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CLIMATE MIGRANTS' RIGHT TO ENJOY THEIR CULTURE

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I Introduction

The Intergovernmental Panel on Climate Change (IPCC) first observed in 1990 that 'migration and resettlement may be the most threatening short-term effects of climate change on human settlements'.[1] Numerous studies have since confirmed that climate change – in combination with multiple other 'stressors' – will force an increasing number of people across the globe to relocate temporarily or permanently to safer habitats.[2] The threat of forced relocation is particularly urgent for Pacific Small Island Developing States (PSIDS) such as Tuvalu, Kiribati, the Solomon Islands, the Republic of the Marshall Islands, Fiji and Vanuatu, which are already losing habitable territory as a result of climate change. At the same time, empirical evidence suggests that a significant proportion of people from low-lying PSIDS could be 'trapped' by worsening climate conditions, declining living standards and few opportunities for migration or income-generation for adaptation.[3] The lack of mobility options only decreases the chances that cultural heritage could be preserved in face of climate change, as well-managed migration is widely recognised as a means of enhancing resilience and adaptive capacity in island communities.[4]

The potential loss of cultural heritage as a result of climate change has significant implications for the enjoyment of human rights. PSIDS first started raising concerns about climate change at international human rights forums more than a decade ago.[5] And at the initiative of a coalition of Small Island Developing States (SIDS) from across regions, the United Nations Human Rights Council has recognised in a range of resolutions that climate change 'poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights'.[6] The Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC) has similarly recognised the importance of human rights standards

in the context of climate change, starting with the acknowledgment in a COP decision that '[p]arties should, in all climate change-related actions, fully respect human rights'.[7] Human rights advocacy at the climate negotiations intensified in the run-up to the 21st COP held in Paris, France in 2015,[8] and the Paris Agreement adopted under the UNFCCC has become the first multilateral climate agreement to recognise States' human rights obligations.[9]

The Paris Agreement and its accompanying COP decision feature other remarkable developments: the Paris Agreement includes a standalone article on 'Loss and Damage', which recognises

> the importance of averting, minimising and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage.[10]

The provision also 'anchors' an institution established by the COP in 2013 to address loss and damage, the Warsaw International Mechanism on Loss and Damage Associated with Climate Change (WIM), into the Paris Agreement while making it subject to the authority and guidance of the Meeting of the Parties to the Paris Agreement.[11] And the COP decision accompanying the Agreement requests the Executive Committee of the WIM

> to establish, according to its procedure and mandate, a task force to complement, draw upon the work of and involve, as appropriate, existing bodies and expert groups under the Convention . . . to develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change.[12]

This builds on the workplan of the WIM, which calls to 'enhance the understanding of and expertise on how the impacts of climate change are affecting patters of migration, displacement and human mobility; and the application of such understanding and expertise'.[13] However, the work of the WIM has so far not been significantly informed by international human rights law. This contribution aspires to demonstrate the added value of a more integrated approach to human rights, climate change and migration, which could inform the work of the future task force of the Executive Committee of the WIM and that of other international bodies and forums mandated to address human rights, climate change or migration.

The link between climate change, the potential loss of cultural heritage and international human rights law has been insufficiently explored in literature on human rights and climate-induced migration, most of which focuses on States' obligations arising from the right to life or the prohibition of inhumane treatment. This focus can be explained by a presumption in the literature that there is a 'normative gap' in international law relating to the protection of climate migrants, which is supposedly apparent from the lack of protection offered under the 1951

Refugee Convention[14] and its 1967 Protocol.[15] This presumption has triggered a quest for human rights norms that might offer the refugee-type protection otherwise provided under international refugee law, whereby the rights to life and the prohibition of inhumane treatment are natural starting points for analysis.[16] This contribution takes a different starting point, exploring the potential of international human rights law to provide a comprehensive framework of protection for actual and potential climate migrants. This framework would be premised on a much wider spectrum of obligations than merely obligations to provide refugee-type protection, ranging from obligations to prevent loss and damage associated with climate change through to obligations to help facilitate or finance community-based relocation in a manner that enables communities to preserve their cultural identities and traditional economies.

