual which Cuba sponsored at San Francisco) and others by H.G. Wells, Professor (as he then was) Hersch Lauterpacht, the Reverend Wilfrid Parsons, S.J., Rollin McNitt and by a committee presided over by Lord Sankey after a

articles in which both civil and political and economic and social rights were catalogued and defined. With two exceptions all the texts on which the Director worked came from English-speaking sources and all of them from the democratic West; but the documentation which the Secretariat later brought together in support of his draft included texts extracted from the constitutions of many countries.

The new drafting committee of eight met at Lake Success from 9 to 25 June. After a long debate during which the Secretariat draft declaration was discussed and compared with a draft convention sponsored by the United Kingdom,[9] the representative of the Soviet Union, Professor Koretsky – a future judge of the International Court of Justice – suggested that a working group consisting of the representatives of France, the Lebanon and the United Kingdom be asked to collate the opinions that had been expressed. He wanted this working group to report back to the Drafting Committee a few days before the next session of the full Commission. Koretsky's motion was interpreted as a delaying tactic, but the working group was nevertheless appointed with a mandate to report back forthwith 'a logical rearrangement' of the articles of the Secretariat draft and how they should be redrafted in the light of the committee's discussions and divided between a manifesto and a convention. The working group met immediately and asked the representative of France, René Cassin, to prepare a new draft based on those articles of the Secretariat draft which he considered appropriate for a declaration. He did this over the week-end with the help of Emile Giraud, an officer in the Division of Human Rights.

Cassin's draft[10] reproduced the Secretariat draft in most of its essentials and style. Some of his articles were no more than a new French version of the official United Nations translation of the English original. He also changed the order of some of the articles, combined in one article principles the Secretariat draft had expressed in two and divided some of them

public debate conducted in Britain by the *Daily Herald*. Still others came from the American Law Institute (the text sponsored by Panama at San Francisco and in the General Assembly), the American Association for the United Nations, the American Jewish Congress, the World Government Association, the *Institut de droit international* and the editors of *Free World;* and the American Bar Association provided an enumeration of subjects.

[9] See U.N. Document E/CN.4/21 Annex B/R.25. The United Kingdom draft convention had little if any influence on the final outcome. It had, however, been prepared with skill and imagination and had it been pushed more energetically might have become a solid basis for the Covenant on Civil and Political Rights. It did not contain any mention of economic, social and cultural rights.

[10] This draft in Cassin's handwriting was displayed, at the request of the French government, at United Nations Headquarters on the occasion of the tenth anniversary of the adoption of the Universal Declaration; and a photographic reproduction of the same manuscript is reproduced in his book, *La Pensée et l'Action,* already cited.

into two or more articles; and he left out some of the articles because, in his opinion, they could be more appropriately included in a convention. Many of his changes and in particular his changed order did not survive the test of time.

One of the very few new ideas in Cassin's draft was in his article twenty-eight which said that "the protection of human rights requires a public force" a truism which the Drafting Committee did not retain. Other articles enunciated principles which were more philosophical than legal, principles not included in the Secretariat draft which had avoided assertions that did not enunciate justiciable rights. His first article which read: "All men are brothers. Being endowed wtith reason, members of one family, they are free and possess equal dignity and rights" created so much difficulty at the Commission's second session that Ambassador Bogomolov was prompted to ask why the Declaration should be filled with solemn affirmations lacking in sense. It also led to difficulties with the Commission on the Status of Women which objected to its language. But the greatest harm that resulted from the introduction of unnecessary philosophical concepts was the needless controversy and useless debate which they invited, particularly in the General Assembly.

With the help of the Commission on the Status of Women, the Commission's two sub-commissions on freedom of information and the prevention of discrimination, the 1948 Geneva Conference on Freedom of Information, the Specialized Agencies and non-governmental organizations, the Human Rights Commission and its Drafting Committee continued to work on the Declaration until the late Spring of 1948. Its work on the two covenants, as they later became, would not be completed until 1954; but on 18 June, 1948, at the end of its third session the Commission adopted its draft of the Declaration with twelve of its members voting in favour. Byelorussia, the Soviet Union, the Ukraine and Yugoslavia – anticipating the stand they would later take in the General Assembly – all abstained from voting. The draft declaration was therefore ready for consideration by the Assembly at its third session.

