



State Responsibility, Climate Change and Human Rights under International Law

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the degree of Doctor of Laws of the European University Institute

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Abstract

The Intergovernmental Panel on Climate Change (IPCC) has stated in numerous reports that unless urgent action is taken to curb the emission of greenhouse gases, irreparable damage will be done to the Earth's ecosystems, with major implications for human rights. The IPCC's reports also demonstrate that developing nations are most severely affected by the consequences of climate change, whereas developed nations have reaped the most benefits from the greenhouse gas-producing activities that led to climate change. This thesis considers the relevance of international human rights law to this equity challenge, paying particular attention to the inter-relationship between international human rights law, the United Nations Framework Convention on Climate Change (UNFCCC) and the general law of State responsibility. The rules of attribution contained in the general law of State responsibility are used to explain how action and inaction that contributes to climate change can be attributed to States. The analysis of substantive rules leads us to believe that the UNFCCC and its Kyoto Protocol provide minimum standards of protection against dangerous climate change, the breach of which is likely to interfere with the enjoyment of human rights. Accordingly, a breach of the substantive provisions of the UNFCCC or the Kyoto Protocol could highlight a violation of human rights obligations related to climate change. The integrative approach presented in the thesis potentially enhances the effectiveness of each framework, as it leads to more specific standards of care for individual States as well as a broader framework for enforcing obligations.

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Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ADRDM	American Declaration of the Rights and Duties of Man
Am J Int'l Law	American Journal of International Law
Annex I Parties	Australia, Austria, Belarus, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, European Union, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom and the United States of America
Arab CHR	Arab Charter on Human Rights
Ariz J In'l & Comp L	Arizona Journal of International and Comparative Law
ARIO	ILC Articles on the Responsibility of International Organisations
ARS	ILC Articles on the Responsibility of States for Internationally Wrongful Acts
ASIL	American Society of International Law
AU	African Union
AWG-KP	Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol
AWG-LCA	Ad Hoc Working Group on Long Term Co-operative Action under the Framework Convention on Climate Change
BYIL	British Yearbook of International Law
CAT	Committee Against Torture
CBDR	Common But Differentiated Responsibilities
CBDRRC	Common But Differentiated Responsibilities and Respective Capabilities
CDM	Clean Development Mechanism
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Committee on the Elimination of Racial Discrimination

CESCR	Committee on Economic, Social and Cultural Rights
CFR	Charter of Fundamental Rights of the EU
CHR	UN Commission on Human Rights
CJEU	Court of Justice of the European Union
CMP	Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol
CMW	International Covention on the Protection of the Rights of All Migrant Workers and Members of Their Families
COP	Conference of the Parties to the United Nations Framework Convention on Climate Change
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CUP	Cambridge University Press
DRC	Democratic Republic of Congo
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECOSOC	UN Economic and Social Council
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
EIA	Environmental Impact Assessment
EIT	Countries with Economies in Transition
EU	European Union
Eur J Int'l L	European Journal of International Law
EPA	US Environmental Protection Agency
ETS	Emissions Trading Scheme
EU ETS	European Union ETS
GA	General Assembly of the UN
Ga J Int & Comp L	Georgia Journal of International and Comparative Law
GEF	Global Environmental Facility
GHG	Greenhouse Gas

Harv.Env't.L.Rev.	Harvard Environmental Law Review
HRC	Human Rights Committee
HRLJ	Human Rights Law Journal
Hum.Rts.Q.	Human Rights Quarterly
HUP	Harvard University Press
IACtHR	Inter-American Court of Human Rights
IACHR	Inter-American Commission on Human Rights
ICAO	International Civil Aviation Organisation
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IEA	International Energy Agency
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organisation
Int'l & Comp L Q	International and Comparative Law Quarterly
Int'l Hum Rts Rep	International Human Rights Reports
Int'l J Child Rts	International Journal on Child Rights
IPCC	Intergovernmental Panel on Climate Change
JI	Joint Implementation
LDCs	Least Developed Country Parties
Leiden J Int'l L	Leiden Journal of International Law
NAMAs	Nationally Appropriate Mitigation Action
NAPAs	National Adaptation Programmes of Action (for LDCs)
NATO	North Atlantic Treaty Organisation
NED YIL	Netherlands Yearbook of International Law
NGO	Non-Governmental Organisation
Nordic J Int'l L	Nordic Journal of International Law
OAS	Organisation of American States

ODA	Official Development Assistance
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the UN High Commissioner for Human Rights
OIC	Organisation of Islamic States
OJLS	Oxford Journal of Legal Studies
OP-ICCPR	First Optional Protocol to the ICCPR
OP-ICESCR	Optional Protocol to the ICESCR
OUP	Oxford University Press
PCIJ	Permanent Court of International Justice
QELRC	Quantified Emissions Limitation or Reduction Commitments
REDD+	Reducing Emissions from Deforestation and Forest Degradation in developing countries
Res	Resolution
San Diego Int'l LJ	San Diego International Law Journal
SC	Security Council
SIDS	Small Island Developing States
Stan J Int'l L	Stanford Journal of International Law
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
U Pa J Int'l L	University of Pennsylvania Journal of International Law
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organisation
WMO	World Meteorological Organisation
Yale HR & Dev LJ	Yale Human Rights and Development Law Journal
Yale J Int'l L	Yale Journal of International Law

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Chapter 1: Introduction

The rule of law is dependent upon a government that is willing to abide by the law. Disrespect for the rule of law begins when the government believes itself and its corporate sponsors to be above the law.

Tim de Christopher¹

¹ Pre-sentencing statement in Salt Lake City District Court, Salt Lake City, USA on 26 July 2011.

² United Nations Secretary General, Ban Ki-Moon, 'Address to High-Level Event on Climate Change', 24 Sept. 2007. See also, United Nations Development Programme, *Fighting Climate Change: Human Solidarity in a Divided World* (Human

1.1 The Relationship between Climate Change and the Enjoyment of Human Rights

Climate change has been characterised as one of the defining challenges of our time.² The Nobel Prize winning Intergovernmental Panel on Climate Change (IPCC) has stated unequivocally in numerous reports that greenhouse gas-emitting human activities are causing global warming and associated damage to natural and human systems.³ The Earth has now warmed by about 0.85 degrees since pre-industrialization, and this is mostly attributable to the fossil fuel combustion that facilitated the economic development of what are now high-income countries from around 1750 onwards.⁴ Carbon dioxide stocked in the atmosphere is currently at an approximated level of 1,900 billion tonnes, a level unprecedented in at least 800,000 years.⁵ The IPCC has indicated that as a result of these existing stocks, many aspects of climate change and associated impacts will continue for centuries even if anthropogenic emissions of greenhouse gases are stopped today.⁶ However, greenhouse gases have not been stopped and instead the flow of global emissions is expanding, partly as a result of increasing contributions from countries that have relatively recently embarked on carbon-intensive pathways of economic growth. This expansion leads to an accelerating increase of the atmospheric stocks of greenhouse gases which, if it continues, could have catastrophic consequences for human populations.

The IPCC's reports make it clear that the adverse effects of climate change are already posing significant threats to human life, livelihoods and traditional cultures, especially in developing countries with a limited capacity to adapt.⁷ For example, inhabitants of low-lying coastal zones and small islands

² United Nations Secretary General, Ban Ki-Moon, 'Address to High-Level Event on Climate Change', 24 Sept. 2007. See also, United Nations Development Programme, *Fighting Climate Change: Human Solidarity in a Divided World* (Human Development Report 2007/2008) 8.

³ See, for example, Intergovernmental Panel on Climate Change, 'Contribution of Working Group I to the IPCC Fifth Assessment Report' in Thomas F Stocker *et al.* (eds), *Climate Change 2013: The Physical Science Basis* (CUP 2013) Section D.3, 2.2, 6.3, 10.3–6, 10.9 (finding that 'It is *extremely likely* that human influence has been the dominant cause of the observed warming since the mid-20th century').

⁴ *Ibid* 12.

⁵ *Ibid* 5.

⁶ *Ibid*.

⁷ Intergovernmental Panel on Climate Change, 'Contribution of Working Group II to the IPCC Fifth Assessment Report' in Vicente R Barros *et al.* (eds), *Climate Change 2014: Impacts, Adaptation and Vulnerability* (CUP 2014) 13. See also, United Nations Development Programme (n 2) 8 (pointing out that of the 262 million people affected by climate disasters annually in the period 2000–2004, over 98 per cent lived in developing countries).

are facing an increased risk of death, injury, ill-health and disrupted livelihoods due to storm surges, coastal flooding and rising sea levels. Poor populations in rural and urban areas face the risk that continuing rises in temperature, changing precipitation patterns and the increased occurrence of drought, extreme weather events and flooding will cause the breakdown of food systems on which they rely for sustenance. Urban populations are exposed to an increased risk of mortality and morbidity during periods of extreme heat; and fishing communities in the tropics and the Arctic are already facing climate change-induced water scarcity and irreversible degradation of marine and coastal ecosystems, all of which puts their traditional livelihoods at risk.⁸ It has been established with a relatively high degree of certainty that these specific impacts are attributable to climate change (see Section 1.3). An important premise of the thesis is that this attribution has normative consequences under existing international human rights law.

It is also significant that there is evidence that provides insight into the consequences of various emission scenarios and the sort of actions needed to alleviate the risks of future climate change. The IPCC's latest Physical Science Report carries a strong warning that without additional mitigation efforts, and even with adaptation, by the end of the twenty-first century warming will lead to a 'high to very high risk of severe, widespread and irreversible impacts globally'.⁹ Pathways that are likely to limit warming to below 2 Celsius relative to pre-industrial levels would require substantial emission reductions over the next few decades and near zero emissions by the end of the century, while pathways to limit warming to lower levels associated with lower risks to human life, health and traditional cultures will require deeper and more rapid cuts.¹⁰ In relation to emission pathways, the IPCC's Mitigation Report stresses that mitigation and adaptation capacity differ immensely between countries, and that mitigation pathways that impose too heavy a burden on developing countries could reduce the resilience of populations to the impact of climate change and other causes of environmental stress.¹¹ The International Energy Agency's finding that 1.3 billion people are still without access to electricity and 2.6 billion people are without clean cooking facilities (over 95 per cent of them in sub-

⁸ See Intergovernmental Panel on Climate Change, 'Contribution of Working Group II to the IPCC Fifth Assessment Report' (n 7) 13.

⁹ Intergovernmental Panel on Climate Change, 'Contribution of Working Group I to the IPCC Fifth Assessment Report' (n 3) 5 (stating that 'most greenhouse gases (GHGs) accumulate over time and mix globally, and emissions by any agent (e.g., individual, community, company, country) affect other agents').

¹⁰ *Ibid.*

¹¹ Intergovernmental Panel on Climate Change, 'Contribution of Working Group III to the IPCC Fifth Assessment Report' in Ottmar Edenhofer *et al.* (eds), *Climate Change 2014: Mitigation of Climate Change* (CUP 2014) 5.

Saharan African or developing Asia) illustrates the IPCC's recommendation that effective global mitigation pathways must involve international cooperation to create or facilitate sustainable development pathways in all regions.¹²

International human rights law is *prima facie* relevant in this case because climate change and its associated impacts have an adverse effect on the enjoyment of internationally recognised human rights. In the mushrooming literature on climate change and human rights, it has sometimes been suggested that climate change as such violates human rights.¹³ This proposition could have some rhetorical force, but disregards the doctrinal point that human rights violations result from the actions of States. This doctrinal point would seem to underpin much of the scepticism regarding human rights and climate change. Bodansky, for example, sustains that despite the overwhelming body of evidence about the man-made causes of climate change and its adverse effects on the enjoyment of human rights, 'Legally, climate change no more violates human rights than does a hurricane, earthquake, volcanic eruption, or meteor impact'.¹⁴ Bodansky's conclusion, although legally accurate, sits uncomfortably with the premise that the purpose of human rights law is, to quote the European Court of Human Rights, '[to guarantee] not rights that are theoretical or illusory but rights that are practical and effective'.¹⁵ Furthermore, the underlying presumption that international law allows States to permit or perform greenhouse-gas emitting activities begs for a critical examination of legal norms.

This thesis will demonstrate that reconciling the lofty principles of international human rights law with the realities of climate change is, in principle, possible. Existing norms of international law are sufficient to establish State responsibility for acts and omissions that lead to dangerous climate change and associated violations of human rights. This will be demonstrated through a legal analysis of

¹² Ibid 5.

¹³ Simon Caney states, 'it is clear that anthropogenic climate change violates [the right to life]', citing factual evidence of severe weather events and heatwaves that will lead to loss of life. Simon Caney, 'Climate Change, Human Rights and Moral Thresholds' in Stephen Humphreys (ed), *Human Rights and Climate Change* (CUP 2009) 77. See also, Sumudu Atapattu, 'Global Climate Change: Can Human Rights (and Human Beings) Survive this Onslaught?' (2008) 20 *Colo. J. Int'l Envtl. L. & Pol'y* 35, 47 (similarly basing her conclusion on factual evidence).

¹⁴ Daniel Bodansky, 'Climate Change and Human Rights: Unpacking the Issues' (2010) 38 *Ga. J. Int'l & Comp. L.* 511, 519. See also, Siobhán McInerney-Lankford, 'Human Rights and Climate Change' in Michael B Gerrard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (CUP 2012) 232 (suggesting that 'aggregate problems of increased emissions, temperature rise, increased acidification of the seas, melting of permafrost, droughts, floods, and extreme weather events, such as cyclones and tsunamis' and 'disparate and multifarious' harms that are spread broadly over vast geographic areas').

¹⁵ See, for example, *Airey v Republic of Ireland* (1979) Series A no 32, 2 EHRR, 305. See also, Stephen Humphreys, 'Introduction: Human Rights and Climate Change' in Stephen Humphreys (ed), *Human Rights and Climate Change* (CUP 2010) 11 (suggesting that the absence of a remedy for climate change victims would significantly undermine the hegemonic status (or aspiration) of human rights law).

three frameworks of international law and the way they are interrelated: international human rights law, the *lex specialis* of the United Nations Framework Convention on Climate Change (UNFCCC),¹⁶ and the general law of State responsibility. The relevance of the UNFCCC *lex specialis* for interpreting human rights norms follows from the observation that this law not only has significant limits on States' discretion to permit or perform activities that contribute to climate change, but also requires action that reflects States' differing historical responsibilities for climate change and their capabilities to respond to it. An examination of the rules of attribution derived from the general law of State responsibility will shed light on the wide range of climate change-related joint and individual conduct that could be wrongful if it breaches a State's obligations under international human rights law. The reliance on the general rules of attribution links the thesis with a small but significant body of international legal scholarship that has examined the relevance of the general law of State responsibility for climate change damage.¹⁷ This thesis focuses on the rights of individuals and peoples as beneficiaries of international human rights obligations, which allows us to draw conclusions about the circumstances in which State action connected with climate change amounts to a wrongful act or acts under international human rights law.

Conceptually, the thesis builds on the idea that international human rights law is intrinsically linked with the concept of State sovereignty; and is a 'key organising concept' in general international law,¹⁸ and incorporated into the *lex specialis* of climate change.¹⁹ Although human rights lawyers have considered it to be a potential shield against human rights accountability, the thesis focuses on its

¹⁶ United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 19 June 1993) 1771 UNTS 107 (UNFCCC).

¹⁷ See, for example, Christina Voigt, 'State Responsibility for Climate Change Damages' (2008) 77 *Nordic J Int'l L* 1, 2 (considering that the relevance of the law of State responsibility for climate change consists for a significant part in 'providing injured States with a right to restitution and compensation'). See also, Roda Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (Martinus Nijhoff 2005), Richard SJ Tol and Roda Verheyen, 'State Responsibility and Compensation for Climate Change Damages: a Legal and Economic Assessment' (2009) 32 *Energy Policy* 1109; Christian Tomuschat, 'Global Warming and State Responsibility' in Holger Hestermeyer *et al.* (eds), *Law of the Sea in Dialogue* (Springer 2011), and René Lefeber, 'Climate Change and State Responsibility' in Rosemary Rayfuse and Shirley V Scott (eds), *International Law in the Era of Climate Change* (Elgar 2012).

¹⁸ James R Crawford, 'Responsibility to the International Community as a Whole' (2001) 8 *Ind. J. Global Legal Stud.* 303 12. See also, Benedict Kingsbury, 'Sovereignty and Inequality' (1998) 9 *Eur.J.Int'l L.* 599, 599 and Christopher G Weeramantry, *Universalising International Law* (Martinus Nijhoff 2004) 38 ('Whether we like it or not, the sovereign state system provides the basis of current international law').

¹⁹ UNFCCC, Preamble ('Reaffirming the principle of sovereignty of States in international cooperation to address climate change').

potential to function as ‘a common denominator for the world’s manifold cultures and traditions’.²⁰ More specifically, State sovereignty may be understood in terms of international law that ‘not only [serves] to place certain limits on the nature and scope of governmental authority but also [contributes] to the development of a justifiable basis for that authority’.²¹ In the context of human rights, it is the States’ sovereign power, including its capacity to legislate, that makes the State best suited to create the conditions for the enjoyment of internationally protected human rights.²² Similarly, States’ sovereign capacity to regulate public and private actors’ emission-producing activities provides a potential basis for obligations to protect the human rights of those affected by climate change. Emission-producing activities affect human beings everywhere, and it is worth noting that the limits of a State’s territory are not the limits of its legal power: as the Permanent Court of International Justice found in the *Lotus* case, States have ‘a wide measure of discretion [...] to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory’.²³ This does not mean that sovereignty entitles a State to do as it pleases: it was implicit in *Lotus* that the sovereignty of other States and international law itself must be respected.²⁴ The extent to which States’ obligations to respect and ensure human rights are confined by territorial or jurisdictional considerations is explored in detail in Section 2.2.2.

Sovereignty not only underpins States’ obligations to protect the human rights of people at home and abroad, but also entitles them to cooperate internationally as equals and to invoke the responsibility of other States for breaches of their international obligations for injury caused to its nationals,²⁵ in accordance with Vattel’s doctrine where: ‘Whoever uses a citizen ill, indirectly offends

²⁰ Crawford (n 18) 308. See also, Weeramantry (n 18) 112, 138 (‘The old view of sovereignty held that the manner in which a sovereign dealt with his own subjects was that sovereign’s exclusive concern. No longer can any sovereign state plausibly take up such a position, and no longer is the world public opinion prepared to accept such an attitude. [The] breach of the walls of sovereignty which human rights doctrine has thus effected is a major factor conditioning both states and peoples into the frame of mind that sovereignty is not absolute but must yield to certain universally accepted norms and standards’ [...] If state sovereignty is to continue into the indefinite future it can only be on the basis of a progressive enlargement of the obligations attendant on sovereignty’).

²¹ Matthew Craven, ‘Legal Differentiation and the Concept of the Human Rights Treaty in International Law’ (2000) 11 *Eur.J.Int’lL.* 489, 519.

²² See, for example, Brigit Toebes, ‘The Right to Health’ in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), (Martinus Nijhoff 2001) 169 (noting that States’ obligations related to the right to health result from the States’ sovereign capacity to provide ‘the basic conditions under which the health of the individual is protected and possibly even enhanced’).

²³ *The Case of the S.S. Lotus (France v Turkey)* [1927] PCIJ Reports, Series A, No. 10.

²⁴ See also, Crawford (n 18) 308 (describing how international law has moved away from freedom from law or *legibus solutes*).

²⁵ Articles on Diplomatic Protection, Report of the International Law Commission on the Work of its 58th Session, Official Records of the General Assembly, 58th Session, Supp No 10, UN Doc A/61/10 (2006) (ILC Articles on Diplomatic

the state, which is bound to protect his citizen'.²⁶ Today the law of State responsibility reflects this doctrine, but recognises that peoples and individuals, and not States, are the ultimate beneficiaries of human rights obligations.²⁷ An example of how sovereignty may function as a vehicle for the protection of human beings against climate change and associated impacts is provided by the landmark climate change case *Massachusetts v EPA*.²⁸ Here the United States Supreme Court upheld the argument submitted by a dozen states in the U.S., American Samoa, the District of Columbia, the cities of New York and Baltimore and several non-governmental organisations that the regulation of greenhouse gas emissions from motor vehicles fell within the mandate of the United States Environmental Protection Agency (EPA). The most significant part of the Court's decision sets out the basis for standing against the defendants: standing was recognised based on the states' sovereign capacity 'to have the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air'.²⁹ Section 2.3 of the thesis demonstrates that at the international level, States can, in a similar vein, invoke the international responsibility of other States that act in breach of their international obligations with regard to climate change to protect the right of their people. On various occasions in the past some Small Island Developing States have expressed their desire to raise the issue of climate change with the International Court of Justice.³⁰

We should also note that the link between climate change and human rights has been articulated in multilateral forums, by various human rights treaty bodies,³¹ and by the Conference of the Parties

Protection) Art 1 (referring to 'diplomatic protection [consisting] of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility', *ibid* 24). This definition was recognised as reflecting customary international law in *Ahmadou Sadio Diallo (Guinea v Democratic Republic of the Congo) (Preliminary Objections)*, [2007] ICJ Rep 582, para 39.

²⁶ Vattel, *Le Droit des Gens* (1758, Anon tr 1797) II vi, para 71. See also, James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 607 (noting that there is no widespread recognition in general international law that harm done to a State's citizens triggers an obligation, not just an entitlement, to take international action under the law of diplomatic protection).

²⁷ See generally Dinah L Shelton, 'Litigating a Rights-Based Approach to Climate Change' (International Conference on Human Rights and the Environment, Tehran, 13–14 May 2009).

²⁸ *Massachusetts v EPA* 549 US SC 497 (2007).

²⁹ *Ibid* 14 (quoting from another landmark environmental case, *Georgia v Tennessee Copper Co.* 206 US SC 230 (1907)).

³⁰ See Rebecca Elizabeth Jacobs, 'Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice' (2005) 14 *Pac. Rim L. & Pol'y J* 103 and UN Press Release, 'Palau Seeks UN World Court Opinion on Damage Caused by Greenhouse Gases', 22 Sept. 2011, available at <http://www.un.org/apps/news/story.asp?NewsID=39710&Cr=pacific+island&Cr1> (accessed 12 July 2014).

³¹ See, for example, UN CEDAW, Statement of the CEDAW Committee on Gender and Climate Change, adopted at 44th Sess held in New York, USA, from 20 July to 7 August 2009. African Commission on Human and Peoples' Rights, 'Climate Change and the Need to Study Its Impacts on Africa', ACHPR/ Res153 (XLVI)09, adopted at the 46th Ordinary

(COP) to the United Nations Framework Convention on Climate Change (UNFCCC).³² The first attempt to link human rights and climate change in an international agreement was made in November 2007, when several Small Island Developing States (SIDS) convened a conference on the human impacts of climate change in order to stimulate concern about the human rights impacts of climate change at the international level. The Small Island Conference led to the adoption of a document that outlined the ‘clear and immediate impacts’ of climate change on human rights.³³ Several months later the UN Human Rights Council adopted Resolution 7/23 on human rights and climate change, initiated by a ‘core group’ composed of the Maldives, Costa Rica and Switzerland. The resolution recognises that climate change ‘poses an immediate and far-reaching threat to people and communities around the

Session (25 Nov 2009); Inter-American Commission for Human Rights, Press Release entitled *IACHR Concludes Its 141st Regular Session*, Press Release No. 28/11 (1 April 2011), available at <http://www.cidh.oas.org/Comunicados/English/2011/28-11eng.htm> (accessed 13 September 2014); 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, available at <http://www.earthjustice.org> (accessed 13 June 2012). The Inuit petition was not considered on admissibility: The Commission merely wrote a letter to the Petitioners advising them that the Commission ‘will not be able to process your petition at present [...] The information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration’ A.C. Revkin, ‘World Briefing Americas: Inuit Climate Change Petition Rejected’ *New York Times* (16 Dec. 2006) 9. However, the IACHR held a hearing on climate change and the petition triggered significant public and scholarly attention. See Earthjustice Press Release entitled ‘Inter-American Commission on Human Rights to Hold Hearing on Global Warming’, (6 Feb. 2007) available at <http://www.earthjustice.org> (accessed 1 July 2012; Elisabeth Caesens and Maritere Padilla Rodriguez, *Climate Change and the Right to Food: A Comprehensive Study* (Heinrich Boll Stiftung Publications Series on Ecology, Vol. 8, 2009) 92 (calling the Commission’s rejection of the petition a ‘missed opportunity to bridge the gap’ between the climate change and human rights regimes) and Stephen Humphreys, *Climate Change and Human Rights: A Rough Guide* (International Council on Human Rights Policy 2008) 43 (arguing that ‘[p]ioneering cases such as the Inuit case will play an important part in creating space for innovation, assisted by a widening understanding of the reality of anthropogenic climate change and its potential to injure’). Similar arguments in Hari M Osofsky, ‘The Inuit Petition as a Bridge? Beyond the Dialectics of Climate Change and Indigenous Peoples’ Rights’ (2005) 31 *American Indian Law Review* 675; Marguerite Middaugh, ‘Linking Global Warming to Inuit Human Rights’ (2007) 8 *San Diego Int’l L.J.* 179; Hari M Osofsky, ‘The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance’ (2006) 83 *Washington University Law Quarterly* 1789 and Sara C Aminzadeh, ‘A Moral Imperative: The Human Rights Implications of Climate Change’ (2006) 30 *Hastings International & Comparative Law Review* 231. Cf Jessie Hohmann, ‘Igloo as Icon: A Human Rights Approach to Climate Change for the Inuit?’ (2009) 18 *Transnat’l L. & Contemp. Probs.* 295 (discussing the risk of creating simplistic images of a traditional culture) and Joanna Harrington, ‘Climate Change, Human Rights, and the Right to Be Cold’ (2007) 18 *Fordham Envtl.L.Rev.* 513, 526 (arguing that ‘The Commission’s decision to reject the [Inuit] Petition on preliminary grounds is admirable, because although there is no doubt that human activities are contributing to global warming, it is not clear that the State bears all responsibility for these activities’).

³² UNFCCC and Decision 1/CP.16 (adopted 10 Dec. 2010), UN Doc FCCC/CP/2010/7/Add.1 (15 March 2011) preambular para 7 (quoting from UN HRC Res. 10/4) and ch I, para 8 (stating that ‘States should, in all climate change-related actions, fully respect human rights’). For a general overview of international discussions on climate change and human rights, see Siobhán McInerney-Lankford, Mac Darrow and Lavanya Rajamani, *Human Rights and Climate Change: a Review of the International Legal Dimensions* (World Bank Study no 61308, 2011); for an account of the role of human rights law in international climate negotiations see Lavanya Rajamani, ‘The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change’ (2010) 22 *Journal of Environmental Law* 391.

³³ Small Island Conference, Malé, Maldives, 13–14 Nov 2007, Malé Declaration on the Human Dimension of Global Climate Change (14 Nov 2007) para 2.

world and has implications for the full enjoyment of human rights'.³⁴ It also requested the Office of the High Commissioner on Human Rights (OHCHR) to undertake a detailed analytical study of the relationship between climate change and human rights.³⁵ The OHCHR replied to the request from the Council by submitting a thirty-two page report to the Council's 10th Regular Session.³⁶ This report was based on OHCHR research and submissions from more than thirty States, thirteen inter-governmental organisations and seventeen non-governmental organisations.³⁷ The report details the implications of climate change impacts and risks for the enjoyment of a range of human rights, including the rights to life, adequate food, safe drinking water and sanitation, the highest attainable standard of health, adequate housing and self-determination.³⁸ In addition, it notes that 'Industrialized countries, defined as Annex I countries under the UN Framework Convention on Climate Change, have historically contributed most to manmade greenhouse gas emissions' while the impacts of climate change 'disproportionally [affect] poorer regions and countries, that is, those who have generally contributed the least to human-induced climate change'.³⁹ It states that human rights standards and principles can 'inform debates on equity and fair distribution of mitigation and adaptation burdens' by '[focusing] attention on how a given distribution of burden affects the enjoyment of human rights',⁴⁰ and also explicitly mentions that States' obligations to address climate change include obligations owed to non-nationals located outside a State's territory.⁴¹ Another key finding is that 'International human rights law complements the [UNFCCC] by underlining that international cooperation is not only expedient but also a human rights obligation and that its central objective is the realization of human rights'.⁴² Yet the report fails to take these points to their logical conclusion, stating that 'The physical impacts of

³⁴ Human Rights Council Resolution 7/23, Human Rights and Climate Change (UN Doc A/HRC/7/78, 14 July 2008) preambular para 1.

³⁵ *Ibid.*

³⁶ Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights, UN Doc A/HRC/10/61 (15 Jan. 2009). The report comments on five thematic areas: (a) the relationship between the environment and human rights; (b) implications of the effects of climate change for the enjoyment of specific rights; (c) vulnerabilities of specific groups; (d) human rights implications of climate change-induced displacement and conflict; and (e) human rights implications of measures to address climate change.

³⁷ For discussions of the report, see John H Knox, 'Linking Human Rights and Climate Change at the United Nations' (2009) 33 *Harv. Envtl. L. Rev.* 1 and R. Dudai, 'Climate Change and Human Rights Practice: Observations on and around the Report of the Office of the High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights.' (2009) 1 *Journal of Human Rights Practice* 294.

³⁸ OHCHR Report on Climate Change and Human Rights (n 36) paras 20-41.

³⁹ *Ibid* para 10.

⁴⁰ *Ibid* para 88.

⁴¹ *Ibid* paras 27, 33, 41, 74.

⁴² *Ibid* para 99.

global warming cannot easily be classified as human rights violations, not least because climate change-related harm often cannot clearly be attributed to acts or omissions of specific States'.⁴³ It also suggests that it is difficult to establish climate change-related human rights violations because it is 'virtually impossible to disentangle the complex causal relationships linking historical greenhouse gas emissions of a particular country with a specific climate change-related effect, let alone with the range of direct and indirect implications for human rights'.⁴⁴ These two claims tend to confuse questions of evidence with legal issues of State responsibility: it is the conduct of States, and not the occurrence of weather-related impacts or the existence of causal relationships *per se*, which has the potential to produce legal consequences under existing international law. This confusion is unfortunate because the evidential complexity of climate change as a legal human rights issue begs for more, rather than less, rigour in expert legal analysis. In any event, citing this complexity cannot replace such legal analysis.⁴⁵

Despite these shortcomings, the report appears to have consolidated a political consensus about the existence of a link between climate change and enjoyment of human rights.⁴⁶ This consensus is reflected in Resolution 10/4, adopted by the Council at its 10th Regular Session held in March 2009. Here too it was initiated by the Maldives, Costa Rica and Switzerland. The resolution lists specific rights that are implicated by climate change, building on the OHCHR report: '*inter alia*, the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination and human rights obligations related to access to safe drinking water and sanitation'.⁴⁷ Climate change has since remained on the Council's agenda: it held a panel discussion on the relationship between climate change and human rights in 2009,⁴⁸ a meeting of the Council's annual Social Forum which focused entirely on climate change in 2010,⁴⁹ and a two-day seminar on 'addressing the adverse impacts of climate change on the full enjoyment of human rights' in

⁴³ Ibid para 96.

⁴⁴ Ibid para 70.

⁴⁵ See also, Knox (n 37) 5 (stating that 'The greatest shortcoming of the OHCHR report is that it says very little about the content of states' duties concerning climate change').

⁴⁶ Consolidating this consensus seems to have been the main objective of the initiators of the resolution. For a discussion, see Marc Limon, 'Human Rights and Climate Change: Constructing a Case for Political Action' (2009) 33 *Harv. Envtl. L. Rev.* 1 445.

⁴⁷ Human Rights Council Resolution 10/4, Human Rights and Climate Change (UN Doc A/HRC/10/L.11, 12 May 2009) preambular para 7.

⁴⁸ UN Office of the High Commissioner for Human Rights, *Summary of Discussion of Human Rights Council Panel Discussion on the Relationship Between Climate Change and Human Rights held on 15 June 2009 at Palais des Nations in Geneva, Switzerland* (2014)16, para 103.

⁴⁹ United Nations, Report of the 2010 Social Forum of the Human Rights Council (Geneva, 4–6 Oct. 2010), UN Doc A/HRC/16/62 paras 12, 43 and 60a.

2012.⁵⁰ At the 26th Regular Session Bangladesh and the Philippines tabled a draft for a fourth resolution on human rights and climate change, which resulted in the adoption of Resolution 26/27 on 23 June 2014.⁵¹ This resolution again calls for a panel discussion,⁵² perhaps reflecting its co-sponsors' dissatisfaction with the lack of progress in the Council's recognition of States' obligations concerning climate change.⁵³ Then on 17 October 2014, during the intercessional climate change negotiations prior to the 20th meeting of the Conference of the Parties to the UNFCCC in December 2014 in Lima (COP20), Human Rights Council Special Procedure mandate holders issued an Open Letter stating that 'There can no longer be any doubt that climate change interferes with the enjoyment of human rights recognised and protected by international law',⁵⁴ and calls on all States to ensure full coherence between their human rights obligations and their efforts to address climate change.⁵⁵

In view of the continuing uncertainty about the relationship between international human rights law and the *lex specialis* of climate change, the thesis' analysis of States' existing human rights obligations devotes specific attention to this relationship. Actual and potential synergies between the two respective frameworks and the general law of State responsibility will also be explored. It is hoped that this analysis not only highlights in what circumstances States may be internationally responsible for climate change-related human rights violations, but also provides insight into the potential role of the UN Human Rights Council and other human rights bodies in addressing the impact of climate change.

⁵⁰ Human Rights Council Resolution 18/22, Human Rights and Climate Change (UN Doc A/HRC/18/ 22, 28 Sept. 2011) para 2.

⁵¹ Human Rights Council Resolution 26/27, Human Rights and Climate Change (UN Doc A/HRC/26/27, 23 June 2014).

⁵² *Ibid* para 6.

⁵³ The text of Resolutions 10/4, 18/22 and 16/27 is very similar, with the crucial paragraph on the relationship between climate change and specific human rights evolving from 'Noting that climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights' (10/4) via 'Emphasizing' the same (18/22) to 'Emphasizing that *the adverse effects of climate change* have a range of implications, both direct and indirect, for the effective enjoyment of human rights' (16/27, italics added).

⁵⁴ 'Open Letter from Special Procedures mandate-holders of the Human Rights Council to the State Parties to the UN Framework Convention on Climate Change on the occasion of the meeting of the Ad Hoc Working Group on the Durban Platform for Enhanced Action in Bonn (20–25 Oct. 2014): A New Climate Change Agreement Must Include Human Rights Protection for All'.

⁵⁵ *Ibid*.

1.2 Methodology

The thesis takes its methodological starting point from legal scholarship on the relationship between poverty and human rights; namely that some factual situations may indicate that human rights are being violated even if internationally wrongful conduct is not immediately evident.⁵⁶ Such factual situations then prompt further analysis to establish violations (or to conclude that there are none) and, in the event of violations, to restore the enjoyment of rights. This analysis necessarily involves the identification of potentially responsible actors, as the non-enjoyment of a human right does not, in itself, amount to a human rights violation.⁵⁷ It also involves a legal analysis of the scope and content of international human rights obligations. The focus of this thesis on States' obligations and State responsibility, because States remain the primary subjects of international law - despite the expanded role of non-State actors in the international legal system. As Section 2.1.2 explains, States are categorised in international climate change law as either 'developed countries', 'developing countries' or 'economies in transition'.

To set the stage for the legal analysis, a general overview of relevant facts is provided in Section 1.3, complemented by brief factual discussions in Sections 3.3.1–3.3.4 in relation to specific human rights. Against this factual background, the thesis examines the content of States' obligations to prevent dangerous anthropogenic interference with the climate system and associated adverse effects on the enjoyment of human rights. The Introduction has already alluded to the notion that a human rights violation involves an act attributable to at least one State that breaches an international obligation

⁵⁶ See, for example, Thomas Pogge, 'Are We Violating the Human Rights of the Poor?' (2011) 14 *Yale Hum. Rts. & Dev. L.J.* 1; Margot E. Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (OUP 2007); Polly Vizard, *Poverty and Human Rights: Sen's Capability Perspective Explored* (OUP 2006) and JC Mubangizi, 'Know Your Rights: Exploring the Connections Between Human Rights and Poverty Reduction With Specific Reference to South Africa' (2005) 21 *South African Journal on Human Rights* 32. See also, Philip Alston, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals' (2005) 27 *Hum. Rts. Q.* 755, 786 (observing that the maxim that poverty violates human rights is true in legal terms 'to the extent that a government or other relevant actor has failed to take measures that would have been feasible [...] and that could have had the effect of avoiding or mitigating the plight in which an individual living in poverty finds him or herself') and David Kinley, *Civilising Globalisation* (CUP 2009) 27 (arguing that 'the incidence of poverty is a reliable sign of attendant human rights problems. The asymmetry in the distribution of wealth between rich and poor countries, and between the rich and poor within countries, is indicative [...] of the relative enjoyment of human rights').

⁵⁷ *Velásquez Radriíguez v Honduras* Inter-American Court of Human Rights Series C No 4 (1988); 95 ILR 232, 291 para 175.

that is binding on the State at the time the act was committed.⁵⁸ This understanding of a human rights violation as an internationally wrongful act is explained in Chapter 2, and is the basis for this thesis. Accordingly, the thesis asks whether it is possible, as a matter of principle, to find one or several States responsible for violations of human rights in climate change-related actions based on existing international laws. I suggest that answering this question requires not only an analysis of the content of States' obligations under international human rights law, but also an analysis of States' common and differentiated obligations to address climate change under the UNFCCC and the inter-relationship between the two. Thus, after setting out the legal framework of international human rights law in Section 2.1.1, Section 2.1 identifies provisions of the UNFCCC and its Kyoto Protocol⁵⁹ that are relevant for human rights protection and which may be instrumental in assessing States' compliance with their human rights obligations. Section 2.1 also discusses the significance of the no-harm rule for the interpretation of States' human rights obligations related to climate change. Together, Sections 2.1.1–2.3.3 contain the substantive legal norms that are central to the thesis' legal analysis.

The presentation of the normative framework is followed by a clarification of rules and principles of general international law that inform the legal analysis. These are used to address what is perhaps the greatest methodological challenge connected with the thesis topic, namely the absence of international human rights jurisprudence dealing with climate change (or transnational problems with similar features). This jurisprudential gap means that it not clear how open-textured provisions of human rights treaties must be interpreted in the context of climate change. It is worth noting here that most legal research on human rights and climate change has dealt with this challenge by analysing existing human rights jurisprudence resulting from claims brought by individuals against their national State, followed by an analysis to establish to what extent States' obligations are limited by a presumed 'territorial scope' of human rights obligations.⁶⁰ This territorial scope is often explored by reference to

⁵⁸ For a discussion on the correlations between human rights, climate change and poverty see Thomas Pogge, 'Poverty, Climate Change, and Overpopulation' (2010) 38 *Ga. J. Int'l & Comp. L.* 525; Wolfgang Sachs, 'Climate Change and Human Rights' (2008) 51 *Development* 332; Peter Singer, 'One Atmosphere' in Stephen M. Gardiner *et al.* (eds), *Climate Ethics: Essential Readings* (OUP 2010); Flavio Comim, 'Climate Injustice and Development: A Capability Perspective' (2008) 51 *Development* 344.

⁵⁹ Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 Dec. 1997, entered into force 16 Feb. 2005) 2303 UNTS 148.

⁶⁰ See, for example, John H. Knox, 'Climate Change and Human Rights Law' (2009) 50 *Virginia Journal of International Law* 198, 202, and McInerney-Lankford, Darrow and Rajamani (n 32) 41. This approach reflects the approach taken in a significant body of human rights scholarship that has concerned itself with the identification of a supposed territorial scope of human rights obligations. See, for example, Marko Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 *Human Rights Law Review* 411, 26 and Maarten Den Heijer and

human rights jurisprudence concerning extraterritorial conduct of States. The problem with this approach is that it misses an important point: emission-producing activities that are known to cause climate change occur primarily, if not solely, *within* the territories and jurisdictions of States. The picture becomes even more blurred where reference is made to admissibility decisions to clarify the content of substantive human rights obligations. For example, some scholars try to explain the content of States' obligations in addressing climate change by reference to the ECtHR's admissibility decision in *Bankovic et al. v Belgium and 16 Other Contracting States*,⁶¹ concerned with the alleged responsibility of members of the North Atlantic Treaty Organisation (NATO) for violations of the ECHR resulting from NATO bombing in Belgrade in 1999. The analysis leads to an unusual line of reasoning: the scope of States' obligations to address climate change would be narrow because 'if dropping bombs on a city does not amount to "effective control" of its occupants, the less immediate and drastic measure of allowing pollution to move across an international border would be unlikely to constitute such control'.⁶² Subsequent jurisprudence indicates that the ECtHR's reasoning on 'extraterritorial' obligations in the *Bankovic* case was flawed.⁶³ All this emphasises the need for a methodology that is more firmly rooted in existing rules and principles of international law, including rules and principles pertaining to interpretation, whereby jurisprudence can serve as additional material for analysis.

The thesis thus adopts a different methodology, namely one which interprets international human rights law in its broader context of general international law. In doing so, it attempts to

Rick Lawson, 'Extraterritorial Human Rights and the Concept of 'Jurisdiction'' in Malcolm Langford *et al.* (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2012). On climate change specifically, see for example Edward Cameron and Marc Limon, 'Restoring the Climate by Realizing Rights: The Role of the International Human Rights System' (2012) 21 *RECIEL* 204 (stating that 'the possible extraterritorial application of human rights [...] has always been a core, contestable and contentious issue at the heart of the international human rights system and its capacity to address climate change' and that 'Clarifying the extraterritorial dimension of human rights obligations in the context of climate change is especially important for vulnerable countries and communities'. Cf Barbara Frey, 'Obligations to Protect the Right to Life: Constructing a Rule of Transfer Regarding Small Arms and Light Weapons' in Mark Gibney and Sigrid Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press 2010) 50 ('When a state party has the means to prevent the violation of core human rights treaty obligations outside its territory and fails to do so, it is acting contrary to the object and purpose of the treaty and violates the principle of *pacta sunt servanda*').

⁶¹ *Bankovic et al. v Belgium and 16 Other Contracting States (Admissibility)*, App no 52207/99 (ECtHR, 12 Dec 2001). For discussions see Fons Coomans and Menno T. Kamminga, *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) and Marko Milanovic, *Extraterritorial Application of Human Rights Treaties* (OUP 2011)

⁶² McInerney-Lankford, Darrow and Rajamani (n 32) 41. For a similar line of argument with a less definite conclusion see Knox (n 60) 202.

⁶³ See *Al-Skeini v United Kingdom* App no 55721/07 (ECtHR, 7 July 2011), paras 136–7 and *Al-Jedda v United Kingdom* App no 27021/08 (ECtHR, 7 July 2011). See further Marko Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 23 *EurJ.Int'IL* 121.

accommodate Norgaard's point that the existence of rights or responsibilities should be kept analytically separate from the question of their justiciability.⁶⁴ This doctrinal point is important for addressing the human rights dimension of what the IPCC calls 'a collective action problem at the global scale'.⁶⁵ First of all this is because the legally binding nature of human rights obligations evidently does not depend on their justicability.⁶⁶ We should recall that international law is a legal system that emerged largely in the absence of institutions and accordingly developed as a system based on the recognition of States as 'political entities equal in law, similar in form [...] the direct subjects of international law'.⁶⁷ Enforcement of these obligations was traditionally, as Crawford puts it, '[if] short of war, by way of moral opprobrium or by reciprocal denial of benefits'.⁶⁸ International law has developed significantly, both normatively and institutionally, but it still lacks a compulsory jurisdiction and a law-making authority.⁶⁹ This does not mean, however, that international law is not effective: Dame Rosalyn Higgins, for example, has convincingly argued it is most accurately characterised as a 'continuing process of authoritative decisions'⁷⁰ that 'provides normative indications for States in their relations with each other'.⁷¹ Sir Malcolm Shaw points out that 'Law is that element that binds the members of the community together in their adherence to recognised values and standards [...] regulating behaviour, and reflecting to some extent, the ideas and preoccupations of the society in which it functions'.⁷² Based on this understanding, international human rights law may be significant in dealing with climate change irrespective of whether or not victims of climate change can enforce this law through litigation. The lack of scholarly work on the opportunity to enforce international human rights law 'as between States' as a method of compelling compliance with obligations to protect the

⁶⁴ Carl Aage Norgaard, *The Position of the Individual in International Law* (Munksgaard 1962).

⁶⁵ Intergovernmental Panel on Climate Change, 'Contribution of Working Group III to the IPCC Fifth Assessment Report' (n 11) 5.

⁶⁶ See, for example, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (26 May 2004) CCPR/C/21/Rev1/Add 13 HRC para 5 (highlighting the significance of the principle of *pacta sunt servanda* in relation to the International Covenant on Civil and Political Rights).

⁶⁷ *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174 177-178.

⁶⁸ Crawford, *Brownlie's Principles of Public International Law* (n 26) 9.

⁶⁹ Precisely these features have led to the conclusion, particularly in the positivist school, that international law was only 'law improperly so called'. See John Austin, *The Province of Jurisprudence Determined* (Wilfrid E. Rumble (ed), CUP 1995) 123 and HLA Hart, *The Concept of Law* (Penelope A. Bulloch and Joseph Raz (eds), 2nd edn, Clarendon Press 1994) ch. 5. Cf Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Athlone 1970) 68.

⁷⁰ Rosalyn Higgins, 'Policy Considerations and the International Judicial Process' (1968) 17 *Int'l & Comp. L.Q.* 58, 58.

⁷¹ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (OUP 1994) 95.

⁷² Malcolm N Shaw, *International Law* (5th edn, CUP 2003) 1.

Earth's climate system (and *vice versa*) is another reason for allocating a central role to the law of State responsibility in the thesis' methodology and argument.

Chapter 2, Section 2 prepares the legal analysis by discussing how to interpret the substantive norms set out in Section 2.1, irrespective of who does the interpreting. Section 2.2.1 explains the significance of general principles of interpretation for the analysis of States' human rights obligations. Section 2.2.2 highlights the importance of an ends-oriented interpretation for clarifying the obligations of States *vis-à-vis* non-nationals who reside outside the State's territory but are affected by its action or non-action related to climate change. This rests on the understanding that the object and purpose of human rights law is 'the protection of basic rights of individual human beings, irrespective of their nationality'.⁷³ The examination of the general characteristics of human rights obligations further suggests that these obligations limit States' discretion in the enactment of legislation, the formulation of policies and international relations and cooperation.⁷⁴ This is a conclusion which sets the stage for the analysis of specific obligations related to climate change. It is also what distinguishes international law most clearly from national civil liability regimes, which may be less well equipped to address climate change than the international legal system.⁷⁵

Still on a preliminary note, Section 2.2.3 discusses how the UNFCCC and the Kyoto Protocol, as forms of *lex specialis*, relate to States' international human rights obligations. More specifically, the doctrinal question addressed concerns the role of human rights law in the international legal system where *lex specialis* is already in place and appears to create parallel obligations and fora for discussion and cooperation. It is important to note that some authors have argued that the UNFCCC is an exemplary instrument that does not impose binding obligations on State Parties. Tomuschat, for example, writes that the concept of common but differentiated responsibilities and respective capabilities (CBDRRC) is 'intended to convey the idea that humankind as a whole has a moral duty to

⁷³ *The Effect of Reservations on the Entry into Force of the ACHR (Articles 74 and 75)* (1982) 2 Inter-AmCtHR (Ser A), (1982) 3 HRLJ 153 .

⁷⁴ As one commentator noted in relation to the ECHR, 'Every government is aware that by subscribing to the Convention, it places itself in a position in which domestic laws and practices may have to be modified to avoid impinging on [...] various liberties' JG Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester University Press 1993) 106.

⁷⁵ See, for example, Douglas A Kysar, 'What Climate Change Can Do About Tort Law' (2012) 42 *Environmental Law Reporter* 10740–41 (stating that in climate change litigation based on tort law judges would have to 'stretch in plaintiffs' direction' to accept a 'probabilistic, risk-enhancement conception of causation rather than requiring proof of actual cause') and N Mustapher, *Exploring the Potential of Tort-Based Climate Change Litigation in Uganda* (2008) 13 (finding that 'causal pathways in the climate change context are too complex and speculative to ground a duty of tort responsibility under conventional approaches').

ensure the continued existence of natural conditions that permit its survival'⁷⁶ and 'does not carry the usual meaning as denoting a binding obligation under international law'.⁷⁷ Bodansky and Rajamani maintain that the UNFCCC 'does not impose strong substantive commitments on countries' but instead 'puts in place a long-term, evolutionary process to address the climate change problem that: enunciates the regimes ultimate objective and guiding principles; establishes an infrastructure of institutions and decision-making mechanisms; promotes the systematic collection and review of data; and encourages national action'.⁷⁸

The argument that a legally binding treaty could be premised on nothing more than moral duties does not stand up to analytical scrutiny. Indeed, by virtue of being a treaty, the UNFCCC has immediate legal effects including its own enforcement potential. The principles of the UNFCCC are contained in the operational part of the treaty and its provisions, especially those relating to developed country parties, are framed in imperative terms.⁷⁹ Treating such treaty provisions as non-binding contradicts the duty of performance and the principle of *pacta sunt servanda*.⁸⁰ Verheyen and Voigt have come to the same conclusion based on a legal analysis of UNFCCC provisions and the Kyoto Protocol in accordance with the general law on treaties. They acknowledge that although the emission of greenhouse gases *per se* is not prohibited under the UNFCCC,⁸¹ a State's failure to take preventive measures in accordance with its differentiated obligations under the Convention could give rise to a breach of obligation for which the State would be internationally responsible.⁸² It is worth stating the obvious, namely that the level of compliance with States' obligations under the UNFCCC is an unreliable indicator of the treaty's relevance for human rights protection. Furthermore, it is worth highlighting that abstract legal principles are capable of producing concrete obligations through a

⁷⁶ Tomuschat (n 17) 8.