The focus of the analysis is 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 (ICCPR). The ICCPR is one of the most widely ratified international human rights treaties, with its 168 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] The right to culture is also arguably enshrined in customary international law.[19] The contribution peruses the Human Rights Committee's (HRC) 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 ICCPR and of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[20] On the basis of this analysis, the contribution suggests that a 'normative gap' related to the protection of climate migrants does not necessarily exist. It also sets out the broader implications of a human rights-based protection framework, referring to State responsibility for violations of the right to culture and international cooperation on human mobility.

II Cultural rights, the right of self-determination and climate change

A The right to culture in international law

The right to enjoy one's own culture is based on Article 27 of the Universal Declaration of Human Rights, which provides that everyone has the right to participate freely in the cultural life of the community.[21] Article 27 of the ICCPR provides a specific right of minorities to enjoy their own culture, while Article 15 of the ICESCR expresses the universal right 'to take part in cultural life'.[22] Similar provisions are contained in other international and regional human rights treaties.[23] Manfred Nowak points out that the right to culture protected under Article 27 of the ICCPR was purposefully formulated as an individual right, but with the phrase 'in community with the other members of their group' inserted

in order to 'maintain the idea of a group',[24] making it an individual right with a collective element.[25] James Anaya, a former 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.[26] The Committee on Economic, Social and Cultural Rights (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.[27]

With regard to the term 'minorities', Manfred Nowak notes that its meaning partly overlaps with the term 'peoples' in Article 1 of the Covenant.[28] 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.[29] 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.[30] Importantly, the term has been interpreted as including aliens; in other words, the term 'minorities' does not relate to nationals of a State only.[31] 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'.[32] Nowak also opines that the rights enjoyed by minorities 'should not be denied to immigrants, including migrant workers, who entered the country only recently'.[33]

The HRC has further made it clear that indigenous communities may constitute a minority group within the meaning of the article.[34] 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.[35] It could accordingly be argued that any group of actual or potential climate migrants that meets the definition of 'minorities' is entitled to protection of their right to culture in their State of origin as well as in a receiving State, regardless of their legal status or citizenship. In this context, it is important to note that even relatively small island nations are often composed of a myriad of culturally distinct groups. For example, the Republic of Vanuatu has about 80 inhabited islands, a population of about 287,000[36] and 138 indigenous languages spoken by distinct cultural communities, each with its own traditions and social structures.[37] When speaking of the right to culture as protected under Article 27, it is the distinct 'micro' cultures of a nation that presumably attract protection entitlements for each of its members. And insofar as an entire nation has a distinct culture, it might be simultaneously protected by virtue of parallel instruments and provisions that are not confined to minorities, including Article 1 of the ICCPR and ICESCR. Moreover, it would be protected where members of the nation migrate to a third country where they would effectively constitute a minority.

For the purpose of international 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'.[38] The HRC clarified in *Ilmari Länsman v Finland*[39] that under Article 27, minorities or indigenous groups have the right to the protection of traditional activities such as hunting, fishing or reindeer husbandry.[40] 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.[41] At the same time, it found that Article 27 does not only protect *traditional* means of livelihood of national minorities: 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. The HRC reaffirmed these findings in *Apirana Mahuika v New Zealand*,[42] where it clarified that economic activities may come within the ambit of Article 27, if they are an essential element of the culture of a community.[43] Accordingly, it found that the Maori's right to enjoy the benefits of commercial fishing came within the scope of Article 27.[44] This broad conception of culture is important for communities and peoples affected by climate change: as Jessie Hohmann notes, the process of identification of victims of human rights violations comes with the risk that the potential victims' culture is represented as static.[45] The HRC's insistence that the right to enjoy one's culture cannot be determined *in abstracto* but has to be placed in context[46] prevents human rights litigation or policy from becoming an obstacle to innovation and change, which would have potentially detrimental effects on people's adaptive capacity.

