

Protecting the Territorial and Resource Dimension of Self-Determination from Climate Change Impacts

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Introduction

This article argues for a more explicit recognition of a *territorial and resource dimension of self-determination* in international law that protects the connection between climate vulnerable peoples to their territory and resources in the context of climate change impacts such as sea-level rise, shifting environmental conditions, and other resource and territorial loss. Preexisting scholarship has already identified a territorial and resource dimension of self-determination in certain contexts,¹ and this article further outlines this dimension in relation to the self-determination of decolonizing peoples, peoples under some kinds of foreign occupation, and the self-determination of Indigenous Peoples. More recent scholarship has suggested the possibility of such a dimension in the context of climate change.² This article proposes that a territorial and resource dimension should be explicitly recognized to protect “climate vulnerable peoples,” including peoples comprising entire States and Indigenous Peoples, from territorial and resource loss caused by climate change. This article discusses potential breaches of this proposed territorial and resource dimension of self-determination in the context of climate change. The article concludes with a discussion of the international legal responsibility associated with breaches of the territorial and resource dimension of self-determination.

Climate Change, Self-Determination, and The Risk of Deterritorialized Peoples

There is increasing acknowledgment that climate change impacts such as sea-level rise and changing environmental conditions will affect the

1 CRITESCU (1981), par. 279 (arguing that inherent in the definition of “people” is a “relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another population”); QUANE (1998) (arguing that, “At present, international law adopts a purely territorial concept of people”); DREW (2001), pp. 651, 663 (arguing that “implicit in any recognition of a people’s right to self-determination is recognition of the legitimacy of that people’s claim to a particular territory and/or set of resources.”); WEWERINKE-SINGH (2019), pp. 102-104 (identifying a “resource dimension” of self-determination which relates to “economic, social and cultural self-determination” and which entails the right of all peoples to pursue socio-economic and cultural development “which may in some cases equate with a peoples’ right to a given territory.”)

2 FRERE, MULALAP, TANIELU (2020), pp. 638, 653-656; JONES (2023), pp. 250, 250-251 (also providing a summary of the recent literature).

self-determination of peoples all over the world,³ including Indigenous Peoples.⁴ A particularly pernicious consequence of climate change is loss of territory and resources, for example from sea-level rise⁵ or from the loss of territory that was formerly habitable but becomes uninhabitable due to extreme heat, environmental degradation, or other climate change impacts. Territorial and resource loss from climate change impacts may be partial or total in scope. Partial losses of territory and resources – for example, from land degradation or desertification – are already affecting peoples⁶ and their development pathways.⁷ At the more extreme end, the literature has recognized that total loss of territory, or habitable territory, could lead to the loss of statehood on account of the general doctrinal understanding that statehood requires habitable territory.⁸ Some scholars have proposed the concept of the *ex-situ* or deterritorialized State⁹ as a possible solution to this dilemma, referring to the idea of a State having continued existence and being afforded all rights and benefits of sovereignty even in the absence of having a connection to territory.¹⁰ Such proposals are noteworthy and important but must be distinguished from the independent threats to peoples (distinct from States) from climate change impacts. Peoples are independent rights holders of

3 Government of the Republic of the Maldives, Submission to the OHCHR Under Human Rights Council Resolution 7/23 (2008) 41 <https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/Submissions/Maldives_Submission.pdf> accessed 31 October 2023 (“The peoples of small, isolated islands who are dependent on local agriculture and fishing could be deprived of their means of subsistence well before the islands are fully inundated. For these reasons, climate change impacts constitute a threat to the enjoyment of the right of the Maldives” people to self-determination.”); OHCHR “Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General: Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights” (2009) UN Doc. A/HRC/10/61 paras 39-41; OHCHR “Understanding Human Rights and Climate Change, Submission to 21st COP of the UNFCCC” (2015) 14 <<https://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf>> accessed 31 October 2023; “Amicus brief submitted to the International Tribunal for the Law of the Sea by the UN Special Rapporteurs on Human Rights & Climate Change (Ian Fry), Toxics and Human Rights (Marcos Orellana), and Human Rights & the Environment (David Boyd)” (30 May 2023) International Tribunal for the Law of the Sea (Case No. 31) Request for an advisory opinion submitted by the Commission of Small Island States on climate change and international law 14-15 <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20230530_Case-No.-312022_opinion.pdf> accessed 31 October 2023.

4 Complaint submitted by Five Tribes in Louisiana and Alaska, “Rights of Indigenous People in Addressing Climate-Forced Displacement” (15 Jan 2020) submitted to Human Rights Council Special Procedures (the “Five Tribes Complaint”) 13-15, 40-41 <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20200116_USA-162020_complaint.pdf> accessed 31 October 2023.

5 ILC (2022), para. 227, 228.

6 SHUKLA (2019) Summary for Policy Makers para. A.1.5.

7 JONES (2023), p. 253; IPCC (2019), para. A.6.

8 STOUTENBURG, (2013), pp. 59-63.

9 BURKETT (2013), pp. 93-95; ILC (2022), para. 197.

10 BURKETT (2013), pp. 89.

their own self-determination under international law¹¹ and thus also face infringements of rights from their own “deterritorialization,”¹² including their own status as “deterritorialized peoples” as a result of territorial and resource loss. Because the right of self-determination carries obligations of an *erga omnes* nature¹³ and acts as an arguable peremptory norm of international law (*jus cogens*),¹⁴ the loss of territory and resources due to climate change impacts will have consequences on peoples that implicate essential principles of international law and therefore warrants separate analysis.

The Territorial and Resource Dimension of Self-Determination in the Contexts of Decolonizing Peoples, Peoples under Foreign Occupation, and Indigenous Peoples

A territorial and resource dimension of self-determination has been delineated in the contexts of decolonization, peoples under foreign occupation, and in the connection of Indigenous Peoples to their lands, territories, and resources. Territorial integrity was recognized as a fundamental component of decolonial self-determination in UN Resolution 1514(XV), including a prohibition on the

11 JONES (2023), p. 252; CASSESE (1995), pp. 143-145 (arguing the “better view” that peoples are holders of legal rights with respect to self-determination for purposes of the International Covenant on Civil and Political Rights (the “ICCPR”) and International Covenant on Economic, Social and Cultural Rights (the “ICESCR”).

12 ILC (2023), par.a 170 (observing that the principle of self-determination is “closely linked to sovereignty over natural resources and the territorial integrity of States” which therefore implies that “states should not lose their right to territorial integrity as a result of sea-level rise.”)

13 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) 2004 <<https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>> accessed 31 October 2023 [hereinafter *A Wall in the Occupied Palestinian Territory*] [155]-[156]; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) 2019 <<https://www.icj-cij.org/public/files/case-related/169/169-20190225-ADV-01-00-EN.pdf>> accessed 31 October 2023 [hereinafter *Chagos*] [180].