⁷⁷ Ibid.

⁷⁸ Daniel Bodansky and Lavanya Rajamani, 'The Evolution and Governance Architecture of the Climate Change Regime' in Detlef Sprinz and Urs Luterbacher (eds), *International Relations and Global Climate Change* (2nd edn, MIT Press 2013) 2.

⁷⁹ See also, Andrew Strauss, 'Climate Change Litigation: Opening the Door to the International Court of Justice' in William C.G. Burns and Hari M. Osofsky (eds), *Adjudicating Climate Change: State, National and International Approaches* (CUP 2009) 354 (stating, in relation to the 'general perception' that the articles of the UNFCCC do not create binding obligations, that 'Given the treaty's obligatory language regarding remediation of the global warming problem, particularly by developed countries, it is quite possible [...] that the ICJ would decide this not to be the case').

⁸⁰ The exception is when a treaty is contrary to a peremptory norm of international law. See Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 Jan. 1980) 1155 UNTS 331, Art 53.

⁸¹ Tomuschat (n 17) 8.

⁸² Verheyen (n 17) 79ff, and Voigt (n 17) 22 (both pointing out that Arts 2 and 4(2) of the UNFCCC and Arts 2–3 of the Kyoto Protocol impose legal obligations on developed States to mitigate climate change). For a different view see Tomuschat (n 17) 18.

process of interpretation.⁸³ The development of international human rights law shows how the disagreement among States as regards the scope of their legal obligations does not negate their obligation or justify its violation. Instead it creates a need for an independent and impartial judge to determine the existence or scope of a specific legal obligation.⁸⁴ Since the UNFCCC does not create a judicial process, the legal interpretation of its provisions probably depends on the jurisdictional capacity and willingness of other judicial and quasi-judicial bodies.⁸⁵ This stresses the need to understand to what extent international human rights law and the law of State responsibility can function as ‘adjoining fields’⁸⁶ to the international climate change regime. In particular, a potential for ‘systemic integration’ of UNFCCC norms and the Kyoto Protocol into other fields of law is already apparent from recent cases brought before national and regional courts.⁸⁷

Building on this point, the final part of Chapter 2 explores how international human rights law and the general law of State responsibility relate to one another. The law of State responsibility contains ‘the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom’.⁸⁸ Accordingly, the law of State responsibility may be called ‘the general secondary law of international obligations, in the same way that the Vienna Convention [on the Law of Treaties] provides the general secondary law of

⁸³ Ronald Dworkin, *Taking Rights Seriously* (HUP 1977) 22–28. This point was evidenced by Dworkin’s discussion of a United States Supreme Court case *Riggs v Palmer* 115 NY 506, 22 NE 188 (1889), where the application of a principle was decisive in the outcome, despite the fact that rules existed which could have been applied.

⁸⁴ Dworkin (n 83). Dworkin’s work is particularly important for understanding how abstract legal principles are capable of producing concrete obligations through a process of interpretation. This argument was evidenced by a discussion of a United States Supreme Court case *Riggs v Palmer* where the application of a principle was decisive in the outcome, despite the fact that rules existed which could have been applied.

⁸⁵ See generally Hari M Osofsky, ‘The Continuing Importance of Climate Change Litigation’ [2010] *Climate Law* 3.

⁸⁶ To borrow from Tawhida Ahmed and Duncan French, ‘Competing Narratives in Climate Change Law’ in Stephen Farrall, Tawhida Ahmed and Duncan French (eds), *Criminological and Legal Consequences of Climate Change* (Hart 2012) 254–55.

⁸⁷ The Court of Justice of the European Union (CJEU)’s decision in the 2011 case that resulted from a challenge to the EU’s emission trading scheme brought jointly by the Air Transport Association of America and several North American airlines shows that a Catch-22 might result from a lack of clarity: the Court considered itself unable to apply provisions of international law (here, the Kyoto Protocol) on the basis that the provisions relied upon were insufficiently clear and precise. See *Case C-366/10, Air Transport Association of America, American Airlines Inc., Continental Airlines Inc., United Airlines Inc. v Secretary of State for Energy and Climate Change* CJEU [2011] OJ C 260/9. We should point out, however, that this restriction follows from the CJEU’s interpretation of EU law and is not related to international law as such. Indeed, neither Art 31(3)(c) of the VCLT nor any other international rule of interpretation requires rules to be clear and precise in order to fulfill an interpretative function.

⁸⁸ James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text, Commentaries* (CUP 2002) 31.

treaties'.⁸⁹ However, its relevance to the international human rights regime—a regime that gives effect to non-reciprocal obligations—is worth analysing.⁹⁰ We should recall that during the protracted drafting of the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts (ARS), the diversity (and volume) of substantive norms of international law increased significantly, with a proliferation of obligations with third-party beneficiaries and obligations concerning common areas, including outer space, the high seas and the Earth's climate system.⁹¹ The ARS reflect these developments and accommodate for obligations that are owed to the 'international community as a whole' into the general law of obligations, marking a departure from the 'classical bilateralism of the duty/right paradigm'.⁹² Section 2.3.1 explains that part of the relevance of the law of State responsibility still consists of the doctrine expressed by the Permanent Court in the *Factory at Chorzów* case that 'it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation',⁹³ but highlights that the law of State responsibility is not a liability system with the primary or exclusive goal of providing injured persons with compensation. As Sections 2.3 (State responsibility), 3.1 (attribution of conduct) and 3.3 (substantive norms) will explain, wrongful conduct can be established even when no-one has been injured as a result of the wrongful act. This means that (in contrast to what some scholars have suggested) it is evidently not necessary to 'disentangle the cobweb of individual acts by States and societal forces'⁹⁴ in order to establish the wrongful nature of certain climate change-related conduct.

Having set the stage for the main legal analysis, Section 3.1 explores how human action and inaction leading to climate change can be attributed to States under the general rule of attribution. It first examines general rules and then specifically explores how these rules apply to different scenarios of wrongful conduct involving multiple States acting jointly or collectively. This is followed by an in-depth analysis of substantive norms of international human rights law in Section 3.3, which focuses on

⁸⁹ Crawford (n 18) 310.

⁹⁰ Dinah Shelton, *Remedies in International Human Rights Law* (2nd edn, OUP 2010) 98.

⁹¹ Dinah Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility' (2002) 96 *Am.J.Int.Law* 833, 834.

⁹² International Law Commission, Third Report on State Responsibility by Mr. James Crawford, Special Rapporteur on State Responsibility (2000) UN Doc A/CN.4/507 (15 March 2000) 43, para 96. See also, Malgosia Fitzmaurice, 'International Responsibility and Liability' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2007) 1020 (pointing out that one of the problems with the law of State responsibility has been how to overcome this paradigm, and 'how to reflect the features of the many environmental obligations that have as a goal the protection of the common interest').

⁹³ *Case Concerning the Factory at Chorzów (Germany v Poland)* [1927] PCIJ Rep Series A no 17, 29.

⁹⁴ Tomuschat (n 17) 9.

the scope of States' obligations related to the exercise or non-exercise of their regulatory capacity and their capacity to cooperate with other States. Because States' obligations under international human rights law are to a large extent rights-specific,⁹⁵ it considers obligations derived from four specific rights: the right of self-determination; the right to life; the right to enjoy culture; and the right to the highest attainable standard of health. The conclusion that international human rights law imposes standards of care on each State that can be ascertained through an analysis of facts and environmental standards that are already binding on the State opens the door to an analysis of the relevance of States' existing obligations under the UNFCCC for clarifying the content of human rights obligations of States with differing responsibilities for climate change and different capacities to address it. The Conclusion makes final remarks about the potential role of the law of State responsibility in strengthening the legal protection offered by international law to peoples and individuals affected by climate change.

⁹⁵ For a more detailed discussion see V Engström, 'Who Is Responsible for Corporate Human Rights Violations?' [2002] Åbo Akademi University Institute for Human Rights 18.

1.3 *The Science*

The scientific evidence on climate change is largely interrelated with the international norms discussed in this thesis, and the role of the IPCC in the development of these norms requires closer examination. The function of the IPCC is to ‘provide internationally coordinated scientific assessments of the magnitude, timing and potential environmental and socio-economic impact of climate change and realistic response strategies’.⁹⁶ This is achieved by reviewing and assessing ‘the most recent scientific, technical and socio-economic information produced worldwide relevant to the understanding of climate change’.⁹⁷ The IPCC has grown into a body that involves thousands of scientists assessing climate change and the damage it can cause. Its first Assessment Report on climate change was published in 1990, and played a key role in the drafting and adoption of the UNFCCC: the treaty reflects recognition of a causal link between human activities that lead to the emission of certain greenhouse gases (primarily CO₂) and climatic changes which produce ‘adverse effects’. It contains a legal definition of climate change (Art. 1), which defines it as ‘a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods’.⁹⁸ States’ obligations under the treaty relate to an ‘ultimate objective’ of achieving, ‘in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system’ (Art. 2). Climate change and its ‘adverse effects’ are acknowledged as ‘a common concern of humankind’, and ‘adverse effects’ are defined as ‘changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare’.⁹⁹ The adequacy of States’ obligations is subject to review by the Conference of the Parties ‘in light of the best available scientific information and assessment on climate change and its

⁹⁶ UNFCCC, Preamble, para 5.

⁹⁷ IPCC website, http://www.ipcc.ch/organization/organization.shtml#.Us_UznnxbwI (accessed 1 December 2014).

⁹⁸ UNFCCC, Art 1 (emphasis added).

⁹⁹ UNFCCC, Preamble and Art 1.

impacts, as well as relevant technical social and economic information’,¹⁰⁰ which in practice is provided by the IPCC.

The IPCC produced follow-up reports in 1996, 2004, 2007 and 2014, and a large number of technical papers, meeting reports, and regular conferences. In all these reports, the IPCC has confirmed that the observed phenomenon of climate change is largely man-made and caused by the excessive emission of anthropogenic greenhouse gases since industrialisation. In 1996 the IPCC found ‘stronger evidence that most of the warming observed over the last fifty years is likely to be attributable to human activities’.¹⁰¹ In its Fourth Assessment Report, the IPCC confirmed, based on observations of increases in global average air and ocean temperatures, widespread melting of snow and ice and rising global average sea level that ‘Warming of the climate system is unequivocal’.¹⁰² The Summary for Policymakers of the Fifth Assessment (2014) confirms again that ‘Human influence on the climate system is clear’ and ‘evident from the increasing greenhouse gas concentrations in the atmosphere, positive radiative forcing [i.e that has a warming effect on the climate], observed warming, and understanding of the climate system’.¹⁰³ It states that ‘It is *extremely likely* that more than half of the observed increase in global average surface temperature from 1951 to 2010 was caused by the anthropogenic increase in greenhouse gas concentrations and other anthropogenic forcings together’ and that ‘Greenhouse gases contributed a global mean surface warming *likely* to be in the range of 0.5°C to 1.3°C over the period 1951 to 2010, with the contributions from other anthropogenic forcings, including the cooling effect of aerosols, *likely* to be in the range of –0.6°C to 0.1°C’. Thus anthropogenic influence on the climate system is plainly distinguishable from natural forcings: ‘the contribution from natural forcings is *likely* to be in the range of –0.1°C to 0.1°C, and from natural internal variability is *likely* to be in the range of –0.1°C to 0.1°C’.¹⁰⁴ The Fifth Assessment Report also clarifies the influence of humans on specific adverse effects of climate change, finding that

¹⁰⁰ UNFCCC, Art 4(2)(d).

¹⁰¹ Intergovernmental Panel on Climate Change, ‘Contribution of Working Group I to the IPCC Second Assessment Report (1996)’ in John T Houghton *et al.* (eds), *Climate Change 1995: The Science of Climate Change* (CUP 1996).

¹⁰² Lenny Bernstein *et al.*, ‘Synthesis Report, adopted at IPCC Plenary XXVII, Valencia, Spain, 12–17 Nov 2007’ in *Climate Change 2007* (Intergovernmental Panel on Climate Change 2007) 30.

¹⁰³ Intergovernmental Panel on Climate Change, ‘Contribution of Working Group I to the IPCC Fifth Assessment Report (2013)’ (n 3) 13.

¹⁰⁴ *Ibid* (adding that ‘Together these assessed contributions are consistent with the observed warming of approximately 0.6°C to 0.7°C over this period’).

‘Anthropogenic influences have *very likely* contributed to Arctic sea ice loss since 1979’¹⁰⁵ and to the global mean sea level rise since the 1970s.¹⁰⁶

The most recent IPCC report on Impacts, Adaptation and Vulnerability provides evidence of ‘risks of climate change that warrant consideration’, including ‘potentially severe impacts relevant to “dangerous anthropogenic interference with the climate system” as described in Article 2 of the UN Framework Convention on Climate Change’ which ‘can involve potentially large or irreversible consequences, high probability of consequences, and/or limited adaptive capacity’.¹⁰⁷ The report expressed ‘high confidence’ that ‘key risks that span sectors and regions’ include the following:

- i. Risk of death, injury, and disrupted livelihoods in low-lying coastal zones and Small Island Developing States, due to rising sea levels, coastal flooding, and storm surges;
- ii. Risk of food insecurity linked to warming, drought, flooding and precipitation variability, particularly for poorer populations;
- iii. Risk of severe harm for large urban populations due to inland flooding;
- iv. Risk of loss of rural livelihoods and income due to water scarcity and reduced agricultural productivity, particularly for farmers and herders with minimal capital in semi-arid regions;
- v. Risk of breakdown of infrastructure networks and essential services (such as water, electricity and health services) as a result of extreme weather events;
- vi. Risk of loss of marine ecosystems and consequent coastal livelihoods, especially for fishing communities in the tropics and the Arctic.
- vii. Risk of loss of terrestrial and inland water ecosystems and the services they provide for livelihoods.
- viii. Risk of mortality, morbidity, and other physical harm during periods of extreme heat, particularly for vulnerable urban populations and those working outdoors.¹⁰⁸

¹⁰⁵ Ibid 17.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid 6-7.

¹⁰⁸ Ibid.

The report notes that due to the time lapse between the emission of anthropogenic greenhouse gases and the effects on the climate system, ‘Projected global temperature increase over the next few decades is similar across emission scenarios’.¹⁰⁹ However, it finds that ‘Mitigation of greenhouse gas emissions over the next few decades can substantially reduce risks of climate change in the second half of the twenty-first century’,¹¹⁰ and provides a range of emission scenarios with associated likelihood of keeping temperature increases below 2° C.¹¹¹ It clarifies that, ‘A lower warming target, or a higher likelihood of remaining below a specific warming target, will require lower cumulative CO₂ emissions’.¹¹² The IPCC pointed out earlier that, ‘The array of potential adaptive responses available to human societies is very large’, but that ‘Adaptation alone is not expected to cope with all the projected effects of climate change, and especially not over the long term as most impacts increase in magnitude’.¹¹³ It also found that ‘the projected impacts of climate change can vary greatly due to the development pathway assumed’ and that differences in regional population, income and technological development are often a strong determinant of the level of vulnerability to climate change.¹¹⁴ It is likely that the pace of progress towards sustainable development in low-income countries is slowed down ‘either directly through increased exposure to adverse impact or indirectly through erosion of the capacity to adapt’.¹¹⁵

Section 3.1 deals with attribution and emphasises that one of the most relevant questions regarding potential legal claims under international law is to what extent anthropogenic climate change

¹⁰⁹ Ibid 5.

¹¹⁰ Ibid 7. An earlier report found that the continuation of the current rate of current rate of greenhouse gas emissions would make a rise of average global temperatures of more than 2° C. within two or three decades nearly inevitable — a level of warming that would almost certainly cause rising sea levels, heatwaves, droughts and more extreme weather conditions.

¹¹¹ Ibid., 25 (finding that ‘Limiting the warming caused by anthropogenic CO₂ emissions alone with a probability of >33%, >50%, and >66% to less than 2°C since the period 1861–1880, will require cumulative CO₂ emissions from all anthropogenic sources to stay between 0 and about 1570 GtC (5760 GtCO₂), 0 and about 1210 GtC (4440 GtCO₂), and 0 and about 1000 GtC (3670 GtCO₂) since that period, respectively. An amount of 515 [445 to 585] GtC (1890 [1630–2150] GtCO₂), was already emitted by 2011’).

¹¹² Ibid 26.

¹¹³ Intergovernmental Panel on Climate Change, ‘Contribution of Working Group II to the IPCC Fourth Assessment Report’ in M.L. Parry *et al.* (eds), *Climate Change 2007: Impacts, Adaptation and Vulnerability* (CUP 2007) 19. ‘Adaptive capacity’ is defined as ‘the ability of a system to adjust to climate change (including climate variability and extremes) to moderate potential damages, to take advantage of opportunities, or to cope with the consequences’ (p 21).

¹¹⁴ Ibid 20. ‘Vulnerability’ is defined as ‘the degree to which a system is susceptible to, and unable to cope with, adverse effects of climate change, including climate variability and extremes. Vulnerability is a function of the character, magnitude, and rate of climate change and variation to which a system is exposed, its sensitivity, and its adaptive capacity’ (p. 21).

¹¹⁵ Ibid.

can be traced back to State conduct. Here it is worth highlighting the range of potential evidence that could be used to establish attribution—either directly or in the context of an obligation to regulate or otherwise influence the conduct of private actors. For example, a recent study focused on private and State-run entities that produce emissions within the jurisdictions of States, showing that ‘nearly two-thirds, 63 per cent, of all industrial carbon dioxide and methane released into the atmosphere can be traced to fossil fuel and cement production by just ninety entities: investor-owned companies, such as Gazprom and Saudi Aramco; and solely government-run industries, such as in the former Soviet Union and China (for its coal production)’.¹¹⁶ Other examples are studies that focus on the influence of States’ energy policies on climate change, such as the International Energy Agency (IEA)’s *World Energy Outlook 2013* which argues that the development and use of renewable forms of energy ‘hinges on government support’.¹¹⁷ The *World Energy Outlook 2012* more specifically concluded that to remain below 2° C, ‘money alone will not do the job’ and that ‘Adequate government policies and planning, regional and sectoral target setting, monitoring and evaluation, training and capacity building for engineers and local workforces (for implementation, maintenance and repair) are needed’.¹¹⁸ It is evident from climate science (see Section 1.1), that preventing dangerous climate change would also require scaled-up international cooperation and assistance to States with limited technological or financial capacity to make the transition to low-carbon development pathways.

Another question of attribution (in the factual sense) that has received much attention in legal literature on climate change is the level of probability with which causation between climate change on the one hand, and specific harm or injury on the other, can be established. The general principle here seems to be that probabilities are higher when the harm is the result of long-term adverse effects (such as coastal erosion, rising sea levels and melting icecaps), and lower when it is the result of sudden-onset events (such as heatwaves, hurricanes, storm surges and very heavy rainfall).¹¹⁹ However, the science of attribution is evolving rapidly and even for sudden-onset events it is sometimes possible to establish a link with anthropogenic climate change with high levels of probability and precision. One example is scientific research on the effect of climate change, in terms of probability, to the 2003

¹¹⁶ Richard Heede, ‘Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010’ (2013) 122 *Climatic Change* 229.

¹¹⁷ International Energy Agency, *World Energy Outlook 2013* (OECD/ IEA, Paris, 2013) 197.

¹¹⁸ International Energy Agency, *World Energy Outlook 2012* (OECD/ IEA, Paris, 2012) 540.

¹¹⁹ As pointed out by Michael B Gerrard, ‘What Litigation of a Climate Nuisance Suit Might Look Like’ (2011) 121 *The Yale Law Journal Online* 135, 139 and Knox (n 60) 240.

heatwave in Europe and the consequences of this event for human beings. It was established that approximately 22,000 to 35,000 deaths were attributable to the heat, and that 75 per cent of those who died would probably have survived for more than a year without the heatwave.¹²⁰ Human activities had generated a tenfold increase in the risk of such weather.¹²¹ Consequently, the argument that attributing specific weather events to GHG emissions is by definition impossible is no longer a ‘truism’.¹²² The IPCC report on Impacts, Adaptation and Vulnerability also reflects progress in the scientific understanding of attribution. It notes, for example, that ‘Each degree of warming is projected to decrease renewable water resources by at least 20% for an additional 7% of the global population’.¹²³ Findings such as these allow us to estimate the contribution of anthropogenic climate change to the likelihood that specific human rights grievances occur, or were caused by, climate change.

In relation to factual attribution, it is worth noting that conclusions have been drawn from IPCC reports in a range of national cases. These indicate that IPCC reports can be used as conclusive evidence for establishing a link between greenhouse gas-emitting activities on the one hand and damage or risks affecting human beings on the other. For example, in Australia a local government council was forced to consider the likely consequences of environmental impact of greenhouse gas emissions from a power plant when considering a planning application for its continued operation.¹²⁴ Pollution caused by the plant was considered a potential threat to the quality of life of human beings everywhere, including those in the locality of the council. Furthermore, the Verwaltungsgericht in Berlin, Germany, found that the government had a duty to publicly disclose government supported projects which increase greenhouse gas emissions based in part on the argument that greenhouse gas emissions in due course threaten the lives of human beings.¹²⁵ In *Massachusetts v EPA*, the Supreme Court relied on the evidence contained in the IPCC’s Fourth Assessment Report to establish that the

¹²⁰ Myles Allen *et al.*, ‘Scientific Challenges in the Attribution of Harm to Human Influence on Climate’ (2007) 155 *U. Pa. L. Rev.* 1353.

¹²¹ *Ibid* and Peter A. Stott *et al.*, ‘Human Contribution to the European Heatwave of 2003’ (2004) 432 *Nature* 610.

¹²² Gerrard (n 119) 139 (suggesting that attributing specific weather events to GHG emissions is impossible because ‘hurricanes, droughts, and heatwaves [...] occurred long before the industrial era; there has always been natural variability’).

¹²³ Intergovernmental Panel on Climate Change, ‘Contribution of Working Group I to the IPCC Fifth Assessment Report (2013)’ (n 3) 8.

¹²⁴ *Australian Conservation Foundation v Minister for Planning* [2004] VCAT 2029 (29 Oct. 2004).

¹²⁵ *Bundes für Umwelt- und Naturschutz Deutschland et al, v Bundesrepublik Deutschland* Case No. VG 10 A 21504 (10 Jan. 2006) Verwaltungsgericht, Berlin.

risk of rising sea levels was sufficiently ‘real’ to grant the state of Massachusetts standing,¹²⁶ referring to the ‘enormity of the potential consequences associated with man-made climate change’.¹²⁷ This point is mentioned in Chapter 4, which discusses causation.

On a final note, we must acknowledge that responsibility for climate change inevitably raises normative questions, even if it is seen as a purely scientific exercise (and not as an application of legal norms). In an innovative study, Elzen *et al.* have demonstrated how methodological choices that are ultimately normative can lead to extremely different conclusions regarding the links between climate change and specific States. For example, they point out that the relative contribution of developed States as a group to climate change can be ‘as high as 80% when excluding recent emissions [which do not yet affect the climate], non-CO₂ GHGs, and changes in land use and forestry CO₂; or about 48% when including all these emissions and discounting historical emissions for technological progress’.¹²⁸ Elzen distinguishes between States’ *contributions* to climate change and their *responsibility* for it, the latter being a broader concept that includes ‘ethical aspects such as the “basic needs” principle’.¹²⁹ The methodology for calculating ‘responsibility’ involves discounting emissions that have been used to meet quantifiable basic needs, such as heating and cooking.¹³⁰ Because of the correlation between basic needs and a range of internationally recognised human rights, methodologies such as these could be used to produce evidence that sheds light on the limits of States’ mitigation obligations under international human rights law (based on the principle of common but differentiated responsibilities and respective capabilities (CBDRRC), see Section 2.1.2) and the extent to which there is a case of conflicting rights (see Section 3.4). Furthermore, it could be used to determine appropriate contributions for reparations in cases of climate change-related damage where multiple States are responsible for the same internationally wrongful act (see Chapter 4). I hope that this thesis will provide further insight into the normative framework of international law and its relevance to the facts set out in this section.

¹²⁶ *Massachusetts v EPA* at 1438, 1455–56.

¹²⁷ *Ibid.*

¹²⁸ Michel G.J. Elzen *et al.*, ‘Countries’ contributions to climate change: effect of accounting for all greenhouse gases, recent trends, basic needs and technological progress’ (2013) 121 *Climatic Change* 397.

¹²⁹ *Ibid* 399 (fn. omitted).

¹³⁰ *Ibid.*

Chapter 2: Legal Framework

Throughout its history, the development of international law has been influenced by the requirements of international life.

International Court of Justice¹³¹

131. *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, para 8.

2.1 Sources

International legal norms, like any legal norms, are determined on the basis of widely shared criteria,¹³² which establish how rules become law.¹³³ In international law, the common point of reference for these criteria is Article 38 of the Statute of the Court of Justice. This identifies treaties, custom and general principles of law as the three main sources of international law, with judicial decisions and teachings of the most highly qualified jurists as subsidiary means for interpreting the rules of law.¹³⁴ The lack of ‘tertiary rules’ (rules that determine how rules related to ascertaining norms are created or modified)¹³⁵ means that the sources of international law can be broad-based in character, influence each other in practice and often overlap.¹³⁶ What international lawyers and tribunals tend to agree on when it comes to the theory of sources of international law is that, in the words of Crawford, ‘its emphasis on general acceptance [by States] is right’.¹³⁷ Taking this theory of sources as the starting point for the thesis will,

¹³² For a thorough study on the question of ascertainment of rules of international law and a plea for a uniform approach see Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (OUP 2011).

¹³³ Jonathan I Charney, ‘Universal International Law’ (1993) 87 *Am.J.Int.Law* 529, 533.

¹³⁴ Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 Oct. 1945) 892 UNTS 199. The provision finds its origins in State practice, arbitral decisions and legal scholarship and is nearly identical to Art 38 of the Statute of the Permanent Court of International Justice. See also, Hugh Thirlway, ‘The Sources of International Law’ in Malcolm D Evans (ed), *International Law* (3rd edn, OUP 2010) 98 (pointing out that the clause in the first paragraph of the Statute of the International Court of Justice was added to emphasise that ‘the sources mentioned in those sub-paragraphs constitute recognized sources of international law, and (presumably) the sole sources of that law’).

¹³⁵ Thirlway (n 134) 115. He illustrates this inter-dependency through the example of the legal status of a UN General Assembly resolution: if one would want to argue that UN General Assembly resolutions have become a source of international law as and of themselves, the most plausible basis for one’s argument would be a body of evidence demonstrating that States have consistently accepted these resolutions as reflecting international law. One would then essentially rely on a new rule of customary international law to prove that a new source of law had come into existence. Thirlway concedes that this situation may be more accurately understood as resolutions having been included in ‘the scope of custom’.

¹³⁶ The systematic reliance on the theory of sources by international lawyers and tribunals is perhaps because, rather than despite its malleability. See Crawford, *Brownlie's Principles of Public International Law* (n 26) 20. See also, Thirlway (n 134) 99 (pointing out that the definition contained in Art 38 has been characterised as ‘inadequate, out of date, or ill-adapted to the conditions of modern international intercourse’, but that ‘no new approach has acquired any endorsement in the practice of States, or in the language of their claims against each other; and the International Court has in its decisions consistently analysed international law in the terms of Article 38’).

¹³⁷ Crawford, *Brownlie's Principles of Public International Law* (n 26) 23. Cf Philip Allott, ‘Language, Method and the Nature of International Law’ (1971) 45 *British Yearbook of International Law* 79, 133 (celebrating the theory of sources based on its ‘relative and highly convenient certainty, its remarkable flexibility and sensitivity over time, and, above all, [...] the strength which it gains from being found by men but created by international society itself’).

it is hoped, avoid confusion between international norms and norms derived from national legal orders which have as such no binding force under international law.¹³⁸

Understanding the various sources of international law and the way they interrelate is not only essential for ascertaining norms but also for interpreting them. For example, Jørgenson has pointed out that general principles of law are an independent source of international law that is capable of ‘[filling] gaps or weaknesses in the law’ and providing ‘a background of legal principles in the light of which custom and treaties have to be applied’.¹³⁹ McAdam has noted that where a human rights norm has become a general principle of law, it can ‘modify the application of treaty or custom, since it has the same status [...] as those two sources of international law’.¹⁴⁰ And Simma and Alston have highlighted the importance of general principles of law as a method for reconciling value-based principles with a consensualist conception of international law.¹⁴¹ The underlying doctrinal point here is that human rights norms derived from different sources of law may be substantively similar, but maintain a separate identity.¹⁴² These considerations must be born in mind when reading Section 2.2, which focuses on one source of law, namely treaties.

The present section analyses international human rights law and the legal framework of the UN Framework Convention on Climate Change (UNFCCC) as sources of legal obligations. In addition, it explores the no-harm rule as a rule of customary international law. The sources of substantive human rights obligations are also set out in relation to four specific human rights: the right of self-determination and the rights to life, culture and to the highest attainable standard of health, analysed in Chapter 3. Questions of interpretation are addressed in Section 2.2. The importance of understanding the full spectrum of sources of international human rights obligations and their inter-relationship is highlighted in Section 2.2.2, which discusses the territorial and personal scope of human rights treaties, and Section 2.2.3, which examines the relationship between the UNFCCC and international human rights law. The conclusions drawn from this analysis are presented in Section 2.3, which discusses the

¹³⁸ The need for doctrinal rigour in the identification of such principles is apparent, for example, in relation to the question of joint responsibility (see Section 3.2).

¹³⁹ Nina HB Jørgenson, *The Responsibility of States for International Crimes* (OUP 2003).

¹⁴⁰ Jane McAdam, *Climate Change, Forced Migration, and International Law* (OUP 2012) 263, fn 178.

¹⁴¹ Bruno Simma and Philip Alston, ‘The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles’ (1988–1989) 12 *Australian Yearbook of International Law* 105 (referring to *South West Africa (Second Phase) (Judgement)* [1966] ICJ Rep 6 34).

¹⁴² Crawford, *Brownlie's Principles of Public International Law* (n 26) 35.

relevance of the general law of State responsibility for the substantive norms discussed in the present section.

2.1.1 The International Human Rights System

The corpus of international human rights law has primarily emerged from a large number of treaties, and is continuously expanding, both normatively and institutionally. The UN Charter contains more than a dozen references to human rights, proclaims the realisation of human rights as one of the main purposes of the Organisation and provides that Member States shall cooperate to take joint and separate action with the UN to promote respect for and observance of human rights.¹⁴³ The Universal Declaration of Human Rights (UDHR) can be understood as an authoritative interpretation of the substantive rights referred to in the UN Charter, based on its preambulatory recital ‘Whereas Member States have pledged themselves to achieve in co-operation with the United Nations the promotion of universal respect for and observance of human rights’ and ‘Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge’ and the proclamation of the UDHR as providing ‘a common standard of achievement for all peoples and all nations’.¹⁴⁴ The UDHR may also be understood as constituting ‘subsequent agreement between the

¹⁴³ United Nations, Charter of the United Nations (24 Oct. 1945) 1 UNTS XVI. Art 1 of the Charter mentions the four purposes of the United Nations. According to Art 1(3) the purposes of the United Nations include ‘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’. In addition, Art 55 of the Charter provides: 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 c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. Article 56 of the Charter provides that ‘All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55’.

¹⁴⁴ See also, Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, UN Doc A/CONF. 32/41 3 (stating that the UDHR ‘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’). See also, Olivier de Schutter *et al.*, ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights’ (2012) 34 *Hum. Rts. Q.* 1084, 1092 (adding that the UDHR also expresses general principles of law) and Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (CUP 2002) 30.

parties' to the Charter regarding its interpretation or the application of its provisions.¹⁴⁵ Furthermore, the parallel existence of human rights norms in a great number of national legal systems has the potential to make those norms binding under international law as general principles of law, and thus as a separate source of international law that can modify the application of treaty or custom.¹⁴⁶

When considering States' obligations under international human rights law, it is important to recall that human rights obligations derived from the UN Charter include civil and political rights and economic, social and cultural rights. This reflects the axiom that human rights are universal, indivisible, interdependent, interrelated and inalienable rights of all human beings.¹⁴⁷ The specific human rights provided in the UDHR have also been codified in the two International Covenants adopted in 1966 which form, together with the UDHR, the International Bill of Human Rights. The International Covenant on Civil and Political Rights (ICCPR)¹⁴⁸ has 167 State parties, which include all States listed in Annex I to the UN Framework Convention on Climate Change (UNFCCC), and dozens of States located in areas where climate change is forecast to have serious negative impacts on human life and livelihoods.¹⁴⁹ The vast majority of States have also ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹⁵⁰ with 160 State parties.¹⁵¹ There are many other widely ratified international human rights treaties, including conventions that protect rights of particular categories of people.¹⁵² The number of ratification of these treaties has risen rapidly in recent years, with all UN Member States except one (South Sudan) having ratified at least one core human rights treaty and 80 per cent having ratified four or more.¹⁵³ The effect of the consolidation of human rights norms through various sources of international law is that the norms contained in the UDHR are applicable across

¹⁴⁵ VCLT Art 31(3)(b). See also, Jayawickrama (n 144) 30 (arguing that whether as an authoritative interpretation of the Charter or as subsequent agreement between the parties, the UDHR 'is acknowledged today as the legitimate aid to the interpretation of the expression 'human rights and fundamental freedoms in the Charter of the United Nations').

¹⁴⁶ McAdam (n 140) 263.

¹⁴⁷ World Conference on Human Rights, June 14–25, 1993, Vienna Declaration and Programme of Action, 1(5), UN Doc A/CONF.157/23 (July 12, 1993) Art 5.

¹⁴⁸ International Covenant on Civil and Political Rights (adopted 16 Dec. 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

¹⁴⁹ For ratification status, see <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> (last accessed 14 November 2014).

¹⁵⁰ International Covenant on Economic, Social and Cultural Rights (adopted 16 Dec. 1966, entered into force 3 Jan. 1976) 993 UNTS 3 (ICESCR).

¹⁵¹ For ratification status, see <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> (last accessed 14 November 2014).

¹⁵² Categorisation from Crawford, *Brownlie's Principles of Public International Law* (n 26) 638.

¹⁵³ See website of the UN OHCHR, <http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx>

different fields of international law as customary norms binding on all States.¹⁵⁴ This was recognised by the International Court of Justice in its Advisory Opinion *Legality of the Threat or Use of Nuclear Weapons*, where it noted the existence of a great many rules of humanitarian law ‘so fundamental to the respect of the human person’ that all States must observe them ‘whether or not they have ratified the conventions that contain them’ because ‘they constitute intransgressible principles of international customary law’.¹⁵⁵

International human rights treaties are authoritatively interpreted by human rights treaty bodies with quasi-judicial functions. In the international human rights system there are ten such treaty bodies composed of independent experts, which monitor compliance with the nine core human rights conventions and optional protocols with reporting procedures. Seven acting human rights treaty bodies are currently reviewing individual complaints,¹⁵⁶ and two other bodies will soon follow suit.¹⁵⁷ Six treaty bodies also possess a mandate to consider State-to-State complaints,¹⁵⁸ and one is about to obtain it.¹⁵⁹ Yet to date these mandates have not been used. The interpretation of human rights treaties occurs as part of the State reporting procedures, through General Comments, or quasi-judicial litigation processes.¹⁶⁰

The United Nations Human Rights Committee (‘HRC’ or ‘Committee’), is the body of independent experts expressly mandated under the treaty to interpret the provisions of the ICCPR and

¹⁵⁴ See also, Margot E Salomon, ‘Deprivation, Causation, and the Law of International Cooperation’ in Malcolm Langford *et al.* (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2012) 304 (arguing that ‘Today, the existence of a customary international law principle to respect and observe human rights in the main, which can be said to apply to basic socio-economic rights, is increasingly difficult to refute). See also, ED Kinney, ‘The International Human Right to Health: What Does This Mean For Our Nation and World?’ (2001) 34 *Indiana Law Review* 1457, 1467. Cf Crawford, *Brownlie's Principles of Public International Law* (n 26) 21 (suggesting that some norms contained in the UDHR have obtained the status of customary international law). On the difficulty of distinguishing within a treaty between norms that are an expression of existing custom on the one hand and norms only created by the treaty on the other see Prosper Weil, ‘Towards Relative Normativity in International Law?’ (1983) 77 *The Am.J.Int.Law* 413, 428. See also, Henry J Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (3rd edn, OUP 2007).

¹⁵⁵ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Reports 241, para 79.

¹⁵⁶ The Human Rights Committee, Committee Against Torture (CAT), Committee on the Elimination of Racial Discrimination (CERD), Committee on the Elimination of Discrimination Against Women (CEDAW), Committee on the Rights of Persons with Disabilities (CRPD), and the Committee on Enforced Disappearances (CED) and the Committee on Economic, Social and Cultural Rights (CESCR).

¹⁵⁷ Committee on Migrant Workers (CMW) and the Committee on the Rights of the Child (CRC).

¹⁵⁸ The Human Rights Committee, CERD, CAT, CMW, CED, CEDAW and CESCR.

¹⁵⁹ The CRC.

¹⁶⁰ See, for example, Michael O’Flaherty, ‘The Concluding Observations of United Nations Human Rights Treaty Bodies’ (2006) 6 *Human Rights Law Review* 1 (on State reporting procedures) and Jayawickrama (n 144) 131. See also, Theodor Meron, *Human Rights Law-Making in the United Nations* (OUP 1986) 10 (pointing out that the interpretative practice of treaty bodies affects the reporting obligations of States as well as their domestic and international practice).

monitor its implementation.¹⁶¹ The interpretative practice of the HRC consists of reviews of State reports submitted by State Parties in accordance with Article 40(1)(a) of the Covenant¹⁶² and General Comments, which it is mandated to make under Article 40(4) of the Covenant, including on Article 6 (the right to life), Article 1 (the right to self-determination) and Article 27 (the rights of minorities). In addition, it interprets Covenant provisions when reviewing individual complaints under the Optional Protocol,¹⁶³ which has led to a significant body of jurisprudence that sheds light on the attributes of rights protected under the ICCPR and on States' obligations to respect and ensure those rights. The ICCPR provides for an inter-State complaint procedure under Articles 41 and 42, subject to the States involved having made a declaration recognising the competence of the Committee to consider inter-State complaints. As of today, only forty-eight States have made such a declaration¹⁶⁴ and, remarkably, no State has ever used the procedure.¹⁶⁵ This has led the HRC to stress the 'potential value' of the procedure in a recent General Comment—a significant potential if States try to pursue international claims based on alleged breaches of human rights law linked to acts and omissions that cause climate change.¹⁶⁶ However, the inter-State complaint procedure can presumably be used in cases where it is difficult or impossible to identify specific victims of alleged breaches of the Covenant, (unlike the individual complaint procedure) as it does not require that complaints be brought by victims of an alleged human rights violation.

¹⁶¹ ICCPR Arts 28–45.

¹⁶² Art 40(1)(a) requires an initial report to be submitted within one year of ratification of the Covenant and, in Art 40(1)(b), submission of further reports at the request of the Committee. The latter requirement has been interpreted as requiring submission of reports every five years. See HRC, *Yearbook of the Human Rights Committee* (1981–2) Vol. I, SR 303 11–6, para 2.

¹⁶³ Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 Dec 1966, entered into force 23 March 1976) 999 UNTS 302 (Optional Protocol to ICCPR).

¹⁶⁴ See <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> (last accessed 14 December 2014).

¹⁶⁵ For a discussion, see Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (1st edn, N.P. Engel Publisher 1993) 585. See also, HRC, *General Comment No. 31* para 2 (encouraging States to make a declaration under Art 41 and/or avail themselves of the procedure under Art 41).

¹⁶⁶ HRC, *General Comment No. 31*. For a hypothetical example, see Margaretha Wewerinke, 'Climate Change: Human Rights Committee, Ad Hoc Conciliation Commission' in Mark Gibney and Wouter Vandenhole (eds), *Litigating Transnational Human Rights Obligations: Alternative Judgments* (Routledge 2013). In contrast with the individual complaint procedure established under the Optional Protocol, the inter-State procedure is aimed at the amicable settlement of disputes between the State Parties involved. The procedure becomes potentially quasi-judicial only in the second instance, when a so-called 'Ad hoc Conciliation Commission' has been appointed and the State Parties involved fail to reach an amicable solution (Art 42(1)(a)). At this stage, the Conciliation Commission would produce a report containing its findings on 'questions of fact' and 'its views on the possibilities of an amicable solution of the matter' (Art 42(7)(c)). This could presumably involve formulating views resembling judicial decisions on the merits, as the HRC has done under Art 5(4) of the Optional Protocol. See further Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel Publisher 2004) 613.

The compliance of State parties with the ICESCR is monitored by the Committee on Economic, Social and Cultural Rights (CESCR). This is a body of independent experts established under ECOSOC Resolution 185/17 of 28 May 1985¹⁶⁷ to carry out the monitoring functions assigned to the UN Economic and Social Council (ECOSOC) in Part IV of the ICESCR.¹⁶⁸ Although it is not established under the treaty which it monitors, the CESCR has gradually developed into a quasi-judicial body resembling the HRC¹⁶⁹ and eventually obtained a treaty basis for its work with the entry into force of the Optional Protocol to the ICESCR. The Protocol mandates the Committee to receive and consider communications,¹⁷⁰ and provides that these may be submitted ‘by or on behalf of individuals or groups of individuals’,¹⁷¹ and also creates a procedure for inter-State communications.¹⁷² The authoritative weight of the Committee’s General Comments as interpretations of the Covenant provisions is supported by the fact that these General Comments are included in its annual reports to ECOSOC, which are in turn considered by the General Assembly.¹⁷³

¹⁶⁷UN Economic and Social Council (ECOSOC), Res. 185/17 (adopted 28 May 1985), UN Doc E/1985/85, at 15.

¹⁶⁸ ICESCR Arts 16–25.

¹⁶⁹ Particularly significant in this regard is ECOSOC Resolution 1987/5, which invited the Committee ‘to consider again at its next session the compilation of recommendations in the summary records of the Committee relating to its future work, paying particular regard to practices followed by other treaty bodies, including the preparation of general comments by the Human Rights Committee’. This invitation was subsequently endorsed by the General Assembly. See ECOSOC Resolution 1987/5: International Covenant on Economic, Social and Cultural Rights (14th Plenary Meeting, 26 May 1987) para 7 (emphasis added) and General Assembly Resolution A/Res/42/102 (93rd Plenary Meeting, 7 Dec. 1987) para 5. The Committee followed-up with a decision to ‘adopt, at the end of its consideration of each report, concluding observations reflecting the main points of discussion and indicating issues that would require a specific follow-up’ and to ‘[convey] the views of the Committee on the implementation of the Covenant by that State Party’. See UN Committee on Economic, Social and Cultural Rights, Report of the 7th Session UN Doc E/1993/22, Supplement No. 2, paras 264 and 265. As Matthew Craven notes, this endorsement by the General Assembly, in combination with the fact that General Comments are part of the State reporting process, result in the General Comments of the Committee carrying significant legal weight. Craven also notes that no objection has ever been made to the Committee’s practice of producing General Comments (at 90) and that the Committee is, and remains, the sole authoritative body or procedure mandated to authoritatively interpret the provisions of the ICESCR (at 91). See Matthew Craven, *The International Covenant on Economic, Social, and Cultural Rights: a Perspective on its Development* (OUP 1995) 91.

¹⁷⁰ See GA Res 832, UN GAOR, 63rd Session, UN Doc A/RES/63/117 (2008). See also, Arne Vandenberg and Wouter Vandenhole, ‘The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: An Ex Ante Assessment of its Effectiveness in [the] Light of the Drafting Process’ (2001) 10 *Human Rights Law Review* 207.

¹⁷¹ OP-ICESCR, Art 2.

¹⁷² OP-ICESCR, Art 10. This procedure is subject to declarations made by the relevant States under the article.

¹⁷³ ICESCR. Arts 16–25.

In addition to treaty bodies, the UN human rights system includes a Charter-based human rights body, the UN Human Rights Council, which is a subsidiary body of the UN General Assembly¹⁷⁴ consisting of forty-seven UN Member States elected by the General Assembly.¹⁷⁵ The Council holds a mandate to ‘[promote] universal respect for the protection of all human rights and fundamental freedoms for all’¹⁷⁶ and to ‘promote the effective coordination and the mainstreaming of human rights within the United Nations system’.¹⁷⁷ The resolutions adopted by the Council are not legally binding and (due to the relatively small number of Council Members) probably not as relevant to the creation of customary international law as resolutions that are adopted by the General Assembly. The thesis nonetheless argues that the Council, as the United Nations’ primary human rights body, is in an ideal position to consider what is needed to address climate change in accordance with human rights obligations, and to promote compliance with States’ obligations to prevent dangerous climate change in accordance with existing legal obligations.

2.1.2 The UN Framework Convention on Climate Change

The UNFCCC is one of several multilateral environmental agreements concluded since the early 1970s, most of which have similar institutional arrangements. It establishes ‘a conference or meeting of the parties (COP, MOP) with decision-making powers, a secretariat, and one or more specialist subsidiary bodies’.¹⁷⁸ There are currently 195 parties to the UNFCCC (194 States plus the European Union),¹⁷⁹ which include all 193 UN Member States.¹⁸⁰ In order to understand the origins of the Convention, we need to bear in mind that climate change was placed on the agenda of the UN General Assembly in September 1988 under the agenda item—submitted by Malta—‘Declaration proclaiming climate as

¹⁷⁴ The Council was created by the General Assembly on 15 March 2006 and replaced the former UN Commission on Human Rights. See UNGA Res. 60/251: Human Rights Council, adopted 15 March 2006, UN Doc A/RES/60/251 (3 April 2006), para 1.

¹⁷⁵ Ibid para 7.

¹⁷⁶ Ibid para 2.

¹⁷⁷ Ibid para 3.

¹⁷⁸ Robin R Churchill and Geir Ulfstein, ‘Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International law’ (2000) 94 *Am.J.Int.Law* 623.

¹⁷⁹ See http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php (accessed 1 Sept. 2013). Niue, a self-governing State in free association with New Zealand, is a Party to the UNFCCC but not a member of the United Nations.

¹⁸⁰ See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-2&chapter=1&lang=en (accessed 1 Sept. 2013).

part of the common heritage of mankind'.¹⁸¹ The item led to discussions and the adoption of a consensus resolution entitled 'Protection of Global Climate for Present and Future Generations of Mankind',¹⁸² in which States expressed concern 'that certain human activities could change global climate patterns, threatening present and future generations with potentially severe economic and social consequences' and noted with concern 'that the emerging evidence indicates that continued growth in atmospheric concentrations of "greenhouse gases" could produce global warming with an eventual rise in sea levels, the effects of which could be disastrous for mankind if timely steps are not taken at all levels'.¹⁸³ The resolution called on 'Governments and intergovernmental organizations to collaborate in making every effort to prevent the detrimental effects on climate and activities which affect the ecological balance, and also calls upon non-governmental organisations, industry and other productive sectors to play their due role'.¹⁸⁴ In the last instance the concept of 'common heritage of mankind' was not mentioned in the resolution: agreement had been reached to refer to a new concept, 'common concern of mankind'.¹⁸⁵ According to commentators, this concept 'is generally seen as being oriented to the fight specifically against ecological dangers threatening human survival'.¹⁸⁶ Through the resolution, the General Assembly also endorsed the establishment of the IPCC by the World Meteorological Organisation and the UN Environment Programme,¹⁸⁷ and urged governments, and intergovernmental and non-governmental organizations to implement programmes and research to enhance the understanding of climate change and its causes.¹⁸⁸

It took another year for States to agree to adopt a legal framework specifically designed to address climate change, through another resolution again entitled 'Protection of Global Climate for

¹⁸¹ Daniel Bodansky, 'The United Nations Framework Convention on Climate Change: A Commentary' (1993) 18 *Yale J. Int'l L.* 451, 465

¹⁸² Protection of Global Climate for Present and Future Generations of Mankind, UNGA Res. 53 (6 Dec. 1988) UN Doc A/43/39.

¹⁸³ Ibid Preamble.

¹⁸⁴ Ibid para 9.

¹⁸⁵ Ibid para 1. Daniel Bodansky notes that most Member States were reluctant to invoke the 'common heritage' concept in the context of climate change. Bodansky, 'The United Nations Framework Convention on Climate Change: A Commentary' (n 181) 465.

¹⁸⁶ Kemal Baslar, *The Concept of the Common Heritage of Mankind in International Law* (Martinus Nijhoff 1998) 295 (comparing the concept with 'common heritage' which is concerned with 'allocating rights of use to state-free areas, or traditional global commons'). See also, Malcolm N Shaw, *International Law* (6th edn, CUP 2008) 533 and S.R. Chowdhury, 'Intergenerational Equity: Substratum of the Right to Sustainable Development' in S.R. Chowdhury, M.G.D. Erik and J.I.M. Paul (eds), *The Right to Development in International Law* (Martinus Nijhoff 1992).