Although the Economic and Social Council through which the Commission's text was transmitted to the General Assembly had so many human rights items on the agenda of its seventh session, including the draft convention on genocide and the Final Act of the Information Conference, that exceptionally it set up a special committee to deal with them, the Council made no changes in the text of the Declaration which when it reached the Assembly was sent to the Third Committee. In the light of the many difficulties which then arose, it was fortunate that the chairman of

this committee was Charles Malik who as rapporteur of the Commission was familiar with all the details of the legislative history of the draft. It was a tribute to the work of the Commission that many of the governments represented in the Assembly would have accepted the text as it stood; but in the event the Third Committee devoted eighty-one long meetings to it and dealt with one hundred and sixty-eight resolutions containing amendments. In the circumstances it is remarkable that the text finally adopted was so much like the Commission's text.

Several delegations, including those of New Zealand and the Soviet Union, tried for different reasons to postpone the adoption of the Declaration. The New Zealanders were opposed to adopting any declaration until the Covenant was ready: "If the Declaration were adopted first", its representative argued, "there was less likelihood that the Covenant would be adopted at all".[11] Had this advice been followed the adoption of the Declaration could have been postponed indefinitely; for it was only in 1966, eighteen years later, that the Assembly approved the Covenants and opened them for signature. Since in the meantime the United Nations human rights programme became a vehicle for political controversy, it is quite unlikely that at any time after, say 1949, the Declaration could have been adopted with its present content. It is inconceivable, for example, that at any later date there would have been no mention in it of the controversial principle of the self-determination of peoples which soon became a hot issue in the United Nations.[12]

Another unsuccessful challenge to the Commission's text was the well organized attempt, under the leadership of Cuba, to replace it in most of its essentials by the text of the American Declaration of the Rights and Duties of Man which the Organization of American States had adopted at Bogota earlier in the year – no small threat when it is remembered that twenty of the then fifty-nine member states of the United Nations were Latin American.

Although the Third Committee was ostensibly a non-political forum, the atmosphere in which it worked was charged by the Cold War and by irrelevant recriminations coming from both sides; but the Committee worked hard and by United Nations standards efficiently. Some of the most controversial issues came up in connection with matters that should never have been discussed. One pregnant source of controversy was the article, already mentioned, that Cassin had fathered in the Commission's

[11] A/C3/S.R. 89 at p. 4.

[12] The Soviet Union did try to have a reference to the principle inserted in the document even in 1948.

Drafting Committee which now read: "All human beings are born free and equal in dignity and rights. They are endowed by nature with reason and conscience and should act towards one another in a spirit of brotherhood". A motion to transfer the article to the preamble was defeated after an emotional debate, probably because the South Africans had tried to amend it in a way which in the charged atmosphere was interpreted as an attempt to weaken it. But the most controversial issue to which the article gave rise was whether it should contain some reference to the Deity. In the event the words "by nature" were deleted.

Attempts to postpone the adoption of the Declaration were, as already indicated, defeated. It was, however only in the night of 6 December that the Third Committee finished its task and forwarded its report to the plenary session of the Assembly, just in time for that body to adopt the Declaration in the night of 10 December,[13] only two days before the end of the session. There were no dissenting votes but the six communist countries which were then members of the United Nations, Saudi Arabia and South Africa all abstained.