14 ILC, “Draft conclusions on identification and legal consequences of peremptory norms of international law (*jus cogens*), with commentaries” (2022) UN Doc. A/77/10 <https://legal.un.org/ilc/texts/instruments/english/commentaries/1_14_2022.pdf> accessed 31 October 2023 (the “Draft Articles on Peremptory Norms”) [Annex (h) (identifying self-determination as a peremptory norm of international law (*jus cogens*))]; CASSESE (1995), p. 140 (“the conclusion is justified that self-determination constitutes a peremptory norm of international law”); ILC, “Draft Articles on Responsibility of States for Internationally Wrongful Acts” (2001) UN Doc A/56/10 ch. IV <https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed 31 October 2023 (the “Draft Articles on State Responsibility”) art. 26 (“Compliance with peremptory norms”) comment 5 (identifying the right to self-determination as a peremptory norm); but see PARK (2021), pp. 711-712 (concluding that despite the importance of the norm, “the legal character of the right of self-determination has not yet reached its conclusion” and that “an opposite view over the right to self-determination as a norm *jus cogens* still remains” that “prevents a definitive confirmation of its peremptory character.”).

dismemberment of non-self-governing territories in paragraph 6 and the respect of the territorial integrity of any such non-self-governing territory.¹⁵ A contemporaneous right of decolonizing peoples to freely dispose of their natural wealth and resources was also being formulated and expressed as part of the broader law of decolonial self-determination,¹⁶ including through the concept of “permanent sovereignty over natural resources” for such decolonizing peoples.¹⁷ The International Court of Justice (the “**ICJ**”), in addressing questions related to the decolonization of Western Sahara in the *Western Sahara* advisory opinion, recognized that peoples can have “legal ties” to their territory and to resources (including wells and water-holes, cultivated lands, and grazing pastures) which could exist even where such people lacked a common sovereign or did not themselves comprise a legal entity.¹⁸ In its 2019 advisory opinion related to the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965, the ICJ affirmed the continuing relevance of Resolution 1514(XV) and the prohibition against the “partial or total disruption of the national unity and the territorial integrity of a country,”¹⁹ in concluding that the territorial partition of the Chagos Archipelago from Mauritius was unlawful.²⁰ While the focus of the ICJ’s advisory opinion was on territorial integrity, and not on resource loss, a separate Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea (“**UNCLOS**”) agreed with Mauritius that the loss of territory and the subsequent creation of a marine protected area by the United Kingdom in and around the Chagos Archipelago breached certain obligations under UN-CLOS. The Arbitral Tribunal concluded that the marine protected area effectively “extinguished” Mauritius’ fishing rights, thereby providing an example of how loss of territory and loss of resources are intertwined.²¹

15 *Chagos* (no. 13) [152]-[153] (citing to para. 6 of resolution 1514(XV)), [160]; HILPOLD (2022). pp. 189, 204.

16 CRITESCU (1981), paras 434, 438; CASSESE (1995), p. 100.

17 SCHRIJVER (2015), pp. 16-17 (“PSNR was an integral part of the decolonization movement, since it was widely felt that the achievement of political self-determination would be an empty shell without realizing simultaneously economic self-determination.”)

18 *Western Sahara* (Advisory Opinion) (1975) <<https://www.icj-cij.org/sites/default/files/case-related/61/061-19751016-ADV-01-00-EN.pdf>> accessed 31 October 2023 [149]-[152].

19 Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res. 1514 (XV) (14 Dec 1960) (adopted by 89 votes to none; 9 abstentions) operative paras 4, 5, 6.

20 *Chagos* (no. 13) [167], [172]-[174].

21 *Ibid.* [48-50]; *In the Matter of the Chagos Marine Protected Area Arbitration before an Arbitral Tribunal Constituted under Annex VII of the United Nations Convention on the Law of the Sea between the Republic of Mauritius and the United Kingdom of Great Britain and Northern Ireland* (Award) (18 March 2015) para. 521; see generally paras 520-536, 537-541 <<https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf>> accessed 31 October 2023.

A territorial and resource dimension of self-determination has also been affirmed by the ICJ in the context of foreign occupation, and specifically in the ICJ's 2004 advisory opinion related to the construction of a wall in the Occupied Palestinian Territory in and around East Jerusalem. Here, the ICJ concluded that the wall, combined with other measures, risked altering the demographic composition of the Occupied Palestinian Territory and thus "severely impedes the exercise by the Palestinian people of its right to self-determination."²² The ICJ also opined on the destruction and disruption of Palestinian resources, including the destruction of agricultural land, fruit and olive trees, and the requisitioning of "fertile agricultural land and some of the most important water wells in the region" as described by the Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967.²³ The ICJ also further quoted the Special Rapporteur on the Right to Food's conclusion that the wall was "cutting communities from their land and water without other means of subsistence" and thus likely leading to displacement and migration.²⁴ This advisory opinion suggests that at least in some contexts of foreign occupation, the self-determination of an occupied people can be infringed by the imposition of measures whereby the occupied people are unable to maintain their connection or control over particular territory²⁵ or are deprived of their resources and means of subsistence.

The territorial and resource dimension of self-determination has found significant expression in the context of the self-determination of Indigenous Peoples.²⁶ Indigenous self-determination is characterized by a triadic link between (i)

22 *A Wall in the Occupied Palestinian Territory* (no. 13) [122]; [115] (citing to written submissions arguing that, "The wall severs the territorial sphere over which the Palestinian peoples are entitled to exercise their right of self-determination and constitutes a violation of the legal principle prohibiting the acquisition of territory by the use of force.").

23 *Ibid.* [133] (quoting UNCHR "Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine" (8 September 2003) UN Doc. E/CN.4/2004/6 para. 9).

24 *Ibid.* (quoting UNCHR "The right to food: Report by the Special Rapporteur, Jean Ziegler" (31 October 2003) UN Doc. E/CN.4/2004/10/Add. 2 para. 51).

25 GAREAU (2005), pp. 489, 520 (arguing that the opinion "consolidates the widely held belief that self-determination is essentially a territorially based right and that there is an organic, definitional link between a 'people' and the territorial base upon which they claim to exercise their right to self-determination.")

26 Human Rights Council "Study of the Expert Mechanism on the Rights of Indigenous Peoples. Right to land under the United Nations Declaration on the Rights of Indigenous Peoples: a human rights focus" (15 Jul 2020) UN Doc. A/HRC/45/38 para. 7 ("Respect for indigenous peoples' self-determination and their customary land tenure systems necessitates recognition of their collective ownership of lands, territories and resources."); Human Rights Council "Report of the Expert Mechanism on the Rights of Indigenous Peoples. Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: indigenous peoples and the right to self-determination" (4 Aug 2021) UN Doc. A/HRC/48/75 para. 39 ("There is a direct link between self-determination and indigenous peoples' rights over their own land and resources."); GILBERT (2016), p. 238 ("the right to self-determination represents an important legal platform to ensure that

self-determination with (ii) Indigenous culture and cultural integrity and with (iii) Indigenous lands, territories, and resources.²⁷ The destruction of territory and loss of access to resources therefore implicates the “direct link between self-determination and indigenous peoples’ rights over their own lands and resources,”²⁸ as described by the UN Expert Mechanism on Indigenous Peoples. This connection between Indigenous lands, territories, and resources to Indigenous self-determination has been recognized and affirmed in the United Nations Declaration on the Rights of Indigenous Peoples,²⁹ the American Declaration on the Rights of Indigenous Peoples,³⁰ and through general comments and decisions issued by the UN Human Rights Committee (the “HRC”)³¹ and general comments from

land rights are guaranteed and protected when natural resources exploitation is taking place on indigenous territories.”); DAES (2005), p. 76 (“Indigenous peoples have repeatedly emphasized the urgent need for understanding by non-indigenous societies of the spiritual, cultural, social, political and economic significance to indigenous societies of their lands, territories and resources for their continued survival and vitality”).

27 WIESSNER (2012), para. 3.1-3.3 (recognizing a triadic connection between self-determination, protection of indigenous culture, and the safeguarding of their land and resources); DAES (2005), pp. 76-79; ÅHREN (2016), para. 6.3.4; Expert Mechanism on the Rights of Indigenous Peoples (Right to land) (no. 26) para. 5; VOUKITCHCHEVITCH (2021) pp. 189-190; GILBERT (2016), p. 239 (“Knowing that land rights are a fundamental element of indigenous peoples’ political, economic, social and cultural development, it is certain that self-determination should grant them the right to freely determine the use of their territories that are central to their cultures.”); FUENTES (2017), pp. 229, 233.

28 Human Rights Council (2021), para. 39.

29 United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res. 61/295, UN GAOR, 61st sess., 107th plen. mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007) annex (“United Nations Declaration on the Rights of Indigenous Peoples”) (the “**UNDRIP**”) arts 3 (affirming that Indigenous Peoples “have the right to self-determination”); art. 10 (prohibiting forced removal of Indigenous Peoples from their lands); art. 25 (acknowledging that 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”); art. 26, para. 1 (Indigenous Peoples must be granted “the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired”); art. 26, para. 3 (States must “give legal recognition and protection to these lands, territories and resources”).