¹⁸⁷ GA Res 43/53, para 5.

¹⁸⁸ Ibid para 6.

Present and Future Generations of Mankind'.¹⁸⁹ The resolution urged governments, intergovernmental and non-governmental organisations and scientific institutions to 'collaborate in efforts to prepare, as a matter of urgency, a framework convention on climate and associated protocols containing concrete commitments in the light of priorities that may be authoritatively identified on the basis of sound scientific knowledge, and taking into account the specific development of developing countries'.¹⁹⁰

When the UNFCCC was adopted three years after the 1989 Resolution, the Preamble stated that 'Acknowledging that change in the Earth's climate and its adverse effects are a common concern of humankind'.¹⁹¹ The UNFCCC establishes both general principles that States must respect in their actions to address climate change,¹⁹² as well as specific commitments that States must undertake in relation to mitigation, public information, education, financial resources and technology transfer.¹⁹³ The relevance of the UNFCCC for the protection of human beings is perhaps most evident from its ultimate objective enshrined in Article 2, which is 'to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system [...] within a time frame sufficient to allow ecosystems to adapt naturally to climate change [...] and to enable economic development to proceed in a sustainable manner'.¹⁹⁴ This objective must be read in the light of the Preamble, where the first paragraph reads 'Acknowledging that change in the Earth's climate and its adverse effects are a common concern of humankind'.¹⁹⁵ 'Adverse effects are defined in Article 1 as 'changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare'.¹⁹⁶ All States commit to take precautionary measures 'to anticipate, prevent or minimize the causes of climate change and

¹⁸⁹ Protection of Global Climate for Present and Future Generations of Mankind, UNGA Res 44 (22 Dec. 1989) UN Doc A/RES/44/207.

¹⁹⁰ Ibid paras 6–9, 12.

¹⁹¹ UNFCCC, Preamble. This was the first time that a 'common concern' concept was incorporated into a legally binding instrument, and in an evolved version: apart from being framed in gender-neutral language, the concept now includes not just climate change, but also its 'adverse effects' as part of our common concern.

¹⁹² Ibid Art 3.

¹⁹³ Ibid, esp. Art 4.

¹⁹⁴ Ibid Art 2.

¹⁹⁵ Ibid Preamble.

¹⁹⁶ Ibid Art 1(1).

mitigate its adverse effects' to achieve the ultimate objective,¹⁹⁷ in accordance with the principle of the principle of 'common but differentiated responsibilities and respective capabilities' (CBDRRC).¹⁹⁸

Article 3(3) specifies that 'Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures',¹⁹⁹ reflecting (again) the precautionary principle. The precautionary principle is generally interpreted as pressing for precautionary regulation or action when there is no conclusive evidence of a particular risk scenario, when the risk is uncertain, or until the risk is disproved.²⁰⁰ This principle is widely considered to be part of customary international law in the environmental field based on 'the importance of preventive action in environmental governance'.²⁰¹ This customary law status of the precautionary principle has since been confirmed by numerous findings of international courts and tribunals which unequivocally found the principle to be part of international law, despite some differences as to its exact meaning.²⁰² A recent interpretation of the principle was by the International Tribunal for the Law of the Sea (ITLOS) in its first Advisory Opinion, which cited it as a principle of customary international law.²⁰³ The precautionary principle is also gradually gaining acceptance in social and economic fields, especially in international health law,²⁰⁴ and attempts have been made in human rights scholarship to demonstrate that human rights treaty bodies could invoke the precautionary principle to achieve

¹⁹⁷ Ibid Art 3(3).

¹⁹⁸ Ibid Art 3(1).

¹⁹⁹ Ibid Art 3(3).

²⁰⁰ Patricia Birnie, Alan Boyle and Catherine Redgwell (eds), *International Law and the Environment* (OUP 2009) 604–607.

²⁰¹ Anja Lindroos and Michael Mehling, 'From Autonomy to Integration? International Law, Free Trade and the Environment' (2008) 77 *Nordic Journal of International Law* 253, 265. (with further references). It is worth noting that already a decade ago, scholars argued that the precaution principle 'has evolved into a general principle of environmental protection at the international level'. See J. Cameron, 'The Status of the Precautionary Principle in International Law' in T. O'Riordan and J. Cameron (eds), *Interpreting the Precautionary Principle* (Earthscan Publications 1994) 262 (with further references).

²⁰² *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* (Judgement) [1997] ICJ Rep 7 and *Southern Bluefin Tuna Cases (New Zealand v Japan and Australia v Japan)* Int'l Trib of the Law of the Sea, Order (27 August 1999). See also, Philippe Sands, *Principles of International Environmental Law*, vol. 2 (CUP 2003) 212 (noting that there is 'no uniform understanding of the meaning of the precautionary principle among states and other members of the international community').

²⁰³ See *Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* Case No 17, 1 Feb. 2011 Seabed Disputes Chamber of the International Tribunal for the Law of the Sea 125–130. For a discussion of the case, see D. Anton, A. Makgill and C. Payne, *Advisory Opinion on Responsibility and Liability for International Seabed Mining (ITLOS Case No. 17): International Environmental Law in the Seabed Disputes Chamber* (ANU College of Law Research Paper No 11–06, 2011).

²⁰⁴ Marie-Claire Cordonier Segger *et al.*, 'Prospects for Principles of International Sustainable Development Law after the WSSD: Common but Differentiated Responsibilities, Precaution and Participation' (2003) 12 *RECIEL* 54 567 62.

environmental protection.²⁰⁵ As Birnlie, Boyle and Redgwell note, the consequences of applying the precautionary principle largely depend on the specific normative context.²⁰⁶

As regards the specific context of the UNFCCC, it is important to recall that Article 3(1) expressly states that the precautionary principle must be interpreted in accordance with the principle of CBDRRC. This principle is an extended version of the principle of ‘common but differentiated responsibilities’ (CBDR), which appears in the 1992 Rio Declaration on Environment and Development²⁰⁷ and was subsequently incorporated into a large number of international treaties dealing with natural resources, many of which refer explicitly to States’ common responsibilities and the need to take account of differentiated circumstances.²⁰⁸ The principle of CBDR or CBDRRC is best understood as an application of the general principle of equity in international law. This acquires a specific meaning through the notion of ‘common heritage of mankind’²⁰⁹ or, in case of the UNFCCC, the notion of ‘common concern of humankind’. As Sands explains, the CBDR principle ‘entitles, or may require, all concerned States to participate in international response measures [...]. Second, it leads to environmental standards which impose differing obligations on States’.²¹⁰ This produces higher standards of achievement for ‘developed’ countries than for developing countries.²¹¹

In the UNFCCC, the inclusion of ‘respective capabilities’ as a marker of differentiation indicates that ‘common but differentiated responsibilities’ are distinct from ‘capabilities’ and thus principally based on States’ individual responsibility for contributions to accumulated greenhouse gases in the global atmosphere.²¹² The Preamble clarifies that States’ obligations are differentiated based on the understanding that ‘the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that *per capita* emissions in developing

²⁰⁵ Séverine Fiorletta Leroy, ‘Can the Human Rights Bodies be Used to Produce Interim Measures to Protect Environment-Related Human Rights?’ (2006) 15 *RECIEL* 66 58. See also, de Schutter *et al* (n 144) 1084ff.

²⁰⁶ Birnlie, Boyle and Redgwell (n 200) 161.

²⁰⁷ Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, UN Doc A/ CONF.151/1 (3–14 June 1992). Principle 7 (‘In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities’). The principle followed in turn from the ‘need’, recognised in the 1972 Stockholm Declaration on the Human Environment, to consider ‘the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries’. Stockholm Declaration of the United Nations Conference on the Human Environment (Stockholm, 16 June 1972), printed in ILM (1972), 1416, Principle 23.

²⁰⁸ Cordonier Segger *et al.* (n 204) 56.

²⁰⁹ *Ibid.*

²¹⁰ Philippe Sands, *Principles of International Environmental Law*, vol. 3 (CUP 2012) 217.

²¹¹ Cordonier Segger *et al.* (n 204) 60.

²¹² Joanne Scott and Lavanya Rajamani, ‘EU Climate Change Unilateralism’ (2012) 23 *Eur.J.Int’lL.* 469, 494.

countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs'.²¹³ The principle of CBDRRC expressed in the UNFCCC thus embodies the understanding that 'developing' (non-Annex I) countries have reaped fewer benefits from historic emissions than 'developed' (Annex I) countries, and have a lower capacity for addressing climate change.²¹⁴ Scott and Rajamani are correct in arguing that 'The fact that [CBDRRC] is a fundamental part of the conceptual apparatus of the climate change regime also implies [...] that state parties are obliged not just to interpret current obligations and fashion new ones in keeping with the CBDRRC principle, but also to take this principle into account in their unilateral actions *vis-à-vis* other parties'.²¹⁵

The principle of CBDRRC is reiterated throughout the Convention and reflected in its substantive provisions. States' common obligations proceed from the Convention's ultimate objective, which requires all State parties to cooperate and to participate in response measures, including through reporting to the Conference of the Parties about their emission levels and, when applicable, measures taken to mitigate climate change and to adapt to the adverse effects.²¹⁶ The UNFCCC operationalises CBDRRC by imposing different obligations on Annex I and non-Annex I Parties,²¹⁷ based on the explicitly stated principle that 'developed country parties should take the lead in combating climate change'²¹⁸ while 'the specific needs and circumstances of developing country parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially

²¹³ UNFCCC, Preamble.

²¹⁴ Duncan French, 'Developing States and International Environmental Law: The Importance of Differentiated Responsibilities' (2000) 49 *Int'l & Comp. L.Q.* 35, 47.

²¹⁵ Scott and Rajamani (n 212) 477.

²¹⁶ Art 4(1) specifically obliges State Parties to develop, update and publish national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not covered by the Montreal Protocol; to formulate, implement and update national and, where appropriate, regional programmes continuing mitigation measures; to promote and co-operate in the development, application and transfer of technologies and processes to control, reduce or prevent such anthropogenic emissions; to promote sustainable management and conservation of sinks and reservoirs of all greenhouse gases not controlled by the Montreal Protocol; to take climate change considerations into account to the extent feasible in their relevant social, economic and environmental policies; and to promote and co-operate in research, exchange of information and education in the field of climate change. Sinks are defined in Art 1(8) as 'any process, activity or mechanism which removes a greenhouse gas, an aerosol or a precursor of a greenhouse gas from the atmosphere'.

²¹⁷ UNFCCC, Preamble. See also, Scott and Rajamani (n 212) 477 (these preambular recitals show that the CBDRRC principle 'takes into account both current and historic contributions to the stock of global greenhouse gases'). As a matter of factual background, we should note that it continues to be the case that the States contained in Annex I, which represent only around 20 per cent of the global population, are those that have contributed the most to the greenhouse gases that have accumulated in the atmosphere. This is true despite the fact that it excludes some of the wealthiest States in the world (namely Brunei, Kuwait, Qatar, Singapore and the United Arab Emirates). See UN Development Programme (UNDP), Human Development Report 2007/2008: Fighting Climate Change: Human Solidarity in a Divided World (2007).

²¹⁸ UNFCCC Art 3(1).

developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration'.²¹⁹ Article 4 contains specific commitments for developed country parties, and obliges them to take action, including the adoption of national policies to help cut their emissions and to protect and enhance greenhouse gas sinks and reservoirs in a way that 'will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions'.²²⁰ This entails an obligation for these parties to periodically submit detailed information on such matters with a view to lowering their anthropogenic emissions to 1990 levels. This information has to be reviewed periodically by the Conference of the Parties (COP).²²¹

Developed country parties and other developed parties listed in Annex II are also obliged to provide 'new and additional financial resources' to offset developing country Parties' implementation costs,²²² and to assist any developing country parties that are particularly vulnerable to the adverse effects of climate change as regards meeting the costs of adaptation to those effects,²²³ 'taking into account the need for adequacy and predictability in the flow of funds'.²²⁴ The same States are obliged to 'take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other Parties, particularly developing country Parties, to enable them to implement the provisions of the Convention' whereby developed country Parties must 'support the development and enhancement of endogenous capacities and technologies of developing country Parties'.²²⁵ The commitments of developing country parties under the Convention are conditional on the provision of financing by developed country parties: Article 4(7) states that the extent to which developing country parties implement their commitments under the Convention will depend on the effective implementation of developed country parties' obligations in terms of financial resources and technology transfer, and repeats the provision in the Preamble that this 'will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of developing country Parties'.²²⁶

²¹⁹ Ibid Art 3(2).

²²⁰ Ibid Art 4(2)(a).

²²¹ Ibid Art 4(2)(b).

²²² Ibid Art 4(4).

²²³ Ibid Art 4(3).

²²⁴ Ibid Art 4(4).

²²⁵ Ibid Art 4(5).

²²⁶ Ibid Art 4(7).

The Conference of the Parties (COP) to the UNFCCC is, as ‘the supreme body of the UNFCCC’,²²⁷ responsible for the Convention's implementation. The COP resembles institutional arrangements established under the other multilateral environmental agreements (MEAs) that have been made since the early 1970s. Like most MEAs, it establishes not only ‘a conference or meeting of the parties (COP, MOP) with decision-making powers’ but also a secretariat and several subsidiary bodies.²²⁸ The purpose of these institutional arrangements is ‘to develop the normative content of the regulatory regime established by [the agreement] and to supervise the states parties’ implementation of and compliance with that regime’.²²⁹ As regards the legal status of the COP and MOP, Churchill and Ulfstein explain that these bodies are ‘not intergovernmental organisations (IGOs) in the traditional sense’ because of their *ad hoc* nature.²³⁰ At the same time, the COP and MOP are created by treaties, possess law-making powers and compliance mechanisms, and are therefore ‘more than just diplomatic conferences’.²³¹ It is also clear that the COP is, like any body created by a treaty, bound by the terms of its constituting treaty as well as by obligations conferred on States under international law.²³² Indeed, the State parties to the UNFCCC have not agreed to exempt the COP from the general rules of international law, and Article 7 makes it expressly subject to the international law created in the UNFCCC.²³³

Article 7 authorises the COP ‘to make, within its mandate, the decisions necessary to promote the effective implementation of the Convention’. In addition, COP decisions are one of the ways in which it exercises its power to ‘exercise such other functions as are required for the achievement of the objective of the Convention as well as all other functions assigned to it under the Convention’.²³⁴ COP decisions are thus not legally binding *per se* and cannot themselves give rise to new substantive

²²⁷ Ibid Art 7(3).

²²⁸ Churchill and Ulfstein (n 178) 623.

²²⁹ Ibid (note omitted)

²³⁰ Ibid.

²³¹ Ibid.

²³² This is—as noted above—the consequence of the non-derogable, and more broadly the objective nature of human rights norms.

²³³ This is important for the assessment of the consequences of COP decision for the enjoyment of human rights. See, for example, Naomi Roht-Arriaza, ‘Human Rights in the Climate Change Regime’ (2010) 1 *Journal of Human Rights and the Environment* 211 (discussing projects under the Clean Development Mechanism (including large hydropower and biomass projects), biofuels, choices on energy and adaptation, and avoided deforestation (REDD and REDD+) as ‘problematic areas where the climate change regime may cause human rights violations’) and Margaux J Hall and David C Weiss, ‘Avoiding Adaptation Apartheid: Climate Change Adaptation and Human Rights Law’ (2012) 37 *Yale J. Int'l L* 309 (discussing human rights violations that might occur in the context of adaptation).

²³⁴ UNFCCC Art 7(2)(m).

obligations that are not already contained in the Convention.²³⁵ Technically, COP decisions constitute ‘subsequent agreement between the Parties regarding the interpretation of the treaty or the application of its provisions’,²³⁶ and this makes them relevant for interpreting the treaty.²³⁷ Rajamani has pointed out that the COP nonetheless has ‘indirect law-making powers’, on the basis that ‘it is authorized to negotiate amendments and Protocols to agreements’ which ‘require ratification by Parties’.²³⁸ In addition, Rajamani explains that the COP has ‘direct’ or ‘genuine’ law-making powers because ‘it is authorized in some cases to develop rules, as for instance for emissions trading, and these rules, although not legally binding, have mandatory force’.²³⁹

2.1.2.1 The Kyoto Protocol

The Kyoto Protocol²⁴⁰ has been ratified by 191 States plus the European Union.²⁴¹ It was negotiated pursuant to an agreement reached at the first session of the COP held in Berlin in 1994. It was agreed that pledges by developed country parties to stabilise emission levels to 1990 levels by 2000 would fall short of achieving the ultimate objective of the UNFCCC.²⁴² At COP1 in Berlin, it was also agreed that developing country parties would not undertake new commitments but would instead focus on the implementation of their existing commitments under the UNFCCC with assistance from developed country parties.²⁴³ The Protocol is thus an operationalisation of the provisions of the UNFCCC and based on the principle of CBDRRC. Its stated objective is to pursue the ‘ultimate objective of the Convention’.²⁴⁴

²³⁵ Lavanya Rajamani, ‘Addressing the ‘Post-Kyoto’ Stress Disorder: Reflections on the Emerging Legal Architecture of the Climate Regime’ (2009) 58 *Int'l & Comp. L.Q.* 803, 824 (pointing at the lack of explicit authorisation for binding law-making, which is provided for in other multilateral environmental agreements).

²³⁶ VCLT Art 31(3)(a).

²³⁷ See also, Rajamani, ‘Addressing the ‘Post-Kyoto’ Stress Disorder: Reflections on the Emerging Legal Architecture of the Climate Regime’ (n 235) 824.

²³⁸ *Ibid* 825 (footnotes omitted; references to Arts 15 and 17 UNFCCC, Art 17 of the Kyoto Protocol).

²³⁹ *Ibid*.

²⁴⁰ Kyoto Protocol.

²⁴¹ UNFCCC Secretariat website, *Kyoto Protocol: Status of Ratification* (last modified on 26 August 2009), available at <http://unfccc.int>.

²⁴² Berlin Mandate, ‘1995, Berlin Mandate, UNFCCC Conference of the Parties: Decisions Adopted by the 1st Session (Berlin, 7 April 1995)’ (1995) 34 *International Legal Materials* 1671.

²⁴³ *Ibid* 1671.

²⁴⁴ Kyoto Protocol, Preamble.

In order to achieve its objective, the Protocol sets legally binding quantified emission limitation and reduction commitments for developed country parties based on an aggregate reduction target.²⁴⁵ It also establishes a more rigorous reporting system and a Compliance Committee with the power to sanction non-compliance, thus representing what Bodansky and Rajamani refer to as a ‘progressively harder approach’ to mitigation than the UNFCCC.²⁴⁶ The aggregate targets for developed country parties are for specified commitment periods, the first of which set an aggregate target of reducing emissions by at least 5 per cent below 1990 levels between 1997 and 2012.²⁴⁷ Developing country parties are expressly required to meet existing commitments under Article 4(1) of the Convention in order to achieve sustainable development, taking into account developed country obligations to provide assistance in the form of finance, technology transfer and capacity building.²⁴⁸ The Protocol also sets up a range of market-based mechanisms to facilitate developed country parties’ compliance with their mitigation obligations under the Protocol.²⁴⁹ The concept of emission trading as a mitigation strategy remains controversial for a number of reasons. These include the apparent inadequacy of existing legally binding targets, uncertainty as to future targets, and the lack of effective national and international mechanisms for monitoring, verifying and compelling compliance with procedural rules designed to safeguard the environmental integrity of the system (i.e. the existence of ‘loopholes’).²⁵⁰ The significance of international human rights law to make these mechanisms function has been explored elsewhere,²⁵¹ and the focus has mainly been on procedural rights and the negative impacts of sponsored projects on local communities. The controversies surrounding the market mechanisms indicate that we cannot assume that the Kyoto Protocol as an instrument automatically benefits the protection of human rights. However, this leaves open the possibility of exploring specific features of

²⁴⁵ Ibid Arts 2–3. The quantified emission limitation or reduction commitments are contained in Annex B.

²⁴⁶ Bodansky and Rajamani (n 78) 2. See also, generally D. Freestone and C. Streck, *Legal Aspects of Implementing the Kyoto Protocol Mechanisms: Making Kyoto Work* (OUP 2005).

²⁴⁷ Kyoto Protocol, Art 3(1).

²⁴⁸ Ibid Art 10.

²⁴⁹ These include ‘joint implementation’ (JI) (allowing States to receive carbon credits for supporting emission reduction projects in other developed States), the ‘clean development mechanism’ (similar to joint implementation, but for supporting projects in developing States) and ‘emissions trading’ (for purchasing unused emission quotas from other States with binding commitments).

²⁵⁰ See Farhana Yamin and Joanna Depledge, *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures* (CUP 2004) 156 and Thomas H. Tietenberg, *Emissions Trading: Principles and Practice* (RFF Press 2006) 170.

²⁵¹ See, for example, Roht-Arriaza and Svitlana Kravchenko, ‘Procedural Rights as a Crucial Tool to Combat Climate Change’ (2010) 38 *Ga J Int'l & Comp L* 613.

the Protocol, namely quantified emission reduction targets and provisions related to compliance, from an international human rights law perspective.

In accordance with the Protocol's provision that 'commitments for subsequent commitment periods shall be established',²⁵² negotiations on new commitments started in 2005 under the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP).²⁵³ This culminated in a decision of the Conference of the Parties acting as the Meeting of the Parties to the Kyoto Protocol (CMP) to set an aggregate target of reducing developed country Parties' overall emissions by at least 18 per cent below 1990 levels in the period 2013–2020.²⁵⁴ However, Japan indicated that it 'does not have any intention to be under obligation of the second commitment period of the Kyoto Protocol after 2012';²⁵⁵ New Zealand did not undertake any new commitments despite indicating that it would remain party to the Protocol;²⁵⁶ and the Russian Federation indicated that it did 'not intend to assume a quantitative emission limitation or reduction commitment for the second commitment period'.²⁵⁷ Parties that did undertake new commitments agreed to review their commitments by 2014 at the latest,²⁵⁸ but without undertaking to ensure that their commitments would be brought in line with an aggregate science-based target.²⁵⁹ The CMP nonetheless declared the

²⁵² Kyoto Protocol, Art 3(9).

²⁵³ In accordance with Art 3(9) of the Protocol, negotiations had started in December 2005 when the COP, serving as a Meeting of the Parties to the Kyoto Protocol (CMP), established the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP). See "Consideration of commitments for subsequent periods for Parties included in Annex I to the Convention under Art 3, para 9, of the Kyoto Protocol", UN Doc FCCC/KP/CMP/2005/8/Add.1, p. 3, Dec. 1/CMP.1 (30 March 2006). In 2012, the CMP, at its 8th session, adopted decision 1/CMP.8 (the Doha Amendment).

²⁵⁴ Decision 1/CMP.8, C, Amendment to Art 3(1) of the Kyoto Protocol. Pursuant to Art 21(7) and Art 20(4), the amendment is subject to acceptance by Parties to the Kyoto Protocol. In accordance with Art 20(4), the amendment will enter into force for those Parties having accepted it on the ninetieth day after the date of receipt by the Depositary of an instrument of acceptance by at least three-quarters of the Parties to the Kyoto Protocol. Decision 1/CMP.8, C, Amendment to Art 3(1) of the Kyoto Protocol. In practice, this means that the targets remain voluntary until after ninety days upon the receipt of 144 instruments of acceptance by the Depositary. The 'Doha amendment' had not yet entered into force at the time of writing (Nov 2014).

²⁵⁵ Ibid fn 14.

²⁵⁶ Ibid fn. 15.

²⁵⁷ Ibid fn. 16.

²⁵⁸ Ibid ch III.

²⁵⁹ Ibid ch III para 7, which states that 'In order to increase the ambition of its commitment, [Parties that chose to revise their commitment] *may* decrease the percentage inscribed in the third column of Annex B of its quantified emission limitation and reduction commitment, in line with an aggregate reduction of greenhouse gas emissions [by developed country Parties] of at least 25–40 per cent below 1990 levels by 2020'. The aggregate reduction of 25–40 per cent below 1990 levels by 2020 is presented in the Fourth Assessment Report of the IPCC as part of a scenario that keeps global temperature rise below 2° C. The target of 18 per cent reductions by 2020, in contrast, is merely the sum of States' voluntarily undertaken commitments and has no grounding in scientific assessments.

mandate of the AWG-KP fulfilled²⁶⁰ and went on to adopt a decision requiring all parties to work towards ‘nationally determined contributions’, ‘without prejudice to the legal nature of contributions’.²⁶¹ It appears that this decision paves the way for a so-called ‘pledge-and-review’ system under the UNFCCC, in which each State party chooses a target for itself without prior consideration of an aggregate target and without being subject to the accountability provisions of the Kyoto Protocol. The nature of a future agreement remains subject to ongoing negotiations, which should be concluded in 2015.²⁶²

2.1.3 The No-Harm Rule

It is widely believed, and supported by authority, that under general international law all States are under an obligation to prevent transboundary environmental damage (the ‘no-harm rule’).²⁶³ This obligation was first articulated in the *Trail Smelter* (1907), where the arbitral tribunal stated that:

*Under the principles of international law... no state has the right to use or permit the use of territory in such a manner as to cause injury by fumes in or to the territory of another of the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.*²⁶⁴

Although the arbitral tribunal in *Trail Smelter* specifically referred to injury caused by fumes, the principle expressed in this case has a more general application to all sorts of environmental damage. It is also thought to apply to the world’s common spaces, in addition to damage that is inflicted by one

²⁶⁰ Ibid ch VII para 30.

²⁶¹ Decision -/CP.19 (advance unedited version), available at http://unfccc.int/files/meetings/warsaw_nov_2013/decisions/application/pdf/cop19_adp.pdf (last accessed 3 December 2014).

²⁶² On which, see generally Lavanya Rajamani, ‘The Durban Platform for Enhanced Action and the Future of the Climate Regime’ (2012) 61 *Int'l & Comp. L.Q.* 501 and Bodansky and Rajamani (n 78).

²⁶³ Sands, *Principles of International Environmental Law* (n 210) 236 (mentioning the views of writers, the apparent approval of Judge de Castro in his dissent in the *Nuclear Tests* case and an examination of State practice by the Rapporteur to the International Law Association's Committee on Legal Aspects of the Environment). For a more critical view see John H Knox, ‘The Myth and Reality of Transboundary Environmental Impact Assessment’ (2002) 96 *Am.J.Int.Law* 291, 294.

²⁶⁴ *Trail Smelter (United States v Canada)* [1941] 3 RIAA 1905, 1965.

State on the environment of another.²⁶⁵ The scope of the principle has been extended to include cases where damage is inflicted on parts of the environment in which all States have an interest. This development is specifically stated in the Stockholm Declaration, which provides that:

*States have, in accordance with the Charter of the United Nations and the principles of international law ... 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.*²⁶⁶

The rule was expressed in almost identical wording in Principle 2 of the Rio Declaration on the Environment and Development²⁶⁷ and, importantly, is restated in the Preamble to the UNFCCC.²⁶⁸ The International Court relied on the principle in its Advisory Opinion *Legality of the Threat or Use of Nuclear Weapons* that ‘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 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’.²⁶⁹ The Court restated this formulation, in almost identical terms, in *Gabcikovo-Nagymaros Project*.²⁷⁰ And in *Pulp Mills*, the Court found that customary international law requires a State ‘to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State’.²⁷¹ It is clear from these formulations that basically, the no-harm rule limits the sovereign rights of a State to perform, or to authorise third parties to perform, damaging activities within its own territory.²⁷² The key element here is to balance States’ sovereignty and their territorial integrity in ‘[protecting] within

²⁶⁵ Jonathan I Charney, ‘Third State Remedies for Environmental Damage to the World’s Common Spaces’ in F. Francioni and T. Scovazzi (eds), *International Responsibility for Environmental Harm* (Graham & Trotman 1991) 149.

²⁶⁶ Stockholm Declaration of the United Nations Conference on the Human Environment (Stockholm, 16 June 1972), printed in ILM (1972), 1416 Principle 21.

²⁶⁷ Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, UN Doc A/ CONF.151/1 (3–14 June 1992).

²⁶⁸ UNFCCC, Preamble.

²⁶⁹ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* para 29.

²⁷⁰ *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* para 41.

²⁷¹ *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* 2010 ICJ Reports 14 para 101.

²⁷² Sands, *Principles of International Environmental Law* (n 210) 236.

the territory the rights of other states, in particular their right to integrity and inviolability in peace and war'.²⁷³

To determine the scope of States' obligations under the no-harm rule, it is important to understand what threshold of damage will trigger the rule.²⁷⁴ The arbitrators in the *Lac Lanoux* arbitration made reference to 'serious injury'²⁷⁵ in a similar way. The ILC incorporated these statements into its Articles on Prevention of Transboundary Harm from Hazardous Activities ('ILC Articles on Prevention of Harm') and its Commentaries, both completed in 2001.²⁷⁶ In its Commentaries, it refers to a 'threshold' of 'significant damage'. It defines 'significant' as 'something more than detectable but [...] not at the level of "serious" or "substantial"'.²⁷⁷ It adds that 'The harm must lead to a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States'.²⁷⁸ Verheyen and Voigt have argued that climate change damage meets the threshold referred to by the ILC, with Verheyen arguing that 'almost all injury expected to result from or already resulting from climate change is more than *de minimus* or insignificant'.²⁷⁹ Here we argue that this would necessarily be the case when 'damage' involves interferences with internationally recognised human rights.

An important point to note here is that despite the emphasis on damage, State responsibility arises not as a result of damage, but as a result of wrongful conduct.²⁸⁰ The Commentaries to the ARS provide implicit support for the proposition that the no-harm rule is actually a preventive obligation. *Trail Smelter* is taken as the single authority for the rule, understood as a rule of customary international law, that 'The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues

²⁷³ *Island of Palmas case (Netherlands, USA)* 2 UN Rep Intl Arb Awards 829 839.

²⁷⁴ Verheyen (n 17) 151.

²⁷⁵ *Lac Lanoux case* [1959] XII RIAA 281, reprinted in 53 *Am J Int'l L* (1959), 50 306.

²⁷⁶ International Law Commission, Articles on Prevention of Transboundary Harm from Hazardous Activities and Commentaries thereto, contained in the report of the 53rd session, UN Doc A/56/10 (2001) ('ILC Articles on Prevention of Harm').

²⁷⁷ *Ibid*, Commentary to Art 2 para 4.

²⁷⁸ *Ibid*.

²⁷⁹ Verheyen (n 17) 52.

²⁸⁰ *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* para 101.

See also, Sands, *Principles of International Environmental Law* (n 210) 246 fn. 62 and accompanying text. This interpretation suggests that a State that permits or carries out potentially hazardous activities may incur international responsibility if it fails to ensure that these activities do not cause damage to the environment of other States or to the world's common spaces).

and remains not in conformity with that obligation',²⁸¹ based on the understanding that the obligation in *Trail Smelter* 'was breached for as long as the pollution continued to be emitted'.²⁸² This suggests that the term 'harm' must be understood in the context of risk prevention.

The existing authorities suggest that the relevant standard of care that States must uphold to avoid incurring responsibility for a breach of the rule is one of 'due diligence' or 'best efforts'.²⁸³ It is worth noting that the principle of 'due diligence', as a principle of international law, has a common origin with the general law of State responsibility and international human rights law: it is derived from the laws on diplomatic protection, requiring States to protect the rights of non-nationals in their territory.²⁸⁴ The notion is generally considered to originate from the 1872 *Alabama* case,²⁸⁵ in which the arbitral tribunal relied on the notion of due diligence as an international and objective standard that imposed obligations on the State to prevent causing damage to another State.²⁸⁶ In *Neer* (1926)²⁸⁷ and *Lac Lanoux* (1957)²⁸⁸ this interpretation is confirmed in almost identical wording. The understanding of due diligence obligations as embodying a precautionary approach is also reflected in various multilateral environmental agreements (MEAs) that have included the standard.²⁸⁹ In its 2011 *Advisory Opinion on the Responsibilities and Obligations of States* the Seabed Disputes Chamber of ITLOS confirmed that the precautionary approach is 'an integral part of the due diligence obligation of

²⁸¹ Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries* (n 88) Art 14(3).

²⁸² Ibid, Commentary to Art 14(3), para 14.

²⁸³ See also, Verheyen (n 17) 170 (with references, all rejecting the alternative standard of fault or intent as a prerequisite for breach of the no-harm rule). See also, Ian Brownlie, *State Responsibility* (Clarendon Press; OUP 1983) 161 (recognising that State responsibility automatically arises from an established 'breach of duty to exercise due diligence in control of private persons').

²⁸⁴ Brownlie (n 283) 161.

²⁸⁵ Blomeryer-Bartenstein, 'Due Diligence' in R. Berhardt (ed), *Encyclopedia of Public International Law*, vol. I (North Holland, The Netherlands, Vol. I (1992), at 1110.

²⁸⁶ *Alabama Arbitration* (1872), in Moore, *International Arbitrations* vol. IV, pp. 4144, 4156–4157, para 10 (concerning a damage claim by the United States against Great Britain for assistance provided to the Confederate cause during the American Civil War).

²⁸⁷ *Neer, case Mexico–United States General Claims Commission, Award of 1926*, IV RIAA (1951), 60 61.

²⁸⁸ *Lac Lanoux case* 50.

²⁸⁹ See, for example, Art 194(1) of the United Nations Convention on the Law of the Sea, Montego Bay, 1833 U.N.T.S. ³⁹⁷ Arts I and II and Art VII(2) of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1046 U.N.T.S. 138, and Art 2(1) of the Convention on Environmental Impact Assessment in a Transboundary Context (E/ECE/1250), reprinted in *International Legal Materials*, vol. 30 (1991), p. 800.

sponsoring States, which is applicable even outside the scope of the [Nodules and Sulphides] Regulations'.²⁹⁰

The ILC has elaborated on the due diligence standard in its Articles on Prevention of Harm and the related Commentaries, which draw extensively on the notion of due diligence as a means of risk prevention.²⁹¹ The Commentaries set out that:

*The duty of due diligence ... is not intended to guarantee that significant harm be totally prevented, if it is not possible to do so. In that eventuality, the State of origin is required, as noted above, to exert its best possible efforts to minimize the risk.*²⁹²

The International Court's interpretation of the no-harm rule in *Pulp Mills* confirms that States' due diligence obligations must be understood as 'best effort' obligations, and that it 'entails not only the adoption of appropriate rules and measures but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators'.²⁹³ The ILC has suggested that under the rule, States are obliged to take certain measures, after having consulted relevant scientific evidence of the risks resulting from their activities, including 'first, formulating policies designed to prevent significant transboundary harm or to minimise the risk thereof and, secondly, implementing those policies'.²⁹⁴ It specifies that this element of the obligation can be met through 'legislation and administrative regulations and implemented through various enforcement mechanisms'.²⁹⁵ The precise standard of care for each State should be assessed on the basis of proportionality: 'the standard of due diligence against which the conduct of the State of origin should be examined is that which is generally considered to be appropriate and proportional to the degree of risk [...] in the particular instance'.²⁹⁶ The ILC's Commentaries to the Articles on the Prevention of Harm specify that 'The economic level of

²⁹⁰ *Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, para 131.

²⁹¹ International Law Commission, Articles on Prevention of Transboundary Harm from Hazardous Activities and Commentaries thereto, contained in the report of the 53rd session, UN Doc A/56/10 (2001) ('ILC Articles on Prevention of Harm'), Art 3.

²⁹² *Ibid*, Commentary to Art 3, para 7.

²⁹³ *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, para 197.

²⁹⁴ International Law Commission, Articles on Prevention of Transboundary Harm from Hazardous Activities and Commentaries thereto, contained in the report of the 53rd session, UN Doc A/56/10 (2001) ('ILC Articles on Prevention of Harm') para 10.

²⁹⁵ *Ibid*.

²⁹⁶ *Ibid* para 11.

States is one of the factors to be taken into account in determining whether a State has complied with its obligations of due diligence. Nevertheless, a State's economic level cannot be used to dispense the State from its obligations [to prevent transboundary harm].²⁹⁷ This interpretation of the no-harm rule reflects the principle of CDRRC contained in the UNFCCC: whereas all States have a positive obligation to take measures to prevent dangerous climate change, the content of those obligations is affected by a State's level of economic development. The inter-relationship of those norms must be considered in light of general rules of interpretation, which are analysed in the next two sections.

²⁹⁷ Ibid. See also, *Alabama Arbitration*, para 13 (finding that due diligence must 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').

2.2 *Questions of Interpretation*

2.2.1 General Rules of Interpretation

In the words of Rosenne, the provisions of human rights treaties are largely ‘written in axiomatic or syllogistic form’ and thus ‘require significant interpretation’.²⁹⁸ This makes it extremely important to understand the rules that govern the construction of treaties contained in the Vienna Convention on the Law of Treaties (VCLT),²⁹⁹ which are generally taken to reflect ‘approximations of the applicable rules’ of customary international law.³⁰⁰ The relevance of these general rules has been repeatedly confirmed by human rights bodies that are expressly mandated with the interpretation of human rights treaties,³⁰¹ and in human rights scholarship.³⁰² Perhaps the greatest advantage of applying these general rules in the human rights context is that it provides objective criteria for interpretation: the frequently cited statement that treaty interpretation is ‘to some extent an art, not an exact science’³⁰³ illustrates the need for ‘meta-rules’ of interpretation that could serve to promote consistency between interpretative processes and safeguarding their integrity. Taking into account the nature of international law itself, it is, of course, significant that the general rules of interpretation are ‘essentially [...] a projection of the (valid) consent [of States]’.³⁰⁴

²⁹⁸ Shabtai Rosenne, ‘Some Reflections Erga Omnes’ in Antony Anghie and Garry Sturges (eds), *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (Kluwer Law International 1998) 515.

²⁹⁹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

³⁰⁰ Martin Scheinin, ‘Impact on the Law of Treaties’ in Menno T Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (OUP 2009) 36. For a discussion of the customary law status of the rules of interpretation contained in the VCLT see further Jan Klabbers, *The Concept of Treaty in International Law*, vol. 20 (Martinus Nijhoff 1996).

³⁰¹ It is worth noting the argument of some human rights scholars that the practice of human rights treaty bodies may reflect the agreement of the parties regarding the treaties’ interpretation. See Scheinin (n 300); Meron (n 59).

³⁰² See, for example, Manfred Nowak, *Introduction to the International Human Rights Regime* (Martinus Nijhoff 2003) 64 (suggesting that the general rules reflected in the VCLT apply to the ICCPR); Salomon, ‘Deprivation, Causation, and the Law of International Cooperation’ (n 154) 304 (suggesting that the general rules of interpretation apply to the ICESCR) and Christine Chinkin, Marsha A. Freeman and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (OUP 2012) 13 (suggesting that CEDAW should be interpreted in accordance with the rules of interpretation encapsulated in the VCLT because the treaty itself does not include provisions on interpretation).

³⁰³ Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2nd edn, CUP 2005) 396.

³⁰⁴ Crawford (n 18) 311.

Yet the applicability of general rules of treaty interpretation to international human rights law cannot be taken for granted: the rules may need to be modified in order to accommodate the normative content of provisions of human rights treaties. After all, the VCLT was drafted as a framework to be applied primarily to treaties without a compliance mechanism that contained reciprocal obligations and did not directly affect third parties.³⁰⁵ Crawford considers that ‘it is not too much to say that [the VCLT] looks at multilateral treaties from the perspective of bilateral treaties’ or that it has a ‘bifocal approach’, dealing with the ‘public order’ aspects of multilateral treaties ‘only peripherally [...] and then usually indirectly’.³⁰⁶ Human rights treaties are perhaps the clearest example of treaties that deviate from the traditional type of treaties: they usually establish their own monitoring and enforcement mechanisms, contain objective rather than reciprocal obligations and have third party beneficiaries.³⁰⁷ The implications of the objective nature of treaty obligations for their interpretation were recognised by the ICJ in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, where the Court stated:

*The Convention was manifestly adopted for a purely humanitarian and civilizing purpose... [I]ts object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interest of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d’être of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.*³⁰⁸

As Craven suggests, treaties of a humanitarian character ‘cannot therefore simply be regarded as the accidental data of an otherwise disinterested legal system. [...] [T]o say that they are “only treaties” is merely to place them within a highly contingent set of understandings as to the nature of international legal relations’.³⁰⁹

³⁰⁵ Scheinin (n 300) 32.

³⁰⁶ Crawford (n 18) 311.

³⁰⁷ Scheinin (n 300) 28.

³⁰⁸ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* [1951] ICJ Rep 15 23.

³⁰⁹ Craven, ‘Legal Differentiation and the Concept of the Human Rights Treaty in International Law’ (n 21) 519.

Turning to the general rules themselves, we find a paradox: it is precisely the rules of treaty interpretation agreed upon by States that minimise the relevance of the intention of the drafters of a treaty in the interpretative process. The VCLT lists preparatory works as ‘supplementary means of interpretation’ that may only be relied upon to determine the meaning of a treaty provision when its interpretation in accordance with the general rules ‘leaves the meaning ambiguous or obscure’, or leads to a result which is ‘manifestly absurd or unreasonable’ (Art. 32).³¹⁰ The IACtHR emphasised the subsidiary nature of this rule in its Advisory Opinion on the death penalty, while stressing that devoting minimal attention to the intention of the drafters of human rights treaties is compatible with the special nature of those treaties. More specifically, it stated that objective criteria of interpretation that examine the texts themselves are more appropriate in interpreting human rights treaties than subjective criteria that only ascertain the intent of the parties involved.³¹¹ Although there is an imperative rule, stated in Article 31(4), that ‘A special meaning shall be given to a term if it is established that the parties so intended’, this rule is unlikely to have much bearing on the interpretation of human rights treaties in the context of climate change given that the drafters of such treaties probably did not have an ascertainable and uniform intention, and quite possibly no intention at all, as to the meaning of treaty terms in relation to climate change. The rule is also unlikely to apply to the interpretation of the principles contained in the UNFCCC, given that the intention of the parties about the most crucial treaty terms was far from uniform.³¹²

The most relevant rules for the treaty provisions analysed in this thesis are thus the general rules of treaty interpretation contained in Article 31 of the VCLT, which reflect customary international

³¹⁰ VCLT, Art 32. See also, Chinkin, Freeman and Rudolf (n 302) 13 (confirming its applicability to CEDAW) and Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (n 166) 14 (highlighting its relevance to the interpretation of the ICCPR).

³¹¹ For a similar line of reasoning see *Restrictions to Death Penalty (Advisory Opinion)* 70 ILR (1986), 466 IACtHR 466. In particular, the ECHR has sought to reconcile the two perspectives by finding that ‘the purpose of the High Contracting Parties in concluding the [ECHR] was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to realise the aims and ideals of the Council of Europe [...] and to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law’. See *Austria v Italy* App no 788/60 (ECtHR, 11 Jan 1961) YB Eur Conv on HR 116, 138–40 116 *et seq.*, endorsed in later cases including *Ireland v United Kingdom* (1978) Series A no 25, 2 EHRR 25, *East African Asians* (1973) 3 EHRR 76. Vierdag argues that this reasoning is ‘essentially valid for human rights treaties generally, and [...] to be regarded as an accurate characterization of such instruments’: EW Vierdag, ‘Some Remarks About Special Features of Human Rights Treaties’ (1994) 25 *NED YIL* 119, 124.

³¹² For a discussion see Bodansky, ‘The United Nations Framework Convention on Climate Change: A Commentary’ (n 181).

law.³¹³ Article 31(3) expresses the general rule that an international 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 light of its object and purpose’.³¹⁴ The term ‘context’ refers to the text of the treaty including, when applicable, its preamble, annexes and agreements between the parties that relate to the treaty’s conclusion.³¹⁵ The interpretative technique of ‘systematic interpretation’³¹⁶ prevents the interpretation of treaty provisions in isolation. The thesis will demonstrate the importance of this technique when interpreting the UNFCCC provisions, which acquire a more specific meaning when interpreted in the light of Article 3 of the Convention. Another example is the significance of reading Article 1(2) of the ICCPR and ICESCR in conjunction with Article 47 of the ICCPR and Article 35 of the ICESCR respectively,³¹⁷ as the latter provisions prohibit an interpretation of individual rights that conflict with the right of self-determination. Furthermore, there is the principle that account must be taken of ‘any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’ (Art. 31(3)(b)), as the interpretative practice of human rights bodies may itself constitute such practice.³¹⁸ This rule thus appears to consolidate the authoritative weight of human rights jurisprudence and instruments such as General Comments and advisory opinions.

The most significant feature of the general rule from the perspective of international human rights law is, however, that it calls for purposive interpretation. It is widely recognised that due to the special nature of human rights treaties the emphasis in their interpretation is, in Nowak’s words, ‘Essentially [...] on interpreting treaties [...] in the light of their object and purpose’.³¹⁹ And for human

³¹³ See, for example, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Rep 2007 43, 109–110. For a discussion about the applicability of these rules to human rights treaties see Nowak, *Introduction to the International Human Rights Regime* (n 302) 64ff. See also, Chinkin, Freeman and Rudolf (n 302) 13 (suggesting that human rights treaties should be interpreted in accordance with the rules of interpretation encapsulated in the VCLT if the treaty itself does not include provisions on interpretation).

³¹⁴ VCLT Art 31.

³¹⁵ Ibid Art 31(2). See also Jayawickrama (n 144) 160.

³¹⁶ Nowak, *Introduction to the International Human Rights Regime* (n 302) 65 (emphasis omitted).

³¹⁷ For a discussion see Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (n 166) XXIII.

³¹⁸ Scheinin, ‘Characteristics of Human Rights Norms’ in Krause and Scheinin (eds), *International Protection of Human Rights: a Textbook* (Åbo Akademi University 2009) 21 (citing as an example Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies, International Law Association, Committee on Human Rights Law and Practice). Cf Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (n 166) XXIV (stating that subsequent practice may be derived from relevant reservations, declarations of interpretation and comments submitted by States).

³¹⁹ Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (n 166) XXIV. See also, Alexander Orakhelashvili, ‘Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights’ (2003) 14 *Eur.J.Int’LL*. 529, 535.

rights treaties ‘naturally the main object is for states parties to protect the rights set out in the treaties’.³²⁰ The IACtHR has emphasised ‘the purpose of guaranteeing the enjoyment of individual human beings of those rights and freedoms rather than to establish reciprocal relations between States’.³²¹ Furthermore, in its Advisory Opinion on the Effect of Reservations on the Entry into Force of the ACHR, the Court emphasised:

*Modern human rights treaties in general... are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations.*³²²

Taking this object and purpose into account allows a ‘dynamic reading’ of human rights instruments, so that human rights law retains its relevance in a changing world.³²³ Often cited is the ECtHR’s characterisation of the ECHR as ‘a living instrument which [...] must be interpreted in the light of the present-day conditions’. The IACtHR has similarly relied on the notion of ‘evolving American law’,³²⁴ and scholars continue to emphasise that rights protected in international human rights treaties ‘are not to be interpreted statically but rather in the light of relevant societal developments’,³²⁵ and that States’ obligations to protect those rights are affected by ‘changing social and moral assumptions’.³²⁶

In this thesis, it is important to emphasise that the technique of purposive interpretation has led to a central role for the principle of effectiveness in human rights jurisprudence. In other words, the principle that provisions of human rights treaties should be interpreted and applied in a way that makes

³²⁰ Nowak, *Introduction to the International Human Rights Regime* (n 302) 65.

³²¹ *Other Treaties Subject to the Advisory Jurisdiction of the Court (Article 64 ACHR) (Advisory Opinion)* (1982) 1 Inter-Am Ct HR (ser A), (1982) 3 HRLJ 140.

³²² *The Effect of Reservations on the Entry into Force of the ACHR (Articles 74 and 75)*.

³²³ Although reliance on this technique of interpretation by human rights bodies has sometimes been criticised for overstepping their mandates, we can also argue, as Shelton does, that reliance on this technique is an inevitable consequence of the generic way in which human rights treaty texts are formulated. See Dinah L Shelton, *An Introduction to the History of International Human Rights Law* (GWU Legal Studies Research Paper No. 346, 2007) 24.

³²⁴ *Ibid.*

³²⁵ Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (n 166) XXIV.

³²⁶ David Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd edn, OUP 2002) 53.

its safeguards practical and effective³²⁷ (referred to by the ECtHR as '*effet utile*').³²⁸ In *Soering v UK*,³²⁹ the principle (first stated in *Ireland v UK*)³³⁰ that 'In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms'³³¹ led the Court to reason that although it agreed with the UK Government that the beneficial purpose of extradition in preventing offenders from evading justice cannot be ignored in determining the scope of application of the Convention,³³² 'These considerations cannot, however, absolve the Contracting Parties from responsibility under Article 3 for all and any foreseeable consequences of extradition suffered outside their jurisdiction'.³³³

As noted by commentators, the principle of effectiveness is 'nothing very exotic in international law'³³⁴ and indeed exists as a cross-cutting principle: in general international law it is known as the principle *ut res magis valet quam pereat*, which means that law should be interpreted in a way that makes it effective.³³⁵ In international human rights law, however, the principle acquires a specific meaning. Its effect on treaty interpretation is generally that in cases of doubt as to the meaning of a treaty provision, its interpretation should favour the protection of the substantive rights protected in the treaty (*in dubio pro libertate et dignitate*).³³⁶ The principle is also closely related to the maxim *Ubi ius ibi remedium*: where there is a right, there is a remedy³³⁷—a maxim that appears in Roman and Dutch

³²⁷ Jayawickrama (n 144). See also, D. Nguyen, P. Daillier and A. Pellet, *Droit International Public* (7th edn, L.G.D.J. 2002) 264; Daniel Rietiker, 'The Principle of "Effectiveness" in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law – No Need for the Concept of Treaty Sui Generis' (2010) 79 *Nordic Journal of International Law* 245.

