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A Right to Enjoy Culture in Face of Climate Change: Implications for "Climate Migrants"

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Centre of Governance and Human Rights Working Papers

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Abstract: This paper considers the extent to which international human rights law offers protection to ‘climate migrants’ irrespective of whether these persons would qualify for refugee status. In contrast with most existing literature, it does not focus on States’ obligations arising from the right to life or the prohibition of inhumane treatment. Instead, the paper focuses on the right of persons belonging to minorities to enjoy their culture as protected under Article 27 of the International Covenant on Civil and Political Rights. The paper peruses the Human Rights Committee’s interpretation of Article 27, with particular attention to its link with the rights of peoples to self-determination and to freely dispose of their natural wealth and resources as protected under Article 1 of the Covenant. Based on this analysis the paper challenges the presupposition that a normative gap exists, pointing instead at a need for further research into the interpretation of norms and obstacles to enforcement.*

1. Introduction

On 26 November 2013 the High Court in Auckland handed down judgement in the case of *Ione Teitiota*, 37, who had been characterised in the media as the ‘world’s first climate change refugee’.¹ Mr Teitiota had claimed protection in New Zealand under the 1967 Protocol to the 1951 Convention relating to the Status of Refugees (‘the Refugee Convention’),² based on adverse effects of climate change on his home and livelihood in Kiribati.³ The case was an appeal from a decision of the New Zealand Immigration and Protection Tribunal (‘the Tribunal’), which in turn appealed the decision of a protection officer to decline Mr Teitiota’s request for refugee status. The Tribunal found that Mr Teitiota was neither a refugee nor a protected person and therefore not entitled to protection.⁴ He was not a refugee because the effects of environmental degradation on Kiribati and on the claimant’s standard of living did not amount to ‘persecution’ within the terms of the Refugee Convention. There was no evidence establishing that the environmental conditions that Mr Teitiota faced or was likely to face on return were so parlous that his life would be placed in jeopardy, or that he and his family would not be able to resume their prior subsistence life with dignity.⁵ The Tribunal further relied on the considerations that the effects of environmental degradation, although proven on the facts, were faced by the population generally and ‘[favoured] to civil or political status’ and that the government of Kiribati could not be said to have failed to protect Mr Teitiota from such effects.⁶ Neither did Mr Teitiota fall within the scope of domestic legislation that gave effect to provisions of the International Covenant on Civil and Political Rights (ICCPR),⁷ which extends protection under the Refugee Convention to

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¹ ‘Kiribati Climate Change Refugee Rejected by New Zealand’ *The Telegraph* (London, 26 November 2013) <<http://www.telegraph.co.uk/news/worldnews/australiaandthepacific/kiribati/10474602/Kiribati-climate-change-refugee-rejected-by-New-Zealand.html>> accessed 26 November 2013.

² Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) and Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Protocol to the Refugee Convention).

³ *Ione Teitiota v Chief Executive of the Ministry of Business Innovation and Employment* [2013] NZHC 3125 (judgement of 26 November 2013).

⁴ *AF (Kiribati)* [2013] NZIPT 800413.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

persons who would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand. The Tribunal held that there was ‘no evidence that any act or omission of the Kiribati government pointed to any risk that the applicant would be arbitrarily deprived of his life under Article 6 and thus there were ‘no “substantial grounds” for believing the applicant or his family would be in danger of being subjected to arbitrary deprivation of life’.⁸

On appeal, the primary submission made on behalf of the applicant was, head-on, that the tribunal erred in law by failing to recognise that a person whose way of life is seriously impaired by warfare or climate change should be entitled to the protection of the Refugee Convention.⁹ Further, it specifically erred in finding that because all people in Kiribati suffer from the same results of ‘global warming’ this disqualified Mr Teitiota from claiming refugee status.¹⁰ The High Court rejected these and a number of other claims, instead upholding the decision of the Tribunal with approval. It held that the applicant, by returning to Kiribati, ‘would not suffer a sustained and systematic violation of his basic human rights such as the right to life under Article 6 of the ICCPR or the right to adequate food, clothing, and housing under Article 11 of the ICESCR’; that his position did not ‘appear to be different from that of any other Kiribati national’ and, finally, that there was ‘certainly [...] no persecution or serious harm which [would] be visited on him for any of the five stipulated convention grounds’.¹¹ It ended with the conclusion, framed in rather defensive terms, that the ‘attempt to expand dramatically the scope of the Refugee Convention [...] is impermissible’.¹²

It is important to note that the legal representatives of the claimant did not challenge the Tribunal’s implicit finding that protection under the ICCPR was conditional on life-threatening acts and omissions of the Kiribati government. Thus, they did not press the point that international human rights protection is not necessarily conditional on a person’s status under international refugee law. This enabled the High Court to decide the case based on a narrow construction of the Refugee Convention and implementing domestic legislation and to refrain from considering legally, politically and ethically controversial questions about the scope of human rights protection.