This is not the place to review the legislative history of the Declaration[14] or even to analyse its thirty articles. Some of the articles could have been better formulated and the document suffers from the inclusion in it of certain assertions which do not enunciate justiciable rights; but having regard to the very great number of people who in one way or another contributed to the text it is a remarkably well drafted document. There were some important omissions including the failure to include any article on the protection of minorities[15] and to recognize any right of petition even at the national level – a right so fundamental that it is recognized even by some authoritarian countries – let alone by the United Nations.[16]

Remembering that the final arbiters of the text were governments it is perhaps just as well that no serious attempt was made to catalogue or define those duties which are correlative to human rights; but the principle that everyone owes duties to the community is recognized in article 29. This important article also stipulates the conditions under which limitations may be legitimately placed on the exercise of human rights and freedoms, the only permitted limitations being such "as are determined by law solely

[13] G.A. A/811.

[14] On the legislative history, see Albert Verdoodt, *La Naissance et Signification de la Déclaration universelle des droits de l'homme* (Louvain, 1964).

[15] See Humphrey, "The Sub-Commission on the Prevention of Discrimination and the Protection of Minorities", *American Journal of International Law,* vol. 62 (1968) p. 869 *et seq.*

[16] Humphrey, "The Right of Petition in the United Nations", *Human Rights Journal,* vol. iv, p. 463 *et seq.*

for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society''.[17] The reference here to public order can be compared with advantage to the use in the Covenant on Civil and Political Rights of the expression ''public order *(ordre public)''* which insofar as that instrument is concerned in any event introduces the nebulous and dangerous concept of public order in civil law jurisdictions.

The Declaration gives pride of place to the traditional civil and political rights which are catalogued and defined in its first twenty-one articles. There then follows, after an ''umbrella article'', a list and definitions of economic, social and cultural rights which, in 1948, were still controversial in many countries; witness the principal reason that motivated the division of the Covenant into two parts. It was indeed the inclusion of these rights in the Declaration which was one of the reasons for its great historical importance.

B. IMPACT AND JURIDICAL CHARACTER OF THE UNIVERSAL DECLARATION

The adoption of the Declaration was recognized as a great achievement and it immediately took on a moral and political authority not possessed by any other contemporary international instrument with the exception of the Charter itself. One of the very few dissenting voices was that of Sir Hersch Lauterpacht who in a book published shortly after the adoption of the Declaration went so far as to question even its moral authority.[18] Had this great lawyer, who was also a dedicated if impatient partisan of human rights, lived longer, he would have recognized not only the great moral authority of the Declaration but, it is submitted, its now binding character as part of the law of nations. There can now in any event, thirty years after its adoption, be no doubt, that the Declaration does possess both moral and political authority. Not only has it become an international standard by which the conduct of governments is judged both within and outside the

[17] The author of the present essay has attempted in an essay in a book to be published sometime in 1978 to discover the meaning of this article.

[18] ''The moral authority and influence of an international instrument of this nature must be in direct proportion to the degree of sacrifice of the sovereignty of states which it involves . . . The Declaration does not import to imply any sacrifice of the sovereignty of the state on the altar of the inalienable rights of man and, through them, of the peace of the world.'' International Law and Human Rights (London, 1950) p. 419.

United Nations (it has been invoked so many times that it would require a major effort of research simply to list them); it has inspired a whole cluster of treaties – including the very important European Convention for the Protection of Human Rights and Fundamental Freedoms[19] – it is reflected in many national constitutions, some of which reproduce its provisions *verbatim* as well as in international legislation and in the decisions of both national and international courts.[20] The thesis to which the remainder of this essay will be devoted is that, in addition to their admitted moral and political authority, the justiciable provisions of the Declaration, including certainly, those enunciated in articles two to twenty-one inclusive,[21] have now acquired the force of law as part of the customary law of nations.