³²⁸ The ECtHR jurisprudence on the principle of effectiveness started with its judgment in *Airey v Republic of Ireland* (1979) Series A no 32, 2 EHRR, 305. The case concerned the scope of a State's obligations in relation to the right to a fair trial, and the Court held that these obligations included a positive obligation to ensure physical access to a courtroom. The principle has subsequently been applied in relation to most rights protected in the Convention, including the rights to life, to freedom of association and of public participation. See, for example, *Ireland v United Kingdom*, para 239; *Artico v Italy* (1980) Series A no 37, 3 EHRR 1, para 33.

³²⁹ *Soering v UK* (1989) Series A no 161, 11 EHRR 439.

³³⁰ *Ireland v United Kingdom*, para 239.

³³¹ *Soering v UK*, para 87.

³³² *Ibid* para 86.

³³³ *Ibid*.

³³⁴ Rietiker (n 327) 276.

³³⁵ John P Grant and Craig J Barker (eds), *Encyclopaedic Dictionary of International Law* (3rd edn, OUP 2009). See also, *Interpretation of the Peace Treaties with Bulgaria, Hungary, and Romania, Advisory Opinion (Second Phase)* [1950] ICJ Rep 65 229 and *Corfu Channel Case (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4 24–26.

³³⁶ Nowak, *Introduction to the International Human Rights Regime* (n 302) 65–66. See also, Orakhelashvili (n 319) 535.

³³⁷ Henry Black, *Black's Law Dictionary* (6th edn, Springer 1990) 1294. The entry adds that "it is said that the rule of primitive law was the reverse: Where there is a remedy, there is a right." For a discussion on its relation to the principle of effectiveness see Alistair R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004) 3, 170, 221.

law and that has long been recognised in common law systems.³³⁸ Illustrations of how this principle operates in international human rights law are particularly plentiful in cases involving individuals who suffered harm whilst in custody. In *Dermit Barbato v Uruguay*, for example, the HRC could not reach a definite conclusion as to how the victim had died: he could have committed suicide or he could have been killed by others. The HRC dealt with this uncertainty by finding that ‘in all the circumstances the Uruguayan authorities *either by act or by omission* were responsible for not taking adequate measures to protect his life, as required by Article 6(1) of the Covenant’.³³⁹ The significance of this decision is that it shows that human rights violations can be established when there is reason to assume that the State could have acted to prevent the violation, and that it triggers additional obligations on the part of the State to provide a remedy.³⁴⁰ In another case concerning death in custody, the ECtHR *Velikova v Bulgaria*,³⁴¹ it is even clearer that uncertainty can work in favour of the individual. The applicant, who was arrested for alleged cattle theft, had complained that he was not feeling well shortly after his arrest. The ECtHR considered the absence of medical evidence about the applicant's condition prior to his death not as a weakness of the applicant's case, but as an indication of the State's failure to safeguard his health.³⁴² The legal analysis of substantive obligations in Chapter 3 (focusing on the rights to life, to the highest attainable standard of health, to enjoy a distinct culture and to self-determination) is largely concerned with the question what States are required to do to prevent a violation. The significance of purposive construction of human rights treaties is dealt with in more detail below, in relation to the territorial and personal scope of human rights treaties.

2.2.2 Territorial and Personal Scope of International Human Rights Treaties

This section examines the territorial and personal scope of States’ obligations under international human rights treaties, taking the ICCPR and the ICESCR as a starting point. The previous section highlighted the methodological point that to interpret human rights provisions, the general rule of treaty

³³⁸ Black (n 337) 1120.

³³⁹ *General Comment No. 6: The right to life (Article 6)* adopted 30 April 1982, UN Doc HRI/GEN/1/Rev 6 at 127 (2003) HRC para 9.2 (emphasis added).

³⁴⁰ With regard to Hugo Dermit, the Committee found the State party under an obligation to establish the facts of his death, to bring to justice any persons found responsible for his death and to pay appropriate compensation to his family, *ibid*, para 11.

³⁴¹ *Velikova v Bulgaria* App no 41488/98 (ECtHR, 18 May 2000), CEDH 2000-VI.

³⁴² *Ibid* para 75.

interpretation with due regard for the special nature of human rights treaties should be used. A first point to note is therefore that the personal scope of human rights treaties—with the exception of those that protect the rights of specific groups—appears to be unrestricted. Indeed, the texts of human rights treaties suggest that the beneficiaries of human rights obligations include, as per the UDHR, ‘all human beings’, save for certain rights of political participation that are confined to ‘citizens’ or rights that specifically protect ‘peoples’ or ‘minorities’. The presumption that States’ obligations under these treaties may be territorially confined comes from the inclusion of jurisdiction clauses in some, but not all, human rights treaties. The need to examine this question also results from the prevalence of the presumption that most or all human rights treaties have a ‘territorial scope’ in human rights scholarship and (albeit to a lesser extent) in international jurisprudence.

Turning to the ICESCR first, we note that this treaty does not include a jurisdictional clause.³⁴³ Article 2(1) of the Covenant provides that States parties to the ICESCR shall ‘take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights’ protected in the present Covenant by all appropriate means, particularly the adoption of legislative measures.³⁴⁴ A textual reading of this provision leads to the conclusion that ‘the undertaking in Article 2(1) “to take steps” in itself, is not qualified or limited by other considerations’.³⁴⁵ This is also clear from Article 23 of the Covenant, which provides that:

The States Parties to the present Covenant agree that international action for the achievement of the rights recognised in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the

³⁴³ Opposite conclusions have been drawn from this omission. See, for example, Rolf Kunnemann, ‘Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights’ in Fons Coomans and Menno T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004), 201, and Knox (n 60) 206 (finding that the obligations are not confined by territorial considerations). See also, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 9 (finding that the absence of a jurisdiction clause was due to ‘the fact that this Covenant guarantees rights which are essentially territorial’). Cf *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (finding that State responsibility could arise for acts committed by one State on the territory of another because the obligation of States to prevent and to punish the crime of genocide was ‘not territorially limited by the [Genocide] Convention’ in light of the absence of a jurisdiction clause).

³⁴⁴ ICESCR Art 2(1).

³⁴⁵ *General Comment No. 3: The Nature of States Parties Obligations (Art 2, para 1)* (14 Dec. 1990) CESCR, para 2.

*holding of regional meetings and technical meetings for the purpose of consultation and study organised in conjunction with the Governments concerned.*³⁴⁶

Further references to international cooperation in the ICESCR are contained in Articles 11,³⁴⁷ 15³⁴⁸ and 22.³⁴⁹ In accordance with these provisions, the Committee on Economic, Social and Cultural Rights (CESCR) has consistently interpreted the Covenant as imposing international cooperation obligations on States.³⁵⁰ In General Comment No. 3 it states that ‘the phrase “to the maximum of its available resources” was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community international community through international cooperation and assistance’.³⁵¹ It goes on to state that it:

*... wishes to emphasise that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard.*³⁵²

General Comment No. 14 of the Committee on the right to the highest attainable standard of health contains an interpretation of Article 12 of the Covenant as providing an entire range of ‘international obligations.’³⁵³ The Committee also mentions a ‘collective responsibility’ on the part of the international

³⁴⁶ ICESCR Art 23.

³⁴⁷ Ibid Art 11 (providing an international cooperation obligation with regard to the rights to an adequate standard of living and the right to be free from hunger).

³⁴⁸ Ibid Art 15 (providing that ‘State Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields’).

³⁴⁹ Ibid Art 22, mandating ECOSOC to ‘bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of [State reports] which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant’. These monitoring functions are now carried out by the Committee on Economic, Social and Cultural Rights in accordance with ECOSOC Resolution 185/17.

³⁵⁰ See *infra* for examples on the right to food, adequate housing, water and the highest attainable standard of health. Sigrun Skogly, *Beyond National Borders: States’ Human Rights Obligations in International Cooperation* (Intersentia 2006) 152.

³⁵¹ CESCR, *General Comment No. 3*, para 13.

³⁵² Ibid para 14.

³⁵³ The listed obligations are: first, to respect the enjoyment of the right to health in other countries; second, to prevent third parties from violating the right in other countries ‘if they are able to influence these third parties by way of legal or political means’; third, ‘depending on the availability of resources’ to facilitate access to essential health facilities, goods and services in other countries, wherever possible and to provide the necessary aid when required; fourth, to ensure that the right to health is given due attention in international agreements and that other international agreements do not adversely impact upon the right to health; fifth, to ensure that their actions as members of international organisations take due account of the

community to address the problem of transmittable diseases and the ‘special responsibility and interest’ of economically developed States to assist poorer developing States in this regard.³⁵⁴ In General Comment No. 12 the Committee sets out similar international obligations in relation to the right to food.³⁵⁵ In passing, we should note that the right of self-determination provided for in Article 1 which is common to the two Covenants imposes transnational obligations *per se*, as ‘peoples’ may comprise the entire population of a State—in which case its protection necessarily depends on the conduct of other States.³⁵⁶ The HRC highlighted in its General Comment No. 12, stating that States’ obligations under Article 1 exist ‘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 of self-determination’.³⁵⁷

Article 2(1) of the ICCPR provides that States must respect and ensure the rights of individuals ‘within its territory and subject to its jurisdiction’.³⁵⁸ The HRC has insisted that this provision must be read in conjunction with Article 5(1) which states that ‘Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the present Covenant’.³⁵⁹ It also emphasises the

right to health; and sixth, to cooperate in providing disaster relief and humanitarian assistance in times of emergency with contributions ‘to the maximum of [a State’s] capacity’. See *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12)* adopted 11 August 2000, UN Doc E/C12/2000/4 CESCR paras 39–40. See also, Craven, *The International Covenant on Economic, Social, and Cultural Rights: a Perspective on its Development* (n 169) 253.

³⁵⁴ *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12)* paras 40, 45.

³⁵⁵ *General Comment No. 12: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: The Right to Adequate Food (Art 11)* adopted 12 May 1999, UN Doc E/C12/1999/5 CESCR paras 36–37.

³⁵⁶ Knox (n 60) 205. See also, Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2nd edn, OUP 2005) (pointing out that ‘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’).

³⁵⁷ *General Comment No. 12: The Right to Self-Determination of Peoples (Art 1)* (13 March 1984) HRC, para 6.

³⁵⁸ For further discussion see Olivier de Schutter, *International Human Rights Law: Cases, Materials, Commentary* (CUP 2010) 123 (pointing out that the central question addressed in the literature is ‘whether the notion of “jurisdiction” (taken separately or in combination with that of “territory”) designates a condition for a finding of State responsibility which is distinct from that of attribution, or whether instead the two notion—“jurisdiction” and “attribution”—are in fact synonymous and thus interchangeable’). See also, Milanovic, ‘From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties’ (n 60) 7, 26 (arguing, at 7, that ‘the word “jurisdiction” is meant to denote solely a sort of factual power that a state exercises over persons or territory’) and Cedric Ryngaert, ‘Jurisdiction: Towards a Reasonableness Test’ in Malcolm Langford *et al.* (eds), *Global Justice, State Duties The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2012) 218 (suggesting that a reasonableness test could be applied to interpret the term ‘jurisdiction’).

³⁵⁹ *Sergio Euben Lopez Burgos v Uruguay* (Communication No. R12/52) para 12.3.

need to take account of the object and purpose of the treaty and the principle of *pacta sunt servanda* when considering the scope and nature of States' obligations,³⁶⁰ and accordingly found that the word 'and' in Article 2(1) must be interpreted disjunctively. Its General Comment 31 it spells out that 'States Parties are required by Article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction'.³⁶¹ This disjunctive reading of the word 'and' has been endorsed by the International Court of Justice in its *Wall* opinion³⁶² and in the literature.³⁶³

In its General Comment No. 31 the Committee interprets the word 'jurisdiction' as implying that 'a State party must respect and ensure the right laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party'.³⁶⁴ The Committee has not provided a clear indication of what would amount to 'power' or 'effective control'.³⁶⁵ In the view of this author, the term 'power' is most relevant to the discussion in this thesis, as it indicates the importance of considering a State's capacity to prevent a violation within the limits set by international law. The concept of 'effective control' may help to address the more specific question of whether a State has 'effective control' over a private actor outside its territory (and thus cases covered by the rule of attribution articulated in Article 8 of the ARS).³⁶⁶ In either case, the

³⁶⁰ HRC, *General Comment No. 31* paras 3 and 5. See also, Frey (n 60) 50.

³⁶¹ *Ibid* para 10.

³⁶² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, para 111.

³⁶³ Theodor Meron, 'Extraterritoriality of Human Rights Treaties' (1995) 89 *Am.J.Int.Law* 78, 79.

³⁶⁴ HRC, *General Comment No. 31* para 10.

³⁶⁵ In General Comment 31 the HRC only states, at para 10, that the principle that the enjoyment of rights is not limited to citizens of States Parties 'also applies to those within the power or effective control of the *forces of* a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained'. The notion of 'effective control' is derived from *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14 where the ICJ referred to control over military or paramilitary operations in foreign territory (paras 105–115). The test was subsequently adopted by the ECtHR, which initially used it to refer to effective control over territory, rather than over private actors acting abroad whose conduct was directly attributable to the State based on specific circumstances (eg *Loizidou v Turkey (Preliminary Objections and Merits)* App no 15318/89 (ECtHR 22 July 1989) para 52; *Bankovic et al. v Belgium and 16 Other Contracting States* paras 54–81). This interpretation seems to have changed in recent cases (see n 63 and accompanying text). The ICJ's decision in the *Genocide* case keeps with the original meaning of the concept and emphasised that the rule is embodied in Art 8 of the ILC. See *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* paras 398–99. For a critical assessment of the ICJ's application of the test see Antonio Cassese, 'The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgement on Genocide in Bosnia' (2007) 18 *Eur.J.Int'lL.* 649, 651.

³⁶⁶ The question whether domestic conduct affecting individuals extraterritorially falls within Art 8 ARS has been discussed in the literature. Lawson and Den Heijer point out that there is overwhelming authority in European jurisprudence for a position that jurisdiction is not an issue in this type of case. See Den Heijer and Lawson (n 60) 203 (with citations). This practice appears to reflect an understanding that the obligations of States, both positive and negative, are not dependent on

principle that ‘facticity creates normativity’ could be relied upon to determine whether a State has violated its obligations under international human rights law.³⁶⁷ This principle is derived from the HRC’s practice of perusing a ‘contextual assessment of the state’s factual control in respect of facts and events that allegedly constitute a violation of a human right’.³⁶⁸ The best known example is the HRC’s decision in *Lopez v Uruguay*, where it found that a State should not be allowed ‘to perpetrate violations of the Covenant on the territory of another state, which violations it could not perpetrate on its own territory’.³⁶⁹ The approach pursued by the Committee essentially considers whether a State has control over a situation or instrumentality that interferes with Covenant rights, rather than over individuals whose rights are affected. Accordingly, Scheinin has considered that jurisdiction merely ‘serves as a shorthand expression for the required factual link between a state and an individual (human rights accountability), or between a state’s conduct and certain grievances (state responsibility)’.³⁷⁰ This approach helps give effect to the object and purpose of human rights treaties, as seen by the ECtHR’s finding that the objective character of human rights obligations gives rise to an obligation for States to secure these rights and freedoms ‘not only to its own nationals and those of the other [...] Parties but also to nationals of States not parties to the Convention and to stateless persons’, as human rights obligations are ‘designed rather to protect the fundamental rights of individual human beings from infringement by any of the [...] Parties than to create subjective and reciprocal rights for the [...] Parties themselves’.³⁷¹ At the same time, it fully recognises that the scope of States’ human rights obligations is affected by the limits of their sovereign power.³⁷²

the geographical location or nationality of beneficiaries. Accordingly, it is safe to assume that attribution is established by considering the obligation rather than focusing on a State’s control over a private actor. The situation is different in cases of private actors acting extraterritorially, because this may fall outside the scope of the obligation. In other words, there is a genuine question of attribution in such cases, which could possibly be resolved through the ‘effective control’ test that was used in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*.

³⁶⁷ Martin Scheinin, ‘Extraterritorial Effect of the International Covenant on Civil and Political Rights’ in Fons Coomans and Menno T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 76. See also, Den Heijer and Lawson (n 60).

³⁶⁸ Scheinin, ‘Extraterritorial Effect of the International Covenant on Civil and Political Rights’ (n 367) 76 (emphasis in the original).

³⁶⁹ *Sergio Euben Lopez Burgos v Uruguay* para 12.3.

³⁷⁰ Martin Scheinin, ‘Just Another Word? Jurisdiction in the Roadmaps of State Responsibility and Human Rights’ in Malcolm Langford *et al.* (eds), *Global Justice, State Duties The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2012).

³⁷¹ *Austria v Italy* 116 *et seq.*

³⁷² See also, Dinah Shelton, ‘Remedies and Reparation’ in Malcolm Langford *et al.* (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (CUP2013) 413 (observing that the terms ‘jurisdiction and control’ contained in some human rights treaties ‘[reflect] the fact that in most instances States do

In the following chapters, the thesis will build on the premise that the existence of a human rights violation allegedly caused by a States' acts and omissions and that affects people outside the State's territory must be assessed through a contextual analysis.³⁷³ This premise is not only compatible with the practice of the HRC, but also with the CESCR's approach of assessing compliance with States' obligations by considering whether all appropriate means have been used to prevent a violation.³⁷⁴ In accordance with this premise, normative consequences can be drawn from the factual reality that the consequences of climate change affect human beings everywhere,³⁷⁵ while climate change mitigation is achieved primarily through national regulation and policies in countries other than the countries that are mostly affected by climate change, as well as through international decision-making, cooperation and perhaps the enforcement of existing legal obligations that require climate change mitigation. Conceptually, this approach builds on the understanding that the cumulative norms derived from the various sources of human rights law create a web of legal relationships that involves all peoples and all nations.³⁷⁶ In this web of relationships the role of sovereign States is to ensure the protection of the human rights of those who are actually or potentially affected by the ways in which it exercises its sovereign power. It is worth noting that applying this approach in the context of climate change does *not* mean that State responsibility occurs 'whenever a chain of causation exists between a State's actions and extraterritorial harm'.³⁷⁷ This will become clear in Section 3.2, which discusses the attribution of conduct to States, and Section 3.3, which discusses the content of States' obligations.

Finally, it is worth highlighting the CESCR's position that the requirement of international cooperation to realise human rights derived from the UN Charter is relevant to the interpretation of the CESCR. This reflects the doctrinal position that norms derived from sources other than a specific treaty

not and cannot legally assert power over the exercise of civil and political rights in another State's territory'). See further *Austria v Italy* 116 *et seq.*

³⁷³ Cf Wouter Vandenhole, 'Is There a Legal Obligation to Cooperate Internationally for Development?' (2009) 23 *Int'l J Child Rts*, 23, 23 (implying that no contextual analysis would be needed where a State allegedly breaches obligations to 'fulfil' economic, social and cultural rights extraterritorially, as the existence of such obligations may be excluded a priori).

³⁷⁴ CESCR, *General Comment No. 3*, para 3.

³⁷⁵ This point is noted in virtually every academic article on human rights and climate change, but usually sets the stage for a discussion on 'extraterritorial' obligations. See, for example, Bodansky, 'Climate Change and Human Rights: Unpacking the Issues' (n 14) 521.

³⁷⁶ Cf Knox (n 60) 165 (suggesting that 'human rights may have ethical or moral import without having correlative duties under international human rights law'). See however also Bodansky, 'Climate Change and Human Rights: Unpacking the Issues' (n 14) (citing Knox, and concluding that 'Thus, in considering the connections of human rights and climate change, we need to focus as much, if not more, on the nature of the duties involved as the nature of rights').

³⁷⁷ Knox, 'Diagonal Environmental Rights' in Mark Gibney and Sigrid Skogly (eds), (University of Pennsylvania Press 2010) 202, fn 187.

potentially affect the interpretation of that treaty as ‘relevant rules of international law applicable between the Parties’. This interpretative technique of ‘systemic integration’ is discussed further in the next section, which will also explain the significance of the no-harm rule and the UNFCCC for States’ obligations under international human rights law.

2.2.3 Relationship between International Human Rights Law and the UNFCCC³⁷⁸

There is another preliminary question to address, namely how the UNFCCC and the Kyoto Protocol, as forms of *lex specialis* of international law, relate to States’ international human rights obligations. The relationship is not easy to assess in relation to the principle of *lex specialis derogate legi generali* (that is, special law prevails over general law),³⁷⁹ or the understanding that *lex specialis* may be used ‘to apply, clarify, update or modify as well as set aside’ general law.³⁸⁰ International human rights law itself is considered to be a special regime, with norms that ‘express a unified object and purpose’ which must be reflected in the interpretation of its norms.³⁸¹ The doctrinal question at stake here is the role of human rights law in the international legal system where *lex specialis* is already in place and appears to create parallel obligations and fora for discussion and cooperation. The precise relationship between these regimes involves far-reaching questions about the nature of the international legal order.³⁸² These questions can only be answered here by establishing how norms across different regimes, but related to one issue, namely the adverse effects of climate change on human beings, are best construed in accordance with applicable rules of interpretation.

The natural starting point for examining this question is the general rule for treaty interpretation where in determining the meaning of treaty provisions, account may be taken of ‘any relevant rules of international law applicable in the relations between the parties’.³⁸³ Clearly, this rule allows us to take

³⁷⁸ See also Margaretha Wewerinke, ‘The Role of the UN Human Rights Council in Addressing Climate Change’ (2014) 8 *HR&ILD* 10, on which this paragraph draws.

³⁷⁹ Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, A/CN.4/L.702, 13 July 2006 paras 5, 14.

³⁸⁰ *Ibid* para 8.

³⁸¹ *Ibid* paras 12, 13.

³⁸² For a discussion, see Bruno Simma and Dirk Pulkowski, ‘Of Planets and the Universe: Self-Contained Regimes in International Law’ (2006) 17 *Eur.J.Int’lL.* 483.

³⁸³ See also, Lindroos and Mehling (n 201) 268 (noting that Art 31(3)(c) is a ‘widely endorsed provision’ which has nonetheless received relatively little scholarly attention.

human rights norms in the interpretation of the UNFCCC, and *vice versa* into account.³⁸⁴ This rule was indeed considered to be the single most important interpretative device for dealing with relationships between different branches of international law in the ILC study ‘Fragmentation of International Law’, by Special Rapporteur Martti Koskenniemi in response to the perceived problem that ‘specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law’.³⁸⁵ The study provides a valuable outline of the key principles that allow for interpretative relationships and synergies between branches of international law. It has offered doctrinal support for the study’s important conclusion that international law must, in principle, be considered as a harmonious system.³⁸⁶ Yet it has also been criticised for its formalistic approach to addressing relationships between norms and rule-systems almost exclusively in terms of potential conflicts,³⁸⁷ and for its over-reliance on the VCLT. Indeed it did not provide a satisfactory answer to the problem of ‘the loss of an overall perspective on the law’.³⁸⁸ The underlying difficulty is perhaps that it did not recognise differences in normativity, except for stating, based on the *jus cogens* provisions in the VCLT, that ‘the *lex specialis* maxim cannot be used to set aside types of international law that are non-derogable, such as (but not only) peremptory norms which are expressly recognised as such’.³⁸⁹ The ILC considered ‘human rights law’ as a ‘special regime’, whose importance lies in ‘the way its norms express a unified object and purpose’ which must be reflected in the interpretation of its norms.³⁹⁰ This confirms that, as *lex specialis*, human rights law may technically limit States’ discretion in the

³⁸⁴ The view in legal scholarship is that Art 31(1)(c) embodies a customary rule that requires consideration of ‘the wider normative environment’ and goes beyond ‘merely affirming the overall applicability of general international law’. See Lindroos and Mehling (n 201) 268.

³⁸⁵ Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, A/CN.4/L.702, 13 July 2006 11.

³⁸⁶ Ibid para 4 (‘It is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations’). See also, para 9 (proposing reconciliation between general and specific norms) and para 11 (allowing for self-contained regimes).

³⁸⁷ Sahib Singh, ‘The Potential of International Law: Fragmentation and Ethics’ (2011) 24 *Leiden J Int'l L* 23 (arguing that ‘the Report’s rule-centric approach to a polarized discourse results only in the propagation of ethical deficiencies’).

³⁸⁸ Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, A/CN.4/L.702, 13 July 2006. See also, Mario Prost, *The Concept of Unity in Public International Law* (Hart 2012) 210.

³⁸⁹ Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, A/CN.4/L.702, 13 July 2006, para 9.

³⁹⁰ Ibid paras 12, 13.

interpretation of norms that are contained in the climate change regime or otherwise aid in the interpretation of the provisions of the UNFCCC, especially where these provisions are vague.³⁹¹

However, the limits to an excessively technical approach to dealing with various regimes become evident when considering that the ‘principle of harmonisation’ recognised by the ILC falls short of a rule that prescribes systemic integration.³⁹² It has already been noted with regard to Article 31(3)(c) that it is unclear when or how the provision should be applied.³⁹³ I argue that the ambiguity is best resolved in accordance with the ILC’s broader observation that ‘whatever their subject matter, treaties are a creation of the international legal system and their operation is predicated upon that fact’.³⁹⁴ This understanding can explain the relevance of international human rights law as embodying norms that constitute intransgressible principles of customary law,³⁹⁵ not all of which are recognised as peremptory norms.³⁹⁶ This understanding of the international legal system finds doctrinal support in the law of treaties itself: in its Preamble the VCLT emphasises (mirroring Art. 1 of the UN Charter) the rule of customary international law that international treaties must be interpreted and disputes settled ‘in conformity with principles of justice’, including specifically ‘human rights and fundamental freedoms for all’.³⁹⁷ It thus stands to reason that the general rules of treaty interpretation require that effect be given to the different branches of international law, not just in a coherent way, but also in accordance with ‘principles of justice’ that include human rights. Accordingly, human rights norms can also be applied as ‘horizontal’ norms that influence the interpretation of other treaties.³⁹⁸ Article 103 of the UN Charter helps consolidate the doctrinal basis for this understanding, as it clarifies that the

³⁹¹ McNerney-Lankford (n 14) 234.

³⁹² See also, *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* [2003] ICJ Rep 161 (Separate Opinion of Judge Simma) para 9 (noting that when general principles of international law with a *jus cogens* character are concerned, the principle of systemic integration ‘turns into a legally insurmountable limit to the permissible treaty’). However, observers have noted that ‘It is hard to see how any treaty could be interpreted in a way that violates such a rule, and why reference to Article 31(3)(c) is necessary in the first place’. See Lindroos and Mehling (n 201) 269.

³⁹³ Lindroos and Mehling (n 201) 268. See also, *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* [2003] ICJ Rep 225 (Separate Opinion of Judge Higgins) para 46 (stating that resort to Art 31(3)(c) would have required ‘more explanation than the Court provides’).

³⁹⁴ Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, A/CN.4/L.702, 13 July 2006, 13.

³⁹⁵ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* para 79. See also, Rosenne (n 298) 515

³⁹⁶ For a discussion, see Scheinin, ‘Impact on the Law of Treaties’ (n 300) 30 (arguing that in the case of human rights law, its normative weight ‘may manifest itself in softer forms [than *jus cogens*] that afford a special status to human rights law in respect of “merely” contractual treaties between states’).

³⁹⁷ VCLT, Preamble and UN Charter, Art 1.

³⁹⁸ See also, Scheinin, ‘Impact on the Law of Treaties’ (n 300) 30

human rights obligations derived from the Charter prevail over obligations under any other international agreement in the event of a conflict between those obligations.

One perspective that pushes ‘systemic integration’ of human rights norms to its limits is what Mario Prost calls an ‘axio-logical perspective’ on international law, which emphasises the role of values in upholding the principle of harmonisation through contextual interpretation. As Prost puts it, ‘Value-driven unity rests on the idea of a common denominator of fundamental values that transcend individual rules and provide the legal order with a general sense of direction’.³⁹⁹ From this perspective, fragmentation is not understood as a conflict of norms: ‘It occurs where a regime, a government, or a tribunal undermines the axio-logical core of international law, whether this core is already well established or simply in the making’.⁴⁰⁰ Human rights obligations may accordingly be seen as creating thresholds of minimum acceptability, or as ‘levels of protection for individual rights which can be regarded as the minimum acceptable outcome under given scenarios’.⁴⁰¹ In interpreting the rules and principles of the UNFCCC the protection of the Earth’s climate as a prerequisite to human life and well-being could become a central consideration.⁴⁰² Conversely, specific value-based norms such as equity and common but differentiated responsibilities and respective capabilities could strengthen the objective of substantive equality that is inherent in human rights law.⁴⁰³ However, this approach is open to criticism if the interpreter fails to demonstrate how ‘values’ or ‘axioms’ are embodied in substantive norms, or how the existing secondary rules of international law support or require their application.

The answer proposed here is that substantive norms themselves offer relatively clear guidance on the relationship between human rights law and the UNFCCC, as long as the object and purpose of the respective substantive norms is taken into consideration. In this context, it is significant that the practice of international human rights bodies increasingly builds on the conceptual understanding of international law as one legal system, while at the same time emphasising the special nature of human rights law,⁴⁰⁴ and that provisions of international instruments other than human rights instruments may

³⁹⁹ Prost (n 388) 200.

⁴⁰⁰ Ibid.

⁴⁰¹ Ibid.

⁴⁰² See also, John Dernbach, *Acting as if Tomorrow Matters: Accelerating the Transition to Sustainability* (Environmental Law Institute 2012) (pointing out that ‘the texts and beliefs of each of the world’s major religions teach responsibility toward other humans as well as the environment’ and ‘Because unsustainable actions adversely affect others, more-sustainable actions are not simply better for us; they reflect our ethical and religious values’).

⁴⁰³ OHCHR Report on Climate Change and Human Rights (n 36) 28.

⁴⁰⁴ See, for example, *The Effect of Reservations on the Entry into Force of the ACHR (Articles 74 and 75), Austria v Italy and Ireland v United Kingdom*.

be invoked based on the understanding that these provisions enlighten their understanding of the human rights in the instruments that they are expressly mandated to apply.⁴⁰⁵ Furthermore, the principle of systemic integration may be considered as intrinsically linked with the principle of effectiveness, both in the context of human rights law (for considering when resort may or must be had to climate change law) and in the context of international law as a legal system which embodies universally applicable human rights norms.⁴⁰⁶

For example, some scholars suggest that the no-harm rule should be relied on to clarify States' obligations under international human rights law *vis-à-vis* persons outside their own territories. Ryngaert argues that States may 'have a *duty* to protect human rights outside their territory [...] if their rights are violated as a result of an act initiated in those States' territory, in line with the *Trial Smelter* principle.⁴⁰⁷ Along similar lines, de Schutter suggests that the no-harm rule and prevention obligations under international human rights law could be mutually reinforcing.⁴⁰⁸ Others have explained that the obligation to prevent human rights violations from occurring elsewhere is 'the logical consequence of the duty under general international law not to harm foreign nationals and to make reparations for breaches'.⁴⁰⁹ This view seems reasonable at the outset, as it seems illogical to interpret human rights obligations as allowing conduct that interferes with human rights if this conduct is unlawful under the no-harm rule. In accordance with this rationale, the no-harm rule could reinforce the argument that human rights obligations arise from a State's capacity to regulate anthropogenic greenhouse gases; a pollutant that causes transboundary harm and thereby affects the enjoyment of human rights. However, in the light of the *lex specialis derogate legi generali* doctrine it would seem to be more appropriate to rely on the *lex specialis* of the UNFCCC to highlight the content of States' obligations to prevent transboundary harm resulting from activities that cause climate change, or alternatively to consider the more specific obligations derived from the UNFCCC and its ultimate objective in conjunction with the no-harm rule as a co-existing norm of customary international law. This thesis argues that the provisions of the UNFCCC embody the no-harm rule, but give it a more specific meaning through the

⁴⁰⁵ *Marino López et al. v Colombia* Case 499-04, Report No. 86/06, Inter-Am CHR, OEA/SerL/V/II127 Doc 4 Rev 1 (2007) para 42.

⁴⁰⁶ Rietiker (n 327) 275. See also *supra*, on the principle of effectiveness.

⁴⁰⁷ Ryngaert (n 358) 222 (footnotes omitted).

⁴⁰⁸ de Schutter (n 358) 165. See also, Simma and Alston (n 141) 104.

⁴⁰⁹ McInerney-Lankford, Darrow and Rajamani (n 32) 46.

ultimate objective of the Convention and the agreed understanding that this objective must be achieved in accordance with the principles of equity and CBDRRC.

The precautionary principle is another example of a norm contained in the UNFCCC that may be relevant to human rights protection. If it is accepted that this principle has a bearing on States' obligations under international human rights law related to climate change, it could help interpret international human rights law as requiring States to take preventive action to reduce the risk that the adverse effects of climate change have on the enjoyment of internationally protected human rights. In the light of the high degree of scientific certainty concerning the causes and consequences of climate change, the precautionary principle creates a fairly high threshold that States must overcome to justify their actions when their compliance with international human rights obligations is assessed. The principle could accordingly ease the evidential burden on claimants in international human rights litigation, which is significant given the various evidential obstacles that may arise in claims of climate change-related State responsibility. However, the 'threshold' of risk that triggers the precautionary principle is to a great extent norm-specific and related to the seriousness of the consequences.⁴¹⁰ In the context of human rights, the principle must therefore be read in conjunction with specific human rights norms. The principle is examined in Section 3.3, which discusses rights-specific obligations.

It is also worth highlighting the significance of Article 3(4) of the UNFCCC, which provides for a right to sustainable development,⁴¹¹ for the substance of States' obligations under the UNFCCC as well as under international human rights law. The right to sustainable development can be understood as a modification of the right to development, which has arguably become a norm of customary international law through its repeated reiteration by the overwhelming majority of States in the international community. The right evolved from a number of UN General Assembly resolutions, in particular, the Declaration on the Right to Development that was adopted by an overwhelming majority of States in 1986,⁴¹² which were based on the ideas of equity, common interest, interdependence and international solidarity as the foundation for a nation's right to development. The UN and other

⁴¹⁰ Marie-Claire Cordonier Segger and Markus W Gehring, 'Precaution, Health and the World Trade Organization: Moving toward Sustainable Development' (2004) 29 *Queen's Law Journal* 139.

⁴¹¹ Art 3(4) provides that 'The Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each party and should be integrated into the national development programmes, taking into account that economic development is essential for adopting measures to address climate change'.

⁴¹² Declaration on the Right to Development (adopted 4 Dec. 1986) GA Res. 41/128, UN GAOR, 97th plen. mtg., UN Doc A/RES/41/128.

international fora subsequently adopted a number of declarations linking development to human rights.⁴¹³ Further legal basis for the right to development is being provided by widely ratified human rights treaties containing a range of substantive rights that are the basis of development of the individual. Some human rights instruments, such as the CEDAW and the African Charter on Human and Peoples' Rights, even include express provisions on the right to development.⁴¹⁴

In the context of climate change, the right to development has sometimes been understood as allowing developing countries to maintain or increase current emission levels.⁴¹⁵ However, this interpretation seems rather simplistic and possibly incorrect, as the right acquires a specific meaning in the context of the UNFCCC due to its codification as a right to *sustainable* development in Article 3(4) of this treaty. We should bear in mind that the term 'sustainable development' is a distinct legal concept which is commonly understood in accordance with the definition in the Brundtland Report as 'development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs'.⁴¹⁶ It should also be noted that the text of Article 3(4) suggests—in line with the CBDRRC principle—that both developed and developing States are required to take policies and measures to protect the climate system against human-induced change, which should be 'appropriate for the specific conditions of each party and [...] integrated into the national development programmes'.⁴¹⁷ The phrase 'taking into account that economic development is essential for adopting measures to address climate change' makes it particularly clear that economic and social development and protection of the Earth's climate system should be considered as mutually reinforcing objectives within the framework of the Convention.⁴¹⁸ In the light of recent evidence which suggests that the realisation of sustainable development in all developing countries requires scaled-up international cooperation to ensure access to electricity, clean cooking conditions and other forms of energy to meet

⁴¹³ These include Declaration on the Establishment of a New International Economic Order, UNGA Res. 3201 (S-VI), S-6 UN GAOR Supp (No. 1), UN Doc A/9556 (1974), Charter of Economic Rights and Duties of States, UNGA Res. 3281 (XXIX), 29 UN GAOR Supp (No. 31), UN Doc A/9631 (1974).

⁴¹⁴ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 Dec. 1979, entered into force 3 Sept. 1981) 1249 UNTS 13 (CEDAW), Art 3.

⁴¹⁵ For a discussion, see Paul Baer, *et al.*, 'The Greenhouse Development Rights Framework: Drawing Attention to Inequality within Nations in the Global Climate Policy Debate' (2009) 40 *Development & Change* 1121.

⁴¹⁶ GH Brundtland and World Commission on the Environment and Development, *Our Common Future: Report of the World Commission on Environment and Development ('Brundtland Report')* (OUP 1987). See also, Crawford, *Brownlie's Principles of Public International Law* (n 26) 358.

⁴¹⁷ UNFCCC Art 3(4).

⁴¹⁸ Failure to integrate the sustainability element into the right to development would make the right self-contradictory, given that adverse effects of climate change have such significant impacts on the ability of individuals and nations to develop. For further discussion see Comim (n 58).

basic human and development needs (which correlate with the enjoyment of a range of human rights),⁴¹⁹ the greatest added-value of the right to sustainable development from the perspective of international human rights law is that it requires States to cooperate with each other to enhance development for all nations, whilst simultaneously addressing the risks posed by climate change.⁴²⁰

To recapitulate: the general rules of interpretation allow for the ‘systemic integration’ of norms when interpreting provisions of international human rights law, but preclude interpretations of other laws that are inconsistent with the object and purpose of protecting the rights of peoples and individuals.⁴²¹ Indeed, the principle of harmonisation works towards the consideration of human rights norms when other norms are interpreted and applied. At the same time, the principle of effectiveness works in favour of taking account of relevant obligations of States derived from the principles and commitments contained in the UNFCCC which could potentially strengthen the existing provisions of international human rights law when applied in the context of climate change. The precautionary principle, CBD/RRRC and the right to sustainable development are examples of provisions that are *prima facie* amenable to interpretation in conjunction with international human rights norms in a way that enhances the effectiveness of each regime. The thesis considers the normative synergies between international human rights law and the UNFCCC in order to determine when a State is responsible for a breach of international human rights law based on action or inaction connected with climate change. To set the stage for this analysis, the next section addresses some preliminary issues related to State responsibility.

⁴¹⁹ Ibid 117.

⁴²⁰ Declaration on the Right to Development (adopted 4 Dec. 1986) GA Res. 41/128, UN GAOR, 97th plen. mtg., UN Doc A/RES/41/128 Arts 3–4. See Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (n 56). See also, Report of the Independent Expert on Human Rights and International Solidarity, UN Doc A/HRC/12/27 (22 July 2009).

⁴²¹ See also, Siobhán McInerney-Lankford, ‘Fragmentation of International Law Redux: The Case of Strasbourg’ (2010) 32 *OJLS* 609 (emphasising the importance of distinguishing between harmonisation and teleological interpretation, and that fragmentation might be justified where it serves to defend a higher standard of human rights protection).

2.3 *Questions of State Responsibility*

2.3.1 Relevance of the General Law of State Responsibility

Today the law of State responsibility is stated authoritatively in the ‘Articles on the Responsibility of States for Internationally Wrongful Acts’ produced by the International Law Commission (‘ILC’). This body was set up by the UN General Assembly in 1947 and its mandate is ‘the promotion of the progressive development of international law and its codification’.⁴²² The topic of State responsibility had been on the ILC agenda for almost half a century⁴²³ when the ILC adopted the final draft of the ILC ARS in 2001. This draft was completed under the ILC’s Special Rapporteur Crawford, and ‘taken note of’ by the General Assembly later that year.⁴²⁴ The importance of these rules can be captured from the ILC’s Special Rapporteur on State Responsibility Roberto Ago’s remark that ‘if one attempts [...] to deny the idea of State responsibility [...] one is forced to deny the existence of an international legal order’.⁴²⁵

The law of State responsibility is based on the principle of independent responsibility of States. This principle basically means that each State is responsible for its own conduct. The principle follows from the constituent elements of an internationally wrongful act of a State listed in Article 2 of the ARS, which states that a State has committed an internationally wrongful act when an action or omission:

⁴²² GA Res 174 (II), 21 Nov 1947 and Statute of the International Law Commission, adopted by the UNGA in Res 174(II) of 21 Nov 1947, as amended by Resolutions 485(V) of 12 Dec 1950, 984(X), of 3 Dec 1955, 985(X), of 3 Dec 1955, and 36/39 of 18 Nov 1981, Art 1(1). The ILC had inherited the topic from a Committee of Experts convened by the Council of the Assembly of the League of Nations ‘to engage in the ‘progressive codification of international law’. However, at the League of Nations’ 1930 Codification Conference in The Hague no agreement on State responsibility was reached, and the League of Nations never took further action on the subject. See League of Nations, *Official Journal, Special Supplement* No. 21, Oct. 1924, at 10, also reproduced in *Am.J.Int.L.* (Washington DC), Special Supplement, vol. 20 (1926) 12ff. See also, Roberto Ago, *First Report on State Responsibility - Review of Previous Work on Codification of the Topic of the International Responsibility of States*, UN Doc A/CN.4/SERA/1969/Add.1 (*Yearbook of the International Law Commission*, 1969) 132.

⁴²³ Ago (n 422) 132

⁴²⁴ GA Res 56/83 (12 Dec. 2001) para 3. The General Assembly also ‘[commended] them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action’. On the influence of the ARS on the evolution of international law see, for example, David D. Caron, ‘The ILC Articles on State Responsibility: the Paradoxical Relationship Between Form and Authority’ (2002) 96 *Am.J.Int.Law* 857, James R Crawford, ‘The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: a Retrospect’ (2002) 96 *Am.J.Int.Law* 874, James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) and Daniel Bodansky and John R Crook, ‘Symposium: The ILC’s state responsibility articles - Introduction and overview’ (2002) 96 *Am.J.Int.Law* 773.

⁴²⁵ Ago (n 422) para 31.

- (a) is attributable to the State under international law; and
- (b) constitutes a breach of an international obligation of the State.⁴²⁶

It is important to note that this straightforward principle constitutes a clear rejection of a private law-oriented model of responsibility based on not two, but three elements: acts, injury and a causal link that connects them.⁴²⁷ Shelton suggests that the two elements of an internationally wrongful act encompass a range of complex questions that are specific to the international legal system, including ‘the nature and range of attributable acts giving rise to responsibility, the standard of care owed, and the nature and scope of reparations’.⁴²⁸ This section will clarify that in the context of climate change, these questions must be answered by reference to the general rules of attribution (see Section 3.1), the substantive norms derived from international human rights law and the UNFCCC (discussed above, and in Sections 3.3 and 3.4) and the rules governing the content of State responsibility read in conjunction with the specific rules that specify the consequences of human rights violations (discussed in the following section).

In relation to the applicability of the general law of State responsibility, an important point to consider is that the ARS are based on a ‘presumption against the creation of wholly self-contained regimes in the field of reparation’,⁴²⁹ thus reflecting what Simma and Pulkowski have called ‘a universalistic concept of international law’.⁴³⁰ This marks a significant departure from the law of State responsibility as originally discussed by the ILC and the League of Nations’ Committee of Experts, which was concerned with a specific issue, namely responsibility of States for injuries to aliens.⁴³¹ The

⁴²⁶ Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the ILC on the Work of its 53rd Session, Official Records of the General Assembly, 56th session, Supplement No. 10, UN Doc A/56/10, chap. IV.E.2 (‘ILC ARS’) Art 2. The ICJ relied on the specification of these two elements in several cases: see, for example, *United States Diplomatic and Consular Staff in Tehran (Judgement)* [1980] ICJ Rep 3 29, para 56; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* 117, para 226; *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* 54, para 78.

⁴²⁷ For a discussion see Brigitte Stern, ‘The Elements of an Internationally Wrongful Act’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 220.

⁴²⁸ Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries* (n 88) 50.

⁴²⁹ International Law Commission, Third Report on State Responsibility by Mr. James Crawford, Special Rapporteur on State Responsibility (2000) UN Doc A/CN.4/507 (15 March 2000) para 147.

⁴³⁰ Bruno Simma and Dirk Pulkowski, ‘Leges Speciales and Self-Contained Regimes’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 146.

⁴³¹ To be precise, the area it had identified as in need of regulation was the responsibility of States for ‘injury caused in their territory to the person or property of foreigners. For a discussion see Ago (n 422) 131, Bodansky and Crook (n 424) 776.

conceptual breakthrough that underpins the law of State responsibility as it is understood today came with the second ILC Special Rapporteur on State responsibility, Roberto Ago, who started dealing with State responsibility as a generic concept confined to ‘secondary rules’ related to the breach of any international obligation, that is, a breach of a ‘primary rule’.⁴³² Ago’s rationale is captured in his statement (now cited in the Commentaries to the ARS) that ‘It is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation’. This newly introduced generality enabled by the distinction between ‘primary’ and ‘secondary’ obligations, allowed the law of State responsibility to evolve into a field of law that ‘covers the field of the responsibility of States for internationally wrongful conduct’.⁴³³

Today the law of State responsibility is still largely, if not entirely, premised on the distinction between primary and secondary rules.⁴³⁴ The ARS are understood to contain ‘secondary’ rules which determine the legal consequences of a breach of a primary (substantive) rule.⁴³⁵ The distinction between primary and secondary rules translates into two types of obligations: as Crawford puts it, ‘a breach of a *primary* obligation gives rise, immediately by the operation of the law of State responsibility, to a *secondary* obligation or series of such obligations (cessation, reparation...)’.⁴³⁶ It is thus clear that although the concept of State responsibility has ‘a particular substantive content of its own’,⁴³⁷ and is as such a ‘legal category’,⁴³⁸ it is only an intermediary category in the analytical sense. Indeed, an internationally wrongful act is still understood in accordance with the principles of State responsibility reflected in *Phosphates in Morocco*, namely as a ‘violation of international law’ and a ‘definitive act which would, by itself, directly involve international responsibility’.⁴³⁹ Although the law

See also, Patrick Daillier, ‘The Development of the Law of Responsibility Through The Case Law’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP) 39.

⁴³² The first ILC Special Rapporteur on State responsibility, FV García-Amador, submitted six reports to the ILC which were all focused on responsibility for injury to aliens. Roberto Ago produced eight reports, which according to the ILC Commentaries to the ARS established ‘the basic structure and orientation of the project’. See Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries* (n 88) 31 para 2.

⁴³³ Crawford, Pellet and Olleson (n 424) 20.

⁴³⁴ See however Bodansky and Crook (n 424) (arguing that some parts of the Articles, including the part on reparations, actually codify primary rules).

⁴³⁵ See generally Crawford, ‘The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: a Retrospect’ (n 424).

⁴³⁶ Ibid 876 (emphasis added).

⁴³⁷ Philip Allott, ‘State Responsibility and the Unmaking of International Law’ (1988) 29 *Harv. Envtl. L. Rev.* 1 12.

⁴³⁸ Ibid 14.

⁴³⁹ *Phosphates in Morocco (Italy v France)* [1938] PCIJ Ser A/B No. 74 10, para 48.

of State responsibility contains rules of invocation, it remains the case that when the act is ‘attributable to the State and [...] contrary to the treaty right of another State, international responsibility would be established *as immediately as* between the two States’.⁴⁴⁰ This follows from the basic principle that ‘Every internationally wrongful act of a State entails the international responsibility of that State’.⁴⁴¹

Despite their generality, the ILC Articles open the door to the exclusion of the general rules of State responsibility in Article 55, entitled *lex specialis*. This article stipulates that the articles do not apply ‘where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law’.⁴⁴² The Commentaries specify that Article 55 is intended to cover ‘strong’ forms of *lex specialis*, including what are often referred to as self-contained regimes, as well as ‘weaker’ forms such as specific treaty provisions on a single point.⁴⁴³ According to its drafter, this provision was created to mitigate the difficulties arising from the creation of ‘general legal categories in relation to particular regimes’, mentioning trade law as the clearest example of a particular regime with its own ‘internal economy’.⁴⁴⁴ Simma and Pulkowski argue that Article 55 accordingly accommodates for the notion of self-contained regimes; that is, regimes which exist in normative isolation.⁴⁴⁵ The effect of Article 55 is that the law of State responsibility is presumed to be subordinate to such regimes. However, Article 55 also reflects and accommodates a much more nuanced view of how general and specific secondary norms interact with each other.⁴⁴⁶ This is perhaps best understood in the light of Crawford’s observation that the ARS allow for special regimes and ‘at the same time [influence] those

⁴⁴⁰ Ibid (emphasis added).

⁴⁴¹ ILC ARS Art 1.

⁴⁴² For a discussion see Bruno Simma, ‘Self-Contained Regimes’ (1985) 16 *NED YIL* 111 at 115.