The legal analysis in this paper will demonstrate that the invocation of provisions of international human rights law to Mr Teitiota’s case could have led to an entirely different line of reasoning, and perhaps a different outcome of the litigation. Notably, the paper focuses not on Article 6 of the ICCPR (to which reference was made in the High Court’s decision) but instead of Article 27, which protects the right of persons belonging to minorities to enjoy their culture. As the paper will set out, the right to enjoy one’s own culture is particularly relevant to inhabitants of small island States are at the forefront of present and impending climatic changes.¹³ The enjoyment of the right might be affected as a result of the adverse effects on climate change on fragile ecosystems that form an intrinsic part of inhabitants’ culture and livelihoods.¹⁴ This vulnerability comes with a risk that cultural heritage, often developed over generations in close connection with a particular natural environment, will be damaged or lost,¹⁵ thus bringing the situation potentially within the scope of international human rights law.

⁸ *AF (Kiribati)* at 92.

⁹ *Ioane Teitiota v Chief Executive of the Ministry of Business Innovation and Employment*, para. 46.

¹⁰ *Ibid* para 40.

¹¹ *Ibid* para 40.

¹² *Ibid* para 63.

¹³ See, for example, J. Salick, ‘Traditional Peoples and Climate Change’ (2009) 19 *Global Environmental Change* 137.

¹⁴ *Ibid* at 138.

¹⁵ *Ibid*.

In examining the relevance of cultural rights to the situation of climate migrants, the paper peruses the United Nations Human Rights Committee (HRC)'s interpretation of Article 27. Through a discussion of the HRC's interpretative practice, attention is drawn to its link with the rights of peoples to self-determination and to freely dispose of their natural wealth and resources as protected under Article 1 of the ICCPR.¹⁶ On the basis of Article 27, the paper sketches out a legal framework that could potentially be relied upon on behalf of individuals or peoples who are forced to move as a result of climate change and who are seeking to protect their traditional culture. More broadly, it explores how international law may provide protection of a peoples' enjoyment of their cultures in scenarios of climate-induced migration. For the purpose of this paper, 'climate-induced migration' is understood as movement of people across borders as a direct or indirect result of the negative effects of climate change on their habitats. 'Climate migrants' are the subjects of such movement.

2. The Right to Enjoy Culture in International Law

The ICCPR is one of the most widely ratified international human rights treaties, with its 167 State parties including all States listed in Annex I to the United Nations Framework Convention on Climate Change (UNFCCC)¹⁷ and dozens of States located in areas where climate change is projected to have serious negative impacts on human life and livelihoods.¹⁸ Similar provisions that are not specifically aimed at the protection of minorities are contained in other human rights treaties.¹⁹ Article 27 reads as follows:

¹⁶ Article 1 provides:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

¹⁷ United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 19 June 1993) 1771 U.N.T.S. 107 (UNFCCC).

¹⁸ For ratification status, see <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> (last accessed 30 August 2012). Notably, some academics have argued that the entire collection of substantive obligations contained in the ICCPR has gradually become binding on all States as customary international law. See, for example, Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press 1989) 80-81.

¹⁹ Expressions of cultural rights are also found in the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) (Article 15); Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) (Article 29); the African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (Banjul Charter) (Article 22); the African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) (1990) OAU Doc. CAB/LEG/24.9/49 (Article 21); the Charter of Fundamental Rights of the European Union (adopted 7 December 2000, entered into force 1 December 2009) reprinted in Official Journal of the European Communities, 18 December 2000 (OJ C 364/01) (Article 22); the American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (Article 26); the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (adopted 17 November 1988, entered into force 16 November 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) (Protocol of San Salvador) (Article 14) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (Articles 17, 26, 31, 64, 65). The latter treaty is particularly important in the context of the present paper; however, the number of States that has ratified the Convention is still low. For a discussion, see Antoine Pécoud and Paul de Guchteneire, 'Migration, Human Rights and the United Nations: an Investigation into the Obstacles to the UN Convention on Migrant Workers' Rights' 24 Windsor Yearbook on Access to Justice 241 and Beth Lyon, 'The Unsigned United Nations Migrant Worker

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.

For the purpose of this paper, we must first establish if and when the beneficiaries of the right include actual or potential ‘climate migrants’ who are seeking protection of the right to enjoy a traditional culture. The answer would depend on one’s interpretation of the term ‘minorities’, as well as the nature of States’ legal obligations under this article. With regard to the term ‘minorities’, Manfred Nowak notes that its meaning partly overlaps with the term ‘peoples’ in Article 1 of the Covenant.²⁰ Nonetheless—as the Grand Captain of the Mikmaq Indians pointed out in a complaint to the HRC on behalf of the Mikmaq Indians against Canada—the two terms are to be distinguished.²¹ An independent definition of ‘minorities’ is also desirable to avoid a situation where State parties to the Covenant might be able to circumvent legal obligations to protect the right on the basis of an overly narrow interpretation of the term.