Law as that term is understood by lawyers acquires its normative binding force from the source or authority from which it emanates. In the case of international law this is ultimately the will of the international community, which has been traditionally expressed either directly by customary rules or indirectly by treaties which are themselves binding by virtue of the customary rule, *pacta sunt servanda.* To these two traditional sources the Statute of the International Court of Justice has added a third, ''the general principles of law recognized by civilized nations''. The fact therefore that the Declaration is not a treaty is not a reason for denying that it has the quality of law. A very good case can be made for the proposition that, as suggested by the French delegation at the 1948 session of the General Assembly many if not all principles set forth in the Declaration are ''general principles of law''[22] a proposition ample evidence for which can be found in the documentation prepared by the United Nations Secretariat for the Drafting Committee of the Human Rights Commission in 1947. But if that is so (and it most probably is) those principles would be part of international law by virtue of their recognition by the legal systems of ''civilized nations'' and not because they are proclaimed by the Universal Declaration. The question, important as it may be, is not therefore an appropriate one for further examination in an inquiry into the juridical

[19] See the preamble to this Convention.

[20] See Egon Schwelb, ''The Influence of the Universal Declaration of Human Rights on International and National Law'', Proceedings of the American Society of International Law (1959) p. 217 *et seq.*; and ''United Nations Action in the Field of Human Rights'', U.N. Publication ST/HR/2 Sales number E 74 V. The latter very useful Secretariat document is now being brought up to date.

[21] Some of the articles set forth, as already indicated, philosophical assertions. Most of the rights proclaimed in articles 22 to 28, but not all of them, are programme rights the implementation of which can only be progressive.

[22] See Sir Humphrey Waldock, 106 *Recueil des Cours* (1962) p. 198: ''certain fundamental rights are general principles of law recognized by civilized nations and have been frequently applied by international tribunals in cases concerning the treatment of foreigners.''

character of the Declaration itself. If the Declaration as such now has the force of law it must be because it has acquired the force of customary law.

There is no agreement as to the meaning or character of custom in international law.[23] Professor A. d'Amato has gone so far indeed as to argue that the concept as traditionally understood must now be replaced by the concept of consensus.[24] The terms "custom" and "customary law" are no more than convenient terms for describing a particular juridical phenomenon; what is important is the phenomenon and not the tag. But tempting as it is to try to discover the real meaning of the phenomenon in the light of some of the theories that are now being put forward as to its real nature and to apply the findings to the Declaration, the case for its binding character will be stronger if these tags are given their traditional (one is tempted to say customary) meaning.

Traditionally and in the still dominant theory "custom", as the tag implies, is usage or practice which is accepted as law, a definition that has behind it the authority of both the Statute of the International Court of Justice[25] and of the Court itself.[26] Usage implies an element of time; but, whereas it was once thought that usage had to be of long standing, it would now seem that although time is still an element the necessary duration need not be long.[27] As Tanaka J. wrote in his dissenting opinion in the Continental Shelf cases, "the speedy tempo of present international life promoted by highly developed communication . . . has diminished the importance of the time factor and made possible the acceleration of the formation of customary international law. What required a hundred years in former days may now require less than ten years".[28] The point need not be laboured here because the Universal Declaration is already thirty years old and the practice that will presently be referred to stretches over the whole of that period.

[23] The much quoted observation made by Professor Jules Basdevant in 1936 is still true: *les idées des juristes sur le caractère de la coutume n'ont atteint ni à l'unité ni à la clarté".* Règles générales de la paix, *Recueil des Cours* 1936 - IV p. 508.

[24] The Concept of Custom in International Law (Cornell University Press, 1971). For a criticism of this theory see H.W.A. Thirlway, *International Law and Codification* (Leiden, 1972) p. 49 *et seq.*

[25] Article 38 1 (b).

[26] See in particular the Continental Shelf cases, I.C.J. Reports, 1969, p. 3 at p. 44.

[27] Josef L. Kunz, "The Nature of Customary Law", *American Journal of International Law,* vol. 47 (1947) p. 666: "international law contains no rules as to how many times or for how long a time this practice must be repeated".
G. Schwarzenberger, *Manual of International Law* (London, 1967) p. 32: "It is not, however, necessary to prove that the practice has been followed for any particular period of time."
Even Thirlway, *op. cit.,* who otherwise takes a very conservative view of the nature of custom, admits that "in the circumstances of today" customary law can "change and develop very much more rapidly than was the case in the smaller and in a sense less active international community of the last century".