⁴⁴³ ILC ARS, Commentary to Art 55 para 5. The notion of self-contained regime stems from the ICJ’s ruling in *United States Diplomatic and Consular Staff in Tehran (Judgement)* 40, para 86, where the Court held that ‘The rules of diplomatic law... constitute a self-contained regime which, on the one hand, lays down the receiving State’s obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse’.

⁴⁴⁴ Crawford (n 18) 305.

⁴⁴⁵ Bruno Simma and Dirk Pulkowski, ‘Leges Speciales and Self-Contained Regimes’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 139.

⁴⁴⁶ Lindroos and Mehling (n 201) 253 (arguing that the notion of self-contained regimes reflects an ‘overly simplistic appreciation of how [...] regimes interact with each other and with the larger body of international law’). See also, Martti Koskenniemi, ‘Doctrines of State Responsibility’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 47 (stating that ‘The fact that human rights protection has been confined under specific treaty regimes does not mean that State responsibility is inapplicable to human rights treaties’).

regimes'.⁴⁴⁷ The influence of international human rights law on the ARS is made explicit in its Commentaries, which make extensive reference to the jurisprudence of international human rights bodies.

The influence of international human rights law on the general law of State responsibility is particularly apparent from the rules expressed in Articles 33 and 42(b) of the ARS. According to these the beneficiaries of human rights obligations are the ultimate beneficiaries of rights accrued as a result of State responsibility incurred by a rights-violating State. Indeed, the Commentaries to Article 33(1) specifically point out that 'a State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights'.⁴⁴⁸ Conversely, the relevance of the general rules of State responsibility to human rights obligations has been expressly and widely recognised by international human rights bodies;⁴⁴⁹ examples of cases where human rights bodies relied on these rules for the interpretation of human rights treaties are increasingly numerous.⁴⁵⁰ The idea that human rights treaties with inter-State procedures constitute self-contained regimes must also be rejected: McGoldrick points out that the ICCPR must be understood as providing 'a modern text, and the HRC a modern institutional forum, in

⁴⁴⁷ Crawford (n 18) 305. It is worth noting the results of a study on 'Diversity in Secondary Rules and Unity of International Law' carried out by the Netherlands Yearbook of International Law. These demonstrated ways in which various branches of international law (including international human rights law) have developed secondary rules which are applied in their respective fields. The study concluded that the effect of these synergies can be evaluated as positive, as 'special rules' were used 'in a way which, at the same time, promoted and guaranteed the growing effectiveness of their own particular set of primary rules, without putting in jeopardy the unity and coherency of the international legal order'. See K.C. Wellens, 'Diversity in Secondary Rules and the Unity of International Law' (1994) 25 *NED YIL*, 28, pp. 3–333. This issue was subsequently published as a book: L.A.N.M. Barnhoorn and K.C. Wellens (eds), *Diversity in Secondary Rules and the Unity of International Law* (Martinus Nijhoff 1995).

⁴⁴⁸ Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries* (n 88) 95 para 3.

⁴⁴⁹ *Patrick Coleman v Australia* Communication No. 1157/2003, para 6.2; *S Jegatheeswara Sarma v Sri Lanka* Communication No. 950/2000 para 9.2; *Humberto Menanteau Aceituno and Mr. José Carrasco Vasquez (represented by counsel Mr. Nelson Caucoto Pereira of the Fundación de Ayuda Social de las Iglesias Cristianas) v Chile* Communication No. 746/1997, para 5.4. See also, the Individual concurring opinion of Kurt Herndl and Waleed Sadi in *Cox v Canada* Communication No. 539/1993.

⁴⁵⁰ For a clear example see *The Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001) Series C No. 79 (2003) 10 *International Human Rights Reports* 758 para 154 and *Marino López et al. v Colombia* para 42. See also, Dominic McGoldrick, *The Human Rights Committee* (OUP 1991) 169. It is also worth noting that the mandates of some human rights bodies (such as the mandate of the ACHPR) explicitly allow them to draw on any instruments of international law relevant to the treaty that enlighten their understanding of the human rights in the instruments that they are expressly mandated to apply.

which the principles of State responsibility are applied in an empirical fashion'.⁴⁵¹ He emphasises that State practice, UN practice and the history of the regime indicate that the ICCPR 'was not intended to be a self-contained regime'.⁴⁵² And Vierdag notes that 'Almost all the provisions in [the ICCPR and the ECHR] contain elements that have corresponding rules in the law of State responsibility'.⁴⁵³

It seems justified to conclude that international human rights law can be interpreted in accordance with the general law of State responsibility, while at the same time (as recognised in Art. 55) adding its own substantive and procedural caveats. The single most important caveat is that under international human rights law, a victim's right to a remedy is a substantive right, which is protected under customary international law,⁴⁵⁴ and expressed in human rights treaties in various forms. Most treaties guarantee the right of access to procedures through which claims of human rights violations are heard and a substantive right to redress.⁴⁵⁵ The ICCPR in particular contains comprehensive provisions on remedies in three separate articles. The broadest of these is Article 2(3) which spells out the obligations of State parties to the Covenant to ensure that any person whose rights are violated shall have an 'accessible, effective and enforceable' remedy.⁴⁵⁶ The right to a remedy exists not only *ex post facto* but also when there is a threat of a violation,⁴⁵⁷ and is intertwined with the principle of effectiveness. An example of this is the ACHPR's understanding that 'The rights and freedoms of individuals enshrined in the [African] Charter can only be fully realized if governments provide

⁴⁵¹ Dominic McGoldrick, 'State Responsibility and the International Covenant on Civil and Political Rights' in Malgosia Fitzmaurice and Dan Sarooshi (eds), *Issues of State Responsibility Before International Judicial Institutions* (Hart 2004) 199.

⁴⁵² *Ibid.* See also, McGoldrick, *The Human Rights Committee* (n 450) 169 (noting that the HRC has generally interpreted the ICCPR in accordance with the general law on State responsibility).

⁴⁵³ Vierdag (n 311) 135.

⁴⁵⁴ See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res. 60/147 of 16 Dec. 2005, Annex, Principles 1(b), 2, 3 and (pertaining to gross violations of international human rights law and international crimes) 11. See also Shelton, *Remedies in International Human Rights Law* (n 90) 103 (noting that '[t]he decision to afford a domestic remedy formerly was left to the discretion of the wrongdoing state, subject to the vague and uncertain doctrine of denial of justice. Today, human rights law requires states to afford an effective remedy for any violation of rights').

⁴⁵⁵ For an overview of global and regional human rights treaties that incorporate the right to a remedy see Shelton, *Remedies in International Human Rights Law* (n 90) 113-20. See also, Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries* (n 88) 95 paras 3-4.

⁴⁵⁶ For a discussion of the evolution of the Human Rights Committee's position on the right to a remedy see generally Martin Scheinin, 'The Human Rights Committee's Pronouncements on the Right to an Effective Remedy: An Illustration of the Legal Nature of the Committee's Work under the Optional Protocol' in Nisuke Ando (ed), *Towards Implementing Universal Human Rights* (Martinus Nijhoff 2004) (esp. 101-103). See also, Shelton, *Remedies in International Human Rights Law* (n 90) 50.

⁴⁵⁷ Shelton, *Remedies in International Human Rights Law* (n 90) 104ff.

structures which enable them to seek redress if they are violated'.⁴⁵⁸ It is a fundamental premise of this thesis that the law of State responsibility provides a structure through which redress for human rights violations could be obtained by States on behalf of the victims of the violation. This follows from the principle of effectiveness; a principle that must be relied upon to give effect to the right of a remedy in the light of threats that adverse effects of climate change pose to the enjoyment of human rights. Chapter 4 explains this premise and its implications in the context of climate change, based on the analysis of attribution and breach examined in Chapter 3.

The conclusion that the law of State responsibility is amenable to application in conjunction with international human rights law can also be made with regard to the UNFCCC and the Kyoto Protocol. Drawing this conclusion is particularly straightforward in case of the UNFCCC, because it does not contain 'special rules' regarding conditions for the existence of a wrongful act nor does it refer to the consequences of breaches of obligations under the treaty.⁴⁵⁹ Moreover, its one article that spells out options for enforcing treaty provisions is fully compatible with the assumption that the full body of 'secondary rules' contained in the general law of State responsibility is applicable to the treaty regime.⁴⁶⁰ During their respective ratifications of the UNFCCC, several States including Nauru, Tuvalu, Fiji and Papua New Guinea, added the reservation that the provisions of the this treaty 'shall in no way constitute a renunciation of any rights under international law concerning State responsibility

⁴⁵⁸ *Jawara v The Gambia* Communications 147/95, 149/96 74.

⁴⁵⁹ The framework for addressing loss and damage concluded at COP 19 at Warsaw, Poland, was established under the adaptation provisions of the UNFCCC, and did not use terms related to breaches of obligations. This means, in my view, that it cannot be plausibly argued that this framework constitutes *lex specialis* which excludes the applicability of the general law of State responsibility. See Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts (22 Nov 2013) UN Doc FCCC/CP/2013/L.15. For a discussion on the (then proposed) loss and damage mechanism under the UNFCCC see Ilona Millar, Catherine Gascoigne and Elizabeth Caldwell, 'Making Good the Loss' in Michael B Gerrard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (CUP 2012). See also, Verheyen, *Tackling Loss & Damage: A New Role for the Climate Regime?* (2012) and Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (n 17).

⁴⁶⁰ Art 14(1) of the UNFCCC provides that parties can jointly seek settlement of their dispute 'through negotiation or any other peaceful means of their own choice'; Art 14(2) entitles parties to unilaterally refer a dispute involving the UNFCCC to the ICJ or to a binding arbitration, subject to each of the parties having made a declaration accepting the jurisdiction of the relevant forum over such disputes; and Art 14(6) provides that where resort to the procedures provided for under paras 1–2 has failed, any party to the dispute can submit the dispute to a conciliation commission that would be created upon the request of that party. No State has so far made a declaration under Art 14. Andrew Strauss rightly observes that the lack of such a declaration would not affect the jurisdiction of the ICJ under Arts 36(1) and (2) of the Statute of the ICJ as there is no need for States to consent to the jurisdiction of the Court more than once. See Strauss (n 79) 343.

for the adverse effects of climate change'.⁴⁶¹ This can thus be seen as a formal confirmation of an existing legal situation.

A slightly more complex situation exists under the Kyoto Protocol as a result of the Compliance Committee established under the treaty. As noted, this body may instigate sanctions on State parties that fail to comply with their treaty obligations, usually consisting of restrictions on parties' eligibility to participate in carbon trading mechanisms.⁴⁶² This function could be interpreted as creating *lex specialis* pertaining to the legal consequences of violations of the Kyoto Protocol that could, as per Article 15 of the ARS, exclude the applicability of (relevant parts of) the general law of State responsibility. I argue here that this interpretation is not correct. This thesis maintains that the correct approach is to consider the situation as analogous to that of human rights treaties with enforcement mechanisms. First, as a result of the principle of effectiveness we can assume that these treaty bodies are established to enhance the effectiveness of the treaty regime, and not to weaken it by annulling rights and legal consequences that would normally arise from a breach in accordance with the law of State responsibility. Second, the Kyoto Protocol and the UNFCCC are expressly concerned with a 'common concern of mankind' and thus, like international human rights treaties, protect the legitimate interests of the international community as a whole rather than merely the interests of State parties.⁴⁶³ For the Kyoto Protocol, this means that it can be safely assumed that neither the existence of the Compliance Committee nor its actual practice replaces the rights of State parties to invoke the responsibility of other State parties that violate its substantive provisions in accordance with the general law of State responsibility to seek an end to the wrongful conduct and reparations for its effects. This conclusion makes it clear that breaches of the Kyoto Protocol may be taken into account as part of State conduct that is wrongful in the aggregate under international human rights law (see Section 3.1). Chapter 4 examines the implications of this point for the legal consequences of such wrongful conduct.

⁴⁶¹ Declarations made by Nauru, Tuvalu, Fiji and Papua New Guinea. See Status of Ratification of the UNFCCC and the Kyoto Protocol, available at <http://www.unfccc.int> (accessed 16 May 2014).

⁴⁶² For a detailed discussion see René Lefeber, 'Holding Countries to Account: the Kyoto Protocol's Compliance System Revisited After Four Years of Experience' (2010) 1 *Climate Law* 133, 134.

⁴⁶³ As argued by Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (n 17) 266 and Fitzmaurice (n 92) 1020. Cf Tomuschat (n 17) 14.

2.4 Conclusion

This Chapter started with a review of the various sources of human rights obligations and proceeded to consider their inter-relationships. What is particularly important here is the position of the ILC that international law must, in principle, be considered as a harmonious system. This position is based on the general rule of treaty interpretation that, in order to determine the meaning of treaty provisions, any relevant rules of international law applicable in the relations between the parties can be taken into account. From the perspective of international human rights law, it is significant that the practice of international human rights bodies increasingly builds on the understanding of international law as one legal system, despite the emphasis placed on the special nature of human rights law.⁴⁶⁴ Indeed, human rights bodies have made it clear that they may use any instruments that improve their understanding of human rights in the instruments that they are expressly mandated to apply.⁴⁶⁵ However, a nuanced approach to systemic integration is needed: both the rule contained in Article 31(3)(c) and the ILC's 'principle of harmonisation' fall short of a rule that prescribes systemic integration. Moreover, international law does not necessarily assume the compatibility of its different branches or the norms contained therein; instead, it requires consideration of the wider normative environment when a particular norm is applied. For the purpose of this thesis, it is appropriate to conclude that the relationship between human rights, the UNFCCC and the law of State responsibility cannot be understood *a priori* or mechanically. Instead, it must be explained through an analysis of the substantive norms contained in the two legal regimes and in the light of their objects and purposes.

A brief examination of specific norms has provided examples of the implications of this approach. It is now clear that the no-harm rule is significant from an international human rights law perspective. This is because its incorporation into general international law means that the risk that climate change will interfere with the enjoyment of human rights in a third country (by definition a risk of 'significant' and even 'serious' harm) triggers positive obligations for States that use or permit the use of their territory for activities that cause climate change. The *lex specialis* of the UNFCCC gives a more specific meaning to the no-harm rule by categorising States into 'developed' and 'developing'

⁴⁶⁴ See, for example, *The Effect of Reservations on the Entry into Force of the ACHR (Articles 74 and 75); Austria v Italy* 138–40; and *Ireland v United Kingdom*.

⁴⁶⁵ *Marino López et al. v Colombia* Case 499–04, Report No. 86/06, Inter-Am CHR, OEA/SerL/V/II127 Doc 4 Rev 1 (2007), para 42.

countries with differentiated obligations. This must be understood in terms of the provisions contained in Article 4. These oblige all State parties to cooperate in areas relevant to climate change—including the development, application and spread of technologies; adaptation; research, and the exchange of information—while imposing specific obligations on developed countries in these areas to help prevent dangerous climate change without perpetuating existing inequalities. Accordingly, the no-harm rule is most appropriately seen as a more general expression of the principles and commitments contained in the UNFCCC. The analysis of the principles and commitments contained in the UNFCCC and the Kyoto Protocol underlines the importance of this legal framework for international human rights protection.

The potential importance of the law of State responsibility for legal responses to climate change-related infringements with human rights follows from its generality and its potential to accommodate various forms of *lex specialis*. Exploring the inter-relationships between legal frameworks leads to the conclusion that the law of State responsibility is applicable to the legal framework of the UNFCCC, despite the fact that the UNFCCC and the Kyoto Protocol both create a platform for continuous negotiations. It is important that this law applies to the obligations that emanate from the broad principles and commitments of the UNFCCC—both of which are incorporated into the operational part of the treaty—as well as to the specific obligation of developed country parties to the Kyoto Protocol to meet quantified emission reduction targets. Indeed, the specificity of the provisions that give rise to the obligations is immaterial as long as it can be established that the State acted contrary to its obligations. This is based on the general principle that the responsibility of a State is automatically activated when an operational treaty provision is breached by that State. Similarly, the law of State responsibility applies automatically when a State breaches its legal obligations under international human rights law. In both cases, the law of State responsibility specifies obligations of cessation and reparations that will become binding on the responsible State—obligations that would complement their existing primary obligations.

One practical difference between the respective legal frameworks of the UNFCCC and international human rights law is that the framework of the latter entitles individuals and sometimes other non-State actors to invoke the responsibility of a State, whereas the UNFCCC does not. Moreover, the UNFCCC does not create a body of adjudication. The probable implication is that the formal change in the legal relationship between States caused by a breach of the UNFCCC will only have a practical effect when another State invokes this law through the traditional framework of State

responsibility, ‘as between the States’. This means that the invoking State give notice of a claim of State responsibility to the allegedly responsible State.⁴⁶⁶ Yet the probability that a State would resort to this diplomatically crude ‘mechanism’ of State responsibility is low in cases where a breach of obligations is not immediately apparent. This creates a potential stalemate where ambiguity as to the exact meaning of obligations (normally resolved through judicial interpretation) makes it difficult for a State to identify a violation. The loss of binding quantified emission reduction limitation commitments for developed country parties to the Kyoto Protocol could therefore affect the effectiveness of the UNFCCC system significantly, even if those Parties remain bound by the more generic obligations under the UNFCCC. At the same time, however, the chances that States will resort to enforcement by invoking the responsibility of another State could increase when negotiations do not deliver an effective response or when the severity of climate change risks and damage becomes more apparent.⁴⁶⁷ An important finding in Chapter 3 is that the specific standards of international human rights law, now consolidated through the interpretation of human rights treaties, can help to close the apparently widening accountability gap in international climate change law. This is demonstrated through an analysis of States’ obligations under specific provisions of international human rights law (Section 3.3), after examining the general rules for attributing potentially wrongful conduct to States (Sections 3.1 and 3.2). This analysis opens the door to conclusions about the potential wrongfulness of action or inaction that contributes to negative effects of climate change on the enjoyment of human rights and the legal consequences thereof.

⁴⁶⁶ ILC ARS Arts 43 and 48. Art 43(2) suggests that the invoking State may specify the allegedly wrongful conduct and request reparations, but is not required to do so.

⁴⁶⁷ In relation to climate change liability generally, Brunnée, Goldberg *et al.* talk about a ‘risk quadrant’ on which the future significance of change liability may depend: on the one axe of the quadrant is the future extent of climate change damage; on the other axe is the effectiveness of the regulatory response. See Jutta Brunnée *et al.*, ‘Policy Considerations’ in Richard Lord *et al.* (eds), *Climate Change Liability: Transnational Law and Practice* (CUP 2012) 63. See also, Joyeeta Gupta, ‘Legal Steps Outside the Climate Convention: Litigation as a Tool to Address Climate Change’ (2007) 16 *RECIEL* 76; David B Hunter, ‘The Implications of Climate Change Litigation’ in William CG Burns and Hari M Osofsky (eds), *Adjudicating Climate Change: State, National, and International Approaches* (CUP 2009) and Jacob David Werksman, ‘Could a Small Island Successfully Sue a Big Emitter? Pursuing a Legal Theory and a Venue for Climate Justice’ in Michael B Gerrard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (CUP 2012). On human rights-based climate change litigation specifically see Eric A Posner, ‘Climate Change and International Human Rights Litigation: A Critical Appraisal’ (2007) 155 *U. Pa. L. Rev.* 1925 (focusing on litigation under the Alien Tort Statute and arguing that for principled, jurisdictional and pragmatic reasons ‘it is unlikely that American courts can provide remedies that are economically sound and politically acceptable’ [to plaintiffs who argue that ‘major emitters of greenhouse gases have violated rights to life and health by contributing to environmental and health injuries associated with global warming’]).

Chapter 3: Establishing State Responsibility under Human Rights Law

Responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility.

Judge Huber in *Spanish Zone of Morocco*⁴⁶⁸

⁴⁶⁸ (1925) 2 RIAA 615, translation; French text, 641.

3.1 *Attributing Climate Change-Related Conduct to States*

Although international human rights law may sometimes require a modified application of the principles of State responsibility, its rules on attribution are overwhelmingly compatible with, if not identical to, the rules of attribution contained in the general law of State responsibility.⁴⁶⁹ The rules on attribution exist because States can rarely, if ever, guarantee the conduct of all private persons or entities on its territory.⁴⁷⁰ Understanding how these rules apply to the substantive norms discussed in Section 2.1 is essential for getting to grips with questions of State responsibility for human rights violations associated with climate change: after all, a large part of the greenhouse gases that cause climate change are emitted by entities other than States: corporations that exploit fossil fuels, utility companies that produce electricity, enterprises that manufacture products, airlines and car companies that allow travel, and producers and consumers who supply and demand these products and services. An analysis of the rules of attribution will clarify in what circumstances conduct contributing to climate change is directly or indirectly attributable to States, thus paving the way for an analysis of substantive rules based on which wrongfulness of State conduct can be established.

The rules on attribution are expressed in Articles 4–11 of the ARS. None of these rules contain a causal requirement.⁴⁷¹ This is a deliberate omission, which was discussed by the ILC in relation to the question whether the occurrence of damage or injury should be a precondition for an internationally wrongful act. Then Special Rapporteur Ago had put forward the argument that damage or injury should be a precondition for wrongful conduct, but only for obligations characterised by Ago as ‘obligations of

⁴⁶⁹ One exceptional case is Art 1 of the Convention Against Torture, which specifies that torture is attributed to a State only ‘when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’. It may also be argued that the CESCR sought to create a special rule of attribution with its notion of ‘minimum core obligations’, the breach of which would be apparent from, for example, a lack of access to essential drugs (*General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12)* paras 43, 47) or to water facilities and services (*General Comment No. 15: The Right to Water (Arts. 11 and 12)* (29 Nov 2002) UN Doc E/C12/2002/11 para 37). However, in the view of the present author this concept reflects the CESCR (then sole) focus on the examination of State reports and is not to be considered a special rule of attribution.

⁴⁷⁰ Crawford, ‘The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: a Retrospect’ (n 424) 879.

⁴⁷¹ Art 2 of the ARS does not mention causation at all, and the Commentaries to Part I of the ARS (‘The Internationally Wrongful Act of a State’) clarify that the establishment of State responsibility does not necessarily involve establishing causation. The Commentaries do mention causation in Part II (‘Content of the International Responsibility of a State’) in the context of reparations that must be made when an internationally wrongful act has already been established: See Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text, Commentaries* (n 88) 295. For this reason this author respectfully disagrees with Fitzmaurice (n 92) 1018 (stating that the Commentary to Art 31 of the ILC ARS ‘describes the link that must exist between the wrongful act and the injury *in order for state responsibility to arise* as a sufficient causal link, which is not too remote’ (emphasis added)).

result'. Ago proposed making a distinction between those obligations from 'obligations of conduct', which could be breached irrespective of whether or not damage occurs.⁴⁷² Yet the distinction proved to be a simplistic and, for the purposes of the ARS, superfluous categorisation of obligations. As Crawford later pointed out, some 'conduct-based obligations are breached through a combination of a failure to act and the occurrence of a prohibited consequence, whereas other conduct-based obligations might be breached without the occurrence of any damage ('as a matter of pure luck').⁴⁷³ This led the ILC to conclude that the precise requirements for wrongfulness to occur must be determined through the examination of the primary rules,⁴⁷⁴ and hence to the deletion of all references to damage and causation from the first part of the ARS.

The general rule of attribution is now contained in Article 4 (entitled 'Conduct of organs of a State'), which provides that 'The conduct of any organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State'.⁴⁷⁵ As suggested above, these rules operate similarly, if not identically, in international human rights law: the HRC, for example, has found violations of the Covenant that were attributable to central government and its legislature, federal governments, municipal authorities, judicial authorities, police and security forces and various types of State agents.⁴⁷⁶ The Commentaries clarify that the reference to a State organ in Article 4 extends to organs of government 'of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy...'.⁴⁷⁷ The type of conduct that is generally attributable to a State as a consequence of these rules includes national legislation, decisions of the judiciary or administrative

⁴⁷² Ago (n 422) 132.

⁴⁷³ James R Crawford, 'Revising the Draft Articles on State Responsibility' (1999) 10 *Eur.J.Int'lL.* 435, 441.

⁴⁷⁴ This point has been emphasised by other several other authors. See, for example, Léon Castellanos-Jankiewicz, *Causation and International State Responsibility* (Amsterdam Centre for International Law, SHARES Series 2012) and Tol and Verheyen (n 17) 1112.

⁴⁷⁵ ILC ARS, Art 4(2) clarifies that 'An organ includes any person or entity which has that status in accordance with the internal law of the State'. See also, Richard B Lillich *et al*, 'Attribution Issues in State Responsibility' (1990) 84 *Proceedings of the Annual Meeting (American Society of International Law)* 51, 52 (pointing out that the principle that 'a state may act through its own independent failure of duty or inaction when an international obligation requires state action in relation to non-State conduct' is reflected in all codifications and restatements of the law on State responsibility).

⁴⁷⁶ McGoldrick, 'State Responsibility and the International Covenant on Civil and Political Rights' (n 451) fn 74–83 and accompanying text, containing citations.

⁴⁷⁷ ILC ARS, Commentary to Art 4, para 5.

measures.⁴⁷⁸ The conduct of a person or entity that is not a government agent or organ but nonetheless exercises governmental authority must also be attributed to the State (Art. 5).⁴⁷⁹ This is true even if the organ or agent exceeds its authority or contravenes instructions (Art. 7).⁴⁸⁰ The practice of human rights bodies also reflects these special rules; for example, the HRC has considered that the conduct of persons or entities empowered to exercise elements of governmental authority is attributable to the State.⁴⁸¹ Other special rules of attribution are contained in ARS articles on the conduct of organs placed at the disposal of a State by another State (Art. 6), the conduct of private actors directed or controlled by a State (Art. 8), conduct carried out in the absence or default of the official authorities (Art. 9), conduct of an insurrectional or similar type (Art. 10), and conduct acknowledged and adopted by a State as its own (Art. 11).

Verheyen considers that rules contained in Articles 8 and 11 of the ARS are particularly relevant for establishing State responsibility in the context of climate change. This is apparently based on the rationale that the conduct of emission-producing private actors must be attributed to States in order to establish State responsibility for climate change damage. The rule in Article 8 provides that the conduct of a person or group of persons acting either on the instruction of, or under the direction or control of, a State will be directly attributable to that State.⁴⁸² Article 11 allows for the attribution of conduct of private actors to a State if it ‘acknowledges or adopts the conduct as its own’.⁴⁸³ Verheyen argues that a State may exercise effective control over polluting activities carried out by private actors (Art. 8) as well as adopting such conduct as its own by ‘approving such private conduct through active (permitting) policies’ (Art. 11).⁴⁸⁴ However, this argument is not convincing: interpreting the rules this broadly would make virtually all-private conduct directly attributable to States. It also seems far-

⁴⁷⁸ Ibid.

⁴⁷⁹ Ibid Art 5.

⁴⁸⁰ Ibid Art 7.

⁴⁸¹ McGoldrick, ‘State Responsibility and the International Covenant on Civil and Political Rights’ (n 451).

⁴⁸² The Commentaries suggest that this rule embodies two rules of custom: the first relating to the conduct of persons acting under the instructions of States, such as ‘auxiliaries’ or ‘volunteers’ recruited or instigated by a State to carry out ‘particular missions’ abroad, the second relating to private persons acting under the direction or control of a State in situations where the State directed or approved of the allegedly wrongful activities. The second rule is based on *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* para 86. See ILC ARS, Commentary to Art 8, paras 2–4.

⁴⁸³ ILC ARS Art 11. Paras 3–4 of the Commentary to Art 11 clarifies that this rule has been applied only in exceptional cases, especially those related to State succession (where a successor State adopted conduct of the predecessor State) and in *United States Diplomatic and Consular Staff in Tehran (Judgement)* 35 (where Iran's subsequent unequivocal and unqualified ‘approval’ of the conduct of militants who attacked the US Embassy in Tehran gave the approval retroactive effect, thus making this private conduct directly attributable to Iran).

⁴⁸⁴ Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (n 17) 239.

fetched to argue that polluting activities carried out by companies, individuals and other private actors are ‘directed’ or ‘approved of’ by States in the sense of Articles 8 and 11 where attribution might be established in accordance with the general rule reflected in Article 4.

It is worth emphasising that the general rule of attribution reflected in Article 4 of the ARS allows omissions to be attributed to States (that is, a failure on the part of the State’s organs or agents to carry out an international obligation).⁴⁸⁵ The Commentaries to the ARS stress that ‘Cases in which the international responsibility of a State has been invoked on the basis of an omission are at least as numerous as those based on positive acts, and no difference in principle exists between the two’.⁴⁸⁶ The Commentaries clarify that an ‘act of a State’ ‘must involve some action or omission by a human being or group [...] What is crucial is that a given event is sufficiently connected to conduct (whether an act or omission) which is attributable to the State.’⁴⁸⁷ For example, in *Corfu Channel (UK v Albania)*,⁴⁸⁸ Albania was held responsible for the consequences of mines that had been laid in its territorial waters, not for the act of laying mines (which was not attributable to it), but based on its failure to mitigate or eliminate the danger.⁴⁸⁹ Therefore the question of attribution of an omission is often evidentially indistinguishable from the question whether the State has complied with the substantive obligation.

The ILC Commentaries stress that the standards for determining whether or not a breach of obligation has occurred vary from one context to another ‘for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation [...] Establishing [these standards] is a matter for the interpretation and application of the primary rules engaged in the given case’.⁴⁹⁰ Sir Ian Brownlie explains that the wrongfulness of an omission that causes harm to another State can be established without specifying which organ or agent should have carried out the acts. This is based on the understanding that it is often ‘impossible to specify which officials or organs were the source of the harm’.⁴⁹¹ The lack of distinct attribution of conduct when

⁴⁸⁵ This formulation was used in Art 1 of the Outcome Document of the Third Committee of the 1930 Hague Conference, reproduced in Yearbook of the United Nations 1956, Vol. II, p. 225, Document A/CN.4/96, Annex 3.

⁴⁸⁶ Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries* (n 88) 35 and Commentary to Art 2 para 4.

⁴⁸⁷ Ibid, Commentary to Art 2 paras 5–6.

⁴⁸⁸ *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4.

⁴⁸⁹ Ibid 23 (‘These grave [...] omissions involve the international responsibility of Albania [which] is responsible under international law for the explosions which occurred [...] and for the damage and loss of human life which resulted from them’).

⁴⁹⁰ ILC ARS, Commentary to Art 2, para 3.

⁴⁹¹ Brownlie (n 283) 151.

establishing State responsibility based on its failure to prevent such harm safeguards the effectiveness of the international legal system, and can be seen as an application of the principle of effectiveness.⁴⁹² Reflecting the importance of this principle in the human rights context, attribution is rarely considered separately when the allegedly wrongful conduct is a State's failure to prevent the violation of a human right or rights. At the evidential level, this can be explained by reference to the object and purpose of human rights law: human rights norms exist, at least in part, to protect individuals against State abuse,⁴⁹³ and the State (in the words of the IACtHR) 'controls the means to verify acts occurring within its territory'.⁴⁹⁴ At the normative level, it reflects the importance of the principle that a State will exercise its legislative, regulatory or other functions in a way that is consistent with its human rights obligations. An example is the ECtHR case *Young, James and Webster v UK*.⁴⁹⁵ This dealt with interference with the right to associate (Art. 11 ECHR) resulting from British Rail policies. The applicants claimed that British Rail was controlled by the government and therefore its allegedly wrongful conduct was attributable to the State.⁴⁹⁶ In deciding the case, the Court thought it unnecessary to establish whether or not the acts of British Rail were attributable to the State, based on its observation that 'it was the domestic law in force at the relevant time that made lawful the treatment of which the applicants complained'.⁴⁹⁷ The obligation to secure the rights contained in the ECHR (Art. 1) involved an obligation to secure those rights in the enactment of national legislation, and thus the State was responsible for any breach of the Convention that resulted from the enactment of this national law.⁴⁹⁸

In relation to climate change, we must emphasise that even if it is difficult to differentiate between questions of attribution and breach, this does not affect the basic principle that attributable conduct is only wrongful if it breaches an international obligation. This point is important because it is precisely the generality of the rule of attribution reflected in Article 4 that means that an extremely broad range of conduct linked with climate change may be attributable to States. Firstly, and perhaps

⁴⁹² Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries* (n 88) Commentary to Art 8, para 1.

⁴⁹³ Dinah Shelton, 'Protecting Human Rights in a Globalized World' (2002) 25 *Boston College International and Comparative Law Review* 273.

⁴⁹⁴ *Velásquez Rodríguez v Honduras*, para 136.

⁴⁹⁵ *Young, James and Webster v UK* (1982) Series A no 44, 4 EHRR 38.

⁴⁹⁶ *Ibid* para 52.

⁴⁹⁷ *Ibid* para 49.

⁴⁹⁸ *Ibid*.

most importantly, a potential source of evidence for establishing attribution is the information reported by States themselves to the COP and the CMP. As noted above, this information is submitted in accordance with a legal obligation imposed on all State parties to the UNFCCC to ‘Develop, periodically update, publish and make available to the Conference of the Parties [...] national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, using comparable methodologies’.⁴⁹⁹ Under the Kyoto Protocol, Annex I parties (listed in Annex B) are similarly obliged to account for all greenhouse gas emissions occurring within their territory. It is worth emphasising that State parties account for emissions produced by public as well as private actors,⁵⁰⁰ which suggests that the *lex specialis* of the UNFCCC contains a special rule of attribution for reported emission-producing activities of States. At a more general level, examples of potentially attributable acts include government interventions such as payment of subsidies and tax concessions for coal power plants, exploration and development of fossil fuels, and activities that facilitate such exploration and development.⁵⁰¹ The export of oil, gas and coal are other examples of acts that might be attributable to States, either directly or (more likely) through the act of issuing permits and licenses.⁵⁰² Attributable conduct could also consist of a State’s failure to enforce its own national law,⁵⁰³ or to uphold international standards related to environmental protection.⁵⁰⁴

The scope for attribution is extended even further through the rule that an internationally wrongful act may consist of several acts and omissions that cumulatively amount to a breach of

⁴⁹⁹ UNFCCC Art 1(a).

⁵⁰⁰ Two possibly exceptional cases are aviation and marine bunker fuels, and ‘emissions resulting from multilateral operations pursuant to the Charter of the United Nations’. It is debateable whether aviation and marine bunker fuels are attributable to Annex I States: on the one hand, there is an obligation to report these emissions, but on the other hand, they are not included in national totals. UNFCCC, Rep. of the Conference of the Parties on its 3rd Sess., at 31, Dec. 1–11, 1997, UN Doc FCCC/CP/1997/7/Add.1 (25 March 1998). We could argue that this construction signals the limited scope of obligations of the UNFCCC, rather than non-attributability of these emissions. This interpretation is supported by Art 2(2) of the Kyoto Protocol, which provides that ‘The Parties included in Annex I shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation and marine bunker fuels, working through the International Civil Aviation Organization and the International Maritime Organization, respectively’. This provision shows that the exclusion of this category from national totals regards delegation to another treaty regime rather than an assumption against attribution. In other words, we could argue that all emissions reported to the Conference of the Parties are attributable to the State for the purpose of establishing State responsibility. This does not, of course, in itself trigger the international responsibility of the State unless a breach of obligation is established.

⁵⁰¹ Although OECD countries have gradually cut back these subsidies, OECD subsidies for fossil-fuel energy still averaged US\$20–22 billion per year in 2008. For a comparative discussion see United Nations Development Programme (n 2) 128.

⁵⁰² Tomuschat (n 17) 9.

⁵⁰³ See *Okyay et al. v Turkey* App no 36220/97 (ECtHR, 12 July 2005). See also, the discussion in Section 3.3.

⁵⁰⁴ See *Oneryildiz v Turkey* App no 48939/99 (ECtHR GC, 30 Nov 2004) para 71. See also, the discussion in Section 3.3.

obligations.⁵⁰⁵ In the ARS, this is expressed in Article 15 which states that State responsibility can arise from a ‘breach consisting of a composite act’.⁵⁰⁶ The breach has to extend over the entire period ‘starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation’.⁵⁰⁷ Verheyen has argued that in accordance with this rule, State responsibility could arise for climate change damage ‘where the cumulative behaviour of a State does not conform to a standard of care for preventing damage or the risk thereof, in the context of the no harm rule’.⁵⁰⁸ This argument seems convincing, with the caveat that the no-harm rule would need to be analysed in conjunction with the *lex specialis* of the UNFCCC when it is applied in the context of climate change. In the context of human rights, the rule supports the conclusion drawn in Section 2.2.2 that a ‘contextual analysis’ of a State’s conduct and the obligations by which it is bound is the most appropriate method for determining whether a human rights violation has occurred. Such an analysis could take account of a range of conduct as attributable to the State—from information reported to the COP and CMP to its national legislation and regulatory framework, energy subsidies, trade policies and the extent of assistance provided and received in accordance with technology transfer and financial obligations—to determine whether all this conduct is in accordance with its international human rights obligations. The next section demonstrates that this approach is equally suitable for establishing violations in cases of joint or collective conduct.

⁵⁰⁵ *Paul and Audrey Edwards v United Kingdom* (2002) 35 EHRR 487 (on the cumulative failure of several public agencies including doctors, the police, the courts and the Crown Prosecution Service that amounted to a breach of obligations under Art 2 of the ECHR).

⁵⁰⁶ ILC ARS Art 15(1). This provides that ‘The breach of an international obligation by a State through a series of actions or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act’.

⁵⁰⁷ ILC ARS Art 15(2). See also, *Ireland v United Kingdom* para 159, in which the ECtHR discussed the concept of a ‘practice incompatible with the Convention’. It found that such a practice ‘consists of an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system; a practice does not of itself constitute a violation separate from such breaches’. The significance of the concept here was its effect on the applicability of the rule of exhaustion of domestic remedies embodied in Art 26 of the Convention. The Court found that the rule did not apply where ‘an applicant State complains of a practice as such, with the aim of preventing its continuation or recurrence, but does not ask the Commission or Court to give a decision on each of the cases put forward as proof or illustration of that practice’.

⁵⁰⁸ Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (n 17) 236.

3.2 *Responsibility or Involvement of Multiple States*

Seeing that anthropogenic climate change is generated by human action and inaction attributable to multiple States, it is important to understand how the rules of attribution apply to States acting jointly or collectively. Article 47 of the ILC ARS codifies the rule that applies joint or collective conduct, stating that ‘Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act’.⁵⁰⁹ The Commentary to Article 47 emphasises that the responsibility of other States for the same act does not diminish or reduce the responsibility of individual States, reflecting the basic principle that States are individually and independently responsible for any breaches of their international obligations. Thus, although Article 47 is concerned with invoking responsibility rather than establishing it, it implies that conduct, including wrongful conduct, can be attributed to multiple States simultaneously.⁵¹⁰ This is an important rule of attribution, as it implies that State responsibility can arise, for example, from the actions of States acting collectively in negotiations and decision-making under the UNFCCC. Reference to the ‘sameness’ of the wrongful act indicates that the Article does not apply to joint conduct that amounts to a different wrongful act for each State (for example, as a result of different obligations of respective States). The reason is probably simple, namely that the usual rules of attribution apply to these situations. Article 47 can be understood as a clarification to the effect that the usual rules also apply to joint wrongful conduct, which is accordingly no more and no less than internationally wrongful acts for which States are individually and independently responsible.⁵¹¹

Some cases clearly illustrate how the principle of independent responsibility applies in different scenarios of joint or collective conduct. The *Corfu Channel* case is a textbook example of conduct involving multiple States, which led to the establishment of a separate internationally wrongful act of one State based on its own obligations. As already noted, Albania was held to have committed an

⁵⁰⁹ ILC ARS Art 47.

⁵¹⁰ It is worth noting that Art 48(1) of the ARIO suggests that this principle extends to wrongful acts committed by international organisations, or by international organisations and one or more States. See Articles on the Responsibility of International Organizations, Report of the ILC on the Work of its 63rd session, Official Records of the General Assembly, 55th session, Supplement No. 10, UN Doc A/66/10 (2011) (ARIO) (‘Where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act’).

⁵¹¹ Exceptions to this general rule are ‘aid or assistance’ (Art 16) and direction or control (Art 17), which can trigger the responsibility of a State for the wrongful conduct of another State.

internationally wrongful act, based on its knowledge of the mines and its failure to warn foreign vessels so as to prevent the risk of death and injury.⁵¹² The fact that another State appeared to have been responsible for laying the mines that caused the damage did not affect, let alone diminish, Albania's responsibility.⁵¹³ The *Soering* case illustrates that the principle of independent responsibility operates similarly in cases of alleged violations of international human rights law involving multiple States: the ECtHR held that the United Kingdom was responsible for a violation of Article 3 of the ECHR based on the Court's finding that exposure to the so-called 'death row phenomenon', a form of inhuman or degrading treatment or punishment, was a foreseeable consequence of the applicant's extradition to the United States.⁵¹⁴ The fact that the United States, and not the United Kingdom, would be responsible for directly inflicting the treatment did not affect the United Kingdom's responsibility for a violation of its own obligation under Article 3.⁵¹⁵

A case where the rule expressed in Article 47 applies occurred in *Certain Phosphate Lands in Nauru*.⁵¹⁶ Here Australia had challenged the admissibility of the claim against it based on the argument that its alleged international responsibility was inseparably linked with the responsibility of two other States, the United Kingdom and New Zealand, over which the Court had no jurisdiction. The ICJ rejected Australia's argument but was willing to consider the case on its merits, emphasising the principle of independent responsibility.⁵¹⁷ Another example is *Mox Plant (Ireland v United Kingdom)*, where the ITLOS order for provisional measures indicated that the parties' failure to cooperate to exchange information and to find measures to prevent harm being caused by the proposed project could constitute a violation of the duty to cooperate to ensure the protection of the marine environment.⁵¹⁸ This order not only implies that the violation of obligations to cooperate with other States may give rise

⁵¹² *Corfu Channel Case (UK v Albania)* p 4.

⁵¹³ The UK alleged that the mines had been laid by Yugoslavia, but this was not proven. *Ibid.*, 16–17. See also, James Crawford, *State Responsibility: The General Part* (CUP 2013) 335.

⁵¹⁴ *Soering v UK*. See also, *Cruz Varas et al. v Sweden* App no 15576/89 (ECtHR 20 March 1991), *Vilvarajah and Others v United Kingdom* App nos 13163/87; 13164/87; 13165/87; 13447/87; 13448/87 (ECtHR, 30 Oct 1991) and the more recent cases *Al Nashiri v Poland* App no 28761/11 (ECtHR GC, 24 July 2014), and *Husayn (Abu Zubaydah) v Poland* App no 7511/13 (ECtHR GC, 24 July 2014).

⁵¹⁵ *Soering v UK* para 86 (stating that the fact that the United Kingdom had no power over the practices and arrangements of the Virginia authorities could not absolve the United Kingdom from responsibility under Art 3 'for all and any foreseeable consequences of extradition suffered outside [its] jurisdiction').

⁵¹⁶ *Corfu Channel Case (UK v Albania)*.

⁵¹⁷ *Certain Phosphate Lands in Nauru (Nauru v Australia) (Preliminary Objections)* [1992] ICJ Rep 240, 258–259; *ibid* 301.

⁵¹⁸ *Mox Plant Case (Ireland v United Kingdom) (Provisional measures)* [2001] 41 ILM 405 (2002).

to the ‘parallel’ responsibility of multiple States, but is also one of the clearest illustrations of enforceable rights derived from such obligations.

In passing, it is worth noting that some human rights scholars have advocated the introduction of a principle of joint and multiple liability to address cases of indivisible damage caused by joint State conduct, such as regional biofuel policies and agricultural subsidies.⁵¹⁹ The ICJ itself stated in *Certain Phosphate Lands in Nauru* that ‘a rule of joint and several responsibility [...] should certainly exist as a matter of principle’,⁵²⁰ adding that it should ‘be developed internationally rather than drawn from municipal analogies’. The wisdom of this statement is perhaps clear from the dissenting opinion of Judge Simma in *Islamic Republic of Iran v United States of America (Oil Platforms)*,⁵²¹ which stated that the generic counterclaim of the United States against Iran should have been upheld despite the fact that some of the allegedly wrongful acts may have been carried out by Iraq, and not by Iran. Judge Simma found that it would be ‘more objectionable not to hold Iran liable than to hold Iran liable for the entire damage caused [...] even though it did not directly cause it all’,⁵²² and found that it was possible to hold Iran responsible because ‘the principle of joint-and-several responsibility [...] can properly be regarded as a “general principle of law” within the meaning of Article 38, paragraph 1 (c), of the Court’s Statute’.⁵²³

In relation to this, at the outset is that Judge Simma used a questionable methodology for ascertaining a general principle of law, namely a comparative analysis of relevant tort law in only five jurisdictions.⁵²⁴ Secondly, and perhaps more importantly, we can observe that Judge Simma could have reached the conclusion that Iran was responsible for violating the relevant treaty provision without resorting to private law analogies. The crux of the matter lies in Judge Simma’s observation that the treaty provision, which protected the parties’ freedom of commerce, imposed a prohibition on the parties to prevent each other’s use of existing capabilities to engage in commerce, also in the future.⁵²⁵

⁵¹⁹ Discussed in Salomon, ‘Deprivation, Causation, and the Law of International Cooperation’ (n 154) 311. See also, reports and statements of the UN Special Rapporteur on the Right to Food; e.g. Contribution of the Special Rapporteur on the right to food to the 17th session of the UN Commission on Sustainable Development (CSD-17), 4–15 May 2009, New York, available at <http://www.srfood.org> (accessed 3 Feb. 2013).

⁵²⁰ *Certain Phosphate Lands in Nauru*, 554 (citing Brownlie, *Principles of Public International Law*, 3rd edn. (1979) 456).

⁵²¹ *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America) (Judgement)* [2003] ICJ Rep 161.

⁵²² *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America) (Separate Opinion of Judge Simma)* para 73.

⁵²³ *Ibid* para 74.

⁵²⁴ *Ibid*.

⁵²⁵ *Ibid* para 26.

Although Simma did not say so, it is clear from his opinion that he considered that this treaty provision could be breached through a pattern of conduct (that is, what Art. 15 of the ARS calls a ‘composite act’). This meant that ‘the particular extent to which Iran was responsible for separate acts that were potentially wrongful [did not need] to be determined with precision’.⁵²⁶ Instead, what needed to be established, according to the judge, was that ‘Iran, because of the Iran–Iraq war, was responsible for a significant portion of those actions, and that such actions impaired the freedom of commerce between the United States and Iran guaranteed by the 1955 Treaty in ways not justifiable simply because of the existence of a state of war’.⁵²⁷ The implicit point here seems to be that the ‘significant portion of those actions’ would amount to a composite act that violated the treaty provision that was binding on Iran. Simma’s subsequent point that the lack of certainty as to the potential attribution of some specific activities to Iran (and not Iraq) constituted an obstacle to establishing responsibility seems to contradict his own finding that Iran had breached its obligation through the ‘significant portion of the actions’ in which both Iran and Iraq were engaged, and which impaired the freedom of commerce. The flip side of this analysis is that if the finding of State responsibility were not actually supported by evidence regarding Iran’s responsibility, the finding would not have been justifiable under existing international law.

A point arising again from this analysis is that inconclusive evidence about attribution is not a bar to establishing State responsibility, as long as the evidence is sufficient to demonstrate that a State has breached an international obligation. It is also clear that each State is responsible for its own conduct. As was noted in Section 3.1, responsibility could be established not only based on specific wrongful acts, but also based on acts and omissions that are wrongful in the aggregate. In this context, it is worth recalling from the discussion of substantive norms in Chapter 2 that some rules and principles relevant to climate change, such as the precautionary principle, could shift the burden of proof to a State or States whose international responsibility is invoked by a beneficiary of the obligation or by another State. This means that even the absence of evidence could sometimes substantiate or consolidate a climate change-related claim of State responsibility. In such cases, questions of attribution may not even arise.⁵²⁸ This conclusion paves the way for an examination of the

⁵²⁶ Ibid para 60.

⁵²⁷ Ibid.

⁵²⁸ Technically speaking, these questions are implicit in the question of whether or not the State has breached the relevant obligation.

substantive content of States' obligations related to specific human rights in the light of the facts related to climate change.

3.3 *Establishing a Breach of Obligation*

3.3.1 The Right of Self-Determination⁵²⁹

The right of self-determination is widely accepted as customary international law,⁵³⁰ and is cited by several highly qualified jurists as a norm of *jus cogens*.⁵³¹ The principle of self-determination has a prominent place in the UN Charter, which sets out as one of the goals of the United Nations, in Article 1(2), ‘To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace’.⁵³² Furthermore, the right was expressed in the UN General Assembly Resolution 1514 on the Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960, which called for immediate steps to provide non-independent territories with complete independence and freedom.⁵³³ The subsequent Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the UN Charter reflects universal agreement that the right also applies outside the colonial context.⁵³⁴ The right has also been reiterated in the resolutions of the Commission on Human Rights and its successor the Human Rights Council.⁵³⁵ The first treaty-based expression of self-determination as a legal right is contained in Article 1 common to the ICCPR and ICESCR⁵³⁶ with additional expressions contained in two separate articles of the ACHPR.⁵³⁷

⁵²⁹ See also Margreet Wewerinke and Curtis Doebbler, ‘Exploring the Legal Basis of a Human Rights Approach to Climate Change’ (2011) 10 *CJIL* 141, on which parts of Section 3.3 dwell.