30 MONTEIRO DE MATOS (2020), p. 24 (citing AG/RES. 2888 (XLVI-O/16)); Organization of American States, American Declaration on the Rights of Indigenous Peoples (2016) (the “**ADRIP**”) arts XXV paras 1, 2, 3; art. XIX paras 1, 2 (recognizing a right of Indigenous Peoples to “live in harmony with nature”, to a “healthy, safe and sustainable environment,” and to “conserve, restore, and protect the environment and to manage their lands, territories and resources in a sustainable way”).

31 HRC “CCPR General Comment No. 23: Article 27 (Rights of Minorities)” (8 April 1994) UN Doc CCPR/C/21/Rev.1/Add.5 paras 3.2, 7 (noting that the right to enjoy a minority culture under article 27 “may consist in a way of life which is closely associated with territory and use of its resources,” particularly for “members of indigenous communities constituting a minority” and that the exercise of cultural rights can manifest in “a particular way of life associated with the use of land resources, especially in the case of indigenous peoples” including “traditional activities such as fishing or hunting.”); see also Human Rights Committee (22 Sept. 2022) “Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019 (*Daniel Billy et al v. Australia*)” UN Doc CCPR/C/135/D/3624/2019 para. 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.”)

the UN Committee on Economic, Cultural and Social Rights (the “CESCR”).³² The HRC also cites article 1 of the ICCPR in its Concluding Observations of States Parties’ conduct in recommending how States may better protect the rights of Indigenous Peoples, including the protection of their historic lands, territories, and resources.³³ Within Inter-American and African regional human rights jurisprudence, a territorial and resource dimension of Indigenous self-determination is tethered to Indigenous existence and survival,³⁴ including an obligation on States to enact positive obligations or ‘special measures’ as appropriate to

32 CESCR ‘General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)’ (20 Jan 2003) UN Doc E/C.12/2002/11 para. 7 (connecting the means of subsistence in paragraph 2, article 1 of the ICESCR with the need for States Parties to “ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples”); CESCR “General Comment No. 21 Right to everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)” (21 Dec 2009) UN Doc. E/C.12/GC/21 para. 36 (affirming the link between aspects of self-determination (in this case, the right to means of subsistence and natural resources), lands and territories, and culture through its conclusion that the “strong communal dimension of indigenous peoples’ cultural life is indispensable to [indigenous peoples’] existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired,” and must be protected by States Parties in order to prevent degradation of their way of life, “including their means of subsistence, the loss of their natural resources, and ultimately, their cultural identity.”); CESCR “General comment No. 26 (2023) on land and economic, social and cultural rights” (24 Jan 2023) UN Doc E/C.12/GC/26 para. 11 (affirming that “land is also closely linked to the right to self-determination . . . Indigenous Peoples can freely pursue their political, economic, social and cultural development and dispose of their natural wealth and resources for their own ends only if they have land or territory in which they can exercise their self-determination.”)

33 See, e.g., HRC “Concluding observations on the seventh periodic report of Finland” (3 May 2021) UN Doc. CCPR/C/FIN/CO/7 paras 42-43 (recommending that Finland review its practices with respect to development projects and extractive industries operations that may impact the rights and interests of the Sámi); HRC “Concluding observations of the Human Rights Committee – Canada” (7 April 1999) UN Doc. CCPR/C/79/Add.105 paras 7, 8 (urging Canada to “report adequately on implementation of article 1 of the Covenant” with respect to Canada’s treatment of Indigenous Peoples and 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.)”); GILBERT (2016), pp. 236-237; CAMBOU (2022) pp. 156-157.

34 GILBERT (2017) p. 26 (“The Inter-American Court has notably emphasized that the close relationship between indigenous peoples and their lands must be recognized and understood as the fundamental base of their culture, spiritual life, integrity, economic survival and cultural preservation.”); *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, African Commission on Human and Peoples’ Rights Comm. No. 276/2003 (25 November 2009) (hereinafter the “*Endorois case*”) <<https://achpr.au.int/index.php/en/decisions-communications/centre-minority-rights-development-kenya-and-minority-rights-group-27603>> accessed 31 October 2023 [260]-[267] (relying on *Saramaka*, in part, in finding that a right to cultural and economic survival of indigenous peoples was protected under article 21 of the African Charter (the right to free disposition of natural resources)); *African Commission on Human and Peoples’ Rights v. Kenya*, Judgment (Reparations), African Court on Human and Peoples’ Rights App. No. 006/2012 (23 June 2022) (hereinafter the “*Ogiek 2022 reparations order*”) <<https://www.african-court.org/cpmt/storage/app/uploads/public/62b/aba/fd8/62babaf-d8d467689318212.pdf>> accessed 31 October 2023 [109] (observing that the “protection of rights to land and natural resources remains fundamental for the survival of indigenous peoples”; [112] (“The close ties that indigenous peoples have with the land must be recognised and understood as the fundamental basis of their cultures, spiritual life, integrity and economic survival.”))

protect Indigenous existence and survival.³⁵ In *Saramaka People v. Suriname*, the Inter-American Court of Human Rights first relied on the right of self-determination to interpret Indigenous land and resource rights³⁶ and also articulated an “inextricable connection” between Indigenous People with their territory and the “natural resources that lie on and within the land” which required protection under article 21³⁷ of the American Convention on Human Rights to “guarantee their very survival.”³⁸ This jurisprudence was reiterated in the 2018 case *Xucuru Indigenous Peoples and its Members v. Brazil*,³⁹ and also referenced in the 2017 Advisory Opinion related to the protection of the environment and human rights under the American Convention.⁴⁰ Similarly, in the African human rights regional system both the African Commission on Human and Peoples’ Rights and the African Court on Human and Peoples’ Rights have relied on article 14 (right to property), article 21 (the right of peoples to free disposition of natural resources), and article 22 (the right to development) of the African Charter on Human and Peoples’ Rights, among other articles, to protect the rights of Indigenous Peoples to their lands, territories, and resources in the *Endorois*⁴¹ and *Ogiek*⁴² cases. In its 2022 reparations order in the *Ogiek* case, the African Court on Human and Peoples’ Rights stressed that the “protection of rights to land and natural resources remains fundamental for the survival of indigenous peoples.”⁴³

35 *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No. 172 (Nov. 28, 2007) <https://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf> accessed 31 October 2023 [85]-[86], [90]-[91], [96], [103], [121]; see also *Endorois case* (no. 34) [187].

36 SHELTON (2011); *Saramaka* (no. 35) [93].

37 Article 21 of the American Convention provides for a right to property.

38 *Saramaka* (no. 35) [122].

39 *Xucuru Indigenous Peoples and its Members v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No. 1346 (Feb. 5, 2018) <https://www.corteidh.or.cr/docs/casos/articulos/seriec_346_ing.pdf> accessed 31 October 2023 [115].

40 *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, Inter-American Court of Human Rights Series A No. 23 (Nov. 15, 2017) https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf accessed 31 October 2023 [48].

41 *Endorois case* (no. 34) [174]-[238] (article 14 protecting a right of Indigenous Peoples to lands, territories, and resources); [252]-[268] (article 21 protecting a right to freely dispose of wealth and natural resources); [269]-[298] (article 22 protecting a right of development).

42 CLARIDGE (2018), pp. 57, 61, 63; *African Commission on Human and Peoples’ Rights v. Kenya*, Judgment Dated 26 May 2017, African Court on Human and Peoples’ Rights App. No. 006/2012 <<https://www.african-court.org/cpmt/storage/app/uploads/public/5f5f5fe9a9/5f55fe9a96676974302132.pdf>> accessed 31 October 2023 [122]-[131] (article 14); [191]-[201] (article 21); [202]-[211] (article 22).