[28] Continental Shelf cases, *op. cit.,* 1977. Quoted by Thirlway.

What is the nature of the practice required? According to the author of a recent prize-winning monograph,[29] "the substance of the practice required is that states have done, or abstained from doing, certain things in the international field". "The occasion of an act of state contributing to the formation of custom must always", he says, "be some specific dispute or potential dispute . . . The mere assertion *in abstracto* of the existence of a legal right or legal rule is not an act of state practice". However, the author gives no authority for his statement, and it is submitted that he is merely describing the kind of state practice that contributed to the formation of customary law when there were few if any alternative means.[30] In the world of the late twentieth century states have more ways, particularly as a result of their participation in many international organizations including the United Nations, through which to express their juridical opinion as to the existence of this or that customary rule.[31] The practice of states in international organizations such as the United Nations and its specialized agencies is just as much evidence of "general practice accepted as law" as the positions they take in disputes or potential disputes. What more authoritative way can there be for a state to express its opinion as to the existence of a customary rule than by the officially recorded votes of their authorized representatives, authorized it may be noted by the state organ, i.e. the Ministry of Foreign Affairs, most competent to bind the state internationally? There is growing support for the proposition that the collective acts of international organizations are evidence in themselves of the development of customary rules[32] and there seems to be no good reason in prin-

[29] Thirlway, *op. cit.,* at p. 58.

[30] The statement isn't even true of primitive national law. See Sir Paul Vinogradoff, *Common Sense in Law* (second edition, London, 1946) at p. 117: "the first thing to be noticed is that legal customs often arise independently of any litigation by the growth of definite views as to rights and duties."

[31] Cf. Richard A. Falk, *The Status of Law in International Society* (Princeton, 1970) at p. 154: "So long as international society was highly decentralized it was necessary to rest all law-making procedures on state practice, but with the growth of the organized international community it certainly seems increasingly plausible to allow the collective acts of the competent international institutions to serve as evidence of 'general practice accepted as law'." Falk, it will be noted, goes further than the thesis defended in this essay which is that the conduct of states as evidenced by their votes in international organizations is proof of state practice, not that the collective acts of such institutions is evidence of the formation of customary law.
And see Kunz, *op. cit.,* at p. 667, who includes international decisions and the practice of international organizations as evidence of the development of customary rules. And Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (London, 1963) at p. 2 where after pointing out that the practice of states includes "their international dealings as manifested by their diplomatic actions and public pronouncements", goes on to say that "with the development of international organizations, the votes and views of states have come to have legal significance as evidence of customary law". See finally G.I. Tunkin, *Droit international public, problèmes théoriques* (Paris, 1965) p. 101 *et seq.*

[32] Cf. the opinion of Professor Falk referred to in the previous footnote.

ciple why this should not be so. As Professor Virally suggests, "since international institutions are themselves subjects of international law, it is clear that their practice can contribute to the creation of custom".[33] The thesis being defended in this essay however is the less radical one that resolutions adopted by international conferences are evidence of *state* practice, not that the collective acts of such conferences are in themselves evidence of the development of customary rules.

What does the practice of states as proved by their votes officially recorded at international conferences show? Nothing could be clearer than that the Declaration was never meant to be binding as part of international law nor could it be simply by virtue of its having been adopted as a resolution of the General Assembly, the decisions of which have the force of recommendations only, except of course, resolutions relating to internal or house-keeping matters. It must be remembered that when it was adopted the Declaration was intended to be only one part of a tri-partite Bill one part of which was to be a multilateral treaty or Covenant. If the Declaration were to be binding why would it be necessary also to have a multilateral convention covering substantially the same ground? It was hardly necessary, therefore, for a number of delegations to stress, when explaining their votes, that the document was not binding. There were some delegations, it is true, which saw some sparks of juridical validity in the Declaration. These included the South Africans who presciently warned the Assembly that although not a treaty the Declaration would nevertheless impose certain obligations on states since it would undoubtedly be regarded as an authoritative interpretation of the rights and freedoms mentioned but not defined by the Charter. Although unlike the South Africans they nevertheless voted for the Declaration, the Chinese and French took a similar position. Referring to the Charter commitment to observe human rights, the Chinese said that the Declaration "stated these rights explicitly"; and the French after saying that the document could be considered an authoritative interpretation of the Charter went on to suggest that the norms set forth in it could also be considered "general principles of law" and therefore a source of law under the Statute of the International Court of Justice. Another delegation that detected elements of juridical obligation in the Declaration was the Chilean which said that "violation by any