⁵³⁰ *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Namibia)*, *ICJ Reports 1971* esp. 31. See also, Thomas M Franck, ‘The Emerging Right to Democratic Governance’ (1992) 86 *Am.J.Int.Law* 46.

⁵³¹ See, for example, Ian Brownlie, *Principles of Public International Law* (5th edn, OUP 1998) 513; Antonio Cassese, *International Law in a Divided World* (OUP 1986) 136; Alexandre Kiss, ‘The Peoples’ Right to Self-determination’ (1986) 7 *HRLJ*, 174. See also, Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (n 166) 8 (adding that the right to self-determination as a peremptory norm of international law ‘is, however, able to claim validity only in its restricted scope of application to peoples under alien subjugation, colonial domination and exploitation in the sense of the [...] 1970 Declaration on Friendly Relations’ [footnote omitted]).

⁵³² Charter of the United Nations (1945), Arts 1(2), 55 and 73.

⁵³³ GA Res. 1514 (XV).

⁵³⁴ UNGA Res. 2625 (XXV), 25 UN GAOR Supp. (No. 28), Annex at 121, UN Doc A/5217 (1970).

⁵³⁵ This is particularly the case with regard to Palestine where an annual resolution on the Palestinians’ right to self-determination is adopted.

⁵³⁶ ICCPR Art 1 and ICESCR Art 1 provide that: 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

The right of self-determination is a right of peoples and applies, first, to all people in non-self-governing territories or territories that are ‘geographically separate and [...] distinct ethnically and/or culturally from the country administering it’.⁵³⁸ In the colonial context, the right of self-determination is understood as a right of peoples to be granted independence.⁵³⁹ This implication was recognised by the ICJ in its Advisory Opinion on Western Sahara,⁵⁴⁰ and subsequently considered by the HRC as applicable to the Western Sahara.⁵⁴¹ The text of Article 1 of the ICCPR and ICESCR states, however, that the right extends to ‘all peoples’ and accordingly the HRC has clarified that it ‘applies to all peoples, and not merely to colonised peoples’.⁵⁴² Joseph considers that the term ‘peoples’ 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’.⁵⁴³ Although the HRC has refrained from proposing a definition of ‘peoples’, its practice suggests that indigenous peoples may constitute ‘peoples’ in the sense of Article 1.⁵⁴⁴ Presumably, peoples inhabiting particular Small Island Developing States threatened with permanent flooding may be considered as beneficiaries of the right.⁵⁴⁵

In its General Comment No. 12, the HRC clarifies that ‘the obligations [under Art. 1] exist irrespective of whether a people entitled to self-determination depends on a State party to the

from 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, and 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.

⁵³⁷ African Charter on Human and Peoples' Rights, Art 20 describes a political dimension of the right, codifying it as the ‘unquestionable and inalienable right to self-determination’. Art 21 of the Charter contains a distinct resource dimension of the right. The interpretation of Arts 20 and 21 as expressing one right, namely the right of self-determination, with Art 21 expressing an ‘economic or resource dimension’ of this right, was first proposed by Martin Scheinin. See, for example, Scheinin, ‘The Right of Self-Determination under the Covenant on Civil and Political Rights’ in Pekka Aikio and Martin Scheinin (eds), *Operationalising the Right of Indigenous Peoples to Self-Determination* (Institute for Human Rights, Åbo Akademi University 2000).

⁵³⁸ Principle IV, GA Res. 1541(XV), 15 Dec 1960.

⁵³⁹ Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (n 166) 23.

⁵⁴⁰ *Western Sahara (Advisory Opinion)* ICJ Rep 1975 59.

⁵⁴¹ HRC, (1999) UN Doc CCPR/C/79/Add. 113.

⁵⁴² HRC, *Concluding Comments on Azerbaijan* (1994) UN Doc CCPR/C/79/Add. 38, para 6. Cf Art 20(2) of the ICCPR, which provides that the right belongs to ‘colonized or oppressed people’.

⁵⁴³ Joseph, Schultz and Castan (n 356) 146.

⁵⁴⁴ See the discussion in Section 3.3.3.

⁵⁴⁵ OHCHR Report on Climate Change and Human Rights (n 36) 41. See also, further references in ch 3 on legal obligations.

Covenant’.⁵⁴⁶ This reflects the conclusion drawn in Section 2.2.2 that the objective nature of human rights obligations prohibits an interpretation of human rights law that restricts the scope of States’ human rights obligations to particular categories of beneficiaries. At the same time, however, the right is closely related to State sovereignty. As the submission of the Maldives to the OCHCHR states, ‘For many peoples, the right to self-determination manifests in the formation of a sovereign State’ which is ‘the primary guarantor and source of protection for political, civil, economic, social and cultural freedoms’.⁵⁴⁷ The implication is that the adverse effects of climate change on the right of self-determination could extend to all other human rights.⁵⁴⁸

The dangers posed by climate change to the enjoyment of the right of self-determination are so severe that legal commentators have commented that ‘Exercising the right of self-determination and protecting the ecosystem from climate change are [...] one and the same [thing]’.⁵⁴⁹ The most obvious threats relate to scientists’ projections that ‘Long-term sea level rise is likely to end the history of many of the low-lying islands, even at 2 degrees Celsius warming’.⁵⁵⁰ The Maldives has stressed these dangers in its submission to the OHCHR, noting that about 80 per cent of most of its atolls that comprise its territory runs the risk of being inundated by 2100 under conservative scenarios of rising sea-levels. Many of the atolls may then already have become uninhabitable due to flooding and storm surges, rising temperatures, extreme weather events and the destruction of freshwater resources, cultivable land and living space.⁵⁵¹ Peoples in other regions may face a similar threat of losing their traditional homelands. One example of this is the Inuit people in the Arctic, whose culture is based on hunting and food sharing and who are faced with the problems of dramatic social and cultural displacement as sea ice melts. Their means of subsistence includes wild animals, which are threatened

⁵⁴⁶ *General Comment No. 12: The Right to Self-Determination of Peoples (Art 1)* para 6.

⁵⁴⁷ *Ibid* para 41.

⁵⁴⁸ On the link between the right of self-determination and other human rights see Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (n 166) 22. See also, CERD’s General Recommendation 21, which states that there is a ‘link with the right of every citizen to take part in the conduct of public affairs at any level’ and that governments should ‘be sensitive towards the rights of persons of ethnic groups, particularly their right to lead lives of dignity, to preserve their culture [and] to share equitably in the fruits of national growth, and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States, GA Res. 2625 (XXV), 24 Oct. 1970 (stating that the ‘subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principles [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’).

⁵⁴⁹ Aminzadeh (n 31) 255–256.

⁵⁵⁰ K Frieler, M Meinhausen *et al.*, “High Noon for 2 degrees Celcius,” *Air Pollution & Climate Secretariat Sweden Environmental Fact Sheet* No. 21 (2009) 2 available at <http://www.airclim.org/factsheets/index.php> (accessed 20 Dec. 2014).

⁵⁵¹ *Ibid* 41.

with extinction as a result of climate change.⁵⁵² A rise in sea-levels and other effects of climate change have already forced populations from Small Island Developing States and the Arctic and elsewhere populations have had to relocate or migrate.⁵⁵³ It has been predicted that by 2050, 25 million to 1 billion people will have been forced to relocate as a result of climate change, with the highest number of migrants coming from sub-Saharan Africa.⁵⁵⁴

As the OHCHR notes in its report, the disappearance of a State due to climate change-related [human] actions ‘would give rise to a range of legal questions, including concerning the status of people inhabiting such disappearing territories and the protection afforded to them under international law’.⁵⁵⁵ It is worth noting that legal questions that arise in this context were examined by the UN Working Group on Indigenous Peoples for four consecutive years, starting in 2003.⁵⁵⁶ Their report was submitted to the UN Commission on Human Rights in 2005 by Working Group member Hampson, and examined cases where the entire population of a sovereign State is likely to be affected.⁵⁵⁷ It distinguished between States which will disappear entirely; States which will lose a significant proportion of their territory, with the remaining territory being uninhabitable or too small to support the existing population; and States which are likely to lose a significant proportion of their territory, with implications for the existing population.⁵⁵⁸ The report observed that that ‘In the case of those States which are likely to disappear for environmental reasons, there would appear to be no successor State on

⁵⁵² United Nations Development Programme (n 2) 82.

⁵⁵³ Walter Kalin and Nina Schrepfer, *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches* (UNHCR Division of International Protection, Legal and Protection Policy Research Series PPLA/2012/01, 2012). See also, Frank Biermann and Ingrid Boas, ‘Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees’ (2010) 10 *Global Environmental Politics* 60 (proposing a Protocol to the Climate Change Convention on the Recognition, Protection and Resettlement of Climate Refugees). Cf Mike Hulme, ‘Climate Refugees: Cause for a New Agreement?’ (2008) 50 *Environment* 50.

⁵⁵⁴ International Organization for Migration, *Migration, Climate Change and the Environment: A Complex Nexus* (2011). It is worth noting that the IPCC observed as early as in 1990 that forced human migration and resettlement at an unprecedented scale may be amongst the most threatening short-term effects of climate change. See Intergovernmental Panel on Climate Change, ‘Contribution of Working Group I to the IPCC First Assessment Report’ in John T Houghton, GJ Jenkins and JJ Ephraums (eds), *Climate Change: The IPCC Scientific Assessment* (CUP 1990) 5–9. See also, McAdam (n 140) 4.

⁵⁵⁵ OHCHR Report on Climate Change and Human Rights (n 36) 15, para 41.

⁵⁵⁶ The item was introduced by Françoise Hampson, then member of the Working Group. See Report of the Working Group on Indigenous Populations on its 21st session, UN Doc E/CN.4/Sub.2/2003/22 (11 August 2003) 20, paras 94–96.

⁵⁵⁷ See Prevention of Discrimination and Protection of Indigenous Peoples: Expanded Working Paper by Françoise Hampson on the Human Rights Situation of Indigenous Peoples in States and Other Territories Threatened with Extinction for Environmental Reasons, Report of the 57th Session of the Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2005/28 (16 June 2005) 3 paras 6–8. Other situations considered were environmental damage caused to the land of indigenous peoples and cases where life was no longer sustainable on the land of a particular indigenous group, and where there was an option for relocation within the same State.

⁵⁵⁸ *Ibid* para 9.

whom obligations can be imposed and eventually the predecessor State will no longer be in existence'.⁵⁵⁹ However, it did not draw any conclusions about State responsibility,⁵⁶⁰ and even after much debate, panel discussions and resolutions adopted by the UN Human Rights Council on human rights and climate change it remains unclear which State, if any, would be legally responsible for the violation of the right of self-determination and other human rights that might result from the annulment of State sovereignty. Presumably as a result of this uncertainty, the OHCHR report states in somewhat cautious terms that 'Sea level rise and extreme weather events related to climate change [which] are threatening the habitability and, in the longer term, the territorial existence of a number of low-lying island States [...] would have implications for the right to self-determination'.⁵⁶¹ It recognises that those 'implications' extend to 'the full range of human rights for which individuals depend on the State for their protection',⁵⁶² but again without taking this point to its logical legal conclusion. At the same time, the OHCHR considers it 'clear' that 'insofar as climate change poses a threat to the right of peoples to self-determination, States have a duty to take positive action, individually and jointly, to address and avert this threat'.⁵⁶³

The OHCHR's caution is in sharp contrast to the Maldives, which claims in unambiguous terms that its people's right of self-determination will have been violated in a scenario of 'permanent loss of statehood, without a successor State to take its place'.⁵⁶⁴ Along similar lines, Tiffany Duong has contended, citing the example of Tuvalu (Polynesia), that 'When the ocean drowns Tuvalu, the loss of sovereignty and statelessness caused by climate change will violate Tuvalu's rights of self-determination'.⁵⁶⁵ The violation of the right occurs, Duong explains, because peoples who are forced to

⁵⁵⁹ Ibid para 12.

⁵⁶⁰ Ibid para 37. The report noted that 'Previous experience relating to displaced indigenous populations suggests that, if handled badly, the consequences can be disastrous both for the displaced population and the host community. It is to be hoped that by addressing the issue in advance of the crisis, and by seeking to ensure the greatest possible participation of the affected populations, some of those difficulties can be avoided'. The report also included a range of legal questions, which were compiled in a survey which States, indigenous peoples and other stakeholders were invited to participate. The Working Group subsequently recommended that the UN Commission on Human Rights appoint a Special Rapporteur on the human rights situation of indigenous peoples in States and territories threatened with extinction for environmental reasons, who would consider the outcome of the survey in a study. However, the Commission did not consider this recommendation before it was abolished and was not taken up by its successor body the UN Human Rights Council. The legal questions raised in the study have not yet been unaddressed by the Council.

⁵⁶¹ Ibid.

⁵⁶² Ibid.

⁵⁶³ OHCHR Report on Climate Change and Human Rights (n 36) pp 14–15

⁵⁶⁴ Ibid 40.

⁵⁶⁵ Tiffany TV Duong, 'When Islands Drown: The Plight of "Climate Change Refugees" and Recourse to International Human Rights Law' (2010) 31 *U. Pa. J. Int'l L.* 1239, 1258.

leave their traditional homelands ‘would no longer be able to raise their children as they wish, while living in harmony with land and sea and thus maintaining their unique history, geography and culture’.⁵⁶⁶ The facts would seem to indicate a *prima facie* violation of the right of self-determination, thus requiring a close examination of the legal norms that oblige a State to respect and promote that right.

We can distinguish three dimensions of the right of self-determination: a political dimension (para. 1); a resource dimension (pars. 1–2), and a solidarity dimension (para. 3).⁵⁶⁷ The political dimension entails the right of all peoples to determine their political status free from national or external interference,⁵⁶⁸ and imposes an obligation on States take into account ‘the freely expressed will of peoples’.⁵⁶⁹ Moreover, it ‘implies that all peoples have the right to determine [...] 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 alien subjugation, domination, and exploitation’.⁵⁷⁰ The resource dimension of the right of self-determination has also been referred to as ‘economic, social and cultural self-determination’.⁵⁷¹ This entails the right of all peoples to pursue socio-economic and cultural development free from national or external interference,⁵⁷² which may in some cases equate with a people’s right to a certain territory.⁵⁷³ This is, quite naturally, conditional on the existence of a link between the people and the claimed territory. This condition is clear in the HRC’s jurisprudence on Article 1, which has emerged through the systematic interpretation of the ICCPR in cases related to Articles 27 and 25. One illustration of the HRC’s approach is *Diergaardt v Namibia*,⁵⁷⁴ where members of the Rehoboth Basters, an ethnic minority in Namibia, claimed violations of Article 25 (the right to public participation) and Article 1 (the right of self-determination)

⁵⁶⁶ Ibid 1259.

⁵⁶⁷ See Scheinin, ‘The Right of Self-Determination under the Covenant on Civil and Political Rights’ (n 537) and Scheinin, ‘Indigenous Peoples’ Land Rights under the International Covenant on Civil and Political Rights’ (Orkel Oppsahls minneseminar, Norwegian Centre for Human Rights, University of Oslo, 28 April 2004) 9.

⁵⁶⁸ Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (n 166) 22.

⁵⁶⁹ *Western Sahara (Advisory Opinion)* 59. See also, Joseph, Schultz and Castan (n 356) 149 (noting that the right ‘can be conceptualized as a sliding scale of different levels of entitlement to political emancipation’).

⁵⁷⁰ *General Recommendation No. 21: The Right to Self-Determination* (48th session, 1996), UN Doc A/51/18, Annex VIII at 125 (1996) CERD at para 4.

⁵⁷¹ Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (n 166) 24.

⁵⁷² Ibid 22.

⁵⁷³ Joseph, Schultz and Castan (n 356) 147 (citing L. Brilmayer, "Secession and Self-Determination: A Territorial Interpretation," 16 *Yale J. Int'l L.* 177 (1991)).

⁵⁷⁴ *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v Namibia* (Communication No. 760/1997).

due to the ending of the 124-year long existence of Rehoboth as a continuously organised territory after Namibia became an independent State.⁵⁷⁵ The applicants also claimed a violation of Article 27 on the basis that their communal land had been expropriated. The HRC stated that ‘the provisions of Article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular Articles 25, 26 and 27’,⁵⁷⁶ and found no violation of Art. 27, due to the Rhoboth Basters’ failure to demonstrate a relationship between the land covered by their claim and the existence of a distinct culture. The resource dimension of the right, and the ability of a people to enjoy the benefits of their natural wealth and resources, were also central to the decision of the African Commission on Human and Peoples’ Rights in *Social and Economic Rights Action Centre (Ogoni people) v Nigeria*,⁵⁷⁷ where the Commission had received evidence that foreign investment had caused serious environmental degradation and interfered with a range of human rights (which were found to constitute violations).⁵⁷⁸ In finding a violation of Article 21 of the ACHPR (the right of peoples to freely dispose of their wealth and natural resources), the Commission noted that the development interfered with the substance of the right and did not create any material benefits accruing to the local population.⁵⁷⁹

The solidarity dimension of the right in Article 1 is essential in order to guarantee both the political and resource dimensions of the right. Recognising this, the HRC has consistently held that the obligations under Article 1 are imposed on ‘all States and the international community’⁵⁸⁰ and that ‘all States parties to the Covenant should take positive action to facilitate the attainment of and respect for the right of peoples to self-determination’.⁵⁸¹ These entail obligations to ensure that peoples can participate in political processes at all levels,⁵⁸² but do not entitle one State to use force against another allegedly oppressive State.⁵⁸³ In the context of climate change, the right also requires that States take account of the material benefits of resource exploitation in dealing with foreign actors. Articles 47 and 35 of the two Covenants have been interpreted as prohibiting a national State from wasting raw

⁵⁷⁵ Ibid paras 3.1–3.2.

⁵⁷⁶ Ibid para 10.3.

⁵⁷⁷ *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* Communication 155/96, reprinted in 15th Annual Activity Report (2001) AHRLR 60 (ACHPR 2001).

⁵⁷⁸ Ibid para 4.

⁵⁷⁹ Ibid para 55.

⁵⁸⁰ *General Comment No. 12: The Right to Self-Determination of Peoples (Art 1)* para 5.

⁵⁸¹ Ibid para 6.

⁵⁸² Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (n 166) 22.

⁵⁸³ James R Crawford, *The Creation of States in International Law* (OUP 2007) pp. 114–118. See also, Joseph, Schultz and Castan (n 356) 151.

materials ‘at the expense of the interests of the relevant peoples or [in transferring] control over natural resources to other States or foreign companies without corresponding compensation for the benefit of these peoples’.⁵⁸⁴ The effect of this provision could be an entitlement and arguably an obligation of States to rescind a treaty if it interferes with a peoples’ right of free disposition over its natural resources for its own ends.⁵⁸⁵ Existing treaties that do not meet this criterion ‘may be unilaterally rescinded by the other party on the basis of its right of free disposition over its natural resources for its own ends’⁵⁸⁶ because it is clear from Articles 47 and 35 of the respective Covenants that reference to ‘international law’ in Article 1(2) cannot be understood as introducing a blanket protection of foreign investment that is protected through other international agreements.⁵⁸⁷

When applied in the context of climate change, the right of self-determination is perhaps best understood as the need for international cooperation in decarbonising the global economy in a way that ensures peoples’ right to their means of subsistence. In the light of the conclusion drawn in Section 2.2.3 that account must be taken of the substantive provisions of the UNFCCC for the interpretation of human rights norms, it could be argued that the duty to cooperate to promote the right of self-determination could be meaningfully interpreted together with the duty to promote sustainable development contained in Article 3(4). The interpretation entails an obligation to cooperate to ensure that the right of all peoples to freely pursue their economic, social and cultural development can be exercised in a way that does not accelerate global climate change. It is also clear from the above analysis (and a consequence of Art. 103 of the UN Charter) that States are prohibited from undertaking treaty obligations, and must rescind a treaty, if compliance with the obligations contained in the treaty would deprive a people of their right of self-determination. This conclusion is particularly important in the context of climate change negotiations under the UNFCCC. Section 3.4 explains that compliance with this element of States’ obligations pertaining to the right of self-determination may involve human rights impact assessment, to establish how the resource dimension of the right can be reconciled with the prevention of dangerous climate change leading to a loss of territory and other potential human rights violations.

⁵⁸⁴ Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (n 166) 26 (footnote omitted).

⁵⁸⁵ *Ibid* 25.

⁵⁸⁶ *Ibid*.

⁵⁸⁷ According to Nowak, ‘the most that can be applied are the rather lax international obligations as are set out, for example, in the 1974 Charter of Economic Rights and Duties of States.’ *Ibid*.

Finally, we should note that if the right of self-determination is likely to be violated as a result of wrongful State action related to climate change, then the positive obligation to protect the right of self-determination acquires additional significance: it could imply that States representing a people threatened by climate change are obliged to defend the right of self-determination rather than ‘remaining passive and ultimately defending itself for alleged rights-violating acts and omissions’.⁵⁸⁸ Moreover, as a result of the solidarity dimension of the right, all States could be obliged to take action to compel a recalcitrant State that violates the right to restore compliance with its obligations to respect the right. This point is analysed in Chapter 4, which discusses legal consequences of violations of international human rights law.

3.3.2 The Right to Life

Without human life, human rights are meaningless.⁵⁸⁹ Thus, the HRC has called the right to life ‘the supreme right’,⁵⁹⁰ and has insisted that no derogation from it is permitted even in times of public emergency which threatens the life of the nation.⁵⁹¹ Some of the most prominent treaty obligations to respect the human right to life are found in Article 6 of the ICCPR⁵⁹² and its Second Optional Protocol.⁵⁹³ Additional provisions are in Article 4 of the American Convention on Human Rights (ACHR),⁵⁹⁴ Article 4 of the African Charter on Human and Peoples’ Rights (ACHPR),⁵⁹⁵ Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention

⁵⁸⁸ Shelton, ‘Litigating a Rights-Based Approach to Climate Change’ (n 27) 236–237 and Shelton, ‘Equitable Utilization of the Atmosphere: A Rights-Based Approach to Climate Change’ in Stephen Humphreys (ed), *Human Rights and Climate Change* (CUP 2010). See also Jacobs (noting that Tuvalu has sought and acquired UN membership specifically in order to address the threats posed by climate change to its sovereignty in the international community of States),

⁵⁸⁹ Bertrand G Ramcharan, ‘The Concept and Dimension of the Right to Life’ in Bertrand G. Ramcharan (ed), *The Right to Life in International Law* (Martinus Nijhoff 1985) 7.

⁵⁹⁰ *General Comment No. 6: The right to life (Article 6)* at para 1; *General Comment No. 14: Nuclear Weapons and the Right to Life (Article 6)* adopted 9 Nov 1984, UN Doc HRI/GEN/1/Rev1 at 18 (1994) HRC at para 1.

⁵⁹¹ *General Comment No. 6: The right to life (Article 6)*. This follows from Art 4(2) of the ICCPR, which lists Art 6 as one of the articles from which no derogation may be made.

⁵⁹² Art 6 of the ICCPR provides that: Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. Paras 2–6 oblige States that have not abolished the death penalty to limit its use and to abolish it for other than the ‘most serious crimes’.

⁵⁹³ UNGA Res. 44/128, UN Doc A/Res/44/128, entered into force 11 July 1991.

⁵⁹⁴ American Convention on Human Rights (adopted 22 Nov 1969, entered into force 21 Oct 1986) OAU Doc CAB/LEG/67/3 Rev 5, 21 ILM 58 (1982) (ACHR).

⁵⁹⁵ African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 Oct. 1986) (1982) 21 ILM 58 (ACHPR or Banjul Charter).

on Human Rights or ECHR) and its Sixth and Twelfth Protocols (ECHRP6 and ECHRP12),⁵⁹⁶ Article 5 of the Arab Charter on Human Rights (Arab CHR),⁵⁹⁷ and Article 6 of the Convention on the Rights of the Child (CRC).⁵⁹⁸ It also appears in Article 3 of the UDHR,⁵⁹⁹ and Article I of the American Declaration of the Rights and Duties of Man (ADRDM).⁶⁰⁰ The right to life generally provides protection against arbitrary deprivation and requires that States take appropriate steps to protect the right to life. In the specific case of the protocols to the ICCPR and the ECHR, the death penalty is prohibited. The right to life has been singled out as a right that is part of customary international law and that creates obligations *erga omnes*.⁶⁰¹ The right has been considered by highly qualified jurists as having the character of a *jus cogens* norm under international law.⁶⁰² The beneficiaries of the right to life are human beings. Article 6 of the ICCPR, for example, stipulates that the right to life is an innate right of every human being.⁶⁰³

The enjoyment of the right to life is affected by climate change because some of its adverse effects are known to be life-threatening or fatal. Natural disasters linked to climate change such as

⁵⁹⁶ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), (adopted 4 Nov 1950, entered into force 3 Sept. 1953, as amended by Protocol Nos. 11 and 14, entered into force 11 May 1994 and 1 June 2010 respectively) ETS 5; 213 UNTS 222 (ECHR).

⁵⁹⁷ Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005) (Arab CHR).

⁵⁹⁸ Convention on the Rights of the Child (adopted 20 Nov 1989, entered into force 2 Sept. 1990) 1577 UNTS 3 (CRC).

⁵⁹⁹ Universal Declaration of Human Rights, General Assembly Resolution 217 A(III) (adopted 10 Dec. 1948), UN Doc A/810 at 71 (1948) (UDHR).

⁶⁰⁰ American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992) (ADRDM).

⁶⁰¹ Although this is, as pointed out elsewhere in the thesis, true for all 'rules concerning the basic rights of the human person', the right to life is often cited as the prime example of a right that creates such obligations. See also, *HRC, General Comment No. 31* para 2 (pointing out that every State Party to the ICCPR has a legal interest in the compliance by every other State Party with its obligations, based on the *erga omnes* nature of Covenant obligations and obligations under the UN Charter 'to promote universal respect for, and observance of, human rights and fundamental freedoms'). See also, WP Gormley, 'The Right to Life and the Rule of Non-Derogability: Peremptory Norms of Jus Cogens' in Bertrand G Ramcharan (ed), *The Right to Life in International Law* (Martinus Nijhoff 1995) 145.

⁶⁰² See Rosalyn Higgins, 'Derogations Under Human Rights Treaties' (1977) 48 *British Yearbook of International Law* (1976–1977) 281 and Gormley (n 601) 143.

⁶⁰³ It is not clear whether or not this includes future generations. One case decided by the HRC seems to suggest that it does: in this case, the Committee considered that the author's allegation that the disposal of nuclear waste violated the right to life of future generations could be treated as an 'expression of concern purporting to put into due perspective the importance of the matter raised in the communication'. The question as to whether a communication could be submitted on behalf of 'future generations' did not need to be resolved in this case because the author submitted the communication also on her own behalf and on behalf of individuals who had specifically authorised her to do so. See *E.H.P. v Canada* Communication No. (67/1980) Human Rights Committee para 8(a). See also, the famous *Philippines Children's case* where the Philippines Supreme Court granted standing to a group of children who had alleged violations of their own environmental rights as well as those of future generations, *Juan Antonio Oposa, et al. v the Honorable Fulgencio Factoran Jr., Secretary of the Department of the Environment and Natural Resources et al.* Supreme Court of the Philippines, GR No. 101083 (Phil).

tropical cyclones, hurricanes, heavy storms and heatwaves, are on the rise throughout the world. The increased burden of disease, droughts and floods are other adverse effects of climate change that pose a direct threat to human life and health.⁶⁰⁴ A report published in August 2009 by the Global Humanitarian Forum reveals that every year climate change is responsible for the death of over 300,000 people, and seriously affects the livelihoods of 325 million people. The report estimates that the livelihoods of another four billion people are at risk of being affected by climate change, while for 500 million people the impacts of climate change are potentially life-threatening.⁶⁰⁵ In another report, leading scientists estimate that climate change has already caused up to 150,000 deaths per year or 5,500,000 DALY's per year by the year 2000.⁶⁰⁶ The heatwave that struck Europe in 2003 — an event that scientists have attributed to global warming — is considered to be ‘directly responsible for tens of thousands of deaths from cardiovascular and respiratory diseases’.⁶⁰⁷

The OHCHR report on the relationship between climate change and human rights cites evidence from the IPCC's Fourth Assessment Report in its discussion of adverse effects of climate change that interfere with the right to life. The report states that:

*A number of observed and projected effects of climate change will pose direct and indirect threats to human lives. [The Fourth Assessment Report of the IPCC] projects with high confidence an increase in people suffering from death, disease and injury from heatwaves, floods, storms, fires and droughts. Equally, climate change will affect the right to life through an increase in hunger and malnutrition [...] Climate change will exacerbate weather-related disasters which already have devastating effects on people and their enjoyment of the right to life, particularly in the developing world.*⁶⁰⁸

⁶⁰⁴ These impacts have been described in several studies. See, for example, The Informal Taskforce on Climate Change of the Inter-Agency Standing Committee and The International Strategy for Disaster Reduction Disaster Risk Reduction Strategies and Risk Management Practices, ‘Critical Elements for Adaptation to Climate Change. Submission to the UNFCCC Ad hoc Working Group on Long Term Cooperative Action’ (11 Nov 2008) p 1.

⁶⁰⁵ Global Humanitarian Forum, Human Impact Report: The Anatomy of a Silent Crisis (August 2009).

⁶⁰⁶ Diarmid H Campbell-Lendrum *et al.*, ‘How Much Disease Could Climate Change Cause?’ in Anthony J McMichael, *et al.* (ed), *Climate Change and Health* (World Health Organization 2003) 152; Anthony J McMichael, *et al.*, ‘Global Climate Change’ in Majid Ezzati *et al.* (eds), *Comparative Quantification of Health Risks: Global and Regional Burden of Disease Attributable to Selected Major Risk Factors*, vol. 1 (World Health Organization 2005) 1534.

⁶⁰⁷ Bodansky, ‘Climate Change and Human Rights: Unpacking the Issues’ (n 14) 581.

⁶⁰⁸ OHCHR Report on Climate Change and Human Rights (n 36) 9.

The impacts of climate change on the right to life were also spelt out in the December 2005 Inuit petition to the Inter-American Commission for Human Rights.⁶⁰⁹ This described how climate change-induced changes in ice and snow were jeopardising individual Inuit lives: as sea ice gets thinner, freezes later in the year and thaws earlier, this causes injury and loss of life. Fish and wildlife which are the Inuit's primary food sources, become scarcer and more difficult to catch, and sudden, unpredictable storms increase the risk of fatal accidents for hunters. Furthermore, the melting summer ice has made the seas rougher, and threatens the lives of hunters in boats.⁶¹⁰ The possible and actual impacts of climate change on the right to life have further been set out in information submitted by States that fed into the OHCHR study on climate change and human rights. For example, the submission of the Republic of the Marshall Islands to the OHCHR explains how flooding and the increased scale, intensity and frequency of sea surges and other extreme weather events could lead to injury and loss of life.⁶¹¹ It also states that 'The potential for severe flooding could result in permanent inundation, especially in those areas with small land masses, leading to forced migration or loss of life'.⁶¹²

In its General Comment No. 6 on the Right to Life, the HRC states explicitly that the right to life 'is a right which should not be interpreted narrowly'.⁶¹³ This reflects the position of all human rights bodies with respect to the scope of the right to life. For example, the Inter-American Court of Human Rights has stated that the 'fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence'.⁶¹⁴ Moreover, the African Commission on Human and Peoples' Rights declared that the link between the right to life and a safe and healthy environment in *SERAC v Nigeria*. In this case the Commission found a violation of the right to life where 'The pollution and environmental degradation to a level humanly unacceptable has

⁶⁰⁹ 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, available at <http://www.earthjustice.org> (accessed 13 June 2012) 90–91.

⁶¹⁰ Ibid.

⁶¹¹ Republic of the Marshall Islands, *National Communication regarding the Relationship Between Human Rights & The Impacts of Climate Change, Submitted by H.E. Mr. Phillip H. Muller to United Nations Human Rights Council on 31 Dec. 2008* (2008) 2.

⁶¹² Ibid.

⁶¹³ *General Comment No. 6: The right to life (Article 6)* paras 1, 5 (quote from para 1).

⁶¹⁴ *Villagrán-Morales, et al., v Guatemala* Ser C, No. 63 (19 Nov 1999) at para 144.

made it living in the Ogoni land a nightmare'.⁶¹⁵ Consequently, the right is understood by commentators as protecting the ability of each individual to 'have access to the means of survival; realize full life expectancy; avoid serious environmental risks to life; and to enjoy protection by the State against unwarranted deprivation of life'.⁶¹⁶

The HRC's views on *EHP v Canada* made it clear that environmental harm is recognised as a valid cause for action under Article 6 of the ICCPR.⁶¹⁷ The communication was submitted by an individual on her own right and, as chairperson of an environmental organisation, 'on the behalf of the present and future generations of Port Hope, Ontario, Canada'.⁶¹⁸ The author claimed that the storage of radioactive nuclear waste near a residential area constituted a threat to the life of present and future generations of Port Hope, specifying that excessive exposure to radioactivity was a known cause of cancer and genetic defects, and that constitute health hazards for Port Hope residents including alpha, beta, and gamma emissions, and radon gas emissions above the approved safety levels.⁶¹⁹ Although the HRC declared the communication inadmissible on the grounds of non-exhaustion of national remedies, it made an important statement insofar as it recognised that the communication '[raised] serious issues with regard to the obligation of States parties to protect human life (Article 6(1))'.⁶²⁰

The text of Article 6(1) generates two categories of obligations: a prohibition of the arbitrary deprivation of life, and an obligation to take positive measures to ensure that right, particularly measures to ensure its protection in law.⁶²¹ The prohibition of the arbitrary deprivation of life is interpreted as creating obligations for State parties to prevent arbitrary killing by their own security forces, whilst requiring States to take measures to prevent and punish the deprivation of life by non-State actors.⁶²² Nowak considers that 'the term "arbitrarily" aims at the specific circumstances of an individual case and their reasonableness (proportionality), making it difficult to comprehend *in*

⁶¹⁵ *SERAC and Another v Nigeria* para 67. See also, *Oneryildiz v Turkey*, 115.

⁶¹⁶ Ramcharan (n 589) 7.

⁶¹⁷ Dinah Shelton, 'Human Rights, Environmental Rights, and the Right to Environment' (1991) 28 *Stan. J. Int'l L.* 103, 113.

⁶¹⁸ *E.H.P. v Canada* .

⁶¹⁹ *Ibid* para 1.3.

⁶²⁰ *Ibid* para 8.

⁶²¹ *General Comment No. 6: The right to life (Article 6)*, paras 3–5; Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (n 166) 105.

⁶²² *General Comment No. 6: The right to life (Article 6)* para 3.

abstracto'.⁶²³ However, the context of the ICCPR makes it clear that the deprivation of life resulting from a 'distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status' automatically amounts to 'arbitrary deprivations'. Furthermore, because 'arbitrariness' is interpreted broadly, obligations to prevent the arbitrary deprivation of life and to 'ensure' the right may well overlap.

The positive obligations of States under the Covenant include an obligation, stipulated in Article 2(2), to take the necessary steps to adopt such laws or other measures to give effect to the rights recognised in the Covenant.⁶²⁴ The text of Article 6(1) of the ICCPR again stipulates that States must protect the right to life 'by law'. Accordingly, the HRC has found that the law's protection is required against a wide variety of threats, including infanticide committed to protect a woman's honour,⁶²⁵ killings resulting from the availability of firearms to the general public,⁶²⁶ and the 'production, testing, possession, deployment and use of nuclear weapons'.⁶²⁷ At the European level, the ECtHR holds that the States' legislative and administrative framework must protect against a wide variety of threats to human life.⁶²⁸ In *Oneryildiz v Turkey* it held that this obligation applies in the context of public or private activities which pose a risk to human life, including environmental harm.⁶²⁹ The Committee has stressed that the legal requirement to protect the right to life is unqualified and of immediate effect.⁶³⁰ According to Nowak, a violation of the obligation to protect the right to life by law can be assumed 'when State legislation is lacking altogether or when it is manifestly insufficient as measured against

⁶²³ Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (n 166) 129. The requirement of proportionality was explicitly applied in the HRC's Views on such individual communications as *Suarez de Guerrero v Colombia* (Communication No. 45/1979) at 13.2–13.3, where it found a violation of the right to life because the killing by members of the police force was intentional, without warning and 'disproportionate to the requirements of law enforcement'. See also, *Bautista v Colombia: Nydia Bautista* (563/1993) para 8.2 and *Arhuaco v Colombia* (Communication No. 612/1995) para 8.2. For similar observations see Ramcharan (n 589) 19.

⁶²⁴ HRC, *General Comment No. 31* para 13.

⁶²⁵ *Concluding Observations on Paraguay* (1995) UN Doc CCPR/79/Add 48, para 16.

⁶²⁶ *Concluding Observations on the United States* (1995) UN Doc CCPR/C79/Add 50 para 17.

⁶²⁷ *General Comment No. 14: Nuclear Weapons and the Right to Life (Article 6)* paras 6–7. See also, Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (n 166) 126; Joseph, Schultz and Castan (n 356) 185 (discussing individual communications concerning nuclear weapons).

⁶²⁸ See, for example, *Osman v United Kingdom* ECHR 1998-VIII 3124, EHRR 245 para 115; *Ilhan v Turkey* App no 22277/93 (ECtHR GC, 20 Dec 2011) Reports 2000-VII, para 91; ECtHR, *Kilic v Turkey* App no 22492/93 (ECtHR, 28 March 2000) Reports 2000-III para 62; and ECtHR, *Mahmut Kaya v Turkey* App no 22535/93 (ECtHR, 19 Feb 1998) Reports 2000-III para 85.

⁶²⁹ ECtHR, *Oneryildiz v Turkey*, para 79 (concerning the State's failure to prevent a possible explosion of methane gas from a garbage dump under the authority of the City Council).

⁶³⁰ HRC, *General Comment No. 31* para 14. See also, de Schutter (n 358) 242.

the actual threat'.⁶³¹ Ramcharan considers that '*deaths resulting from a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment*' could amount to a violation of the right to life.⁶³²

The positive obligations of States under the right to life not only include, but go beyond, an obligation to take legislative measures.⁶³³ Demonstrating what Nowak calls a 'resolute application of the premises derived from Art. 6',⁶³⁴ the HRC has taken the view that the right requires that States take 'measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics'.⁶³⁵ This requirement is in accordance with the general obligation of States 'to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant'.⁶³⁶ More specifically, it reflects the HRC's understanding that these positive obligations, will only be fully met if States protect individuals against violations by its agents as well as violations committed by private persons or entities likely to prejudice the enjoyment of Covenant rights.⁶³⁷ Moreover, 'There may be circumstances in which a failure to ensure Covenant rights as required by Article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities'.⁶³⁸ Similarly, in the landmark IACtHR case *Velásquez Radríguez v Honduras*,⁶³⁹ the State's failure to take action to prevent a violation, or to respond to it, constituted a violation of the right to life.⁶⁴⁰ The Court ruled that State responsibility for the violation had arisen 'not because of the act [of abduction and killing] itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention'.⁶⁴¹ It is worth noting that the notion of 'due diligence' has been

⁶³¹ Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (n 166) 123.

⁶³² Ramcharan (n 589) 20.

⁶³³ *General Comment No. 6: The right to life (Article 6)*, para 5.

⁶³⁴ Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (n 166) 127.

⁶³⁵ *General Comment No. 6: The right to life (Article 6)*, para 5. In Nowak's opinion the HRC's interpretation of Art 6(1) shows 'not only a willingness to innovate, but also a resolute application of the premises derived from Art 6, whereby the right to life is not to be interpreted narrowly and States parties are obligated to take positive measures to ensure it.' Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (n 166) 127.

⁶³⁶ ICCPR Art 2(1); *HRC, General Comment No. 31* para 6.

⁶³⁷ *HRC, General Comment No. 31* para 8.

⁶³⁸ *Ibid.*

⁶³⁹ *Velásquez Radríguez v Honduras*.

⁶⁴⁰ *Ibid* para 182.

⁶⁴¹ *Ibid* para 172.

incorporated into various instruments dealing with violence against women,⁶⁴² and applied in cases involving alleged violations of the right to life in cases of domestic violence.⁶⁴³ The effect of applying the notion was to safeguard the effectiveness of the human rights regime: it placed the burden of proof squarely on the State, requiring it to demonstrate that it had taken all necessary measures to prevent domestic violence and to protect the applicant against abuse by a private person.⁶⁴⁴ Moreover, the burden of acquiring information on potential risks to human life rested with the State.⁶⁴⁵

ECtHR jurisprudence, starting with *Osman v UK*,⁶⁴⁶ suggests that the standard of care required in relation to a risk, of which the State had actual or presumed knowledge, is one of reasonableness: ‘The Court does not accept [...] that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life. [...] Such a rigid standard must be considered to be incompatible with the requirements of [the right to life]. ...[H]aving regard to the [fundamental] nature of [the right], it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge’.⁶⁴⁷ In *Budayeva v Russia* the ECtHR summarised States’ obligations to protect human life against environmental risks as ‘a positive obligation to take regulatory measures and to adequately inform the public about any life-threatening emergency, and to ensure that any occasion of the deaths caused thereby would be followed by a judicial inquiry’.⁶⁴⁸ In *Oneriyildiz v Turkey*, the Court relied on its vast body of jurisprudence on environmental hazard cases under Article 8 of the Convention, providing for the right to private and family life.⁶⁴⁹ This finding was reiterated in *Guerra v Italy*⁶⁵⁰

⁶⁴² See, for example, *CEDAW, General Recommendation No. 19* (11th session, 1992) UN Doc HRI/GEN/1 para 9 (‘States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation’) and UNGA, Declaration on the Elimination of Violence Against Women, 20 Dec. 1993, UN Doc A/RES/48/104 Art 4 (‘States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons’).

⁶⁴³ *Opuz v Turkey* App no 33401/02 (ECtHR, 9 June 2009).

⁶⁴⁴ *Ibid* paras 147–149.

⁶⁴⁵ *Ibid* paras 147–149.

⁶⁴⁶ *Osman v United Kingdom*.

⁶⁴⁷ *Ibid* paras 115–16.

⁶⁴⁸ *Budayeva et al v Russia* App no 48939/99 (ECtHR, 30 Nov 2004) para 132.

⁶⁴⁹ Art 8 of the Convention provides: 1). Everyone has the right to respect for his private and family life, his home and his correspondence. 2). There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. The development of this body of jurisprudence started with the Court’s

where the Court found that the State had human rights obligations due to its failure to communicate essential information to the applicants ‘that would have enabled them to assess the risks they and their families might run if they continued to live in Manfredonia, a town particularly exposed to danger in the event of an accident at the factory’.⁶⁵¹

The case of *Tatar C. v Roumanie*⁶⁵² suggests that States’ obligations to address a ‘serious and substantial risk’ to life caused by environmental pollution overlap substantially with ‘due diligence’ obligations arising from the precautionary principle (which is incorporated into Art. 3(1) of the UNFCCC and customary international law; see Section 2.1). The case concerned pollution that allegedly caused asthma in the applicants. The issue before the Court was that the evidence was inconclusive on causation (that is, regarding the existence of a causal link between pollution and the asthma of the applicants). The Court found in favour of the applicants, finding that no proof of causation was needed to establish a violation of Article 8 that had been brought about through the State’s failure to prevent environmental pollution.⁶⁵³ It stressed that even in the absence of scientific probability regarding a causal link, the existence of a serious and substantial risk to health and well-being of the applicants imposed on the State ‘a positive obligation to adopt adequate measures capable of protecting the rights of the applicants to respect for their private and family life and, more generally, to the enjoyment of a healthy and protected environment’.⁶⁵⁴ Because it is the ECtHR’s position that its reasoning in relation to States’ obligations under Article 8 ‘is applicable *a fortiori* in respect of Article 2’,⁶⁵⁵ we can safely assume that when environmental disturbance poses a serious and substantial risk to human life, this will impose even stronger obligations on States to avert that risk.

From *Tatar C. v Roumanie*, and more generally from the interpretative practice of human rights bodies pertaining to the right to life, it appears that obligations to ensure this right overlap with, but go further than, ‘due diligence’ obligations under the no-harm rule and the UNFCCC. This means that States are not only obliged to assess potential risks to human life, but must also respond to any ‘serious

decision in *Lopez Ostra v Spain* App no 16798/90 (ECtHR, 9 Dec 1994) (finding a violation of Art 8 where the State had tolerated and promoted the establishment of a plant in a residential area that caused serious pollution and health problems to the inhabitants).

⁶⁵⁰ *Guerra v Italy* App no 14967/89 (ECtHR, 19 Feb 1998) Reports 1998-I, no 64.

⁶⁵¹ Ibid para 60. The factory concerned was a fertilizer plant that produced toxic emissions.

⁶⁵² *Tatar C. Roumanie* App no 67021/01 (ECtHR, 5 July 2007).

⁶⁵³ Ibid para 84.

⁶⁵⁴ Ibid.

⁶⁵⁵ *Oneryildiz v Turkey*, para 84.

and substantial' risk with measures 'designed to secure respect' for human rights,⁶⁵⁶ and 'capable of protecting [those rights]'. This interpretation shows that States do not have the discretionary powers to prioritise policy objectives such as the protection of particular industries over measures that would avert the serious and substantial risks posed by climate change to human life. Since the right to life is non-derogable, the obligation to assess risks and take adequate measures to protect it applies to all States at any time.

3.3.3 The Right to Enjoy a Culture

The right of minorities to enjoy their own culture is based on Article 27 of the UDHR, which provides that everyone has the right to participate freely in the cultural life of the community.⁶⁵⁷ Article 27 of the ICCPR provides a specific right of minorities to enjoy their own culture,⁶⁵⁸ while Article 15 of the ICESCR expresses the universal right 'to take part in cultural life'.⁶⁵⁹ Furthermore, Article 13 of the American Declaration provides the right to take part in the cultural life of the community,⁶⁶⁰ while Article 14 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) provides for the universal right to take part in the cultural and artistic life of the community.⁶⁶¹ An almost identical provision is contained in Article 17 of the African Charter on Human and Peoples' Rights.⁶⁶² The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) singles out 'the right to equal participation in cultural activities' as one of the rights that States must guarantee and which can be enjoyed without discrimination.⁶⁶³ The CRC provides the right to participate in all aspects of social and

⁶⁵⁶ *X. and Y. v Netherlands* Application no 8978/80 (ECtHR, 26 March 1985), 8 EHRR 235 para 23.

⁶⁵⁷ UDHR, Art 27(1).

⁶⁵⁸ ICCPR, Art 27 provides that 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'.

⁶⁵⁹ ICESCR, Art 15(1)(a).

⁶⁶⁰ American Declaration, Art 13.

⁶⁶¹ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (adopted 17 Nov 1988, entered into force 16 Nov 1999) OAS Treaty Series No. 69 (1988) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 67 (1992), Art 14(1).

⁶⁶² Banjul Charter, Art 17(2).

⁶⁶³ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 Dec. 1965, entered into force 4 Jan. 1969) 660 UNTS 195 Art 5.

cultural life.⁶⁶⁴ The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) provides the right of access to, and participation in, cultural life,⁶⁶⁵ and CEDAW Article 13 obliges States to guarantee the equal enjoyment between men and women of the right to participate in recreational activities, sports and all aspects of cultural life.⁶⁶⁶ Finally, the Convention on the Rights of Persons with Disabilities (CRPD) also provides the right of persons with disabilities to take part on an equal basis with others in cultural life.⁶⁶⁷

Article 27 of the ICCPR has proven to be one of the most important binding provisions for the protection of indigenous peoples' rights,⁶⁶⁸ and is therefore potentially significant for indigenous peoples or other communities with a distinct culture which are directly exposed to the negative impacts of climate change. Nowak points out that this right was purposefully formulated as an individual right, but with the phrase 'in community with the other members of their group' in order to 'maintain the idea of a group',⁶⁶⁹ making it an individual right with a collective element.⁶⁷⁰ The CESCR specifies that the beneficiaries of the right are individuals, but that the right may be exercised either by a person as an individual, in association with others, or within a community or group, as such.⁶⁷¹ Its importance for indigenous peoples is partly due to the HRC's recognition of a strong link between Article 1 and Article 27, starting with its decision in *Lubicon Lake Band v Canada*,⁶⁷² where it decided to consider the merits of the complaint concerning the right of self-determination, a right not cognisable under the Optional Protocol,⁶⁷³ under Article 27. This article has since provided an indirect way to invoke the provisions of Article 1. A significant part of the jurisprudence of the HRC on Article 27 now reflects

⁶⁶⁴ CRC Art 31(2).

⁶⁶⁵ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 Dec. 1990, entered into force 1 July 2003) 2220 UNTS 3, Art 43(1)(g).

⁶⁶⁶ CEDAW, Art 13(c).

⁶⁶⁷ Convention on the Rights of Persons with Disabilities (adopted 13 Dec. 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD), Art 30(1).

⁶⁶⁸ The HRC's views on several complaints submitted by representatives of indigenous peoples account for the greater part of its jurisprudence under Art 27. For an analysis of this jurisprudence. See Martin Scheinin, 'The Right to Enjoy a Distinct Culture: Indigenous and Competing Uses of Land' in Theodore S Orlin, Allan Rosas and Martin Scheinin (eds), *The Jurisprudence of Human Rights Law: A Comparative Interpretive Approach* (Åbo Akademi University Institute for Human Rights 2000) 163ff.

⁶⁶⁹ Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (n 166) 655.