43 *Ogiek 2022 reparations order* (no. 34) [109].

A Definition of “Climate Vulnerable Peoples”

There is no universal definition of “peoples” under international law.⁴⁴ However, there appears to be broad recognition that peoples comprising entire States constitute “peoples”⁴⁵ under international law based in part on the term “peoples” being used as a synonym for States in the UN Charter.⁴⁶ As discussed above, decolonizing peoples, peoples under some kinds of occupation, and Indigenous Peoples are also recognized as constituting “peoples” in at least some respects with a right of self-determination, and in each case, having rights to territory and resources as aspects of that self-determination. Consistent with the continuing and permanent ability of peoples to determine their “internal and external political status” “when and as they wish,” that is stressed in modern formulations of self-determination,⁴⁷ as well as the ability of peoples to define new threats to their self-determination⁴⁸ and to propose remedies to new kinds of domination, exploitation, or subjugation,⁴⁹ this article proposes that the term “climate vulnerable peoples” be used to describe those peoples whose self-determination is threatened or infringed by climate change impacts. Such impacts could include partial or total deterritorialization or resource loss, displacement, infringements on economic, cultural, or social self-determination, limited political choices related to a people’s collective future, or any other kinds of injuries that will infringe on a people’s ability to freely determine its destiny in the international system. This term is proposed both descriptively – in other words, as a way to discuss

44 CRITESCU (1981), par. 279; ALFREDSSON (2005), p. 170; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion), Separate Opinion of Judge Cançado Trindade (2010) <<https://www.icj-cij.org/public/files/case-related/141/141-20100722-ADV-01-08-EN.pdf>> accessed 30 June 2023 [228]; MAGUIRE (2021), p. 86.

45 MELANDRI (2019), pp. 61-68 (concluding that self-determination applies to peoples in independent States); JONES (2021), pp. 8-9; CASSESE (1995), p. 102.

46 CRITESCU (1981), para. 268; see also paras 284-287 (summarizing the rights of peoples comprising States).

47 Final Act of the Conference on Security and Co-operation in Europe, concluded 1 August 1975, reprinted in 14 Int’l L. Materials 1292 [hereinafter the “**Helsinki Final Act**”] Principle VIII <<https://www.osce.org/files/t/documents/5/c/39501.pdf>> accessed 31 October 2023; UNGA ‘Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation Among States’ UN GAOR 25th Session Supp No 18 UN Doc. A/8018 (1970) [hereinafter “**Friendly Relations Declaration**”] Principle V (“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.”); see also CASSESE (1995), pp. 128; 285-288.

48 ESPIELL (1980) UN Doc E/CN.4/Sub.2/405/Rev.1 para. 44 (observing that colonial and alien domination “means any kind of domination, whatever form it may take, which the people concerned freely regards as such.”)

49 JONES (2021), p. 14.

common challenges faced by peoples in the context of climate change – and also definitionally and as a possible category of rights holders under international law entitled to the territorial and resource dimension of self-determination.

Examining the Legal Basis of a Territorial and Resource Dimension of Self-Determination for Climate Vulnerable Peoples

Recognizing a territorial and resource dimension of self-determination to protect the self-determination of climate vulnerable peoples is supported by current doctrine. The ICJ's conclusion in *Western Sahara* that "legal ties" can exist between a people to its territory and resources even in the absence of formal State sovereignty suggests that such ties are fundamental to the concept of self-determination and speak to a right of peoples to their territory and resources. Self-determination's protection of resources – through a people's permanent sovereignty over its natural resources,⁵⁰ as well as the protection of resources and subsistence in common article 1 of the ICCPR and ICESCR⁵¹ – is applicable in the context of climate vulnerability. For example, Arctic Indigenous Peoples have described how the loss of resources and their means of subsistence now threaten their cultural integrity and pose existential threats to their ability to survive as discrete communities and peoples.⁵² The IPCC anticipates that weather and climate extremes will impact natural resource flows including through the redistribution of marine fish stocks and through changes in precipitation and water availability.⁵³ This will lead to increasing food and water insecurity⁵⁴ particularly for peoples in small islands and in regions dependent on glacier and snow-melt.⁵⁵

50 SCHRIJVER (2015), pp. 16-17; see also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (2005) <<https://www.icj-cij.org/sites/default/files/case-related/116/116-20051219-JUD-01-00-EN.pdf>> accessed 31 October 2023 [244].

51 In addition to common article 1, both article 47 of the ICCPR and article 25 of the ICESCR recognize that, "Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources."

52 See, e.g., WATT-CLOUTIER (2005), pp. 1-8, 67, 74, 94 <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2005/20051208_na_petition.pdf> accessed 31 October 2023; Five Tribes Complaint (no. 4) 9, 30-34.

53 "IPCC, 2022: Summary for Policymakers" in H.-O. Pörtner *et al.* (eds), 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* (Cambridge University Press 2022) para. B.5.3 <https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf> accessed 31 October 2023.

54 *Ibid.* para. B.1.3.

55 *Ibid.* para. C.3.4.

Territorial loss from sea-level rise threatens the ability of island States to maintain stable maritime boundaries, which could result (among other things) in loss of maritime entitlements related to exclusive economic zones that become part of the high seas.⁵⁶ Complete loss of territory (or habitable territory) will irrevocably sever the connection between a people with its territory and will produce permanent displacement. The prohibition against States taking “any action”⁵⁷ aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country can be applied and extended in the context of climate vulnerability through an interpretation that requires States to mitigate climate-induced territorial loss through emissions reductions and by assisting climate vulnerable peoples with adaptation efforts to maintain a connection to their territory. In the same way that preserving a people’s connection to territory has been a fundamental concern of self-determination in the decolonial, foreign occupation, and Indigenous contexts, climate vulnerable peoples are entitled to the preservation of their territory and a relationship to that territory.

Acknowledging a legal relationship between climate vulnerable peoples with their territory and resources premised on self-determination is further supported by paragraph 3 of common article 1 of the ICCPR and ICESCR, which requires that States Parties “promote the realization of the right of self-determination.”⁵⁸ The HRC has opined that article 1 of the ICCPR “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.”⁵⁹ The obligation of States to “take positive action to facilitate realization of and respect for the right of peoples to self-determination”⁶⁰ and to “promote the right to Self-determination of peoples”⁶¹ can be extended and applied to promote an ongoing, positive obligation on States to protect against the territorial and resource loss brought by climate change.⁶²

56 ILC, “Sea-level rise in relation to international law”, 72nd session (27 April-5 June and 6 July-7 August 2020) (28 February 2020) UN Doc A/CN.4/740 para. 190(d).

57 Friendly Relations Declaration (no. 47) Principle V, para. 8.

58 HRC “CCPR General Comment No. 12: Article 1 (Right to Self-determination), The Right to Self-determination of Peoples” (13 March 1984) [hereinafter “General Comment No. 12”] para. 6 <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2f-GEC%2f6626&Lang=en> accessed 31 October 2023.

59 *Ibid.*

60 *Ibid.*

61 Committee on the Elimination of all forms of Racial Discrimination “General Recommendation 21, the right to self-determination” 48th sess. (1996) U.N. Doc. A/51/18, annex VIII at 125 para. 3.

62 WEWERINKE-SINGH (2019), p. 104.

The related principle of the equal rights of peoples⁶³ implies that all peoples, including climate vulnerable peoples, should be entitled to relevant protections of self-determination recognized in other circumstances, including a territorial and resource dimension. For example, climate vulnerable peoples who comprise an entire State – perhaps an island State vulnerable to sea-level rise, or an equatorial State vulnerable to loss of habitability from extreme heat – share certain characteristics with those Indigenous Peoples who are also vulnerable to the consequences of territorial and resource loss from climate change, including with respect to their existence and survival.⁶⁴ The recognition of a territorial and resource dimension in the context of Indigenous self-determination (or in other contexts) should therefore be considered and extended to climate vulnerable peoples.