In both theory and practice, there are four requirements understood to be implied by the term ‘minorities’, namely: (1) numerical inferiority to the rest of the population; (2) being in a non-dominant position; (3) having ethnic, religious or linguistic characteristics that are distinct from those of the overall population of the State; and (4) showing, explicitly or implicitly, a sense of solidarity.²² Importantly, the term has been interpreted as including aliens; in other words, the term ‘minorities’ does not relate to nationals of a State only.²³ The HRC has gone as far as to state that just as beneficiaries of the right ‘need not be nationals or citizens, they need not be permanent residents’ and thus may include ‘migrant workers or even visitors’.²⁴ Nowak also opines that the rights enjoyed by minorities ‘should not be denied to immigrants, including migrant workers, who entered the country only recently’.²⁵ These interpretations indicate that the right is a human right rather than a right of citizens.²⁶ It could accordingly be argued that any group of climate migrants that meets the definition of ‘minorities’ is entitled to protection of their right under Article 27 in a host State, regardless of their legal status or citizenship.

As Nowak points out, the right in Article 27 was purposefully formulated as an individual right, but with the phrase ‘in community with the other members of their group’ inserted in order to preserve the idea of a group.²⁷ As a result, the right is best understood as an individual right containing a collective element.²⁸ James Anaya, who currently holds the mandate of the United Nations Special Rapporteur on the Rights of Indigenous Peoples, has pointed out that Article 27 in practice protects both group and individual interests in cultural integrity.²⁹ Because of its

Rights Convention: an Overlooked Opportunity to Change the “Brown Collar” Migration Paradigm’ 42 *International Law and Politics* 391.

²⁰ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Second edn, N.P. Engel Publisher 2004) 643.

²¹ *Mikmaq Tribal Society v Canada* Communication No 78/1980 para. 7.3.

²² F. Capotorti, *Study by the Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities on the rights of persons belonging to ethnic, religious and linguistic minorities*, U.N. Doc. E/CN.4/Sub.2/384/Rev.1 (1997) at 96.

²³ Nowak 645. Cf. Capotorti, n. 22, at 12.

²⁴ See *General Comment No. 23: The Rights of Minorities (Art. 27)* adopted on 8 April 1994, UN Doc CCPR/C/21/Rev1/Add5 HRC para. 5.2.

²⁵ Nowak 647.

²⁶ *Ibid* 646.

²⁷ *Ibid* 655.

²⁸ See also *General Comment No. 23: The Rights of Minorities (Art. 27)* para. 16.

²⁹ S. James Anaya, ‘International Human Rights and Indigenous Peoples: the Move Toward the Multicultural State’ (2004) 21 *Arizona Journal of International and Comparative Law* 13, 22.

individual dimension the right to enjoy one's own culture is cognizable under the Optional Protocol, which means that individuals may use the individual complain procedure established under this protocol in cases of alleged violations of their Article 27 rights by State parties.³⁰ As the HRC has considered that self-determination is *not* a right cognizable under the Protocol, Article 27 has in some cases provided an indirect way to invoke the provisions of Article 1.

The HRC has taken the view that indigenous communities may constitute a minority group within the meaning of the article.³¹ It has upheld this view in several complaints submitted by representatives of indigenous peoples, which together make up most of the findings of the Committee under Article 27.³² Most notable in this regard is the Committee's decision in *Lubicon Lake Band v Canada*,³³ where it decided to deal with a complaint about an alleged violation of the right of self-determination of a people under Article 27 instead of under Article 1. It held that 'historical inequities and certain more recent developments' threatened the way of life and culture of the Lubicon Lake Band, and constituted a violation of Article 27.³⁴ As will be elaborated below, this case, as well as further caselaw under Article 27, suggests a strong link between Articles 1 and 27; a link which is, as we will see, of practical significance for actual or potential climate migrants seeking protection of their right to enjoy their culture. From a doctrinal perspective, an important implication of this link is that the reasoning of the HRC in Article 27 cases is instructive for understanding how peoples' rights are protected under international law, irrespective of whether a people constitutes a minority within the meaning of Article 27.

3. Cultural Rights, the Right of Self-Determination and Climate Change

Most of the HRC's views under Article 27 concern complaints submitted to the HRC by members of indigenous peoples. One of the first cases was *Dierraardt et al v Namibia*,³⁵ where the petitioning members of the Rehoboth Basters, an ethnic minority within Namibia, claimed violations of Articles 25 (the right to public participation) and 1 (the right of self-determination) due to the ending of the 124-year long existence of Rehoboth as a continuously organised territory as a result of the emergence of Namibia as an independent State.³⁶ In addition, the authors claimed a violation of Article 27 on the basis that their communal land was expropriated. Although it did not find a violation of either provision, the HRC recognized 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'.³⁷ In relation to Article 27, the HRC explicitly stated that no violation could be found due to the Rehoboth Basters' failure to demonstrate a relationship between the land covered by their claim and a distinct culture.