In relation to the right of self-determination, it must be noted that the jurisprudence of the HRC reflects a strong link between Articles 1 and 27. This link was first developed in the case of *Lubicon Lake Band v Canada*,[47] where the indigenous Lubicon Lake Band alleged that the permission of energy exploration by private corporations in the Band's territory entailed violations of the Band's right of self-determination. Although the HRC considered the right of self-determination as not cognisable under the Optional Protocol, it proceeded to consider the communication under Article 27 instead.[48] Article 27 has since provided an indirect way to invoke the provisions of Article 1 through the individual complaint procedure, and a significant part of the jurisprudence of the HRC on Article 27 now reflects the simultaneous expression of the right of self-determination. Accordingly, the reasoning of the HRC in Article 27 cases is instructive for understanding how the rights of peoples affected by climate change are protected under international law, irrespective of whether the peoples in question constitute minorities within the meaning of Article 27.

B Climate change, migration and the right to culture

The enjoyment of the right to culture is most obviously affected by climate change where 'culture' involves a close relationship of indigenous peoples with territory

or land.[49] Anthropologists have found that this relationship is reflected in many indigenous cultures and languages: in, for example, 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'.[50] 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'.[51] At the same time, however, Pacific indigenous cultures are characterised by a history of 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.[52] Traditional knowledge of navigation and canoe-building possessed by indigenous peoples across the Pacific further underscores the historical importance of mobility to Pacific indigenous cultures.[53] Still, many migrants continue to feel a linkage with their indigenous lands, even after having lived elsewhere for considerable periods of time.[54] The loss or uninhabitable character of an indigenous territory breaks such connections and threatens the cultural identity of affected peoples. Indeed, some indigenous peoples principally 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.[55] This indicates 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 still threatens to interfere with their cultural identity and associated human rights.

These observations are confirmed by the submissions made by SIDS to the Office of the High Commissioner for Human Rights (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'.[56] 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'.[57] The submission concludes that '[t]he 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'.[58] Along similar lines, the Republic of the Maldives has stated in a submission to the OHCHR that 'catastrophic climate change would [. . .] cause the denial of the right to self-determination of the Maldives people'.[59] The OHCHR seemed to follow this rationale in its analytical study on the relationship between climate change and human rights, where it suggested that the right of self-determination could potentially be negated as a result of the adverse effects of climate change.[60]

III State responsibility for violations of the right to culture

What are the implications of the right to culture and the right of self-determination for actual and potential 'climate migrants'? To understand this, we must analyse what Judge Huber in *Spanish Zone of Morocco* called 'the necessary corollary of a right', namely responsibility.[61] A closer examination of the HRC's jurisprudence sheds light on the precise requirements of the right to culture which, when violated, would result in State responsibility. And an analysis of the territorial scope of States' obligations and the law of State responsibility will shed light on the circumstances in which a State or State might be internationally responsible for violations of the right to culture that are a direct or indirect result of climate change.

A States' obligations to respect and ensure the right to culture

When considering States' obligations related to the right to culture, a first point to note is 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, based on a systematic examination of the terms in their context and in the light of the object and purpose of the ICCPR.[62] 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'.[63] 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, pointing 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.[64]

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 recognised in the Covenant.[65] The Committee has stipulated that this requirement 'is unqualified and of immediate effect'.[66] The HRC's position that Article 27 creates positive obligations flows directly from this understanding. In the view of the Committee, Article 27 prescribes 'Positive measures of protection . . . 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'.[67]

The HRC's assessment of States' compliance with obligations has focused on both the consequences of States' acts or omissions and the decision-making process

through which the alleged violation materialised. Scheinin describes the test applied by the HRC as a 'combined test of participation by the group and sustainability of the indigenous economy'.[68] Examples of this test are found in the HRC's views on a series of cases against Finland brought by members of the indigenous Sami people, concerning their traditional reindeer herding culture.[69] In *Ilmari Länsman v Finland*,[70] the HRC suggested that the right contains a substantive aspect that States are obliged to protect against interferences by private actors:

> 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.[71]

This rationale 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'.[72] In considering this question, the HRC 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*,[73] another case concerning reindeer herding in Finland alleging violation of Article 27, this time for logging activities, the HRC reaffirmed 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'.[74]

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, 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.[75] 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'.[76] More specifically, the respondent State had been able to prove that reindeer husbandry was protected by national legislation, and that the obligations imposed by Article 27 had been observed in the permit proceedings.[77]

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 alone. However, it went on to consider a range of other factors before concluding that there had been no violation. First, it noted that 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.[78]

In *Apirana Mahuika v New Zealand*, 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.[79]

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.[80] 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 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.[81]

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',[82] and that the State party was 'under a duty to bear this in mind when either extending existing contracts or granting new ones'.[83] 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'.[84] 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 International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (i.e. that a violation may consist of a composite act or practice).[85] This consolidates the interpretation of Article 27 as giving rise to a broad spectrum of positive and negative obligations, which may include obligations to adopt laws and policies to prevent deprivations of the right to culture that would result from dangerous climate change. This interpretation begs for further examination of the circumstances in which violations of these obligations may be established.

B Linking adverse effects of climate change on the enjoyment of the right to culture to wrongful conduct

Where it is alleged that the right to culture is being violated in connection with the adverse effects of climate change, several questions relating to state responsibility emerge. At the outset, the most pressing question is which state would be responsible for alleged violations. The jurisprudence discussed above appears to be of little assistance in answering this question: as most existing human rights jurisprudence, it concerns cases brought by peoples and individuals against their own State. The question of which State was potentially responsible for the alleged

violations therefore did not arise in these cases. In contrast, cases of human rights infringements involving climate change, migration and mobility could involve wrongful conduct attributable to multiple States. It seems unlikely that actual or potential climate migrants would exclusively seek to hold their home state accountable for their grievances, given that those states often lack significant control over the causes of climate change and have limited adaptive capacity to preserve the habitability of islands, while depending on the mercy of third States for the creation of international mobility options for their nationals. In all likelihood, meaningful litigation would address states that made significant contributions to historical emissions while possessing the means to provide affected states with adaptation finance and their inhabitants with migration options.[86]

An important question to address, then, is the territorial scope of States' obligations under international human rights law, including in particular the ICCPR. A first point to note in this regard is that the personal scope of international 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'. We should also note that the right of self-determination provided for in Article 1 of the 1966 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.[87] The HRC highlighted this in its *General Comment on the Right to Self-Determination of Peoples*, 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'.[88]

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'. 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.[89]

It also emphasises the 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.[90] Accordingly, it considers that the word 'and' in Article 2(1) must be interpreted disjunctively. The disjunctive reading of the word 'and' has been endorsed by the International Court of Justice in its *Wall* opinion[91] and in the literature.[92] In relation to the phrase 'subject to its jurisdiction', the HRC has

clarified that the relevant test to apply for establishing jurisdiction is whether a State has control over a situation or instrumentality that affects the enjoyment of Covenant rights.[93]

In the context of climate change, an argument could accordingly be made that by virtue of Articles 27 and 1 of the ICCPR, States with jurisdiction or control over private entities whose activities contribute to climate change incur positive obligations to protect the culturally significant economic activities of minorities or peoples that are threatened by climate change. These obligations would arise irrespective of the location of the minorities or peoples. States also presumably have an obligation to provide these beneficiaries with the opportunity to participate in the decision-making process related to the activities that could affect their rights. Measures that deprive cultural minorities or peoples from the ability to benefit from their traditional economy altogether are outright prohibited, as is clear from the HRC's rejection of a margin of appreciation to allow economic activities that deprive beneficiaries of this right. Moreover, insofar as climate change-induced migration is symptomatic of a denial of the right to enjoy a culture, one or several States might be under an obligation to provide an adequate and effective remedy to climate migrants as a result of having failed to control private activities that cause climate change. These obligations would arise where a State's failure to address climate change can be characterised as 'wrongful' under international human rights law. In a similar vein, a State's failure to provide relevant assistance to States affected by climate change might be characterised as a wrongful act that triggers obligations to provide affected peoples with an adequate and effective remedy.