[33] Max Sørensen (ed.) *Manual of International Law* (London, 1969) p. 139. In its Advisory Opinion relating to the Treaty of Lausanne and the frontier between Turkey and Iraq, the Permanent Court of International Justice invoked the unanimity rule as being "in accordance with the unvarying tradition of all diplomatic meetings or conferences". Publications of the Court, Series B., no. 12 at p. 30.

state of the rights enumerated in the Declaration would mean violation of the principles of the United Nations",[34] a statement which was undoubtedly motivated by the dispute mentioned below between Chile and the Soviet Union regarding the refusal of the Government of the latter country to allow the wife of a Chilean diplomat to leave the Soviet Union with her husband. These first official *dicta* were the beginning of a now developed practice of regarding the Declaration as an authoritative and therefore binding interpretation of the Charter.

To say that the Declaration is now part of the customary law of nations is, as already indicated, not to say that it is binding by virtue of the fact that it was adopted as a resolution of the General Assembly. As Sir Hersch Lauterpacht put it in the book already mentioned it was (and still is) "idle to attempt to kindle sparks of legal vitality in the Universal Declaration of Human Rights by regarding it as a recommendation of the General Assembly and by inquiry into its legal effects as such".[35] If the Declaration is now part of the law of nations and therefore binding on all states whether they voted for it or not, this is not because it was adopted by the Assembly, important as that may have been, but for other reasons including subsequent events and the emergence of a juridical consensus evidenced by the practice of states that the Declaration is now, whatever the intention of its authors may have been in 1948, binding as part of the law of nations.[36]

No scholar has yet attempted to review all the cases where the Declaration has been invoked either within or outside the United Nations with a view to determining whether they provide evidence of practice accepted as law and hence juridical consensus. That attempt will not be made here; but mention will be made of a few cases – all of them except one from United Nations practice – which, it is submitted, show that the Declaration has in fact been accepted as law.

The Declaration was less than five months old when, on 25 April, 1949, the General Assembly invoked two of its articles – article 13 on the right of everyone to leave any country including his own and article 16 on the right to marry without any limitation due to race, nationality or religion – in a resolution stating that "measures which prevent or coerce the wives of citizens of other nationalities from leaving their country of origin with their husbands or to join them abroad are not in conformity with the Charter"

[34] A/C.3/S.R.91 at p. 97.
[35] *Op. cit.*, p. 412.
[36] Reference may be made here to the dissenting opinion of Tanaka J. in the South West Africa cases, Second Phase, where he said that although not binding in itself, the Universal Declaration constituted evidence of the interpretation and application of the relevant Charter provisions. I.C.J. Reports 1966, pp. 288 and 293.

and recommended that the Soviet Union withdraw measures of that nature.[37] The resolution does not say in so many words that the Declaration is binding; but it does say after invoking the two articles in question that the measures adopted by the Soviet Union were not in conformity with the Charter. Since the Charter neither catalogues nor defines human rights, the logical and inescapable conclusion is that the states which voted for the resolution were using the Declaration to interpret the Charter. This was the first of many times that the General Assembly used the Declaration – as certain delegations said in 1948 it should be used – as an authentic interpretation of the Charter.[38]