The relationship between land and culture is of great significance in the context of climate-induced migration and potential claims under Article 27. In the literature, this relationship has been explored in detail in relation to low-lying island States where it is reflected in many indigenous languages: for example, in Cook Islands Maori, 'enua' means 'land, country, territory, afterbirth'; in Futuna (Wallace) 'fanua' means 'country, land, the people of a place'; and in Tonga, 'fonua'

³⁰ *General Comment No. 23: The Rights of Minorities (Art. 27)* para. 3.1.

³¹ *Ibid* para. 3.2.

³² For an analysis of this jurisprudence see Martin Scheinin, 'The Right to Enjoy a Distinct Culture: Indigenous and Competing Uses of Land' in T.S. Orlin, A. Rosas and M. Scheinin (eds), *The Jurisprudence of Human Rights Law: A Comparative Interpretive Approach* (Åbo Akademi University Institute for Human Rights 2000) 163 ff.

³³ *Ominayak and the Lubicon Lake Band v. Canada* (Communication No 167/1984).

³⁴ *Ibid* para. 33.

³⁵ *J.G.A. Dierraardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia* (Communication No 760/1997).

³⁶ *Ibid* paras 3.1-3.2.

³⁷ *Ibid.* para 10.3.

means ‘island, territory, estate, the people of the estate, placenta’ and ‘fonualoto’, ‘grave’.³⁸ As Kalaveti Batibasaga and others point out, in several Polynesian languages ‘pro-fanua is both the people and the territory that nourishes them, as a placenta nourishes a baby’.³⁹ However, the simplistic idea that indigenous peoples are necessarily physically bonded to their location should be avoided. In this regard, John Campbell refers to the narrative of an inhabitant of a village in north-eastern Papua New Guinea named Tabara, which has a ‘history of fusion, division and travel’ extending over 130 kilometres in distance.⁴⁰ This suggests that certain types of migration occur without substantive loss of, or even as part of, indigenous cultures. At the same time, as Campbell points out, many migrants continue to feel a connection with their land, even after having resided elsewhere for considerable periods of time.⁴¹ This implies that despite the fact that migration and mobility are sometimes inherent in indigenous cultures, the loss of indigenous peoples’ land that is projected to occur as a result of climate change is still likely to interfere with their cultural identity and associated human rights.

Often classified as a ‘slow-onset disaster’, the projected inundation of low-lying small islands will inevitably trigger individuals and communities to relocate within or outside the territory of their States of origin.⁴² The possible disappearance of these States’ territories raises complex questions related to statehood, citizenship and the right of self-determination of affected peoples, as well as to cultural identity. The relationship with Article 1 is particularly significant in this context. Small island States that are threatened with inundation have underlined this significance in multilateral discussions. For example, the Maldives has stated in a submission to the United Nations Office of the High Commissioner for Human Rights (OHCHR) that ‘[t]he permanent loss of statehood, without a successor State to take its place, violates a people’s right to self-determination’.⁴³ The Republic of the Marshall Islands (RMI) has highlighted that the threat of physical disappearance or disuse of a State’s territory is without precedent, and that climate change poses a real and complex threat to nationhood.⁴⁴ It has indicated that it does not believe that migration could be a solution that is fully in accordance with the right to self-determination:

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 is, perhaps, itself a violation of the fundamental human right to nationhood. Due to natural geography, there are few – if any – alternatives for relocating within RMI, and/or within atolls. The reclassification of 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.⁴⁵

³⁸ Kalaveti Batibasaga, 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 Pond, W., ‘The Land with All Woods and Water’, Waitangi Tribunal Rangahaua Whanui Series, Waitangi Tribunal, Wellington (1997) 32).

³⁹ Ibid.

⁴⁰ J. 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 Publishing 2010) 62 (citing J.D. Waiko, ‘Na Minandere, Imo Averi? We Are Binandere, Who Are You?’ 26 Pacific Viewpoint, 9).

⁴¹ Campbell 63.

⁴² 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).

⁴³ Ibid 40.

⁴⁴ 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 December 2008* (2008) 10.

⁴⁵ Ibid.