Finally, the possible extinction of peoples from loss of territory or resources would present a severe infringement on their self-determination. This is not a hypothetical – such possibilities have already been described (for example) by Arctic Indigenous Peoples in international legal petitions related to climate change impacts in the region, including petitions from members of Arctic Indigenous communities such as the Inuit,⁶⁵ the Athabaskan peoples,⁶⁶ and the Native Village of Kivalina.⁶⁷ Small island States have also described the possibility of their extinction from climate change impacts.⁶⁸ Current projections of global warming estimate somewhere between 2.4 °C to 2.8 °C of warming above pre-industrial averages by the end of this century,⁶⁹ and there is also increasing recognition

63 Friendly Relations Declaration (n 47) Principle V; Helsinki Final Act (n 47) Principle VIII; CRITESCU (1981), para. 157 (observing the close relationship between the equal rights of peoples and self-determination).

64 TSOSIE (2013), pp. 239, 254 (observing that “the right to self-determination for the Pacific Island Nations, as well as indigenous peoples in the United States and elsewhere, is closely tied to their ancestral land base” and arguing that such peoples have a “right to survive as a distinctive land-based people”).

65 See generally WATT-CLOUTIER (2005).

66 The Arctic Athabaskan Council on Behalf of All Arctic Athabaskan Peoples of the Arctic Regions of Canada and the United States, “Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada”, 23 April 2013 <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2013/20130423_5082_petition.pdf> accessed 31 October 2023.

67 Five Tribes Complaint (no. 4).

68 See, e.g., Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law (adopted 31 October 2021, entered into force 31 October 2021) 3447 UNTS, U.N. Reg. 56940 (COSIS Agreement) preamble (“*Alarmed* by the catastrophic effects of climate change which threaten the survival of Small Island States, and in some cases, their very existence.”)

69 United Nations Environment Programme, “Emissions Gap Report 2022: The Closing Window—Climate crisis calls for rapid transformation of societies” (27 Oct 2022) (United Nations Environment Programme) pp. xvi, xxi <<https://www.unep.org/emissions-gap-report-2022>> accessed 31 October 2023.

that warming above 1.5 °C risks triggering a variety of climate change tipping points, with severe consequences to humanity.⁷⁰ The risk of deterritorialization and resource loss at these anticipated levels of global warming will pose threats to the existence and survival of climate vulnerable peoples, constituting an irreparable or existential infringement on their self-determination.

Attribution of Internationally Wrongful Acts in the Context of Climate Change

Assuming the recognition of a territorial and resource dimension of self-determination for climate vulnerable peoples, what are the international legal consequences associated with loss of territory and resources from climate change impacts? Under the Draft Articles on Responsibility of States for Internationally Wrongful Acts (the “**Draft Articles on State Responsibility**”), an internationally wrongful act of a State takes place when there is “conduct” consisting of an “action or omission” that is “attributable to the State under international law” and also “constitutes a breach of an international obligation.”⁷¹ The rules of attribution are discussed in articles 4 through 11, and capture conduct of State organs,⁷² persons or entities empowered by the law of the State to exercise governmental authority (so-called “parastatal entities”),⁷³ conduct at the direction or control of the State,⁷⁴ and conduct which the State acknowledges and adopts as its own.⁷⁵ The wide range of circumstances lending themselves to attribution, combined with the fact that attributable conduct may also consist of an action or omission, has led Wewerinke-Singh to conclude that an “extremely broad range of conduct linked with climate change may be attributable to States.”⁷⁶ The 2022 *Billy* decision from the HRC also took a broad approach to admissibility and attribution when it rejected Australia’s argument that Australia could never be legally responsible for its mitigation and adaptation acts or omissions

70 David McKay *et al.* “Exceeding 1.5 °C global warming could trigger multiple climate change tipping points” (2022) 377 *Science* 6611 <<https://www.science.org/doi/10.1126/science.abn7950>> accessed 31 October 2023; UN “Secretary-General’s remarks to High-Level opening of COP27” (7 Nov 2022) <<https://www.un.org/sg/en/content/sg/speeches/2022-11-07/secretary-generals-remarks-high-level-opening-of-cop27>> accessed 31 October 2023 (“And our planet is fast approaching tipping points that will make climate chaos irreversible. We are on a highway to climate hell with our foot still on the accelerator.”)

71 Draft Articles on State Responsibility (no. 14) art. 2.

72 *Ibid.* art. 4.

73 *Ibid.* art. 5.

74 *Ibid.* art. 8.

75 *Ibid.* art. 11.

76 WEWERINKE-SINGH (2019), p. 90.

that were allegedly infringing the human rights of Indigenous communities in the Torres Strait Islands.⁷⁷ The HRC found breaches of articles 17 and 27 of the ICCPR stemming from Australia's delays in implementing climate adaptation measures.⁷⁸ With respect to mitigation, the HRC found relevant the fact that Australia was a high-emissions, high-developed jurisdiction.⁷⁹ While the HRC did not ultimately review Australia's mitigation conduct on the merits, its admissibility determination suggests that at least some State actions or omissions with respect to climate mitigation and adaptation conduct can fall within the ambit of attributable conduct under human rights law and potentially the general international law of State responsibility⁸⁰ – and particularly, the actions or omissions of high-emissions, high-developed States.

Breaches of the Territorial and Resource Dimension of Self-Determination in the Context of Climate Change

Assuming attributable conduct, the Draft Articles on State Responsibility permit a finding of breach when an act of that State is “not in conformity with what is required of it by that obligation, regardless of its origin or character.”⁸¹ A breach of any such “primary obligations” then gives rise, immediately by operation of the international law of State responsibility, to secondary obligations which describe the legal consequences of such a breach.⁸² Such secondary obligations generally consist of cessation of the wrongful conduct and full reparation.⁸³ According to Verheyen, a State can demand cessation without the need to draw a causal link between the acts or omissions and damages caused as long as a breach of an international obligation can be shown.⁸⁴ Shelton, as well, describes that causation becomes a critical element at the stage of secondary obligations on account of a responsible State's obligation to make full reparation for the “injury caused by the internationally wrongful act.”⁸⁵

77 *Billy* (no. 31) paras 7.6-7.8.

78 *Ibid.* paras 8.9-8.14.

79 *Ibid.* para. 7.8.

80 WEWERINKE-SINGH (2019), p. 66 (arguing that it is “justified to conclude that international human rights law can be interpreted in accordance with the general law of State responsibility” with the additional understanding that human rights law carries its own substantive and procedural caveats).

81 Draft Articles on State Responsibility (no. 14) art. 12.

82 CRAWFORD (2002), pp. 874, 876-877.

83 Draft Articles on State Responsibility (no. 14) art. 28 comment (2).

84 VERHEYEN (2005), p. 243.

85 SHELTON (2012), p. 385 (citing Draft Articles on State Responsibility (no. 14) art. 31(2)).

Assuming the applicability of the *Billy* approach that focuses on the conduct of high-emissions, high-developed States with respect to mitigation, climate vulnerable peoples facing territorial and resource loss could characterize the burning of fossil fuels by such high-emissions, high-developed States as conduct that infringes the territorial and resource dimension of self-determination and amounts to a breach of their self-determination as contemplated by article 12 of the Draft Articles of State Responsibility. The argument would be that the burning of fossil fuels by States in today's circumstances, at approximately 420 ppm of atmospheric CO₂⁸⁶ and with the near-certainty of warming above 1.5 °C,⁸⁷ amounts to a breach of the self-determination of climate vulnerable peoples because of the loss of territory and resources now taking place and that will continue to take place even if States stopped burning fossil fuels today. The authors in *Billy* made effectively the same argument under human rights law – one accepted by the HRC – that they already faced “real predicaments” from climate change that have “already compromised their ability to maintain their livelihoods, subsistence and culture.”⁸⁸ In combination with their “limited resources” and “vulnerability,” the HRC held that the information provided by the authors alleged “serious adverse impacts that have already occurred and are ongoing... more than a theoretical possibility.”⁸⁹