⁶⁷⁰ *General Comment No. 23: The Rights of Minorities (Art 27)* adopted 8 April 1994, UN Doc CCPR/C/21/Rev1/Add5 HRC para 16.

⁶⁷¹ *Ibid* para 9. See also, James S Anaya, 'International Human Rights and Indigenous Peoples: the Move Toward the Multicultural State' (2004) 21 *Ariz. J. Int'l & Comp. L.* 13, 22 (pointing out that Art 27 in practice protects both group and individual interests in cultural integrity).

⁶⁷² *Ominayak and the Lubicon Lake Band v Canada* (HRC, Communication No. 167/1984).

⁶⁷³ *General Comment No. 23: The Rights of Minorities (Art 27)* para 3.1.

the simultaneous expression of the right of self-determination, which means that the standards identified here must be understood as adding substance to the above discussion on the right of self-determination.

The adverse effects of climate change on the right to enjoy a culture are partly linked with the impacts on the right of self-determination. Before discussing some of these effects, it is important to note that for the purpose of human rights law, ‘culture’ is understood as a ‘broad inclusive concept encompassing all manifestations of human existence’ which includes ‘natural and man-made environments’ 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’.⁶⁷⁴ The HRC clarified in *Ilmari Länsman v Finland*⁶⁷⁵ that under Article 27, minorities or indigenous groups have the right to the protection of traditional activities such as hunting, fishing or reindeer husbandry.⁶⁷⁶ It noted the ‘spiritual significance’ to the complainants’ culture of Mount Riutusvaara, (where the activities that allegedly interfered with the complainants’ right were carried out), as well as the potential negative effects of a disturbed environment on the quality of slaughtered reindeer.⁶⁷⁷ In *Apirana Mahuika v New Zealand*,⁶⁷⁸ the HRC reaffirmed that economic activities may come within the ambit of Article 27, if they are an essential element of the culture of a community.⁶⁷⁹ It recalled its finding in *Ilmari Länsman* that Article 27 does not only protect traditional means of livelihood of national minorities and that accordingly, the fact that a minority uses modern technology to adapt its traditional means of livelihood to a modern way of life does not prevent it from invoking Article 27 to protect those means.⁶⁸⁰ In *Apirana Mahuika*, it found that the Maori people’s right to enjoy the benefits of commercial fishing came within the scope of Article 27.⁶⁸¹ This broad conception of culture is important for potential victims of climate change: as Hohmann notes in a discussion of the *Inuit People* petition to the IACHR, the process of identification of victims of human rights violations comes with the risk that potential

⁶⁷⁴ General Comment No. 21: Right of Everyone to Take Part in Cultural Life (Art 15, para 1 (a), of the ICESCR) adopted 21 Dec. 2009, UN Doc E/C12/GC/21 CESCR, paras 11 and 13.

⁶⁷⁵ *Ilmari Länsman et al. v Finland* (HRC, Communication No. 511/1992).

⁶⁷⁶ General Comment No. 23: The Rights of Minorities (Art 27) para 7.

⁶⁷⁷ Ibid para 9.3.

⁶⁷⁸ *Apirana Mahuika et al. v New Zealand* (Communication No. 547/1993).

⁶⁷⁹ Ibid para 9.3.

⁶⁸⁰ General Comment No. 23: The Rights of Minorities (Art 27) para 9.3.

⁶⁸¹ *Apirana Mahuika et al. v New Zealand* para 9.4.

victims' culture is represented as static. The HRC's insistence that the right to enjoy one's culture cannot be determined *in abstracto* but has to be placed in context⁶⁸² prevents human rights litigation from becoming an obstacle to innovation and change, which would have potentially detrimental effects on people's adaptive capacity.⁶⁸³

The enjoyment of the right to enjoy culture is most obviously affected by climate change where 'culture' involves a close relationship of indigenous peoples with territory or land.⁶⁸⁴ Anthropologists have found that this relationship is reflected in many indigenous cultures and in indigenous languages: for example, in the Cook Islands Maori—a language spoken by inhabitants of islands that face inundation—'enua' means 'land, country, territory, afterbirth'; in Futuna 'fanua' means 'country, land, the people of a place'; and in Tonga, 'fonua' means 'island, territory, estate, the people of the estate, placenta' and 'fonualoto', 'grave'.⁶⁸⁵ As Batibasaqa, Overton and Horsley point out, in several Polynesian languages 'pro-fanua is both the people and the territory that nourishes them, as a placenta nourishes a baby'.⁶⁸⁶ For indigenous peoples around the world, their lands are often part of fragile ecosystems that are threatened or already damaged by the negative impacts of climate change, and often located in economically and politically marginal areas.⁶⁸⁷ The damage to ecosystems comes with considerable risk that indigenous cultural heritage, often developed over generations in close connection with a particular natural environment, may be damaged or lost.⁶⁸⁸ Indigenous peoples themselves have sometimes pointed out that their ties with a certain territory or land are not only important but also dynamic and flexible. Certain indigenous cultures are characterised by continuous migration: one example is the village of Tabara in north-eastern Papua New Guinea, which has a history of fusion, division and migration extending over 130 kilometres.⁶⁸⁹ However, many migrants continue to feel a linkage with their indigenous land, even after having lived elsewhere for considerable

⁶⁸² *General Comment No. 23: The Rights of Minorities (Art 27)* at para 9.3; *Apirana Mahuika et al. v New Zealand* para 9.4.

⁶⁸³ Hohmann (n 31) (esp. 315, 316).

⁶⁸⁴ See, for example, J. Salick, 'Traditional Peoples and Climate Change' (2009) 19 *Global Environmental Change* 137, 147.

⁶⁸⁵ Kalaveti Batibasaqa, John Overton and Peter Horsley, 'Vanua: Land, People and Culture in Fiji' in John Overton and Regina Schreyvens (eds), *Strategies for Sustainable Development: Experiences from the Pacific* (Zed Books 1990) 100 (referring to W Pond, "The Land with All Woods and Water," Waitangi Tribunal Rangahaua Whanui Series, Waitangi Tribunal, Wellington (1997) at 32).

⁶⁸⁶ *Ibid.*

⁶⁸⁷ Salick (n 684) 138.

⁶⁸⁸ *Ibid.*

⁶⁸⁹ 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* (Hart 2010) 62 at 62 (citing JD Waiko, 'Na Minandere, Imo Averi? We Are Binandere, Who Are You?' 26 *Pacific Viewpoint* 9 (1985) 9).

periods of time.⁶⁹⁰ The loss or uninhabitable character of an indigenous territory breaks such connections and threatens the cultural identity of a people. Indeed, some indigenous people or peoples reject migration as a form of adaptation to climate change because they consider the ties to their territory as an essential part of their culture.⁶⁹¹

These observations are confirmed by the submissions made by Small Island Developing States to the OHCHR, which emphasise the links between the right of self-determination and traditional culture. For example, the submission made by the Republic of the Marshall Islands (RMI) rejects the ‘potential enforcement of an assertion that a low-lying, remote developing island nation can simply “adapt” to the physical loss of its homeland and nationhood by removing the population to a foreign nation’ as ‘perhaps, itself a violation of the fundamental human right to nationhood’.⁶⁹² The submission explains that the Marshallese are known for their strong emphasis on traditional culture which values cooperation and sharing. It specifically explains that in accordance with its customary system of land tenure, land is ‘not viewed as interchangeable real estate, but instead as a foundation of national, cultural and personal identity and spirit’.⁶⁹³ The submission concludes that ‘The reclassification of the Marshallese as a displaced nation or, loosely defined, as “climate refugees”, is not only undesirable, but also unacceptable as an affront to self-determination and national dignity’.⁶⁹⁴

A closer examination of the HRC’s jurisprudence sheds light on the precise requirements of the right to enjoy culture which, when violated, would result in State responsibility. It must be noted here that Article 27 is the only right protected under the ICCPR that is negatively formulated in the treaty text. However, the HRC has consistently held that Article 27 imposes positive obligations on States. In the view of the Committee, Article 27 requires ‘positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them’.⁶⁹⁵ It explains that ‘Positive measures of protection are [...] required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party’.⁶⁹⁶ The interpretation of the right as giving rise

⁶⁹⁰ Ibid.

⁶⁹¹ For a discussion see Karen E McNamara and Chris Gibson, “We do not want to leave our land”: Pacific ambassadors at the United Nations resist the category of “climate refugees” (2009) 40 *Geoforum* 475.

⁶⁹² Submission of the Republic of the Marshall Islands to the OHCHR (n 611) 10.

⁶⁹³ Ibid 3.

⁶⁹⁴ Ibid 10.

⁶⁹⁵ *General Comment No. 23: The Rights of Minorities (Art 27)* para 7.

⁶⁹⁶ Ibid para 6.1.

to negative and positive obligations mirrors the interpretation of parallel rights protected under other human rights treaties. The Committee on the Rights of the Child has identified a close linkage between Article 30 CRC and Article 27 ICCPR in its General Comment on indigenous children and their rights under the Convention.⁶⁹⁷ This Committee has stated that States must refrain from interfering with the right and instead take positive measures to protect it against the acts of public authorities and against the acts of other persons within the State party.⁶⁹⁸ The protective measures themselves must be participatory.⁶⁹⁹ Along the same lines, the CESCR has interpreted the right to take part in cultural life (Art. 15 ICESCR) as requiring ‘both abstention (i.e., non-interference with the exercise of cultural practices and with access to cultural goods and services), and positive action (ensuring preconditions for participation, facilitation and promotion of cultural life, and access and preservation of cultural goods)’.⁷⁰⁰

To give effect to the substantive and procedural dimensions of the right, the HRC’s assessment of States’ compliance with obligations has focused on both the consequences of States’ acts and the omissions and decision-making process through which the alleged violation materialised. Scheinin describes the test as a ‘combined test of participation by the group and sustainability of the indigenous economy’.⁷⁰¹ Examples of this test are found in the HRC views on a series of cases against Finland brought by members of the indigenous Sami people, concerning their traditional reindeer herding culture.⁷⁰² In *Ilmari Länsman v Finland*,⁷⁰³ the HRC suggested that the right contains a substantive aspect that States are obliged to protect:

A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken under Article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his own culture. Thus,

⁶⁹⁷ *General Comment No. 11: Indigenous Children and Their Rights under the Convention* adopted 12 Feb. 2009, UN Doc CRC/C/GC/11 CRC para 16.

⁶⁹⁸ *Ibid.*

⁶⁹⁹ *Ibid* para 20.

⁷⁰⁰ *General Comment No. 21: Right of Everyone to Take Part in Cultural Life (Art 15, para 1 (a), of the ICESCR)* para 6.

⁷⁰¹ Martin Scheinin, ‘Advocating the Right to Development through Complaint Procedures under Human Rights Treaties’ in A. Bard Andreassen and Stephen P. Marks (eds), *Development as a Human Right: Legal, Political and Economic Dimensions* (Intersentia 2010) 343.

⁷⁰² These cases include *O.Sarea v Finland* (Communication No. 431/1990) and the cases discussed below.

⁷⁰³ *Ilmari Länsman et al. v Finland*.

*measures whose impact amount to a denial of the right will not be compatible with the obligations under Article 27.*⁷⁰⁴

This triggered the question of ‘whether the impact of the quarrying on Mount Riutusvaara is so substantial that it does effectively deny the authors the right to enjoy their cultural rights in that region’.⁷⁰⁵ In considering this question, it examined the impacts of quarrying activities that had already taken place as well as any future activities that may be approved by the authorities. In *Jouni Länsman v Finland*,⁷⁰⁶ another case concerning reindeer herding in Finland alleging violation of Article 27, this time for logging activities, the HRC made it clear that both logging that had already taken place as well as ‘such logging as has been approved for the future and which will be spread over a number of years’ needed to be considered. In relation to both past and future activities, the question was whether the logging was ‘of such proportions as to deny the authors the right to enjoy their culture in that area’.⁷⁰⁷

In both cases the HRC found no violation of Article 27. In *Ilmari Länsman v Finland* it concluded that in the amount that had already taken place, the quarrying did not constitute a denial of the complainants’ right to enjoy their own culture considering that the complainants and their interests had been considered during the proceedings leading up to the granting of the quarrying permit,⁷⁰⁸ and that based on the evidence, the reindeer herding in the area did not appear to have been adversely affected by the quarrying that had already taken place. It also considered the compatibility of approved future activities based on evidence submitted by the respondent State which showed, in the view of the HRC, compliance with its obligations: it appeared from the evidence that the State’s authorities had ‘endeavoured to permit only quarrying which would minimise the impact on any reindeer herding activity in Southern Riutusvaara and on the environment’.⁷⁰⁹ More specifically, the respondent State had been able to prove that reindeer husbandry was protected by national legislation,⁷¹⁰ and that the obligations imposed by Article 27 had been observed in the permit proceedings.⁷¹¹

⁷⁰⁴ Ibid paras 9.4.

⁷⁰⁵ Ibid paras 9.5–9.7.

⁷⁰⁶ *Jouni E. Länsman et al. v Finland* (Communication No. 671/1995).

⁷⁰⁷ Ibid para 10.4.

⁷⁰⁸ *Ilmari Länsman et al. v Finland* paras 9.6.

⁷⁰⁹ The key evidence were the quarrying permits themselves, which laid down conditions to minimise the effects of stone extraction on reindeer husbandry (para 9.6).

⁷¹⁰ *Ilmari Länsman et al. v Finland* para 7.7 (referring to Section 2, subsection 2 of the Reindeer Husbandry Act).

⁷¹¹ Ibid.

Jouni E. Länsman was also decided on the basis of evidence of the State's compliance with its obligations. There was no agreement as to the evidence of the long-term impacts of the logging activities. Consequently, the HRC concluded that it could not find a violation of Article 27 on this basis. However, it went on to consider a range of other factors before concluding that there had been no violation. First, it noted that the authorities had clearly consulted the community to which the complainants belonged in drawing up logging plans. Second, it found that in the consultation the community did not react negatively to these plans. Third, the State had been able to prove that the authorities had completed the process of 'weighing [up] the complainants' interests and the general economic interests in the area' during the decision-making process. Fourth, the HRC noted that the national courts had considered specifically whether the proposed activities constituted a denial of rights under Article 27. Having considered these four factors, the HRC concluded that it was 'not in a position to conclude, on the evidence before it, that the impact of logging plans would be such as to amount to a denial of the authors' rights under Article 27 or that the finding of the Court of Appeal affirmed by the Supreme Court, misinterpreted and/or misapplied article 27 of the Covenant in the light of the facts before it'.⁷¹²

In *Apirana Mahuika v New Zealand*,⁷¹³ the HRC clarified its notion of the test it was applying in order to assess whether or not an alleged violation of Article 27 had occurred. It stated that 'the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy'.⁷¹⁴ The case concerned a settlement between New Zealand and the Maoris to regulate all Maori fishing rights and interests, partly in replacement of an existing treaty between the State and the Maori. The complainants had not been part of an extensive process of negotiations on the settlement.⁷¹⁵ However, the facts demonstrated that New Zealand had engaged in a process of broad consultation before going on to legislate and had paid specific attention to the sustainability of Maori fishing activities. The Maori were given access to a great percentage of quotas under the settlement, and thus effective possession of fisheries was returned to them. With regard to

⁷¹² *Jouni E. Länsman et al. v Finland*, para 10.5.

⁷¹³ *Apirana Mahuika et al. v New Zealand*.

⁷¹⁴ *Ibid* para 9.5.

⁷¹⁵ *Ibid* para 5.8.

commercial fisheries, the settlement established a control system in which Maori shared not only the role of safeguarding their interests in fisheries, but also their effective control. As regards non-commercial fisheries, the Crown obligations under the Treaty of Waitangi continued, and regulations were made to recognise and provide for customary food gathering. Based on these facts, the HRC was unable to find that the cultural rights of the complainants had been denied. It then went on to consider the participation limb of the test. As with the *Länsman* cases, the authorities had proven that special attention had been paid to the cultural significance of the traditional activities of the complainants. The HRC held that by engaging in the process of broad consultation before legislating, and by paying specific attention to the sustainability of Maori fishing activities, the State had taken the necessary steps to ensure that the settlement and its enactment through legislation were compatible with Article 27.⁷¹⁶

The HRC concluded all the above cases with a statement that basically warned the respondent State that compliance with Article 27 was a continuous process involving systematic consideration of the impact of the State's activities and the activities of private actors on the enjoyment of cultural rights by minorities. In *Ilmari Länsman* it even suggested that the very activities that were subject of the communication could give rise to a violation in different circumstances: it stated that if mining activities in the Angeli area were approved on a large scale and significantly expanded by those companies to which permits had been issued, then this might constitute a violation of the complainant's right under Article 27. It reiterated that 'future economic activities must, in order to comply with Article 27, be carried out in a way that the authors continue to benefit from reindeer husbandry',⁷¹⁷ and that the State party was 'under a duty to bear this in mind when either extending existing contracts or granting new ones'.⁷¹⁸ Similarly, in *Apirana Mahuika* the Committee clarified that in the further implementation of the relevant legislation the State was obliged to bear in mind that 'measures affecting the economic activities of Maori must be carried out in a way that the authors continue to enjoy their culture, and profess and practice their religion in community with other members of their group'.⁷¹⁹ It went even further in *Jouni E. Länsman*, by adding that,

The Committee is aware, on the basis of earlier communications, that other large-scale exploitations touching upon the natural environment, such as quarrying, are being planned and

⁷¹⁶ Ibid para 9.6.

⁷¹⁷ *Ilmari Länsman et al. v Finland* para 9.8.

⁷¹⁸ Ibid.

⁷¹⁹ *Apirana Mahuika et al. v New Zealand* para 9.9.

*implemented in the area where the Sami people live. Even though in the present communication the Committee has reached the conclusion that the facts of the case do not reveal a violation of the rights of the authors, the Committee deems it important to point out that the State party must bear in mind when taking steps affecting the rights under Article 27, that though different activities in themselves may not constitute a violation of this article, such activities, taken together, may erode the rights of Sami people to enjoy their own culture.*⁷²⁰

These views do not just indicate the broader objective of compliance with human rights obligations, but are also a clear demonstration of an application of the principle embodied in Article 15 of the ARS (i.e. that a violation may consist of a composite act or practice). It is clear from the jurisprudence discussed here that obligations arising under Article 27 (which often echo the norms embodied in Art. 1) are positive and negative, thus presumably overlapping in part with the obligations under the rights to life, health and self-determination. In other words, all these rights could be taken to impose obligations on States to take legislative and other measures to achieve the standards of protection required under each of these rights. The participation dimension of the right under Article 27 is to be read in conjunction with Article 1 of the Covenant, and may therefore point towards an obligation to ensure that affected people are able to participate in decision-making on climate change at all levels. Although States may have acted in accordance with Article 27 and Article 1 obligations by admitting indigenous peoples organisations as observers (with some participation rights) to international climate negotiations under the UNCCC,⁷²¹ the extent to which this meets the requirements of participation in decision-making has not yet been analysed.

It is important to note that the interpretation of Article 27 by the HRC is indicative of a minimum level of protection guaranteed under Article 27. In the context of the Covenant this can be understood as the ‘core’ of the right which must be protected at all times.⁷²² Given the effects of climate change on the ability of minorities to benefit from culturally significant activities, the approval of activities that cause these effects could lead to a finding of State responsibility for a violation of the right.

⁷²⁰ *Jouni E. Länsman et al. v Finland* para 10.7.

⁷²¹ On public participation in international climate change negotiations, see for example Michele Betsill, ‘Environmental NGOs meet the Sovereign State: The Kyoto Protocol Negotiations on Global Climate Change’ (2002) 13 *Colo. J. Int'l Envtl. L. & Pol'y* 49.

⁷²² See the discussion in ch 2 on the nature of obligations under the ICCPR.

3.3.4 The Right to the Highest Attainable Standard of Health

The Preamble to the WHO Constitution adopted in 1946 recognises that the ‘enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being’.⁷²³ A more often cited expression of the human right to health is found in Article 12 of the ICESCR,⁷²⁴ and in special human rights treaties such as the ICERD,⁷²⁵ the CEDAW,⁷²⁶ the CRC,⁷²⁷ ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989),⁷²⁸ the CMW,⁷²⁹ and the CRPD.⁷³⁰

At the regional level, the right to health is contained in Article 16 of the ACHPR⁷³¹ and reiterated in an ACHOR Protocol on violence against women,⁷³² and the African Charter on the Rights and Welfare of the Child.⁷³³ In the Inter-American context the right is contained in Article 10 of the Protocol of San Salvador,⁷³⁴ and in the European context both the European Social Charter (ESC)⁷³⁵ of the Council of Europe as well as the Charter of Fundamental Rights (CFR) of the European Union⁷³⁶

⁷²³ Constitution of the World Health Organization (WHO) (adopted 22 July 1946, entered into force 7 April 1948) 14 UNTS 185 (Constitution of the WHO).

⁷²⁴ ICESCR Art 12. The provision reads as follows: 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

⁷²⁵ ICERD Art 5(e)(iv).

⁷²⁶ CEDAW Arts 11(1)f, 12 and 14(2)b.

⁷²⁷ CRC Art 24.

⁷²⁸ ILO Convention No. 169 (adopted at the 76th General Conference of the International Labour Organization on 27 June 1989, entered into force 5 Sept. 1991) 1650 UNTS 384 (‘ILO Convention No. 169’) Arts 7, 20, 25, and 30.

⁷²⁹ CMW Art 28.

⁷³⁰ CPRD Arts 25 and 26.

⁷³¹ Art 16, ACHPR provides that ‘Every individual shall have the right to enjoy the best attainable state of physical and mental health’.

⁷³² Protocol to the ACHPR on the Rights of Women in Africa (adopted by the 2nd Ord. Sess. of the Assembly of the African Union, Maputo on 13 Sept. 2000, entered into force 25 Nov 2005) AU Doc CAB/LEG/66.6 (‘Protocol to the ACHPR on the Rights of Women in Africa’) Art 14.

⁷³³ African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 Nov 1999) OAU Doc CAB/LEG/24.9/49 (1990) (‘African Charter on the Rights and Welfare of the Child’) Arts 14, 11(2)(h).

⁷³⁴ Protocol of San Salvador, Art 10 provides that ‘Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being ... [and that] ... In order to ensure the exercise of the right to health, the States Parties agree to recognize health as a public good....’

⁷³⁵ European Social Charter (adopted 18 Oct. 1961, entered into force 26 Feb. 1965) 529 UNTS 89; revised and adopted as European Social Charter (entered into force 7 Jan. 1999) ETS No. 163 (‘ESC’) Arts 11 and 13.

⁷³⁶ Charter of Fundamental Rights of the European Union (adopted 7 Dec. 2000, entered into force 1 Dec. 2009) reprinted in *Official Journal of the European Communities*, 18 Dec. 2000 (OJ C 364/01) (CFR) Art 35.

contain the right to health. The Arab CHR of the League of Arab States also recognises the right to health.⁷³⁷ Finally, the Organization of Islamic States (OIC) has endorsed the human right to health in the Cairo Declaration on Human Rights in Islam.⁷³⁸ The human right to health is now generally accepted as part of customary international law.⁷³⁹ This conclusion is based on the widespread ratification of human rights treaties and other instruments containing the right to health, and on the commitment of governments to the provision of health care services pursuant to national legislation.⁷⁴⁰

The CESCR has emphasised that although ‘the right to health is not to be understood as a right to be *healthy*’,⁷⁴¹ it nonetheless creates States’ obligations.⁷⁴² The CESCR has emphasised that ‘Health is a fundamental human right indispensable for the exercise of other human rights’.⁷⁴³ The text of Article 12 of the CESCR (and of Art. 24, CRC) make it clear that the general scope of the right extends beyond the provision of health care, and includes provision for the general conditions for health such as ‘adequate supply of safe and potable water and basic sanitation; the prevention and reduction of the population’s exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health’.⁷⁴⁴ Mirroring the language of Article 25(1) of the UDHR, the right to health is defined in Article 12(1) of the ICESCR as a right of ‘everyone’. The CESCR has confirmed that the right is a right of ‘Every human being’.⁷⁴⁵ In accordance with Articles 2(2) and 2(3) of the ICESCR the enjoyment of the right should be non-discriminatory.⁷⁴⁶ It is significant that commentators consider that this may mean ‘providing equal opportunities when past developments have caused serious inequalities to arise’.⁷⁴⁷

In its study on climate change and human rights, the OHCHR notes that ‘Climate change is projected to affect the health status of millions of people, including through increases in malnutrition,

⁷³⁷ Arab CHR, Arts 38–39.

⁷³⁸ See Art 17 of the Cairo Declaration on Human Rights in Islam, adopted at the 14th Islamic Conference of Foreign Ministers, Res. No. 49/19-P (1990). See also, Art 15 of the Covenant on the Rights of the Child in Islam (adopted in June 2005 at the 32nd Islamic Conference of Foreign Ministers in Sana'a, Republic of Yemen, not yet in force) OIC Doc OIC/9-IGGE/HRI/2004/Rep. Final (2004).

⁷³⁹ Kinney (n 154) 1464–67 and 1475.

⁷⁴⁰ Ibid 1466.

⁷⁴¹ *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12)* para 8.

⁷⁴² Ibid paras 30–45.

⁷⁴³ Ibid para 1.

⁷⁴⁴ Ibid para 15.

⁷⁴⁵ Ibid.

⁷⁴⁶ *General Comment No. 14: Nuclear Weapons and the Right to Life (Article 6)* para 35.

⁷⁴⁷ Asbjørn Eide, ‘The Right to an Adequate Standard of Living Including the Right to Food’ in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights* (Martinus Nijhoff 2001) 144.

increased diseases and injury due to extreme weather events, and an increased burden of diarrhoeal, cardio-respiratory and infectious diseases. Global warming may also affect the spread of malaria and other vector borne diseases in some parts of the world'.⁷⁴⁸ The report goes on to note that 'Non-climate related factors, such as education, health care [and] public health initiatives are critical in determining how global warming will affect the health of populations. Protecting the right to health in the face of climate change will require comprehensive measures, including mitigating the adverse impacts of global warming on underlying determinants of health and giving priority to protecting vulnerable individuals and communities'.⁷⁴⁹ Hunt has also drawn attention to the impacts of climate change on the right to health in his capacity as a Special Rapporteur on the Right of Everyone to the Enjoyment of Physical and Mental Health; a post created by the UN Commission on Human Rights in 2002.⁷⁵⁰ In his report to the 62nd General Assembly he lists several impacts of climate change on the right to health, including a decline in dependable access to water; disruption in natural ecosystems; increases in the range and season of disease-spreading vectors; and various adverse health impacts of droughts and floods.⁷⁵¹ He claims that 'The failure of the international community to take the health impact of global warming seriously will endanger the lives of millions of people across the world'.⁷⁵²

Rising temperatures and sea levels, droughts, desertification, heatwaves and extreme weather events⁷⁵³ indeed have significant impacts on the right to the highest attainable standard of health and related human rights. Globally, an estimated 1.8 billion people run the risk of having to live in a water-scarce environment by 2080 as a consequence of climate change.⁷⁵⁴ Water-borne and vector-borne diseases such as cholera, malaria, hantavirus, dengue fever, scrub typhus and schistosomiasis are expected to increase as a result of temperature and geographic changes that are causally linked with

⁷⁴⁸ OHCHR Report on Climate Change and Human Rights (n 36) para 32 (footnotes omitted).

⁷⁴⁹ Ibid para 34 (footnotes omitted).

⁷⁵⁰ UN Commission on Human Rights, Res. No. 2002/31 (2002).

⁷⁵¹ Paul Hunt, 'Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, UN Doc A/62/214 (8 August 2007)' 45379 1, 22 (paras 100–101).

⁷⁵² Ibid para 102.

⁷⁵³ These impacts are described in several studies. See, for example, The Informal Taskforce on Climate Change of the Inter-Agency Standing Committee and The International Strategy for Disaster Reduction Disaster Risk Reduction Strategies and Risk Management Practices, "Critical Elements for Adaptation to Climate Change. Submission to the UNFCCC Ad hoc Working Group on Long Term Cooperative Action" (11 Nov 2008) p 1.

⁷⁵⁴ Ibid 95.

climate change.⁷⁵⁵ Africa and Asia are the world regions worst affected by climate change impacts on heat and cold-related illnesses, estimated to have caused 35,000 additional deaths a year in 2010.⁷⁵⁶ Several climate-sensitive infections are already resurfacing⁷⁵⁷ together with conditions which are increasingly conducive for mosquitoes, and the increased transmission risks and highland epidemics.⁷⁵⁸ The World Health Organisation (WHO)'s World Malaria Report 2011 notes that thirty-five countries in central Africa bear the highest burden of cases (over 80 per cent) and deaths (over 90 per cent).⁷⁵⁹ The population at risk of malaria in Africa is projected to grow by 170 million by 2030,⁷⁶⁰ and vulnerable groups such as children,⁷⁶¹ the elderly, and pregnant women⁷⁶² will be hardest hit. The vulnerability of these groups is also high in relation to cholera. The WHO attributes this increase in significant part to the increasing occurrence of extreme weather events which undermines transmission pathways.⁷⁶³

Farming societies at lower latitudes will face decreasing crop productivity even from small local temperature increases. Africa is generally recognised as the world's most vulnerable region in terms of climate change impacts on agricultural produce⁷⁶⁴ and fishery losses.⁷⁶⁵ This is due to 'the range of projected impacts, multiple stresses and low adaptive capacity'.⁷⁶⁶ In West, East and Sub-Saharan Africa the median temperature increase is expected to be between 3° C and 4° C, roughly 150 per cent of the global mean temperature rise.⁷⁶⁷ Experiments within higher emission scenarios even project levels of warming for the period 2070–2099 of up to 9° C for North Africa (Mediterranean coast) in June to August, and up to 7° C for Southern Africa in September to November.⁷⁶⁸ Droughts in

⁷⁵⁵ Intergovernmental Panel on Climate Change, 'Contribution of Working Group I to the IPCC Fourth Assessment Report' in S. Solomon *et al.* (eds), *Climate Change 2007: The Physical Science Basis* (CUP 2007) 48; World Health Organization, *Protecting Health from Climate Change: Connecting Science, Policy and People* (2009) 7.

⁷⁵⁶ World Health Organization (n 755) 161.

⁷⁵⁷ *Ibid.*

⁷⁵⁸ *Ibid.*

⁷⁵⁹ World Health Organization, *World Malaria Report 2011* (2011) 35.

⁷⁶⁰ Intergovernmental Panel on Climate Change, 'Contribution of Working Group I to the IPCC Fourth Assessment Report' (n 755) 439.

⁷⁶¹ World Health Organization, *Protecting Health from Climate Change: Connecting Science, Policy and People* (n 755) 16.

⁷⁶² Intergovernmental Panel on Climate Change, 'Contribution of Working Group I to the IPCC Fourth Assessment Report' (n 755) 446.

⁷⁶³ World Health Organization and World Meteorological Organization, *Atlas of Health and Climate* (2012) at 14.

⁷⁶⁴ Climate Vulnerability Forum, *2nd Climate Vulnerability Monitor: A Guide to the Cold Calculus of a Hot Planet* (2012) 178.

⁷⁶⁵ *Ibid.*

⁷⁶⁶ *Ibid.*

⁷⁶⁷ Intergovernmental Panel on Climate Change, 'Contribution of Working Group II to the IPCC Fourth Assessment Report' (n 113) 443.

⁷⁶⁸ *Ibid.*

Sub-Saharan Africa are occurring more frequently and lasting longer.⁷⁶⁹ Crop yields could drop across large regions of sub-Saharan Africa by as much as 50 per cent by 2020.⁷⁷⁰ Studies carried out in 2011 show that a temperature rise of just 1° C. (much less than what is currently projected even under the most optimistic scenarios) could cut yields from three-quarters of Africa's entire maize crop by at least 20 per cent.⁷⁷¹ These impacts increase the risk of malnutrition: the estimated result of droughts and rising temperatures in Africa is that tens of millions more individuals are likely to be exposed to the risk of food insecurity and the health consequences of malnutrition.⁷⁷²

The obligations arising from the right to health are understood as including 'immediate obligations ... [to] ... guarantee that the right will be exercised without discrimination of any kind' and to take steps 'towards the full realization' of the right that 'must be deliberate, concrete and targeted towards the full realization of the right to health'.⁷⁷³ To clarify the content of States' obligations, the CESCR has used a respect-protect-fulfil typology of obligations that arise from the right to health.⁷⁷⁴ It understands the obligation to 'respect' the right as 'an obligation of States to respect the freedom of individuals and groups to preserve and to make use of their existing entitlements'.⁷⁷⁵ States are therefore obliged to ensure 'the effective implementation of the obligations arising from other human rights provisions: the right to property, the right to work with an adequate income, and/or the right to social security',⁷⁷⁶ and to guarantee and uphold the collective land rights of indigenous peoples.⁷⁷⁷ The CESCR has interpreted the right to health as requiring respect for the right to health of a people within a State's territory and in other States,⁷⁷⁸ entailing an obligation 'to refrain from unlawfully polluting air, water and soil, e.g. through industrial waste from State-owned facilities'.⁷⁷⁹ Commentators consider that the right could be violated 'if a state encroaches upon people's health by, for example [...] engaging

⁷⁶⁹ Ibid.

⁷⁷⁰ World Health Organization, *Protecting Health from Climate Change: Connecting Science, Policy and People* (n 755) 20.

⁷⁷¹ Ibid.

⁷⁷² Ibid.

⁷⁷³ *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12)* para 30.

⁷⁷⁴ Ibid para 15. This typology is based on the work of the former Special Rapporteur on the Right to Food, Asbjørn Eide. See Asbjørn Eide, 'Economic, Social and Cultural Rights as Human Rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights* (2nd edn, Martinus Nijhoff 2001) 23–25.

⁷⁷⁵ Eide, 'Economic, Social and Cultural Rights as Human Rights' (n 774) 142.

⁷⁷⁶ Ibid.

⁷⁷⁷ Ibid.

⁷⁷⁸ *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12)* para 39.

⁷⁷⁹ Ibid para 34.

in [...] [environmental] activities detrimental to people's health'⁷⁸⁰ and, in the context of climate change, by actively engaging in 'activities that harm the composition of the global atmosphere or arbitrarily interfere with healthy environmental conditions'.⁷⁸¹ The obligation to protect the right to health involves 'the preservation of existing entitlements or resource bases', including regulation⁷⁸² and through legal or political means, in accordance with the UN Charter and applicable international law.⁷⁸³ States must prevent 'encroachment on the land of indigenous peoples or vulnerable groups',⁷⁸⁴ 'ensure food availability, regulation of food prices and subsidies, and rationing of essentials while ensuring producers a fair price',⁷⁸⁵ and prevent private enterprises from engaging in environmental pollution 'especially when it contaminates the food chain'.⁷⁸⁶ The literature claims, correctly in the view of this author, that States' obligations to protect the right against infringements by private actors entails an obligation to regulate private actors in order to achieve and uphold emission limitation and reduction standards,⁷⁸⁷ and to adopt and implement 'laws, plans, policies, programmes and projects that tackle the adverse effects of climate change'.⁷⁸⁸ Indeed, the CESCR has interpreted the right to health as requiring that States ensure that international instruments 'do not adversely impact upon the right to health'.⁷⁸⁹ This again implies an obligation to assess the impacts of potential climate agreements on the enjoyment of human rights before concluding such agreements and refraining from concluding agreements that lead to infringements of the right or a impaired enjoyment of that right.

The ACHPR decision in *SERAC v Nigeria* illustrates how a violation of the right to health can arise from a State's failure to regulate private actors engaged in polluting activities.⁷⁹⁰ This decision, and the CESCR's interpretation of Article 12 of the ICESCR, illustrate how the right to health requires

⁷⁸⁰ Toebe (n 22) 180.

⁷⁸¹ Paul H Hunt and Rajat Khosla, 'Climate Change and the Right to the Highest Attainable Standard of Health' in Stephen Humphreys (ed), *Climate Change and Human Rights* (CUP 2009) 252.

⁷⁸² See Eide, 'Economic, Social and Cultural Rights as Human Rights' (n 774) 143. See also *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12)* para 35.

⁷⁸³ *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12)* para 39.

⁷⁸⁴ Eide, 'Economic, Social and Cultural Rights as Human Rights' (n 774) 143.

⁷⁸⁵ *Ibid* 144.

⁷⁸⁶ CESCR, Concluding Observations on the Russian Federation, UN Doc E/1998/22 (1997) para 124.

⁷⁸⁷ Hunt and Khosla (n 781) 252. Inspiration may also be drawn from the *Minors Oposa* decision of the Philippine Supreme Court, which decided that on the basis of the rights to health and ecology contained in the Philippines Constitution the Philippine government had to protect the population against the impacts of rainforest logging activities. *Juan Antonio Oposa, et al. v the Honorable Fulgencio Factoran Jr., Secretary of the Department of the Environment and Natural Resources et al.*

⁷⁸⁸ Hunt and Khosla (n 781) 255.

⁷⁸⁹ *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12)* para 39.

⁷⁹⁰ *Ibid* para 50.

States to provide beneficiaries of the right with information about serious health risks. Indeed, the State's failure to produce basic health and environmental impact assessments was a significant factor in establishing a violation of the right to health.⁷⁹¹ This requirement relates both to the prevention of environmental harm and to the ability of beneficiaries to protect themselves against associated health risks. This dimension is closely related to what the CESCR describes as the obligations to 'fulfill' the right to health; a positive obligation that is triggered 'whenever an individual or group is unable, for reasons beyond their control' to enjoy the right 'by the means at their disposal'. It also mentions 'victims of natural or other disasters'⁷⁹² as persons who may need additional protection. It basically requires that the State 'be the provider', which 'can range anywhere from a minimum safety net, providing that it keeps everyone above the poverty line appropriate to the level of development of that country, to a full comprehensive welfare model...'⁷⁹³ According to the CESCR, States must give 'sufficient recognition to the right to health in the national political and legal systems, preferably by way of legislative implementation',⁷⁹⁴ and must allocate 'a sufficient percentage of a State's available budget [...] to the right to health'.⁷⁹⁵ States are required to adopt measures against environmental and occupational health hazards,⁷⁹⁶ and a coherent national policy to minimise the risk of occupational accidents and diseases, which must be formulated, implemented and periodically reviewed.⁷⁹⁷ National policies to reduce and eliminate air, water and soil pollution should be formulated and implemented.⁷⁹⁸ The right to health must be given 'due attention in international agreements' and may require, in the view of the CESCR, 'the development of further legal instruments'. States are also required to 'facilitate access to essential health facilities, goods and services in other countries, wherever possible and [to] provide the necessary aid when required'.⁷⁹⁹ This is interpreted as an obligation on high-

⁷⁹¹ Ibid.

⁷⁹² *General Comment No. 12: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: The Right to Adequate Food (Art 11)* para 15.

⁷⁹³ Eide, 'The Right to an Adequate Standard of Living Including the Right to Food' (n 747) 145.

⁷⁹⁴ *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12)* para 36.

⁷⁹⁵ See, for example, CESCR, *Concluding Observations on Chile*, UN Doc E/C.12/1988/SR.13, para 12 and CESCR, *Concluding Observations on North Korea*, UN Doc E/C.12/1987/SR.22, paras 5 and 17. See also, Curtis Doebbler and Flavia Bustreo, 'Making Health an Imperative of Foreign Policy: The Value of a Human Rights Approach' (2010) 12 *Health and Human Rights Journal* 47, 53.

⁷⁹⁶ *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12)* paras 36–37.

⁷⁹⁷ Ibid.

⁷⁹⁸ Ibid.

⁷⁹⁹ Ibid para 39. See also, Doebbler and Bustreo (n 795) 53 (stating that the right to health 'encourages a world order in which donor states can point out human rights obligations to recipient countries, while recipient countries can point out the

income States to facilitate access to essential health service as well as assistance to adapt to climate change in low-income States.⁸⁰⁰ Once again, the parallel obligations contained in the UNFCCC could serve as a bottom line in the interpretation of these obligations.

duties to cooperate to ensure human rights, including the obligations for providing adequate resources that are incumbent upon donor countries’).

⁸⁰⁰ Hunt and Khosla (n 781) 252.

3.4 Conflict Between Rights

The analysis of rights has confirmed what has long been observed in the analysis of human rights jurisprudence, namely that there are ‘more extensive obligations on States than are immediately obvious from a superficial perusal of the text’. In particular, compliance with human rights obligations may involve more than just regulation, and require ‘actual expenditure and the deployment of resources to ensure that the right can be freely exercised “without interference from private individuals”’.⁸⁰¹ In the worst case scenario this could mean ‘considerable trouble and expense as a result of an obligation to advance particular social or economic policies which [the government of a particular State] may not wholly support’.⁸⁰² Indeed, even negatively formulated rights trigger obligations to take measures that are ‘deliberate, concrete and targeted as clearly as possible towards meeting human rights obligations’.⁸⁰³ At the same time, rights can conflict, especially in the context of a global problem that is entwined with virtually all aspects of the modern society. Humphreys is concerned that conflicting rights could undermine the potential of international human rights law to protect human beings against adverse effects of climate change, and sustains that ‘it is foreseeable that some [economic rights holders] will invoke the human right to property or peaceful enjoyment of their possessions to prevent or reduce action on climate change [...]’.⁸⁰⁴ This raises the question of how the content of States’ human rights obligations should be determined in cases of conflicting rights related to climate change. The fact that artificial entities such as corporations do not have rights under international human rights treaties means that this question can only be answered by reference to States’ obligations owed to peoples and individuals.⁸⁰⁵ At the same time, States’ human rights obligations extend to beneficiaries

⁸⁰¹ Andrew Clapham, *Human Rights in the Private Sphere* (Clarendon Press 1993) 345.

⁸⁰² Merrills (n 74) 106.

⁸⁰³ CESCR, *General Comment No. 3*, para 2. The general principle concerning limitations of rights is contained in Art 29(2) of the UDHR, which states that ‘In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely 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’.

⁸⁰⁴ Humphreys, *Climate Change and Human Rights: A Rough Guide* (n 31) 5.

⁸⁰⁵ This question merits separate analysis in the regional context, where corporations and organisations are sometimes recognised as beneficiaries of human rights treaties. See, for example, *Sunday Times v UK* (1980) 2 EHRR 317, *Refah Partisi (The Welfare Party) v Turkey* (2003) 37 EHRR 1 and *OAO Neftyanaya Kompaniya Yukos v Russia* App no 14902/04 (ECtHR, 17 Jan 2012).

everywhere irrespective of their location or nationality⁸⁰⁶ insofar as beneficiaries are affected by the State's instrumentalities (see Section 2.2.2). Situations of conflicting rights at any level, national or global, must therefore be resolved through an analysis of the States' sovereign capacity to prevent the violation of a right but without violating other human rights in the process.⁸⁰⁷ This analysis necessarily involves an analysis of the scope of States' obligations related to the substantive rights at stake, in view of their object and purpose.

It is important to recall that the limitations of certain rights are spelt out in detail. For example, imposing the death penalty in certain cases, killing during armed conflicts and the use of reasonable force by law enforcement agents are identified as the only possibly lawful limitations on the right to life. These specific limitations contrast with the much broader limitations permitted in relation to economic and social rights. In relation to the right to property, it is important to note that it has possibly the widest range of potentially permitted limitations of all human rights.⁸⁰⁸ However, States' discretion to interfere with the enjoyment of a right is again limited in cases where the interference simultaneously interferes with other rights. This reflects the conclusion of the 1993 Vienna World Conference on Human Rights that 'All human rights are universal, indivisible, interdependent and interrelated',⁸⁰⁹ already alluded to in Section 2.1.

There are plenty of examples of how established limitations of human rights affect States' obligations in cases where rights conflict. A good example is the ECtHR case *Mastromatteo v Italy*,⁸¹⁰ in which the ECtHR carried out a risk assessment to establish whether obligations to protect the right to life had been complied with. The case considered the compatibility of a prisoner release scheme with Article 2 of the ECHR and arose from a claim that the State had violated its positive obligations to protect the right to life as a result of the risk created by prisoners who were released through the scheme. The Court scrutinised the key features of the scheme—including statistical evidence on the behaviour of prisoners granted early release—and extrapolated from these that the authorities could not

⁸⁰⁶ Cf de Schutter *et al.* (n 144) (with the latest of the comprehensive set of Principles (No. 44) stating that 'These principles on the extraterritorial obligations of States may not be invoked as a justification to limit or undermine the obligations of the State towards people on its territory').

⁸⁰⁷ The author would like to thank Martin Scheinin, who has formulated this point so clearly both orally and in writing.

⁸⁰⁸ For example, Art 21(2) of the ACHR provides that 'No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law'.

⁸⁰⁹ Vienna Declaration and Programme of Action para 26.

⁸¹⁰ *Mastromatteo v Italy*, App no 37703/99 (ECtHR, 24 Oct 2002).

have foreseen that the release of this particular prisoner would pose a real threat to life.⁸¹¹ Accordingly, it found no violation. It is worth noting that the case was decided solely with reference to the States' obligations to protect the right to life: neither the government in its submissions, nor the Court in its judgement referred to a potential conflict between the applicant's right to life and the prisoners' right to liberty. This is based on the understanding that the right to liberty can be limited through criminal law which, in the light of the evidence, made the continued interference with the right that would have occurred if the prisoner had remained in presumably lawful detention.⁸¹² Based on this presumption, the question before the Court centred on the extent of the interference with the right to liberty that was *required* to protect the right to life. In the context of climate change, apparent conflicts between rights could also be easy to resolve where it is clear from the context that one right (e.g. the right to property) is subject to broad permitted limitations, whereas another right (e.g. the right to life) is not. *Mastromatteo v Italy* also confirms that analyses of relatively complex evidence can be used to clarify the content of positive obligations. This in turn indicates a potential for reliance on existing scientific evidence of climate change-related risks to human life, well-being and culture to establish the content of States' obligations to prevent and avert those risks.

Treaty texts provide further guidance on how to deal with situations of conflicting rights. For example, as noted above, Article 47 of the ICCPR and Article 35 of the ICESCR provide that nothing in the Covenants 'shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources'. The jurisprudence of the HRC furthermore suggests that States' obligations under Article 1 can influence the interpretation of other Covenant provisions, and the case of *Gillot v France* demonstrated that Article 1 may be invoked not just to reinforce other rights, but also to justify limitations to the exercise of the rights of individuals where the limitation is a reasonable measure to promote the collective right of self-determination.⁸¹³ This interpretation reflects

⁸¹¹ Ibid 76.

⁸¹² The case of *Tim de Christopher* illustrates, however, that the criminal law can also be abused to restrict the right to liberty of peaceful protestors. On this case see <http://www.peacefuluprising.org>.

⁸¹³ *Marie-Hélène Gillot et al. v France* (Communication No. 932/2000) para 3.16. This finding is significant in view of the Committee's position that Art 1 cannot be invoked by individuals in communications submitted under the individual complaints procedure. *General Comment No. 23: The Rights of Minorities (Art 27)* para 3.1; HRC, *Ivan Kitok v Sweden* (Communication No. 197/1985) HRC para 6.3; *Ominayak and the Lubicon Lake Band v Canada*, para 13.3; *Marshall v Canada* (Communication No. 205/1986) (also known as Second communication by *Mikmaq Tribal Society v Canada*) para 5.1 and *Apirana Mahuika et al. v New Zealand* para 9.2. This restrictive approach has been criticised: Nowak, for example, asserts that in spite of the fact that the Covenant is formulated "more individualistically" than some other human rights treaties, 'both the *travaux préparatoires* and the purpose of [the Covenant provisions] show [...] that the choice of the word "individual" does not necessarily rule out that certain collectivities (religious societies, associations, parties, trade unions,

the principle that measures ‘aimed at correcting conditions which prevent or impair the enjoyment of [human rights] may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria’.⁸¹⁴ It is also clear that under international human rights law, ‘positive action [required to promote a right] 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’.⁸¹⁵

Another relevant principle for dealing with potentially conflicting rights is the principle of non-discrimination. International human rights law permits and sometimes requires ‘some sort of privileged treatment [...] in order to achieve real equality’.⁸¹⁶ This broader objective of achieving substantive equality, as manifested and operationalised through the principle of non-discrimination, is particularly important in the context of climate change. The principle basically prescribes that a State may have to treat right-holders who are in different positions differently, if treating them similarly would perpetuate inequalities.⁸¹⁷ Human rights jurisprudence shows⁸¹⁸ that the principle is capable of creating positive obligations in relation to all human rights.⁸¹⁸ The CESCR has emphasised that in the context of the right to health, the non-discrimination principle entails an obligation for States to take affirmative measures particularly to ensure this right for women, children and adolescents, the elderly, persons with disabilities and indigenous peoples.⁸¹⁹ In *Lubicon Lake Band v Canada*,⁸²⁰ the HRC held that ‘historical inequities and certain more recent developments’ threatened the way of life and culture of the Lubicon Lake Band in violation of Article 27,⁸²¹ thus indicating that the combination of historical

minorities) may rely on the Covenant’s rights of relevance to them and enforce these by means of an “individual communication”). Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (n 166) 14.

⁸¹⁴ *General Comment No. 23: The Rights of Minorities (Art 27)* para 6.2. This principle was decisive in the HRC’s Views on a communication concerning an alleged violation of Art 25 (public participation). The HRC found that State conduct that limited the right of public participation of certain citizens could be justified where this limitation was a reasonable measure to promote the collective right of self-determination. *Marie-Hélène Gillot et al. v France*, para 3.16.