In the same context, some legal writers have pointed at the intimate relationship between indigenous peoples and their natural environments. This relationship has led Sara Aminzadeh to state that '[e]xercising the right of self-determination and protecting the ecosystem from climate change are [...] one and the same'.⁴⁶ Along similar lines, Tiffany Duong has contended, citing the example of Tuvalu, that '[w]hen the ocean drowns Tuvalu, the loss of sovereignty and statelessness caused by climate change will violate Tuvalu's rights of self-determination'.⁴⁷ She points out that when Tuvaluan people are forced to leave their homelands, they 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.⁴⁸ The OHCHR seemed to follow this rationale in its study, where it suggested that the right of self-determination could potentially be negated as a result of the impacts of climate change.⁴⁹

4. Positive Obligations to Ensure the Right to Enjoy Culture

In light of the above, what are the legal obligations of States towards members of minorities who migrate as a result of climate change? To answer this question, it is important to understand the nature of legal obligations under this provision, particularly whether these include 'positive' obligations to take measures to ensure the right. This is important because climate change as such is caused primarily by greenhouse gas emissions emitted through the acts of private persons, and thus establishing a legal link between climate change-induced migration and greenhouse gas emissions often requires an understanding of what a State failed to do to reduce these emissions. Positive obligations might also reverse the burden of proof in human rights litigation, thus providing alleged victims of climate change with the avenue of arguing that a respondent State must prove compliance with its obligations to protect them. One consequence could be that victims are able to claim reparations even if the cause of the damage is uncertain.⁵⁰

Based merely on the text of Article 27, it would seem reasonable to argue that the provision does not impose positive obligations on States on the basis that it is negatively formulated. Indeed, Article 27 is the only provision in the Covenant that is formulated in negative terms. The HRC has nonetheless found that the provision does create positive obligations, based on a systematic examination of the terms in their context and in the light of the object and purpose of the ICCPR.⁵¹ As there is nothing in the provision to the contrary, a systematic interpretation of the Covenant requires that the provision be interpreted in accordance with Article 2 of the Covenant which sets out an obligation of States 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant'.⁵² As Nowak explains, the obligation to respect these rights 'means that States Parties must refrain from restricting the

⁴⁶ Sara C. Aminzadeh, 'A Moral Imperative: The Human Rights Implications of Climate Change' (2006) 30 *Hastings International & Comparative Law Review* 231 255-6.

⁴⁷ T. T. V. Duong, 'When Islands Drown: The Plight of "Climate Change Refugees" and Recourse to International Human Rights Law' (2010) 31 *University of Pennsylvania Journal of International Law* 1239 1258.

⁴⁸ *Ibid* 1259.

⁴⁹ 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 January 2009) 10.

⁵⁰ This would amount to a precautionary approach in the interpretation of human rights obligations. Dinah L. Shelton, 'Litigating a Rights-Based Approach to Climate Change' (International Conference on Human Rights and the Environment, Tehran, 13-14 May 2009) 235.

⁵¹ As per Article 31(1) of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT). In its General Comment on the Nature of General Legal Obligations under the ICCPR, the HRC states explicitly that the Covenant must be interpreted in accordance with the rules of treaty interpretation as contained in the VCLT. See *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.

⁵² ICCPR, Article 2(1). See also *HRC, General Comment No. 31* para. 6.

exercise of these rights where such is not expressly allowed'.⁵³ In its *General Comment No. 31 on the Nature of the General Legal Obligations Imposed on States Parties to the Covenant*, the Committee elaborated on this obligation, stating that 'any restrictions on any of the [Covenant rights] must be permissible under the relevant provisions of the Covenant'.⁵⁴ It added that '[i]n no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right'.⁵⁵

The HRC has noted that the positive obligations of States will only be fully discharged if States protect individuals against violations by its agents as well as by private persons over which it has jurisdiction.⁵⁶ It points out that:

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.⁵⁷

The positive obligations of States under the Covenant include an obligation, spelled out in Article 2(2), to take the necessary steps to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the Covenant.⁵⁸ The Committee has stated that this requirement 'is unqualified and of immediate effect'.⁵⁹

The HRC's position that Article 27 creates positive obligations flows directly from this rationale. Accordingly, it stated in General Comment 23 that '[p]ositive 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'.⁶⁰ This interpretation is in accordance with the object and purpose of the ICCPR in general and Article 27 in particular: as Nowak points out,

the ... purpose of a specific provision on the protection of minorities in the Covenant is to set down some sort of privileged treatment for minorities in order to achieve real equality. This 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, ethnic, religious and linguistic groups, by businesses and similarly powerful private actors.⁶¹

Such obligations are important in the case of migrants who come from a distinct culture and must flee from the impacts of climate change, and who may be met with hostility and xenophobia by other groups in a third State. In a broad sense, positive obligations under Article 27 might be also be construed as giving rise to prevention obligations, perhaps requiring affirmative action to the benefit of minorities whose cultures are at risk of extinction due to climate change. In light of

⁵³ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (First edn, N.P. Engel Publisher 1993)

³⁶. See also *HRC, General Comment No. 31* para. 6.

⁵⁴ *HRC, General Comment No. 31* para. 6.

⁵⁵ *Ibid.*

⁵⁶ *Ibid* para. 8.