Further evidence of the growth of the practice is to be found in the Declaration on the Granting of Independence to Colonial Countries and Peoples which the General Assembly adopted in 1960.[39] This Declaration, which was adopted by eighty-nine votes (including the votes of all the states except South Africa which abstained in the voting on the Universal Declaration in 1948) to none with nine abstentions, provides in its seventh and final paragraph that "all states shall observe faithfully and strictly the provisions of . . . the Universal Declaration of Human Rights". Like that Declaration, the Declaration on the Granting of Independence is not binding by virtue of its having been adopted by the General Assembly; its peremptory terms are however evidence of the practice and juridical consensus of states. The fact that the powers responsible for the administration of the colonial territories in question all abstained from voting undoubtedly affects the quality of the evidence. It may be noted, however, that Professor Tunkin, the distinguished Soviet international lawyer (who was at the time the legal counsel of the Soviet Foreign Office) has nevertheless said that the 1960 declaration is itself part of customary law.[40] His arguments can be applied with much greater force to the Universal Declaration of Human Rights.

The objection that the most interested states abstained from voting cannot be raised against the probative value of the Declaration on the Elimination of All Forms of Racial Discrimination which the General Assembly

[37] G.A. Resolution 285 (III).

[38] See Sir Humphrey Waldock, 106 *Recueil des Cours* (1962) p. 199 where he says that the Declaration may be referred to "for indications of the content of the human rights envisaged in the Charter". He went further in a lecture to the British Institute of International and Comparative Law where he mentioned the "constant and widespread recognition of the principles of the Universal Declaration" which "clothes it, in my opinion, in the character of customary law". International and Comparative Law Quarterly, Supplementary Publication no. II, 1965, p. 15. And see Goodrich and Hambro, *The Charter of the United Nations* (Revised second edition, Boston, 1949) p. 547.

[39] G.A. Resolution 1514 (XV) of 14 December 1960.

[40] *Op. cit.*, and see my discussion of the question in Luard (ed.) *op. cit.* pp. 51-52.

unanimously adopted on 20 November, 1963. In terms only slightly different from those used in the 1960 Declaration, article 11 of this Declaration says that "every state shall promote respect for and observance of human rights and fundamental freedoms in accordance with the Charter of the United Nations and shall fully and faithfully observe the provisions of . . . the Universal Declaration of Human Rights".[41] In voting for such a provision states must be taken as meaning what they say. They cannot on one occasion say that the Declaration is to be fully and faithfully observed and on another that it is not binding. The provision is also pertinent for another reason; for it is obviously another example of the use of the Universal Declaration to interpret the Charter.

In the same year, on 4 December, 1963, the Security Council adopted a resolution which speaks of *apartheid* as being "in violation" of South Africa's "obligations as a member of the United Nations and of the Provisions of the Universal Declaration of Human Rights".[42] Here again the Security Council was obviously using the Declaration to interpret the Charter. Because of its limited membership resolutions of the Security Council, however authoritative in other respects, are not as good evidence of state practice as are those of an Assembly the membership of which is now practically universal. Reference may therefore be made to the resolution of 27 October 1966 by which the General Assembly terminated the mandate of South Africa over South West Africa (Namibia) on the ground that the mandate had "been conducted in a manner contrary to the mandate, the Charter of the United Nations and the Universal Declaration of Human Rights".[43] That the General Assembly was again using the Declaration to interpret the Charter is clear enough. When, however, the International Court of Justice upheld in 1971 the right of the United Nations to terminate the mandate over South West Africa, it did not have to base its opinion on the Declaration although Judge Fuad Ammoun very nearly did so in his separate opinion.[44] For although the Charter does not catalogue or define human rights it does stipulate that they shall be enjoyed "by all without distinction as to race, sex, language or religion".[45] Therefore, in the words of the Court, "to establish instead, and to enforce, distinctions, exclusions, restrictions and limitations based on grounds of race, colour, descent or national or ethnic origin which constitute a

[41] G.A. Resolution 1904 (XVIII) of 20 November, 1963.

[42] Resolution S/5471.

[43] Resolution 2145 (XXI). Portugal and South Africa voted against and France, Malawi and the United Kingdom abstained.