A second possible characterization of breach of the right of self-determination could be rooted in the “solidarity” dimension of self-determination,⁹⁰ and the failure of States to take the coordinated, cooperative action required to keep global warming from causing territorial and resource loss and from threatening the existence and survival of climate vulnerable peoples. The duty of States to protect and respect the self-determination of all peoples is supported by paragraph 3 of article 1 of the ICCPR and ICESCR and has been further affirmed by the HRC in its General Comment 12 and by the the Committee on the Elimination of Racial Discrimination in its General Comment 21. A distinct but arguably related “duty to cooperate” is recognized in international law, including in the context of the environment,⁹¹ and has been identified by the International Law

86 “Vital Signs” (NASA April 2023) <<https://climate.nasa.gov/vital-signs/carbon-dioxide/>> accessed 31 October 2023 (displaying 419 ppm of atmospheric CO₂ levels as of October 2023).

87 McGRATH (2023) (citing research from the WMO showing a 66% chance of temporarily breaching 1.5° C of warming by 2027); BORENSTEIN (2023).

88 *Billy* (n 31) para. 7.10.

89 *Ibid.*

90 WEWERINKE-SINGH (2019), pp. 101, 104.

91 See, e.g., Friendly Relations Declaration (no. 47) Principle IV (“The duty of States to co-operate with one another in accordance with the Charter”); DE SCHUTTER (2012) (describing duties of international cooperation); Declaration of the United Nations Conference on the Human Environment, 1972, 11 ILM 1416 (1972)

Association as a key principle in addressing challenges from sea-level rise.⁹² Under this characterization, the breach lies in the omission and the failure by States (and perhaps more specifically, high-emissions, high-developed States) to promote and protect the self-determination of climate vulnerable peoples by taking the coordinated measures to stop warming and address climate change impacts. Here, as well, *Billy* provides a reference point – the HRC held that the failure to promote the positive obligations imposed by articles 17 and 27 of the ICCPR in implementing appropriate adaptation measures such as seawalls constituted a breach by Australia of its affirmative duties under the ICCPR to protect the Indigenous authors. The omission and failure to mitigate emissions and reduce warming, as well as to assist climate vulnerable peoples with their adaptation efforts to protect their territory and resources, could constitute a similar breach or breaches of the positive obligation to promote and protect the self-determination of such impacted peoples.

Other characterizations of breach are also possible from a perspective of self-determination. The concept of a “composite breach” under article 15 may permit an argument that conduct taken by certain States in the aggregate constitutes a breach.⁹³ The breach described by article 14, section 3 of the Draft Articles on State Responsibility, which notes a breach of an international obligation “requiring a State to prevent a given event occurs when the event occurs,” may be applicable to the extent that climate vulnerable peoples can identify an event that should have been prevented pursuant to international legal obligations.⁹⁴ States are under a general obligation “to protect the natural environment against widespread, long-term and severe environmental damage.”⁹⁵ States are

(the Stockholm Declaration) Principle 24 (“International matters concerning the protection and improvement of the environment should be handled in a co-operative spirit by all countries, big and small, on an equal footing.”); Declaration of the United Nations Conference on Environment and Development, 1992, 31 ILM 874 (1992) (the Rio Declaration) Principles 7, 27; see also CRAIK (2020), pp. 22, 22-23 (observing that a duty to cooperate has been a “near constant inclusion within multilateral environmental treaties and is a recognized ‘fundamental principle’”).

92 Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise, contained in Committee on International Law and Sea Level Rise, “Report of the International Law Association Committee on International Law and Sea Level Rise” (2018) International Law Association Report of the 78th Conference Principle 4, commentary <<https://www.ila-hq.org/en/documents/conference-report-sydney-2018cteeversion>> accessed 31 October 2023.

93 WEWERINKE-SINGH (2019), pp. 91-92; VERHEYEN (2005), p. 236; Draft Articles on State Responsibility (no. 14) art. 15 (comment 8) (“The number of actions or omissions which must occur to constitute a breach of the obligation is also determined by the formulation and purpose of the primary rule.”)

94 VERHEYEN (2005), p. 236.

95 *Legality on the Threat or Use of Nuclear Weapons* (Advisory Opinion) 1996 <<https://www.icj-cij.org/sites/default/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>> accessed 31 October 2023 [31] (observing “a general obligation to protect the natural environment against widespread, long-term and

also bound by a treaty obligation under the UNFCCC to prevent “dangerous anthropogenic interference with the climate system.”⁹⁶ Comment (14) to article 14 refers to *Trail Smelter* as an example of a breach of an obligation of prevention, and further notes that the obligation to prevent the transboundary breach in *Trail Smelter* continued “for as long as the pollution continued to be emitted” and that such a breach “may be progressively aggravated by the failure to suppress it.”⁹⁷

Specific arguments can also be made in the context of Indigenous Peoples, where there is a well-recognized connection between Indigenous Peoples and their lands, territories, and resources, including the need for ‘special measures’ as appropriate to safeguard their physical and cultural survival.⁹⁸ The *Billy* decision from the HRC affirmed that States must protect the ability of Indigenous Peoples to “enjoy the territories and natural resources that they have traditionally used for their subsistence and cultural identity” so as to ensure “the survival and continued development of the cultural identity.”⁹⁹ The need for ‘special measures’ to protect the full exercise of Indigenous rights, combined with vulnerability to certain kinds of environmental or climate change impacts,¹⁰⁰ may impose adaptation obligations on States to preserve the territorial and resource dimension of impacted Indigenous Peoples akin to the human rights obligations identified in *Billy*. The need for ‘special measures’ may also impose mitigation obligations to reduce greenhouse gas emissions to prevent catastrophic global warming and related threats to Indigenous existence and survival.

Secondary Obligations Associated with the Breach of the Territorial and Resource Dimension of Self-Determination

A State in breach of an international legal obligation must cease its wrongful conduct and make full reparation for the injury caused by the internationally

severe environmental damage.”)

96 United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 19 June 1993) 1771 UNTS 107 art. 2.

97 Draft Articles on State Responsibility (no. 14) art. 14 (comment 14).

98 *Saramaka* (no. 35) [85]-[86], [90]-[91], [96], [103], [121]; *Endorois* case (no. 34) [196]-[198].

99 *Billy* (no. 31) para. 8.13.

100 MONTEIRO DE MATOS (2020), p. 206; *Saramaka* (no. 35) paras 173-174, 178; *Kichwa Indigenous People of Sarayaku v. Ecuador*, Inter-American Court of Human Rights Series C No. 245 (June 27, 2012) <https://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf> [264]; *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Inter-American Court of Human Rights Series C No. 79 (Aug. 31, 2001) <https://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf> [104] (noting allegations from the Commission related to vulnerability).

wrongful act.¹⁰¹ Cessation covers both acts and omissions of a State¹⁰² and can also include an obligation to assure and guarantee non-repetition.¹⁰³ Reparation may take the form of restitution, compensation, or satisfaction, either singly or in combination.¹⁰⁴ If a breach of self-determination is predicated on the ongoing burning of fossil fuels, secondary obligations would require cessation of the conduct in question – i.e., an obligation to stop using fossil fuels and to stop emitting greenhouse gases. Reparation to injured peoples would subsequently be required, including the possibility of restitution or compensation to injured peoples for the injury “caused by” the breach.¹⁰⁵ Verheyen discusses the ILC’s commentary that causality is a necessary but not sufficient condition for reparation and that other attributes such as “directness,” “foreseeability,” and “proximity” can qualify the relationship between wrongful act and injury, suggesting that there is no single formula with respect to causation.¹⁰⁶ Wewerinke-Singh concludes that in the context of climate change, determining the scope of reparations is likely to be a “fact-sensitive exercise” requiring “significant interpretation of complex evidence related to risks and responsibilities.”¹⁰⁷

Where breach of self-determination is rooted in the positive obligation to promote the self-determination of peoples, cessation would mean stopping that failure and omission. States would therefore need to undertake affirmative coordinated measures to protect the self-determination of climate vulnerable peoples at risk of territorial or resource loss. As in *Billy*, which also involved a failure by a State to undertake positive legal obligations, the implementation of adaptation measures to protect the territory and resources of climate vulnerable peoples may be warranted. Mitigation measures to prevent further territorial and resource loss could also represent cessation of the failure or delay in promoting the territorial and resource dimension of self-determination. In addition, there would be a separate obligation to provide full reparation to peoples that have faced infringements on their self-determination from the failure to promote and protect the self-determination of climate vulnerable peoples as described above.