⁵⁷ *Ibid.*

⁵⁸ ICCPR Article 2(2). See also *HRC, General Comment No. 31* para. 13.

⁵⁹ *HRC, General Comment No. 31* para. 14.

⁶⁰ *General Comment No. 23: The Rights of Minorities (Art. 27)* para. 6.1.

⁶¹ Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* 662.

Articles 1, 55 and 56 of the Charter of the United Nations,⁶² the provision might specifically require States to cooperate so as to prevent irreversible loss of intangible cultural heritage that would deprive minorities or peoples of their rights. The interpretative challenge lies in determining what this would mean for individual States, including States that might be confronted with requests for protection by climate migrants, whose rights might already have been affected by the adverse effects of climate change.

5. State Responsibility for Violations of the Right to Enjoy Culture

The HRC offered important clarification of what could amount to a breach of States' obligations in a series of cases against Finland brought by members of the indigenous Sami people. These cases all concerned alleged interferences with Sami people's traditional reindeer herding culture.⁶³ In *Ilmari Länsman et al. v. Finland*,⁶⁴ the HRC decided that the impact of stone quarrying permitted by the Finnish authorities was not so 'substantial' as to amount to a violation of Article 27 because the extent of quarrying did not constitute a denial of the petitioners' right to enjoy their own culture.⁶⁵ The HRC went on to state that under Article 27 measures must be taken to ensure the effective participation of members of minority communities in decisions affecting them, noting that the interests of the petitioners were considered during the decision-making process.⁶⁶ A similar situation arose in *Jouni E. Länsman et al. v. Finland*,⁶⁷ and in applying what Martin Scheinin has described as its 'combined test of participation by the group and sustainability of the indigenous economy'⁶⁸ the HRC was again unable to find a violation of Article 27.⁶⁹

In *Apirana Mahuika et al v. New Zealand*,⁷⁰ the HRC further fine-tuned this test. The case concerned a settlement between New Zealand and Maoris that would regulate all Maori fishing rights and interests. The complainants had not been part of an extensive process of negotiations on the settlement.⁷¹ However, the facts demonstrated that New Zealand had engaged itself in a process of broad consultation before proceeding to legislate while paying specific attention to the sustainability of Maori fishing activities. The HRC held that the State Party's extensive consultation with Maori representatives and its specific attention to the sustainability of Maori fishing activities amounted to compliance with Article 27.⁷² The Committee reiterated 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

⁶² Charter of the United Nations (1945). For a discussion about the duty to cooperate in the context of climate change-induced interferences with human rights see John H. Knox, 'Climate Change and Human Rights Law' (2009) 50 *Virginia Journal of International Law*.

⁶³ These cases include *O.Sarea v. Finland* (Communication No 431/1990) and the cases discussed below.

⁶⁴ See *Ilmari Länsman et al. v. Finland* (Communication No 511/1992).

⁶⁵ *Ibid* paras. 9.5-9.7.

⁶⁶ *Ibid*.

⁶⁷ *Jouni E. Länsman et al. v. Finland* (Communication No 671/1995).

⁶⁸ Martin Scheinin, 'Advocating the Right to Development through Complaint Procedures under Human Rights Treaties' in Bard A. Andreassen and Stephen P. Marks (eds), *Development as a Human Right: Legal, Political and Economic Dimensions* (Intersentia 2010) 343.

⁶⁹ *Jouni E. Länsman et al. v. Finland* para 10.5 (finding that because the petitioners were consulted and did not react negatively to plans for logging, a violation of Article 27 could not be found). The Committee applied the test again in the case of *Äärelä and Näkkäljärvi v. Finland* (Communication 779/1997), again finding no violation of Article 27 on the same grounds as in the two *Länsman* cases.

⁷⁰ *Apirana Mahuika et al. v. New Zealand* (Communication No 547/1993).

⁷¹ *Ibid* para. 5.8.

⁷² *Ibid* para. 9.6.

continue to benefit from their traditional economy'.⁷³ In doing so, it made an important pronouncement on the margin of appreciation:

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, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27.⁷⁴

This interpretation is indicative of a minimum level of protection guaranteed under Article 27, which might be understood as the 'core' of the right which must be protected at all times.⁷⁵ It could be deduced that States are obliged to address the threat posed by climate change to the traditional cultures of indigenous people and other cultural minorities in order to avoid denial of the right. It is clear from the jurisprudence of the HRC and other bodies that these obligations 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 construed as imposing obligations on States to take legislative and other measures to achieve standards of protection that are required under each of these rights. The participation dimension of the right under Article 27 could be construed in conjunction with Article 1 of the Covenant, pointing towards an obligation to ensure that affected people are able to participate in decision-making on climate change at all levels.