It is sometimes suggested that Article 2(1) would be too widely interpreted if it would prohibit activities that have the cumulative, indirect, remote and unintended consequence of impinging on human rights. However, doctrinal analysis supports the opposite conclusion, namely that a substantive provision of the Covenant read in light of Article 2(1) does have the capacity to render some of these activities unlawful under international law. First of all, there is no causal requirement inherent in either international human rights law or the general law of State responsibility. In other words, establishing a causal link between a human rights deprivation on the one hand and the act or omission of a particular State is not required to prove the existence of a human rights violation per se. Illustrative is the European Court of Human Rights (ECtHR)'s decision in *Tatar C. Roumanie*, where the Court highlighted 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'.[94] It is clear from this judgment, which reflects the general law of State responsibility,[95] that a failure to act in accordance with a positive obligation will be attributed to 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.[96] Thus, instead of requiring immediacy, directness,

proximity or intention in relation to human rights deprivations, human rights law renders State conduct potentially unlawful by virtue of allowing conduct that puts human rights at serious risk. The law of State responsibility suggests that several States could be held individually responsible for the same or similar risky conduct.[97] As responsibility is established on a case-by-case basis, there is no question of multiple states being simultaneously responsible without having regard to differing circumstances. Indeed, precisely those differing circumstances will be considered in determining whether or not a state's conduct is lawful in light of its obligations to respect and ensure the right to culture.

Foreseeability will be a key question in litigation on the right to culture and climate change. In other words, judicial or quasi-judicial bodies will need to consider whether the risk of denial of the right is, to some extent, a foreseeable consequence of the State's conduct. In the context of climate change and migration, foreseeability must be considered in light of the overwhelming body of scientific evidence that unambiguously links the emission of greenhouse gases with changes in the Earth's climate system. More specifically, it has been recognised since at least 1990, when the IPCC issued its first Assessment Report, that anthropogenic climate change has the potential to render island territories uninhabitable. And as noted above, the same report highlighted migration and resettlement as likely consequences of climate change. In light of the principle of effectiveness, it seems unlikely that human rights bodies would require complainants in climate change cases to prove that the specific harm suffered was a foreseeable consequence of the specific State's conduct, as imposing such a stringent test could effectively deprive millions of people of a remedy for potential violations of their right to culture. Instead, the foreseeability of specific human rights violations would again need to be considered on a case-by-case basis, taking account of the State's actual or assumed knowledge about the causes and consequences of climate change at the time the allegedly wrongful conduct occurred.

The HRC's jurisprudence under Article 27 already shows a tendency to consider a wide range of factors in determining whether a State has breached its obligations to respect and ensure the right to culture. As we have seen above, the Committee tends to consider the impact of the permitted activities on the minorities' traditional culture, details of consultation processes and decisions of national courts. In deciding cases involving alleged violations of the right to culture resulting from climate change, human rights bodies could also take account of parallel obligations under the UNFCCC, the Kyoto Protocol and the Paris Agreement, including obligations to provide technology, finance and capacity building to developing countries in accordance with the principle of 'common but differentiated responsibilities and respective capabilities'.[98] Taking account of these differentiated obligations would lead to interpretations of States' human rights obligations that reflect States' historical contributions to climate change and their capacity to realise not only the rights of their own people but also rights of actual or potential climate migrants from third countries.[99] The need to consider a wide range of factors in establishing violations of the right to culture also prevents a scenario where virtually every State

is responsible for violations of the right, as only in certain circumstances a state's conduct—or rather, a state's practice—relating to climate change will be considered wrongful in light of Article 27.