⁸¹⁵ *General Comment No. 12: The Right to Self-Determination of Peoples (Art 1)* para 6.

⁸¹⁶ Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (n 166) 662.

⁸¹⁷ See also, United Nations Development Programme (n 2) 147 (suggesting that developed States that do not respect the CBDRRRC principle act contrary to their international commitments on poverty reduction).

⁸¹⁸ See generally Curtis Francis Doebbler, *The Principle of Non-Discrimination in International Law* (CD Publishing 2007). See also, de Schutter *et al.* (n 144) 1086; and Miriam Alfie Cohen, ‘Affirmative Action and the Equality Principle in Human Rights Treaties: United States’ Violation of Its International Obligations’ (2002) 43 *Virginia Journal of International Law* 249.

⁸¹⁹ *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12)* paras 21–27.

⁸²⁰ *Ominayak and the Lubicon Lake Band v Canada*.

⁸²¹ *Ibid* para 33.

inequities and developments that perpetuate those inequities can constitute a breach of human rights obligations. States acquire positive obligations to protect minorities because equality ‘cannot be achieved by mere State obligations of non-interference, since experience shows that minorities, and indigenous peoples in particular, are not only threatened by government action but equally by other, more dominant [...] groups, by businesses and similarly powerful private actors’.⁸²² Indeed, the analysis in Section 3.3.3 has shown that international human rights law requires affirmative measures to protect peoples and members of minorities with a distinct culture, also through consultation on measures that may interfere with these traditional economies. These interpretations suggest that differentiation between beneficiaries of human rights may potentially be used in any situation of conflicting rights that exists or emerges as a result of climate change and associated effects on the distribution of public and private resources.

The decision of the European Committee on Social Rights (‘the Committee’) on a complaint against France in a discrimination case is a useful illustration of how compliance with ‘best effort’ obligations that arise from the overarching prohibition of discrimination can be assessed in cases where realisation on the right places a considerable burden on a State’s resources. The case, *Autism-Europe v France*, arose from a complaint that France was failing to take sufficient measures to guarantee equality in access to education for individuals suffering from autism, in violation of the right of persons with disabilities to independence, social integration and participation in the life of the community (Art. 15), the right of children to education and training (Art. 17(1)), and the prohibition of discrimination (Art. E, Part V). After noting that ‘failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all’⁸²³ the Committee found that the substantive rights and the prohibition of discrimination were ‘so intertwined as to be inseparable’.⁸²⁴ It found a violation of the three provisions in question based on the *ratio* that the Charter required States

[T]o take not merely legal action but also practical action to give full effect to the rights recognised in the Charter. When the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of resources. States Parties must be

⁸²² Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (n 166) 662.

⁸²³ *Autism-Europe v France* Complaint No. 13/2002 (4 Nov 2003) para 27.

⁸²⁴ *Ibid* para 47.

*particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities.*⁸²⁵

The decision in *Autism-Europe v France* illustrates an important point, namely that positive obligations arising from the prohibition of discrimination can be exercised in a way that reconciles the immediate nature of those obligations with concurring obligations and in so doing ensures the realisation of potentially competing rights. This reflects a standard that could be meaningfully used to reconcile States' obligations to protect peoples and individuals against the adverse effects of climate change with co-existing obligations to protect the equal rights of those who have obtained negligible benefits from emission-producing activities.⁸²⁶ *Autism-Europe v France* shows how obligations identified using such a standard are enforceable, and more specifically that the right not to be discriminated against in the enjoyment of rights can be violated 'when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different'.⁸²⁷

We should note, however, that evidential difficulties almost inevitably arise in determining the scope of States' obligations when conflicts between rights involve beneficiaries within the State's territory as well as a potentially never-ending number of beneficiaries abroad. Part of the answer lies in acknowledging that 'Because of their direct knowledge of their society and its needs' it is often 'for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures [that may limit the enjoyment of a particular human right]'.⁸²⁸ As indicated in Chapter 1, some States have already presented evidence of the actual and potential adverse effects of climate change on human life and well-being to the attention of other States in international forums such as the UN Human Rights Council. In relation to this evidence, it remains unclear what the precise obligations of each State are in connection with the risk climate change poses to the enjoyment of human rights—a question that involves considering to what extent States may need to restrict the enjoyment of rights within their own territory to prevent the violation of rights in other countries. The significance of 'systemic integration' is perhaps most apparent in relation to this question, as the

⁸²⁵ Ibid para 53.

⁸²⁶ The estimated 1.3 billion individuals without access to electricity and 2.6 billion people without clean cooking conditions could be considered as particularly disadvantaged groups entitled to positive measures in the context of climate change mitigation. See International Energy Agency, *World Energy Outlook 2013* (n 117).

⁸²⁷ *Autism-Europe v France*, para 52, quoting from *Thlimmenos v Greece* App no 34369/97 (ECtHR, 6 April 2000) ECHR 2000-IV para 44.

⁸²⁸ *Case of James et al. v United Kingdom* (1986) Series A no 98, para 46. See also, *Handyside v UK* (1996) Series A no 24, 1 EHRR 737, para 48.

content of a State's otherwise unspecific human rights obligations *vis-à-vis* beneficiaries of human rights everywhere may be illuminated by reference to the principle of CDDRRC.

The principle of CDDRRC and the provisions of Article 4 of the UNFCCC which operationalise it ensure that the objective of preventing dangerous climate change is met without exacerbating existing inequalities. The key point here is that although the principle of CDDRRC applies exclusively to relations between States, it shares with international human rights law the objective of achieving substantive equality.⁸²⁹ Accordingly, CDDRRC could function as an application of the human rights principle of non-discrimination in inter-State relations, making it a form of affirmative action to correct historical inequities to ensure the equal enjoyment of rights at the global level. This application is consistent with the express prohibition of discrimination based on nationality under international human rights law and its interpretation as requiring States to take positive steps to eradicate discrimination. This was highlighted by the Special Rapporteur on the Right to Housing, Raquel Rolnik, when she stated that as a result of States' obligations to protect the right to adequate housing and the principle of non-discrimination, 'Industrialized countries must lead in reducing emissions levels and support developing countries in pursuing low-carbon development paths'.⁸³⁰ Similarly, Hunt and Khosla have argued that in light of the 'irony for many developing countries [...] that, while they have contributed the least to the process of climate change, they are the ones most at risk from its consequences, and least able to cope'⁸³¹ developed States have 'a human rights duty, arising from non-discrimination and equality, to take reasonable steps to stop and reverse climate change'.⁸³² This makes the erosion of the CDDRRC-based accountability framework established under the Kyoto Protocol extremely important from an international human rights law perspective.

⁸²⁹ Cordonier Segger *et al.* (n 204) 57 (explaining that differentiated responsibility 'aims to promote substantive equality between developing and developed States within a regime, rather than mere formal equality' whereby 'the aim is to ensure that developing countries can come into compliance with particular legal rules over time — thereby strengthening the regime in the long term').

⁸³⁰ UN HRC, Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in This Context, UN Doc A/64/255 (6 August 2009) para 70.

⁸³¹ United Nations Secretary General, Ban Ki-Moon, *Address to High-Level Event on Climate Change*, 24 Sept. 2007, quoted in: Hunt and Khosla (n 781) 250.

⁸³² *Ibid.*

3.5 Conclusion

In view of the fact that it is private actors, not States, who are the main emitters of anthropogenic greenhouse gases, it is significant that a failure to take certain action can be attributed to a State under the general rule of attribution, insofar as the State was required to take that action. International human rights law indeed creates positive obligations to adopt measures ‘in the sphere of the relations of individuals between themselves’.⁸³³ This is the case not only for the rights to life and to the highest attainable standard of health, but also for rights of self-determination and the right to enjoy a distinct culture (and even where the right is negatively formulated in the treaty text). The bottom line set by human rights law is that the human environment remains suitable for sustaining human life and that it, in Shelton’s words, ‘does not deteriorate to the point where internationally guaranteed rights such as the rights to life, health, property, family and private life, culture and safe drinking water are seriously impaired’.⁸³⁴ The action required of each State can be determined using a contextual analysis that takes account of factual circumstances and environmental norms and standards that are already binding on the State. An important premise of this thesis is that this involves, as a minimum, compliance with existing legal obligations under the UNFCCC and that the differentiation of States’ obligations in accordance with CBDRRC is imperative to avoid perpetuating historical inequalities in the enjoyment of rights.

It is significant that States’ positive obligations to protect against threats to human life and health⁸³⁵ include obligations to establish a legislative and administrative framework that provides effective protection against a wide variety of threats.⁸³⁶ This is particularly clear from the jurisprudence of the ECtHR on the right to life: it has found violations of the right to life in virtually all cases where allegedly life-threatening environmental damage constituted a breach of the States’ domestic environmental legislation.⁸³⁷ The ECtHR’s finding in *Oneryildiz v Turkey* that a failure to uphold

⁸³³ *X. and Y. v Netherlands* para 23.

⁸³⁴ Dinah Shelton, ‘The Environmental Jurisprudence of International Human Rights Tribunals’ in Romina Picolotti and Jorge D Taillant (eds), *Linking Human Rights and Environment* (University of Arizona Press 2003) 22.

⁸³⁵ See generally Knox (n 60) and Dinah Shelton, *Human Rights, Health & Environmental Protection: Linkages in Law & Practice* (Background Paper for the World Health Organization, 2002).

⁸³⁶ See, for example, *Okyay et al. v Turkey* App no 36220/97 (ECtHR, 12 July 2005). See also the cases cited in n 628.

⁸³⁷ Shelton, ‘Litigating a Rights-Based Approach to Climate Change’ (n 27) 224 (with references, noting that ‘the Court will hold the state to the level of environmental protection it has chosen and nearly always finds a violation if the state fails to enforce its own laws’).

international norms related to environmental protection could amount to, or be evidence of, a human rights violation is particularly significant.⁸³⁸ Indeed, it suggests that breaches of international environmental legislation could trigger legal consequences under international law insofar as the breach simultaneously contravenes a State's obligations under international human rights law.⁸³⁹ It is conceivable that similar consideration is given to provisions of the UNFCCC and the Kyoto Protocol which, when fully implemented, would protect human life, well-being, traditional culture or even the existence of entire nations. This integrative approach is based on the assumption that compliance with human rights obligations involves, at a minimum, upholding existing legislation that offers legal protection against serious and substantial risks to the enjoyment of human rights.

The ECtHR's approach to the Hague Convention on the Civil Aspects of International Child Abduction illustrates the operation of this principle where legal protection is provided by an international treaty: the ECtHR has systematically considered States' compliance with relevant provisions of the treaty in child abduction cases related to Article 8 of the ECHR.⁸⁴⁰ One legal scholar has even observed that 'the Court looks so closely into the Hague Convention that it is sometimes difficult to tell whether the judges are applying the European Convention on Human Rights or the Hague Convention'.⁸⁴¹ In the context of this thesis, the most interesting element of this approach is that apparent violations of the Hague Convention almost automatically lead to a violation of Article 8 of the ECHR.⁸⁴² The general principle that States are obliged to respect and uphold laws and entitlements that provide human rights protection reflected in this approach is clearly embedded in the substantive human rights norms discussed above. The legal protection created by the UNFCCC consists primarily in its principles and commitments. As Mayer points out, 'the very reason for the existence of a law of climate change [is] the guarantee of an equal right of all nations, all individuals, to enjoy their existence'.⁸⁴³ This is perhaps most apparent from its ultimate objective of preventing dangerous climate change and associated adverse effects on human beings, coupled with the understanding that the protection of the Earth's climate is a prerequisite for human life and well-being. The principles of precaution, equity and CDBRRC strengthen this objective in a way that is consistent with the object

⁸³⁸ *Oneryildiz v Turkey*, para 71.

⁸³⁹ See, for example, *E.H.P. v Canada*.

⁸⁴⁰ See, for example, *Carlson v Switzerland* App no 49492/06 (ECtHR, Nov 2008) para 76.

⁸⁴¹ Rietiker (n 327) 273.

⁸⁴² Ibid.

⁸⁴³ Benoît Mayer, 'Climate Change and International Law in the Grim Days' (2013) 24 *Eur.J.Int'lLaw*. 947, 965.

and purpose of human rights norms. Indeed, the principle of precaution reinforces the requirement that States exert best efforts in ensuring human rights based on the best available scientific evidence.

Because the UNFCCC framework constitutes legal protection against a dangerous situation that would undermine the enjoyment of human rights, a breach of the UNFCCC almost certainly coincides with a violation of international human rights law. The doctrinal basis for this argument lies in the interpretation of human rights norms — which specifically require States to protect human rights through the rule of law — in accordance with their object and purpose, the principle of effectiveness and in conjunction with States’ legal duty to cooperate to realise human rights. The result of this interpretation is potentially enhanced accountability for States’ compliance with international obligations to prevent dangerous climate change and associated human rights violations.⁸⁴⁴ Judicial or quasi-judicial bodies with a mandate to interpret human rights treaties could take account of States’ existing commitments to take action in accordance with an ultimate objective of preventing dangerous climate change when considering questions of State responsibility for human rights violations related to climate change. This would allow such bodies to clarify the meaning of otherwise open-textured provisions of international human rights law in a way that not only gives effect to the principle of effectiveness, but also upholds the practice of international human rights bodies to hold States to account for non-compliance with the standards they have set for themselves. The ultimate objective of the UNFCCC and the obligations that flow from it are important because protection of the Earth’s climate system is a prerequisite for the enjoyment of a range of human rights which States are required to protect under international human rights law. CBDRRC could assist human rights bodies in developing interpretations of obligations in line with States’ historical contributions to climate change and their capacity to realise not only the rights of their own people but also the rights of non-nationals abroad, serving as indicators of minimum standards which States have already agreed to uphold. More specific standards for protection could be ascertained through the interpretation of human rights

⁸⁴⁴ As suggested in the Introduction, this integrative promotes accountability and enforcement. As an illustration, reference can be made to legal scholars’ observations that if Parties to the Kyoto Protocol would fail to meet their targets during the first commitment period and thus violate their treaty obligations, these Parties may avoid accountability under the Kyoto’s compliance system simply by withdrawing from the Protocol. Rajamani, ‘Addressing the ‘Post-Kyoto’ Stress Disorder: Reflections on the Emerging Legal Architecture of the Climate Regime’ (n 235) 282. This action would not, of course, affect the government’s accountability at the domestic level. This seems particularly relevant in the case of Canada, where environmental groups already sued the government for failing to fully fulfil its obligations under the Kyoto Protocol. See *Friends of the Earth v Minister of the Environment* Court File No. T-1683-07 (filed 19 Sept. 2007). The argument that there is an implicit link between the Kyoto Protocol and human rights—even the right to life—that is being protected by the limits on greenhouse gases could provide State and individual victims of climate change with avenues for raising such violations before judicial or quasi-judicial international bodies.

treaties, both at human rights bodies' own initiative and when invited to do so in the context of negotiations or litigation.⁸⁴⁵ The application of the principle of effectiveness—which features prominently in international human rights jurisprudence—may even make it imperative to consider the legally binding provisions of the UNFCCC as minimum 'standards of care' required of individual States under international human rights law.

Conversely, the *lex specialis* on climate change must be interpreted in accordance with international human rights law. This follows from the analysis of the relationship between different branches of international law in Section 2.2.3. This concluded that substantive human rights obligations are binding on all States as 'horizontal' norms that influence the interpretation of other treaties and even invalidate instruments that are not in accordance with those obligations. International human rights obligations may accordingly be understood as creating thresholds of minimum acceptability,⁸⁴⁶ or as 'levels of protection for individual rights which can be regarded as the minimum acceptable outcome'⁸⁴⁷ in international climate change negotiations and the interpretation of the UNFCCC and the Kyoto Protocol. In this context, perhaps the most pressing question is what is required of States collectively to comply with their respective obligations to protect human rights against dangerous climate change.⁸⁴⁸ This involves determining what is 'dangerous' within the meaning of Article 2 of the Convention⁸⁴⁹ and accordingly what it takes for each State to 'take precautionary measures' to 'prevent [...] dangerous anthropogenic interference with the climate system' in accordance with international human rights obligations. Although the evidence created by the IPCC provides key evidence related to Article 2, it only started to focus specifically on vulnerability relatively recently and appears to lack the

⁸⁴⁵ Scheinin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights' (n 367) 76 (proposing that the content of 'extraterritorial' obligations can be ascertained through a contextual assessment of 'facts and events that allegedly constitute a violation').

⁸⁴⁶ Caney (n 13) 69ff.

⁸⁴⁷ OHCHR Report on Climate Change and Human Rights (n 36) 28.

⁸⁴⁸ The question of environmental impacts assessment for climate change-related activities received considerable attention after the Federated State of Micronesia (FSM) requested a transboundary environmental impact assessment of a proposed coal power plant in the Czech Republic. See Letter from Andrew Yatilman, Director, Office of Environment & Emergency Management, to Ministry of the Environment of the Czech Republic, Request for a Transboundary Environmental Impact Assessment (EIA) proceeding from the plan for the modernisation of the Prunerov II power plant (Dec. 3, 2009), available at <http://www.climatelaw.org/cases/country/case-documents/cz/FSM.request.TEIA.pdf>. For an academic analysis see Maketo Robert *et al.*, 'Transboundary Climate Challenge to Coal' in Michael B Gerrard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (CUP 2012).

⁸⁴⁹ Simon Caney is one author who has proposed that the ultimate objective of the UNFCCC must be understood as prohibiting action that causes 'climate change that systematically undermines the widespread enjoyment of human rights'. See Caney (n 13) 69.

methodological tools to assess all risks relevant to human rights protection.⁸⁵⁰ More comprehensive analyses are needed not only to assess how direct impacts of climate change affect the enjoyment of specific human rights, but also to determine, as the OHCHR puts it, ‘how a given distribution of burden affects the enjoyment of human rights’.⁸⁵¹ This may require the integration of human rights indicators into the more sophisticated of forecasting models.⁸⁵² Forecasting models would also need to consider the consequences of specific policies such as reforestation, biofuel substitution, carbon trading and various forms of adaptation for the enjoyment of human rights.⁸⁵³ These models could draw on existing frameworks for human rights impact analysis, based on benchmarks and indicators,⁸⁵⁴ and use data collected through other processes, such as data related to health, food security and human development.⁸⁵⁵ However, new methodologies need to be developed to link macro-level trends with micro-level observations, including anecdotal evidence or judicial decisions that reveal human rights violations.⁸⁵⁶ In light of the apparent differentiated impacts of climate change, there is also a pressing need for further data, including in particular disaggregated data, to help provide a better insight into the consequences of mitigation and adaptation scenarios for the enjoyment of rights by disadvantaged groups.⁸⁵⁷

The evidential complexities in assessing how human rights are affected by State action related to climate change not only require *ex ante* assessments, but also call for more consideration of the

⁸⁵⁰ See Intergovernmental Panel on Climate Change, ‘Contribution of Working Group II to the IPCC Fourth Assessment Report’ 781. The IPCC defines ‘vulnerability to climate change’ as ‘the degree to which [geophysical, biological and socio-economic] systems are susceptible to, and unable to cope with, adverse impacts’.

⁸⁵¹ OHCHR Report on Climate Change and Human Rights (n 36) para 88.

⁸⁵² Humphreys, *Climate Change and Human Rights: A Rough Guide* (n 31) 7.

⁸⁵³ For an example of a potentially suitable model see global macroeconomic model E3MG (energy-environment-economy) developed at the University of Cambridge, at <http://www.4cmr.group.cam.ac.uk/directory/researchspecialties/e3mg/view>.

⁸⁵⁴ UN Office of the High Commissioner for Human Rights, *Human Rights Indicators: A Guide to Measurement and Implementation* (HR/Pub/12/5, New York and Geneva, 2012).

⁸⁵⁵ For an analogous discussion, see Olivier de Schutter *et al.*, ‘Foreign Direct Investment, Human Development and Human Rights: Framing the Issues’ (2009) 3 *HR&ILD* 137.

⁸⁵⁶ See, for example, Scott and Rajamani (n 212) 469ff (highlighting potentially detrimental impacts of EU aviation tax policies on vulnerable people in developing countries). Some methodological questions that arise in this context have been discussed in relation to trade and investment. For a discussion see Olivier de Schutter *et al.*, ‘Foreign Direct Investment, Human Development and Human Rights: Framing the Issues’ (n 855).

⁸⁵⁷ The need for aggregated data has been articulated by the CEDAW Committee in a Statement on Gender and Climate, which draws attention to the ‘differential impacts’ of climate change and calls for the equal participation of women in climate negotiations, for States to ensure ‘Safety nets and insurance for social protection’, and for states to produce ‘sex-disaggregated data, gender-sensitive policies and program guidelines to aid Governments’ in ensuring human rights. It concludes that ‘Gender equality is essential to the successful initiation, implementation, monitoring and evaluation of climate change’. UN CEDAW, Statement of the CEDAW Committee on Gender and Climate Change, adopted at 44th Session held in New York, USA, from 20 July to 7 August 2009.

UNFCCC and the Kyoto Protocol as providing minimum standards of legal protection. The treaties' reporting system and specific obligations significantly ease the burden on actors responsible for interpreting human rights norms who are faced with climate change-related claims. In relation to the Kyoto Protocol, it could of course be argued that its role in protecting human beings against the adverse effects of climate change is ambiguous at best, given that commitments have been low in comparison with mitigation needs. Based on these considerations, we can argue that States could choose to 'kill Kyoto softly',⁸⁵⁸ or put it to sleep, without affecting legal protection of actual or potential victims of climate change.⁸⁵⁹ However, this argument misses the point that the provisions of the Kyoto Protocol shed light on what emission reductions human rights law requires *at a minimum* from States that are historically responsible for climate change. The existence of these quantified minimum standards is important for creating accountability in an area of law where it is not easy to distinguish between the individual contributions of States to climate change and its adverse effects from overall trends. Furthermore, the Kyoto Protocol's system of compulsory reporting and rigorous compliance monitoring makes it relatively easy to prove that a State has failed to comply with its obligations, if this is indeed the case. And its compliance system not only helps to achieve a transparency objective by facilitating the 'measurement, reporting and verification' of emissions attributable to States, but also has the capacity for instigating sanctions on States that fail to meet their quantified emission reduction targets.⁸⁶⁰ The erosion of this part of the UNFCCC framework is therefore significant for the protection of human beings against risks created by climate change, despite the fact that its precise significance for individual human beings is hard to pinpoint or demonstrate.

It is not clear how the agreement currently being negotiated will compare with the Kyoto Protocol in terms of the fulfillment of States' legal obligations to protect human rights. In this context, we must recall that conduct that appears to breach the UNFCCC or the Kyoto Protocol—such as a State's failure to participate in good faith in negotiations to agree on a subsequent commitment period under the Kyoto Protocol, as required under Article 3(9) of the Protocol—could consolidate claims of wrongful conduct under international human rights law, even if wrongfulness of the act itself is difficult to establish.

⁸⁵⁸ Lavanya Rajamani, 'From Berlin to Bali and Beyond: Killing Kyoto Softly?' (2008) 57 *Int'l & Comp. L.Q.* 909.

⁸⁵⁹ It might however be contrary to Art 3(9) of the Kyoto Protocol. See Section 2.1.2.1 *surpa*.

⁸⁶⁰ Lefeber, 'Holding Countries to Account: the Kyoto Protocol's Compliance System Revisited After Four Years of Experience' (n 462) 134.

Conclusion

The primary responsibility for propagating law-consciousness lies with the State.

Christopher G Weeramantry⁸⁶¹

⁸⁶¹ *The Law in Crisis: Bridges of Understanding* (Capemoss 1975) 56.

As the thesis has demonstrated, international human rights law could provide an exclusive or complementary basis for State responsibility claims related to climate change. It has also emphasised that international human rights law creates *erga omnes* obligations, based on the ‘legitimate interest’ of the international community as a whole in compliance with these obligations. In a similar vein, the substantive obligations derived from the UNFCCC and the Kyoto Protocol (and parallel customary norms, such as the no-harm rule, the precautionary principle and the right to sustainable development) are most appropriately characterised as obligations to the international community as a whole.⁸⁶² The characterisation of these obligations as *erga omnes* affects the legal consequences when they are breached, including the rights of States to invoke responsibility and the content of ‘secondary’ obligations incurred by the responsible State as a result of the breach. This was recognised by the HRC in its General Comment 31, in which it not only commends that violations of Covenant rights by any State Party ‘deserve the attention’ of all other State Parties, but also stresses that drawing attention to possible breaches of Covenant obligations and calling on other State Parties to comply with their obligations should ‘far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interests’.⁸⁶³

The ARS codify the entitlement of a State that is specifically affected by the breach of an *erga omnes* obligation to invoke the responsibility of the violating State. This confirms that States with populations whose human rights have been violated as a result of wrongful conduct contributing to climate change could, in principle, invoke the responsibility of the violating State or States. The ARS make it clear that when there is a plurality of injured States, each is entitled to invoke responsibility.⁸⁶⁴ However, the claim of a wrongful act connected with climate change specifically affecting a particular State or States necessarily raises questions about the ‘attribution’ of specific impacts to anthropogenic climate change. The evidence reviewed in Section 1.3 suggests that States whose populations are affected by long-term effects of climate change, such as rising sea levels and the melting of permafrost, would have no difficulty in establishing that they were specifically affected by wrongful conduct that contributed to climate change. Yet meeting the ‘specifically affected’ standard may be more difficult for States whose populations are primarily affected by the amplification of pre-existing risks or

⁸⁶² See Section 2.3.1 *supra*.

⁸⁶³ HRC, *General Comment No. 31* para 2. Cf. Tomuschat (n 17) 14 (suggesting that recognising the *erga omnes* nature of the obligations contained in the UNFCCC ‘would mean that every individual State could possibly bring a claim against every other State’ which he considers to be ‘not a sensible proposition’).

⁸⁶⁴ ILC ARS, Art 46 and Commentary. See also, Crawford, *State Responsibility: The General Part* (n 513) 545ff.

vulnerabilities. These may be the increased risk of drought, disease or extreme weather events. The extent to which States are specifically affected by the breach depends on the evidence and interpretation of the ‘specifically affected’ criterion in the context of the alleged violation.

The ARS recognise, however, that States with a ‘wider, more diffuse interest in performance of the [*erga omnes*] obligation’⁸⁶⁵ could also be ‘injured States’ as regards the right to invoke responsibility. This is the case when the breach is ‘of such a character as to radically change the position of all the other States to which the obligation is owed with regard to the further performance of the obligation’.⁸⁶⁶ It is important to note that the rule does not apply automatically to any breach of obligations owed to the international community as a whole: as Crawford points out, it is restricted to breaches which affect the ‘structure of the whole regime’ such as breaches of disarmament treaties or specific regimes for environmental protection.⁸⁶⁷ A breach of obligations to prevent dangerous climate change derived from the UNFCCC almost certainly comes into this category: the irreversibility of the changes to the Earth’s climate system resulting from the breach means that the ultimate objective of preventing dangerous climate change will become more difficult to achieve, and perhaps even unachievable, as a result of the breach. It therefore appears that at least all State Parties to the UNFCCC would be able to invoke the responsibility of another State or States for such a breach as ‘injured States’. In a similar vein, one State’s breach of its own obligations to prevent climate change-induced human rights violations will affect the capacity of virtually all other States to guarantee minimum levels of human rights protection, thus arguably entitling those States to invoke the responsibility of the violating State as ‘injured States’. The right to invoke responsibility for wrongful conduct related to climate change is, presumably, not even confined to ‘injured States’ in this broader sense: the ARS suggest that where the obligation breached is of an *erga omnes* nature, all States could invoke responsibility based on the presumption that in light of the nature of the obligation, invocation will be in the collective interest.⁸⁶⁸

⁸⁶⁵ Crawford, *State Responsibility: The General Part* (n 513) 546.

⁸⁶⁶ ILC ARS, Art 42 (suggesting that if the obligation breached is not owed to the State itself but to the international community as a whole, a State is entitled to invoke the responsibility of another State if the violation specifically affects that State or ‘is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation’).

⁸⁶⁷ Crawford, *State Responsibility: The General Part* (n 513) 547.

⁸⁶⁸ ILC ARS, Art 48. See also, Gormley (n 601) 146. Malgosia Fitzmaurice states that ‘Even considering that Article 48 probably represents, at least in part, progressive development rather than existing customary law, it constitutes an important development’. Fitzmaurice (n 92) 1021.

In relation to the legal consequences of wrongful conduct (or what the ARS call the ‘content’ of State responsibility), the first point to note is that legal consequences will arise even if the breach has not caused any verifiable injury, or if the link with injury cannot be approximated or proven. This follows from the basic principle that a State that commits an internationally wrongful act ‘must, so far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed had that act not been committed’.⁸⁶⁹ The emphasis on restoring the situation to what it was before the wrongful act was committed reflects the broader objective of compliance with obligations,⁸⁷⁰ which is emphasised in the ARS through the codification of the continued duty of performance,⁸⁷¹ and of the duty to cease the wrongful act (if it is ongoing)⁸⁷² in two separate articles. The Commentaries emphasise that compliance with these obligations is a prerequisite to the restoration and repair of the legal relationship affected by the breach.⁸⁷³ The duty of cessation further comprises an obligation to offer appropriate assurances and guarantees of non-repetition where the circumstances require, which may be described as a positive reinforcement of future performance.⁸⁷⁴ International human rights law also recognises that adequate and effective remedies for violations ‘serve to deter violations and uphold the legal order that the treaties create’.⁸⁷⁵ The duty of cessation is therefore an important part of remedies for human rights violations and characterised by the HRC as ‘an essential element of the human right to a remedy’ that entails an obligation ‘to take measures to prevent the recurrence of a violation’, including through changes in the State Party’s laws or practice if necessary.⁸⁷⁶

⁸⁶⁹ *Case Concerning the Factory at Chorzów (Germany v Poland)* 47.

⁸⁷⁰ The PCIJ added that ‘restitution in kind, or if that is not possible, payment of a sum corresponding to the value which restitution in kind would bear; the award if need be of damages of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which serve to determine the amount of compensation for an act contrary to international law’. *Phosphates in Morocco (Italy v France)* 10, para 48.

⁸⁷¹ ILC ARS, Art 29.

⁸⁷² ILC ARS, Art 30(a). The treatment of cessation as a distinct legal consequence of an internationally wrongful acts is a relatively novel development: previously cessation was considered as part of the remedy of satisfaction. See also, Shelton, *Remedies in International Human Rights Law* (n 90), and Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries* (n 88) 68, para 114 and Crawford, *Brownlie's Principles of Public International Law* (n 26) 567.

⁸⁷³ ILC ARS, Commentary to Art 30, para 1.

⁸⁷⁴ ILC ARS, Art 30(b) and Commentary to Art 30, para 1.

⁸⁷⁵ Shelton, *Remedies in International Human Rights Law* (n 90) 99.

⁸⁷⁶ *HRC, General Comment No. 31*, paras 16–17. This states that in general, the purposes of the Covenant would be defeated without an obligation integral to Art 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, in cases under the Optional Protocol the Committee has frequently included in its Views the need for

The consequences for States that incur this obligation based on climate change-related wrongful conduct could be drastic, particularly where the violation involves not a single act or omission, but a series of wrongful acts. To meet its obligation of cessation, a State may need to make changes to significant parts of its laws, regulatory system, conduct in international negotiations and levels of assistance requested from, or provided to, other States in order to restore compliance with the violated obligation. The ACHPR's finding on remedies for the range of human rights violations is established in *SERAC v Nigeria* which illustrates that the duty to offer appropriate assurances and guarantees of non-repetition may reinforce existing procedural rights: Nigeria had incurred a 'secondary' obligation to provide 'information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations'.⁸⁷⁷ In relation to the evidence, it is worth noting that compliance with the obligation to end damaging conduct does not necessarily require the identification of victims: the obligation relates to State conduct already identified as wrongful, and thus the evidence relied upon to establish the breach will usually be sufficient to determine what cessation entails for a particular State or States.

The duty to make full reparations for the injury caused by the wrongful act⁸⁷⁸ is closely related to the question of causation: it requires the identification of victims and triggers evidentiary questions related to the scope of injury for which reparations must be made. Article 33(1) clarifies that the duty to make reparations may be owed to the international community as a whole, while Article 33(2) specifically acknowledges that the content of responsibility 'is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State'.⁸⁷⁹ Injury is understood as including any material or moral damage caused by the act⁸⁸⁰ and includes 'the injury resulting from and ascribable to the wrongful act' rather than 'any and all consequences' flowing from it.⁸⁸¹ This makes it clear that there must be a link between the wrongful act and the injury in order for there to be an obligation of reparation. However, the causal requirement

measures, beyond a victim-specific remedy, to be taken to avoid a recurrence of the type of violation in question. Such measures may require changes in the State Party's laws or practices.

⁸⁷⁷ *SERAC and Another v Nigeria* para 69.

⁸⁷⁸ ILC ARS Art 31(1).

⁸⁷⁹ This marks a significant breakthrough, as it departs from the traditional principle that injuries suffered by individuals are legally suffered by the State of nationality, and it is the State that claims reparations for these injuries. See, for example, *Corfu Channel Case (UK v Albania)*. See also, *HRC, General Comment No. 31*, para 16. *Sergio Euben Lopez Burgos v Uruguay* para 14.

⁸⁸⁰ ILC ARS, Commentary to Art 31, para 5.

⁸⁸¹ ARS, Commentary to Art 31, para 10.

inherent in the link is not the same in relation to every breach,⁸⁸² and can be established even when the wrongful conduct was only one of several factors that contributed to the injury.⁸⁸³ Where the obligation breached relates to the prevention of harm, the link between injury and the breach is likely to involve consideration of the extent to which the harm was a reasonably foreseeable consequence of the action taken.⁸⁸⁴ The link between the emission of greenhouse gases, climate change and certain adverse effects, such as rising sea levels, is indisputably foreseeable as a result of the legal definitions contained in the UNFCCC and based on the UNFCCC reports. As regards specific injury suffered, the evidence cited in Sections 1.3 and 3.3 indicates that a broad range of climate change-related risks and harm could be considered as reasonably foreseeable consequences of climate change and the human activities that are known to cause it. Moreover, in the light of the principle of effectiveness, it is appropriate to shift at least part of the risk of uncertainty or lack of proof to the State where it can be established with a reasonable degree of certainty that specific injury has occurred as a result of global warming.⁸⁸⁵ This supports the proposition of a commentator who states that the correlation between greenhouse gas emissions, atmospheric chemistry and global warming has probably ‘been demonstrated with sufficient confidence that it seems unlikely that an adjudicator would require a complainant, in order to obtain relief, to demonstrate what would not be possible — that a specific emission of greenhouse gases by State S directly caused the specific impact in State I’.⁸⁸⁶ All this means, that existing evidence (including that reviewed in Sections 1.3 and 3.3) may well be sufficient to substantiate claims for reparation for climate change-related State conduct that constitutes a violation of international human rights law. As the science of attribution evolves, the chances that the victims of such wrongful conduct will be able to ascertain their entitlement to reparations should increase. Moreover, where State responsibility is invoked through individual complaint procedures under human rights treaties, victims have usually been identified in a claim’s admissibility stage. This means that a link between State conduct and the individual’s situation will already have been established once a case reaches the reparations stage.⁸⁸⁷

⁸⁸² Ibid.

⁸⁸³ See, for example, *United States Diplomatic and Consular Staff in Tehran (Judgement)*.

⁸⁸⁴ Shelton, *Remedies in International Human Rights Law* (n 90) 99, 89.

⁸⁸⁵ Ibid 50, 317 (stating that the burden of uncertainty or lack of proof may sometimes shift to the State to uphold the deterrent function of remedies for human rights violations).

⁸⁸⁶ Werksman (n 467) 412.

⁸⁸⁷ The ‘victim requirement’ is one of the admissibility criteria that need to be met before a particular judicial or quasi-judicial human rights body can consider the merits of an international complaint for an alleged human rights violation. For

Once the duty to make full reparations has been triggered, the scope of the injury has to be established. This will be a fact-sensitive exercise which will require significant interpretation of complex evidence related to risks and probabilities. However, the law of State responsibility does provide some clear road signs for determining the nature and amount of reparations due. The first is the principle that no reduction or attenuation of reparation will be made for any concurrent causes.⁸⁸⁸ The duty to make reparations is similarly unaffected by a responsible State's ability to pay,⁸⁸⁹ or by a claimant's inability to determine the quantity and value of the losses suffered.⁸⁹⁰ That is, the duty of the responsible State to make full reparations for the injury is unqualified in general international law.⁸⁹¹ In the light of the principle that the beneficiaries of human rights obligations are the ultimate holders of the right to 'full reparations', the unqualified nature of the duty to make those reparations then means that the general law of State responsibility accommodates States' obligations to ensure the right to a remedy. The understanding of this right as a substantive human right implies that the focus of the duty to make reparations for a breach of international human rights law lies squarely on restoring the rights of victims, insofar as victims of the violation can be identified. Where it is not certain whether an individual qualifies as a victim of the breach, uncertainty could be addressed in accordance with the human rights principle *in dubio pro libertate et dignitate* and the principle of effectiveness.

example, Art 34 of the ECHR provides that only complainants who are directly affected by the alleged breach of the ECHR have a right to complain about the violation before the ECtHR. Art 1 of the Optional Protocol of the ICCPR and Art 2 of the Optional Protocol to the ICESCR contain a similar requirement.

⁸⁸⁸ See, for example, *United States Diplomatic and Consular Staff in Tehran (Judgement)*.

⁸⁸⁹ See Crawford, *State Responsibility: The General Part* (n 513) 481 (noting that some ILC members had suggested to include the responsible State's ability to pay as a factor that should be taken into account when determining reparation due, but that this suggestion was not taken on board because 'there was a feeling that as the expression 'full reparation' had appeared in the Draft Articles and had not been criticized to a significant extent by governments, the expression should be retained').

⁸⁹⁰ *Mentes et al. v Turkey Reports, Judgements & Decisions ECtRH 1997-VIII 2693 para 106* (stating that there should be some pecuniary remedy, but 'since the applicants have not substantiated their claims as to the quantity and value of their lost property with any documentary or other evidence, the Government have not provided any detailed documents, and the Commission has made no findings of fact in this respect, the Court's assessment of amounts to be awarded must, by necessity, be speculative and based on principles of equity').

⁸⁹¹ ILC ARS, Commentary to Art 31, para 12 (stating that 'international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes'). See also, Crawford, *State Responsibility: The General Part* (n 513) 496. This is also clear from the cases discussed in Section 3.2 involving States incurring independent responsibility to make reparations for the entirety of the injury despite the fact that other States had also contributed to the same injury.

Furthermore, irrespective of whether or not victims can be identified, the content of the obligation must reflect the aim of re-establishing the *status quo ante*.⁸⁹²

Perhaps the most pressing legal question raised by States' duties to make full reparations for wrongful conduct connected with climate change concerns the likelihood that the consequences of a duty to make full reparations exceed what the responsible State can (reasonably or actually) bear on its own. This probability is clear from the cases discussed in Section 3.2, all of which involved multiple States to which the same injury could be ascribed and one State (potentially) incurring responsibility to make reparations for the entire injury: in *Corfu Channel*, the establishment of Albania's responsibility led to an unqualified obligation to make full reparations for the damage caused by the presence of mines in its waters, despite the fact that it was acknowledged that another State had probably laid the mines. In other words, Albania was held fully responsible for repairing the damage that appeared to be caused in part by the wrongful conduct of another State. In a similar vein, in *Soering* the United Kingdom incurred an unqualified obligation to make full reparations for damage done to the applicant by the United States, a non-party to the ECHR. And in *Certain Phosphate Lands in Nauru* the dispute was settled with Australia paying for the full settlement; however, the two other States that were allegedly responsible for the same wrongful act agreed to pay Australia a contribution to the settlement.⁸⁹³

The latter example of burden-sharing reflects good practice rather than an existing rule: such a rule or principle for apportioning responsibility for reparations between responsible States is currently lacking (except for the basic principle of equity, quoted in Art. 47(2) of the ARS, that an injured State may not recover, by way of compensation, more than the damage it has suffered).⁸⁹⁴ The principle of effectiveness is particularly relevant in this case: the duty to make reparations may be interpreted accordingly as obliging States that incur an unbearable or disproportionate burden of reparations to work proactively to meet their obligation. The most obvious avenue is negotiations or cooperation with other responsible States, as in *Certain Phosphate Lands in Nauru*. Where such negotiations or cooperation fail, the first responsible State may need to invoke the responsibility of another State (or States) and to trigger ensuing obligations to make reparations for the same injury. The advantage of the

⁸⁹² *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* pp. 43, 232; *Ahmadou Sadio Diallo (Guinea v DRC)* ICJ (30 Nov 2010); *Velásquez Rodríguez v Honduras*.

⁸⁹³ UK Agreement, 24 March 1994, in UKMIL (1994) 65 BY 625.

⁸⁹⁴ ILC ARS, Art 47(2).

rule contained in Article 47 of the ARS is that it entitles the first responsible State (as a non-injured State) to invoke the responsibility of other responsible States for wrongful conduct contributing to injury. This then triggers the obligation to make reparations which could be due to the same victims. We can speculate that reliance on this rule by one responsible State could trigger a ‘race to the top’. This may even occur if claims are triggered by a responsible State’s motivation to share an otherwise massive burden for reparations (capped at the amount of injury actually suffered). For any subsequent successful claim would entail the task of ascertaining whether or not the wrongful conduct had been stopped and, if the wrongful conduct is ongoing, articulating duties of cessation. This would help consolidate the limits of States’ discretion in areas that affect the Earth and its inhabitability for human beings.

We can observe that States’ obligations towards victims could create a new situation of potentially conflicting rights, especially where these obligations involve making reparations for significant damage that has already been done. This case could be addressed through the application of the substantive norms and principles that are routinely applied in human rights cases to reconcile the rights of victims with those of other beneficiaries.⁸⁹⁵ The nature of this exercise has led commentators to characterise the practice of human rights bodies of resorting to remedies as ‘the area of judicial activity that most clearly embodies the tension between the ideal and the real’.⁸⁹⁶ The wide range of remedies awarded for human rights violations (including restitution, compensation, rehabilitation, and measures of satisfaction such as public apologies, public memorials, guarantees of non-repetition and, more importantly, changes in relevant laws or practices) reflect the potential for constructing remedies that are consistent with the object and purpose of international human rights law.⁸⁹⁷ It is not the nature of climate change-induced human rights’ violations but the potential scale of injury ascribable to climate change-related wrongs that creates the most significant legal, evidential and practical questions regarding reparations for those violations. The severity and scale of damage and, in the human rights context, the virtually limitless number of potential victims of any established violation, means that the effectiveness of international laws pertaining to climate change is hinged on the extent to which States exercise their right to invoke responsibility (as injured or non-injured States) and cooperate to give effect to the victims’ right to a remedy and to restore the rule of law.

⁸⁹⁵ Shelton, *Remedies in International Human Rights Law* (n 90) 99.

⁸⁹⁶ Paul Gewirtz, ‘Remedies and Resistance’ (1983) 92 *Yale L.J.* 585.

⁸⁹⁷ HRC, *General Comment No. 31* para 16.

In this regard, we should note that wrongful conduct that amounts to ‘serious breaches of obligations under peremptory norms of general international law’ has specific legal consequences that go beyond the rights of invocation and obligations to cease the wrongful act and make full reparations for the injury.⁸⁹⁸ These consequences include a duty not to recognise the situation created by the breach as lawful;⁸⁹⁹ a duty not to provide aid or assistance in maintaining the unlawful situation;⁹⁰⁰ and a duty of all States to cooperate to bring the breach to an end through lawful means.⁹⁰¹ It is significant that in its *Wall* Advisory Opinion the ICJ not only recognised the duties of cooperation and non-recognition as customary international law, but also implied that these obligations extend to all serious breaches of *erga omnes* obligations.⁹⁰² Given the potentially catastrophic consequences of climate change for the enjoyment of human rights, it is conceivable that wrongful conduct that is one of the concurrent causes of climate change will trigger obligations of non-recognition and cooperation for all other States. We should emphasise that whether or not a State’s conduct amounts to a ‘serious breach’ depends on

⁸⁹⁸ ILC ARS, Arts 40 and 41. Art 40(1) defines a ‘serious breach’ of an obligation under a peremptory norm as involving ‘a gross or systematic failure by the responsible State to fulfil the obligation’. A peremptory norm can be understood in accordance with Arts 53 and 64 of the VCLT as norms that are ‘mandatory and imperative in any circumstances’. See Gerald Fitzmaurice, ‘Third Report on the Law of Treaties’ (1958) II Yearbook of the International Law Commission 40. Some have argued that the scholarly attention for the *jus cogens* concept has been disproportionate to its actual influence. See Weil (n 154) 432 and Christian Tomuschat, ‘Reconceptualizing the Debate on Jus Cogens and Obligations Erga Omnes: Concluding Observations’ in Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff 2006) 436.

⁸⁹⁹ The Commentaries to Art 41 stipulate that ‘waiver or recognition induced from the injured State by the responsible State cannot preclude the international community interest in ensuring a just and appropriate settlement’.

⁹⁰⁰ Art 40 ILC ARS. See also Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text, Commentaries* (n 88) Commentary to Art 41 paras 4, 9 (explaining that the second paragraph of Art 40 provides for an obligation of abstention which comprises two obligations, namely not to recognise the situations created by the serious breaches as lawful and, secondly, not to render aid or assistance in maintaining that situation).

⁹⁰¹ ILC ARS, Commentary to Art 40, para 3 (explaining that the obligation arises from substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat that it presents to the survival of States and their peoples and the most basic human values).

⁹⁰² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* para 159 (‘Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognise the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory [...]. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end’). Cf ILC ARS, Commentary to Art 41(1), para 3 (stating that ‘paragraph 1 [...] may reflect the progressive development of international law’, but adds that ‘in fact such cooperation, especially in the framework of international organizations, is carried out already in response to the gravest breaches of international law and is often the only way of providing an effective remedy’). In particular, commentators have argued that the rule contained in Art 41(1) has been construed too narrowly by the ILC, given that under customary international law ‘the same consequences follow from any serious breach of any customary international law obligation designed to protect fundamental values of the international community as a whole’. See Antonio Cassese, ‘The Character of the Violated Obligation’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 416.

substantive obligations which are, as highlighted in this thesis, differentiated. Furthermore, it must be stressed that international law, including substantive human rights norms, limits States' discretion in responding to serious violations.⁹⁰³ Maintaining these limits is important because the wrongful conduct could be of such scope and quality that non-recognition would have severe economic and political consequences for the recalcitrant State or States, thus creating a risk of knock-on effects on the enjoyment of human rights.⁹⁰⁴ These risks reinforce the importance of the duty to cooperate, which requires 'a joint and coordinated effort by all States to counteract the effects of these breaches, [possibly] in the framework of a competent international organization, in particular the United Nations'.⁹⁰⁵ In relation to climate change, cooperation designed to bring an ongoing serious violation to an end could take place under the auspices of the COP to the UNFCCC, given that the wrongful conduct would almost certainly constitute a violation of that treaty. Another appropriate forum for the required cooperation could be the UN Human Rights Council. One potential role for quasi-judicial human rights treaty bodies could be to deduce specific standards from existing human rights principles to ensure that the potentially massive burden of reparations for human rights violations related to climate change is shared equitably between responsible States. This could be done, either at their own initiative or in response to a claim (under one of the inter-State complaint procedures) by a State that has incurred responsibility against another State that allegedly contributed to the same injury through the same or related wrongful conduct.

This concludes my analysis of the inter-relationship between three branches of international law and their potential applicability to State conduct contributing to dangerous anthropogenic climate change. The analysis reveals how international courts and human rights bodies can play a significant role in establishing State responsibility for climate change-related violations of human rights law when

⁹⁰³ See, for example, Art 1 of the 1966 Covenants. See also, Margo Kaplan, 'Using Collective Interests to Ensure Human Rights: an Analysis of the Articles of State Responsibility' (2004) 79 *N.Y.U. L. Rev* 1902. See also, the ILC ARS' Commentary to Art 40, which refers to the ICJ's Namibia Advisory Opinion where the Court stressed that 'The non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international cooperation'. See ILC ARS, Commentary to Art 41(1), para 10.

⁹⁰⁴ Some members of the HRC have suggested that States' obligations under Art 1(3) of the ICCPR to promote the right to self-determination may include the termination of diplomatic relations with States that violate this right. See McGoldrick, *The Human Rights Committee* (n 450) 251–52 (noting instances where individual HRC members questioned governments with regard to their diplomatic relations with Israel (in the context of its occupation of Palestinian territories) and with South Africa (in the context of the apartheid regime).

⁹⁰⁵ ILC ARS, Commentary to Art 41(1) para 2.

provided with sufficient and relevant evidence.⁹⁰⁶ Competent organs of the United Nations and individual States must ensure that the wrongful conduct of recalcitrant States that disrupts the Earth's climate system, and that prevents the full enjoyment of rights as a result of this conduct, are brought to a stop. An integrative approach to the three legal frameworks thus could significantly enhance the potential of international law to govern State behaviour in a way that reduces the risks to human beings posed by climate change.

⁹⁰⁶ Relevant evidence could include, for example, the study by Elzen *et al.*, referred to in Section 1.3 (n 128 and accompanying text), which sheds light on States' contributions to climate change and the extent to which historical and ongoing emissions are linked to the fulfilment of basic needs.

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