In its advisory opinions in *Chagos* and *A Wall in the Occupied Palestinian Territory*, the ICJ determined that the breaches of self-determination imposed an

101 Draft Articles on State Responsibility (no. 14) art. 28 comment (2).

102 *Ibid.* art. 30 comment (2).

103 *Ibid.* art. 30 comments (12), (13).

104 *Ibid.* arts. 31, 34.

105 *Ibid.* art. 31.

106 VERHEYEN (2005), p. 251.

107 WEWERINKE-SINGH (2019), p. 138.

additional obligation on States to cooperate to bring to an end such breaches.¹⁰⁸ In the context of climate change, bringing the breach of self-determination to an end suggests nothing less than an ongoing obligation to prevent further territorial and resource loss – in other words, an obligation to actually stabilize the climate system and stop warming. Because the timescale for climate stabilization will take decades or even centuries,¹⁰⁹ this secondary obligation to bring the breach to an end and to stabilize the climate could last well into the foreseeable future, or even impose an indefinite duty until the climate has been stabilized.

In both *Chagos* and *A Wall in the Occupied Palestinian Territory*, the ICJ additionally observed that United Nations organs can help direct such cooperative action and can provide input on ending the identified breach of self-determination¹¹⁰ – suggesting the utility of a guiding framework resolution akin to resolution 1514(XV) from the UN General Assembly that can delineate the rights and obligations of peoples and States in the context of climate change and self-determination. Among other things, such a framework should ensure that the self-determination of low-income, low-emitting, and/or vulnerable peoples is protected and sustained in an era of profound climate instability and increasingly devastating global warming.

108 Draft Articles on Peremptory Norms (no. 14) Conclusion 19, comment (5). The analysis presented by the Draft Articles on Peremptory Norms, and the application in this paragraph, is premised in part on the conclusion that such a breach constitutes a “serious” breach under article 40 of the Draft Articles on State Responsibility. See also *Chagos* (no. 13) [180], [182]; *A Wall in the Occupied Palestinian Territory* (no. 13) [159].

109 IPCC, 2021: Summary for Policymakers in V. Masson-Delmotte et al. (eds), *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP 2021) Table SPM.1 <https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf> accessed 31 October 2023 (showing cooling of the planet by 2081-2100 in best case scenario SSP1-1.9; but continued warming in four other scenarios by 2100).

110 Draft Articles on Peremptory Norms (no. 14) Conclusion 19, comment (8); *A Wall in the Occupied Palestinian Territory* (no. 13) [160], [162]; *Chagos* (no. 13) [180]-[182].

Bibliography

- ÅHREN, Mattias (2016). *Indigenous Peoples' Status in the International Legal System*, Oxford University Press, Cambridge.
- ALFREDSSON, Gudmundur, 2005, "Minorities, Indigenous and Tribal Peoples, and Peoples: Definitions of terms as a Matter of International Law" in *Minorities, Peoples and Self-Determination*, N. Ghanea and A. Xanthaki (eds), Martinus Nijhoff Publishers, Leiden, pp. 163-172.
- AMICUS BRIEF SUBMITTED TO THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA BY THE UN SPECIAL RAPPORTEURS ON HUMAN RIGHTS & CLIMATE CHANGE (IAN FRY), Toxics and Human Rights (Marcos Orellana), and Human Rights & the Environment (David Boyd)' (30 May 2023).
- BORENSTEIN, Seth "In early 2029, Earth will likely lock into breaching key warming threshold, scientists calculate" (*AP* 30 October 2023) <<https://apnews.com/article/warming-carbon-climate-change-too-late-943b4b34b-ff5110631c2e02f5cdf7d68>>, accessed 31 October 2023.
- BURKETT, Maxine (2013). "The Nation Ex-Situ" in *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate*, M. Gerrard and G. Wannier (eds), Cambridge University Press, Cambridge, pp. 89-122.
- CAMBOU DOROTHÉE (2022). "Indigenous peoples' right to self-determination and the principle of state sovereignty over natural resources: a human rights approach and its constructive ambiguity" in *Research Handbook on the International Law of Indigenous Rights*, D. Newman (ed.), Edward Elgar, Northampton, pp. 148-168.
- CASSESE, Antonio (1995). *Self-Determination of Peoples: A Legal Reappraisal*, Cambridge University Press, Cambridge.
- CESCR "General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)" (20 Jan 2003) UN Doc E/C.12/2002/11 para. 7.
- CESCR "General Comment No. 21 Right to everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)" (21 Dec 2009) UN Doc. E/C.12/GC/21 para. 36.
- CESCR "General Comment No. 26 (2023) on land and economic, social and cultural rights" (24 Jan 2023) UN Doc E/C.12/GC/26 para. 11.
- CLARIDGE, Lucy (2018). "Litigation as a Tool for Community Empowerment: The Case of Kenya's Ogiek," *ErasmusLR*, no. 11, vol. 1, pp. 57-66.
- CRAIK, Neil (2019). "The Duty to Cooperate In International Environmental Law", *Yearbook of International Environmental Law*, vol. 30, no. 1, pp. 22-44.
- CRAWFORD, James (2002). "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect", *AJIL*, vol. 96, no. 4, pp. 874-890.

- CRITESCU, Aureliu (1981). "The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments," UN Doc E/CN.4/Sub.2/404/Rev.1.
- DAES, Erica-Irene A. (2005). "Indigenous Peoples' Rights to Land and Natural Resources" *Minorities, Peoples and Self-Determination*, N. Ghanea, A. Xanthaki (eds), Martinus Nijhoff Publishers, Leiden, pp. 75-91.
- DE SCHUTTER (2012). Olivier *et al.* "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights," *HR Quarterly*, vol. 34, 1084-1169.
- DREW, Catonia (2001). "The East Timor Story: International Law on Trial," *EJIL*, vol. 12, pp. 651-684.
- ESPIELL, Héctor Gros (1980). "The Right to Self-Determination: Implementation of United Nations Resolutions" UN Doc E/CN.4/Sub.2/405/Rev.1 para. 4.
- FRERE, Tekau, MULALAP, Clement Yow, TANELU, Tearinaki (2020). "Climate Change and Challenges to Self-Determination: Case Studies from French Polynesia and the Republic of Kiribati", *YaleLJ Forum*, no. 129, 638, 653-656.
- FUENTES, Alejandro (2017). "Protection of Indigenous Peoples' Traditional Lands and Exploitation of Natural Resources: The Inter-American Court of Human Rights' Safeguards", *IJonMinority&GroupRights*, vol. 24, no. 3, 229-253.
- GAREAU, Jean-François (2005). "Shouting at the Wall: Self-determination and the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory," *LeidenJIL*, vol. 18, 489-521.
- GILBERT, Jérémie (2016). *Indigenous Peoples' Land Rights under International Law: From Victims to Actors*, 2nd ed., Martinus Nijhoff Publishers, Leiden.
- GILBERT, Jérémie (2017). "Indigenous Peoples, Human Rights, and Cultural Heritage: Towards a Right to Cultural Integrity," in *Indigenous Peoples' Cultural Heritage: Rights, Debates, Challenges*, A. Xanthaki, S. Valkonen, L. Heinämäki, and P. Nuorgam, P. (eds), Brill Nijhoff Publishers, Leiden, pp. 20-38.
- GOVERNMENT OF THE REPUBLIC OF THE MALDIVES, Submission to the OHCHR Under Human Rights Council Resolution 7/23 (2008) 41 <https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/Submissions/Maldives_Submission.pdf> accessed 31 October 2023.
- HILPOLD, Peter (2022, "'Humanizing' the Law of Self-Determination – The Chagos Island Case," *NordicJIL*, vol. 91, 189-215.
- HRC "Concluding observations on the seventh periodic report of Finland" (3 May 2021) UN Doc. CCPR/C/FIN/CO/7 paras 42-43.
- HRC "Concluding observations of the Human Rights Committee – Canada" (7 April 1999) UN Doc. CCPR/C/79/Add.105 paras 7, 8.