[44] I.C.J. Reports, 1971, p. 16 *et seq.* For Judge Ammoun's separate opinion see p. 76 *et seq.*

[45] E.g. Articles 1 and 55.

denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter''.[46]

The Advisory Opinion of the Court in the Namibia case is, therefore, of little help in proving the proposition that the Universal Declaration is now part of the law of nations. This cannot be said of the Proclamation of Teheran which was unanimously approved on 13 May, 1968, by the International Conference on Human Rights, an inter-governmental conference convened by the United Nations at which 84 states were represented. Article 2 of this proclamation which was later endorsed by the General Assembly in its resolution of 19 December 1968, says that the Universal Declaration of Human Rights ''constitutes an obligation for the members of the international community''.[47] Still more recent evidence of the now binding character of the Declaration can be found in the Final Act of the Helsinki Conference on Security and Cooperation in Europe of 1975, section VII of which says, *inter alia,* that ''in the field of human rights and fundamental freedoms, the participating states will act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights''. Again the same consistent association of the Declaration with the Charter and the same underlying assumption that the latter must be interpreted by reference to the former. That the participating states were treating the Declaration as giving rise to legally binding obligations appears most clearly from the ensuing sentence where they say that ''they will *also fulfil their obligations* as set forth in the international declarations and agreements in this field, including *inter alia* the International Covenants on Human Rights, by which they may be bound''.[48] The fact that the Final Act may itself not be binding is for present purposes irrelevant; for what we are looking for is evidence of state practice and *opinio juris.*

This review of state practice relating to the Universal Declaration does not pretend to be exhaustive. Enough has been said, however, to conclude that if governments mean what they say – and it must be assumed that they do mean what their officially authorized representatives say on their behalf – then the Declaration is to be ''faithfully and strictly'' observed (words of the Declaration on the Granting of Independence to Colonial Countries and Peoples), that it is to be ''fully and faithfully'' observed (words of the Declaration on the Elimination of all Forms of Racial Discrimination) that

[46] See p. 57, para. 131 of the Advisory Opinion.

[47] Final Act of the International Conference on Human Rights, Teheran, 22 April – 13 May, 1968. A/Conf. 32/41 p. 4.

[48] Italics added.

states shall ''act in conformity'' with it (words of the Helsinki Agreement) and that it therefore ''constitutes an obligation for the members of the international community'' (words of the Teheran Conference) – which is to say that it is binding on states as part of the law of nations. There is indeed a kind of inescapable logic in this conclusion. For it is the only instrument universally applicable to all states which catalogues and defines the human rights and fundamental freedoms which, it is now generally recognized, the Charter binds states to respect although it does not define or list them. By the development of a new customary rule the Universal Declaration of Human Rights has become an authentic interpretation of the Charter.

The importance of the Conclusion can hardly be exaggerated. The conventional wisdom of certain jurists is to say that, while the Declaration may have great moral and political authority, it is merely, as its preamble says, ''a common standard of achievement'' and has no binding legal force; the Covenants on the other hand are binding on all states that ratify them. It is unlikely, however, that the Covenants will ever be universally ratified; but if, by the development of a new rule of customary international law, the Declaration has become an authentic interpretation of the human rights provisions of the Charter, then its provisions, like those of the Charter itself, bind all member states. If, in addition to becoming an authentic interpretation of the Charter the Declaration has become part of the customary law irrespective of the Charter, it is also binding on all states whether they are members of the United Nations or not. This would mean, amongst other things, that if, for example, a country were expelled from the Organization under article six of the Charter, that country would nevertheless continue to be bound by the Declaration. In countries, moreover, in which the customary law of nations is part of the law of the land, the Declaration could be invoked before and applied by national courts.

The question of the juridical character of the Universal Declaration is not, therefore, an idle academic exercise. If the thesis set forth in this essay that it has become part of the customary law of nations is correct then its adoption by the United Nations on 10 December, 1948, was a far greater achievement than its authors could ever have imagined.