6. Territorial Boundaries or Causation as a Shield against State Responsibility?

An outstanding question in the interpretation of States' obligations is the territorial scope of obligations. Much scholarship has been devoted to the broader question of whether States' obligations under the ICCPR extends towards individuals outside a State's territory, with several scholars relying on the HRC's statement in *Lopez v Uruguay* 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'⁷⁶ to argue that the obligations of State parties do extend to persons outside their territories.⁷⁷ The HRC itself has offered some clarification: it first stated in its *General Comment No. 31* that States owe obligations 'to anyone within the power or effective control of the State Party, even if not situated within the territory of the State Party',⁷⁸ and then apparently changed its approach to one that considers whether a State has control over a situation that interferes with Covenant rights, rather than over individuals whose rights are affected.⁷⁹

In the context of climate change, an argument could accordingly be made that by virtue of Articles 27 and 1, States with control over activities that cause climate change incur positive obligations to

⁷³ Ibid para. 9.5.

⁷⁴ Ibid para. 9.5.

⁷⁵ HRC, *General Comment No. 31* para. 6.

⁷⁶ *Sergio Euben Lopez Burgos v. Uruguay* (Communication No R12/52) para. 12.3.

⁷⁷ For an overview see Olivier de Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press 2010) 123. See also Marko Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 *Human Rights Law Review* 411.

⁷⁸ HRC, *General Comment No. 31* para. 10.

⁷⁹ For a discussion see 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 (supporting what the author characterises as a 'facticity creates normativity approach'). For criticism of this approach in the context of climate change see Knox 202-203 fn. 187.

protect the culturally significant economic activities of certain minorities. This would then include an obligation to take measures that provide members of these minorities with the opportunity to participate in the decision-making process in relation to the activities that could affect their rights. Measures that deprive cultural minorities or peoples from the ability to benefit from their traditional economy are seemingly prohibited in any event. Insofar as climate change-induced migration is symptomatic of the denial of this ability, one or several States might be under an obligation to provide an adequate and effective remedy to climate migrants as a result of their involvement in the causes of climate change (and thus irrespective of their obligations under international refugee law). These conclusions trigger questions about the extent to which States' acts or omissions that contribute to climate change can be meaningfully linked with the interferences with climate migrants' cultural rights if these interferences triggered the migration.

Although anecdotal and scientific evidence would need to be considered on a case-by-case basis, it is instructive to note here that climate change-induced migration can be legally understood as a foreseeable consequence of climate change. The Intergovernmental Panel on Climate Change (IPCC) first observed in 1990 that '[m]igration and resettlement may be the most threatening short-term effects of climate change on human settlements' and more generally that the gravest effects of climate change may be those on human migration.⁸⁰ This recognition of the impact of climate change on human migration has triggered a considerable body of scholarship, including, as Jane McAdam notes, alarmist and non-empirically grounded assumptions about the extent and nature of such migration.⁸¹ However, the assumption that climate change—in combination with multiple other 'stressors'—triggers large-scale human migration is virtually undisputed. As McAdam puts it, climate change 'tends to multiply pre-existing stressors' and 'acts as a threat multiplier, which magnifies existing vulnerabilities'.⁸² This reveals the complexity of climate change-induced migration as a human rights problem, with causal factors involved that may not easily be linked with the acts and omissions of States. In this regard, it is worthwhile recalling that establishing causation is not necessarily required to prove the existence of a human rights violation. Illustrative is the European Court of Human Rights' decision in *Tatar C. Roumanie*, finding that 'even in the absence of scientific probability about 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'.⁸³ It is clear from this judgment, which reflects the general law of State responsibility,⁸⁴ that a failure to act in accordance with a positive obligation will be attributed to

⁸⁰ Intergovernmental Panel on Climate Change, 'Contribution of Working Group I to the IPCC First Assessment Report' in J.T. Houghton, G.J. Jenkins and J.J. Ephraums (eds), *Climate Change: The IPCC Scientific Assessment* (Cambridge University Press 1990) accessed 1 December 2013 5-9.

⁸¹ Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford University Press 2012) 4.

⁸² *Ibid* 5.

⁸³ *Tatar C. Roumanie* (judgement of 5 July 2007) (App No 67021/01) ECtHR para. 84.

⁸⁴ The general law of State responsibility has been studied by the International Law Commission (ILC) for nearly 50 years and culminated in the Articles on the Responsibility of States for Internationally Wrongful Acts ('ILC Articles'). See ILC, '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 (including the ILC Articles and Commentaries thereto). For a discussion about the applicability of the law of State responsibility to the ICCPR see 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 Publishing 2004) and Dominic McGoldrick, *The Human Rights Committee* (Oxford University Press 1991) 169 (noting that the HRC has generally interpreted the ICCPR in accordance with the general law on State responsibility).

the State and trigger the State's responsibility if the State was bound by the obligation. It will not be necessary to link the omission to a specific organ or agent.⁸⁵