- HUMAN RIGHTS COUNCIL “Study of the Expert Mechanism on the Rights of Indigenous Peoples. Right to land under the United Nations Declaration on the Rights of Indigenous Peoples: a human rights focus” (15 Jul 2020) UN Doc. A/HRC/45/38 para. 7.
- HUMAN RIGHTS COUNCIL “Report of the Expert Mechanism on the Rights of Indigenous Peoples. Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: indigenous peoples and the right to self-determination” (4 Aug 2021) UN Doc. A/HRC/48/75 para. 39.
- HUMAN RIGHTS COMMITTEE (22 Sept. 2022) “Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019 (*Daniel Billy et al. v. Australia*)” UN Doc CCPR/C/135/D/3624/2019 par. 8.13.
- ILC, “Sea-level rise in relation to international law” 73rd session (18 April-3 June and 4 July-5 August 2022) UN Doc A/CN.4/752 paras 227, 228.
- ILC, “Report of the International Law Commission” 74th session (24 April-2 June and 3 July-4 August 2023) Supplement No. 10 UN Doc A/78/10 para 170.
- ILC, “Draft conclusions on identification and legal consequences of peremptory norms of international law (*jus cogens*), with commentaries” (2022) UN Doc. A/77/10 <https://legal.un.org/ilc/texts/instruments/english/commentaries/1_14_2022.pdf> accessed 31 October 2023”.
- ILC, “Draft Articles on Responsibility of States for Internationally Wrongful Acts” (2001) UN Doc A/56/10, IV.
- In the Matter of the Chagos Marine Protected Area Arbitration before an Arbitral Tribunal Constituted under Annex VII of the United Nations Convention on the Law of the Sea between the Republic of Mauritius and the United Kingdom of Great Britain and Northern Ireland* (Award) (18 March 2015) <<https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf>> accessed 31 October 2023.
- JONES, Natalie (2023). “Prospects for invoking the law of self-determination in international climate litigation,” *RECIEL*, vol. 32, no. 2, 250-258.
- JONES, Natalie (2021). “Self-Determination and the Right of Peoples to Participate in International Law-Making,” *BritishYIL*, vol. 00, no. 0, 1-33.
- Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) 2004 <<https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>> accessed 31 October 2023.
- Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) 2019 <<https://www.icj-cij.org/public/files/case-related/169/169-20190225-ADV-01-00-EN.pdf>> accessed 31 October 2023.

- MAGUIRE, Amy (2021). "Self-Determination Claimant Groups and the Creation of International Norms" in *Changing Actors in International Law*, K. Scott, K. Claussen, C. E. Côté, and A. Kanehara (eds), Brill Nijhoff, Leiden, pp. 75-100.
- MCGRATH, Matt "Global warming set to break key 1.5C limit for first time" (*BBC News* 17 August 2023) <<https://www.bbc.com/news/science-environment-65602293>> accessed 31 October 2023.
- MELANDRI, Manuela (2019). *Self-Determination, International Law and Post-Conflict Reconstruction: A Right in Abeyance*, Routledge, New York.
- MONTEIRO DE MATOS, Mariana (2020). *Indigenous Land Rights in the Inter-American System*, Brill, Leiden.
- OHCHR "Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General: Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights" (2009) UN Doc. A/HRC/10/61 paras 39-41.
- OHCHR "Understanding Human Rights and Climate Change, Submission to 21st COP of the UNFCCC" (2015) 14 <<https://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf>> accessed 31 October 2023.
- PARK, Ki-Gab (2021). "The Right to Self-Determination and Peremptory Norms," in *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations*, Dire Tladi (ed), Brill Nijhoff, Leiden, pp. 689-712.
- QUANE, Helen (1998). "The United Nations and the Evolving Right to Self-Determination", *ICLQ*, vol. 47, no. 3, 537-572.
- SCHRIJVER, Nico J. (2015). "Fifty Years Permanent Sovereignty over Natural Resources: the 1962 UN Declaration as the Opinion Iuris Communis", in *Permanent Sovereignty over Natural Resources*, M. Bungenberg & S. Hobe (eds), Springer, Heidelberg, 15-28.
- SHELTON, Dinah (2011). "Self-Determination in Regional Human Rights Law: From Kosovo to Cameroon", *AJIL*, vol. 105, no. 60, 60-81.
- SHELTON, Dinah (2012). "Remedies and Reparation," in *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*, M. Langford, W. Vandenhoe, M. Scheinin, & W. van Genugten (eds), Cambridge University Press, Cambridge, pp. 367-390.
- SHUKLA, P. R. et al. (eds) (2019). *Climate Change and Land: an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems*, IPCC Summary for Policy Makers.
- STOUTENBURG, Jenny (2013). "When do States Disappear? Thresholds of Effective Statehood and the Continued Recognition of 'Deterritorialized' Island States," in *Threatened Island Nations: Legal Implications of Rising Seas and*

- a *Changing Climate*, M. Gerrard and G. Wannier (eds), Cambridge University Press, Cambridge, pp. 57-88.
- TsOSIE, Rebecca (2013). "Climate Change and Indigenous Peoples: Comparative Models of Sovereignty," *Tulane EnvLJ*, vol. 26, no. 2, 239-257.
- UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, UNGA Res 61/295, UN GAOR, 61st sess, 107th plen. mtg, Agenda Item 68, Supp. No. 49, UN Doc A/RES/61/295 (2 October 2007) annex ("United Nations Declaration on the Rights of Indigenous Peoples").
- VERHEYEN, Roda (2005). *Climate Change Damage and International Law*, Brill Nijhoff, Leiden.
- VOUKITCHEVITCH, Zhannah (2021). "Procedural Barriers to Indigenous Peoples' Participation in International Lawmaking – Extended Continental Shelf Delimitation in *Inuit Nunaat*," in *Changing Actors in International Law*, K. Scott, K. Claussen, C.E. Côté, & A. Kanehara (eds), Brill Nijhoff, Leiden, pp. 185-210.
- WATT-CLOUTIER, Sheila (2005). "Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States".
- Western Sahara* (Advisory Opinion) (1975) <<https://www.icj-cij.org/sites/default/files/case-related/61/061-19751016-ADV-01-00-EN.pdf>> accessed 31 October 2023 [149]-[152].
- WEWERINKE-SINGH, Margaretha (2019). *State Responsibility, Climate Change, and Human Rights Under International Law*, Hart Publishing, Oxford.
- WIESSNER, Siegfried, 2012, "Indigenous self-determination, culture, and land: A reassessment in light of the 2007 UN Declaration on the Rights of Indigenous Peoples" in E. Pulitano and M. Trask (eds), *Indigenous Rights in the Age of the UN Declaration*, Cambridge University Press, Cambridge, pp. 31-63.