The unwillingness of human rights bodies to recognise either territorial boundaries or causation as automatic shields against State responsibility seems evident. Accordingly, the precise limits on States' discretion need urgent clarification. As this article has demonstrated, there is a specific need for (quasi-) judicial interpretation of States' obligations in the context of climate change-induced damage to human beings and traditional cultures. Human rights bodies might be able to offer such interpretations at their own initiative or, when confronted with petitions, on a case-by-case basis in light of the specific facts of one case. In the view of the present author, a proactive stance of human rights bodies would be preferable given the strenuousness of the task of interpreting obligations that are essentially about solving a problem that involves the international community as a whole. *Ex post facto* litigation might serve to provide victims with a remedy, but is highly unlikely to offer the clarification of States' obligations that is needed to make international human rights law better equipped to inform climate change-related State action, including in the area of migration.

7. Concluding Remarks

This article has purported to show that States' obligations under international human rights law towards climate migrants potentially stretch much further than a mere obligation to allow individual migrants basic refugee-type protection. And although this protection may, in some cases, be a precondition for enjoyment of Article 27 rights within the territory of a host State, the added value of these rights is that it creates obligations to prevent and remedy forced migration. More specifically, traditional economies and cultures need to be protected against adverse effects of climate change through positive State action by virtue of States' existing obligations under Articles 27 and 1. These provisions also require that cultural minorities and peoples be consulted about measures that might interfere with these traditional economies. However, the operationalisation of these requirements might be hampered by lack of insight into their meaning and scope in the context of climate change. The requirement nonetheless flows from treaty obligations and could thus, based on the principle of *pacta sunt servanda*, give rise to the international responsibility of a State that fails to meet it.⁸⁶ In accordance with the general law of State responsibility, the violating State would incur additional obligations to cease the internationally wrongful act and make full reparations for injury caused by the act.⁸⁷ The responsibility of States for human rights violations could be invoked by one or several States against one or several others, or by individuals through international human rights bodies.⁸⁸ This is important considering that a State where minorities or peoples reside presumably has a right, and perhaps an obligation, to assert and defend the rights of these people(s) rather than, as Dinah Shelton puts it, 'remaining passive and ultimately defending itself for alleged rights-violating acts

⁸⁵ As the ILC recognises, there is often a close link between the basis of attribution and the substantive obligation that is allegedly breached. See James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries* (Cambridge University Press 2002) Commentary to Chapter II, para. 4.

⁸⁶ It could be argued that States have partly complied with Article 27 and 1 obligation by admitting indigenous peoples organisations as observers (with some participation rights) to international climate negotiations under the UNCCC. 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 *Colorado Journal of International Environmental Law & Policy* 49.

⁸⁷ ILC Articles, Article 31.

⁸⁸ On remedies for violations of international human rights law see generally Dinah Shelton, *Remedies in International Human Rights Law* (2nd edn, Oxford University Press 2010)

and omissions'.⁸⁹ Human rights bodies or courts could take account of these obligations when confronted with claims submitted on behalf of climate migrants that invoke Articles 27 and 1 of the ICCPR.

The invocation State responsibility (or any form of legal liability) for consequences of climate change comes however with its own legal and practical obstacles.⁹⁰ In relation to the ICCPR, these obstacles include the above-mentioned ambiguity about substantive legal obligations, including about the content of obligations owed by third States towards members of minorities who are forced to flee from the impacts of climate change. Moreover, questions arise with regard to the type of evidence, including scientific evidence, which might be needed to establish wrongfulness of climate change-related acts attributable to States. Possible answers to these questions could give rise to radically different conclusions about State responsibility, ranging from a scenario where no State is legally responsible for adverse effects of climate change that affect human beings to one where virtually every State is responsible for such effects. One would hope that human rights bodies confronted with these questions would find nuanced answers, perhaps through taking account of the principle of 'common but differentiated responsibilities and respective capabilities' in determining the content of human rights obligations of each State.⁹¹ This would enable 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 rights of non-nationals abroad. International human rights scholarship could be instrumental in understanding how this part of international human rights law could be meaningfully invoked to deal with climate change-induced migration, including in the context of international climate change negotiations and international cooperation.

⁸⁹ Shelton 91.

⁹⁰ On State responsibility for climate change generally, see Roda Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (Martinus Nijhoff Publishers 2005); Christina Voigt, 'State Responsibility for Climate Change Damages' (2008) 77 *Nordic Journal of International Law* 1 22 and Christian Tomuschat, 'Global Warming and State Responsibility' in Holger Hestermeyer and others (eds), *Law of the Sea in Dialogue* (Springer 2011) 18-22.

⁹¹ I have elaborated this possibility elsewhere. See Margreet Wewerinke, 'Climate Change: Human Rights Committee, Ad-Hoc Conciliation Commission' in Mark Gibney and Wouter Vandenhoe (eds), *Litigating Transnational Human Rights Obligations: Alternative Judgments* (Routledge 2013).

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