In accordance with the general law of State responsibility, a State that has actually violated its obligations to respect and ensure the right to culture would incur additional obligations to cease the wrongful conduct and make full reparations for injury caused by the act.[100] 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.[101] The role of States affected by climate change in enforcing obligations pertaining to the right to culture is important considering that States where minorities or peoples reside presumably have a right, and perhaps an obligation, to assert and defend their people's right to culture rather than, as Dinah Shelton puts it, 'remaining passive and ultimately defending itself for alleged rights-violating acts and omissions'.[102] The initiative of PSIDS to consider a Pacific Climate Treaty that would protect cultural rights while seeking redress for loss and damage associated with climate change could be seen as a way of defending the rights of Pacific island peoples on the international plane.[103] Minorities and peoples affected by climate change also have a crucial role to play in identifying and developing suitable remedies for violations of their right to culture, as restoration of the enjoyment of the right necessarily entails regaining autonomy over their lives and livelihoods. This requires that these minorities and peoples have a 'seat at the table' where responses to the adverse affects of climate change and mobility and relocation options are being developed or negotiated.

IV Concluding remarks

The HRC's jurisprudence related to the right to culture suggests that States' existing obligations to ensure actual and potential climate migrants' right to culture are broad and far-reaching. The implementation of these obligations might be hampered by lack of insight into their precise meaning and scope in the context of climate change. However, this contribution has demonstrated that States' discretion relating to a range of issues relevant to the protection of cultural rights in the face of climate change and migration – including mitigation ambition, the provision of financial, technological and capacity-building support to developing countries and the response to climate-induced migration once people decide to move – is limited by these existing obligations. More specifically, States with control over the actors or instrumentalities that cause climate change have obligations to prevent forced migration through climate change mitigation and support for adaptation. There are parallel obligations to consult with cultural minorities and peoples about measures that might interfere with their traditional economies. These requirements exist irrespective of the location or nationality of those whose human rights are affected. The binding nature of these requirements means that the law of State responsibility will be engaged where one or several States fail to meet them. States that are responsible for violations will have

incurred an obligation to restore the enjoyment of the right to culture where beneficiaries are experiencing deprivations.

Human rights bodies and experts could be instrumental in understanding how the right to culture could be meaningfully invoked to deal with climate change-induced migration. Human rights bodies could offer clarification of the precise scope of relevant obligations at their own initiative or, when confronted with petitions, in light of the specific facts of a case. In the view of the present author, a proactive stance of human rights bodes is desirable given the strenuousness of the task of interpreting obligations with both transnational and local dimensions. *Ex post facto* litigation might serve to provide selected victims with a remedy, but is highly unlikely to offer the comprehensive clarification needed to guide States' responses to actual and potential climate-induced migration. Members of human rights treaty bodies, Special Procedures of the UN Human Rights Council and other members of the international human rights community should therefore engage directly in the work of the WIM, including its Task Force on displacement, to ensure that human rights obligations inform the responses to actual and potential climate-induced migration that might be developed at the national, regional and international levels. At the same time, experts and decision makers need to engage with minorities and peoples affected by climate change in order to safeguard the right to culture in the design of such responses.

Notes

* An earlier version of this article was published as a Working Paper by the Centre for Governance and Human Rights, University of Cambridge and the Cambridge Centre for Climate Change Mitigation Research.

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4 Ibid.

5 See, for example, Initial Report of Kiribati to the Committee on the Rights of the Child, UN Doc CRC/C/KIR/1 (7 December 2005).

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8 For details see John Knox, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, UN Doc A/HRC/31/52 (1 February 2016) paras 7–22.

9 Paris Agreement (adopted 12 December 2015, not yet entered into force) UN Doc FCCC/CP/2015/L.9/Rev.1 ('Paris Agreement'), preambular para 11.

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11 Article 8(2) Paris Agreement.

12 UNFCCC, Adoption of the Paris Agreement, COP Decision 1/CP.21, UN Doc FCCC/CP/2015/L.9/Rev.1 (12 December 2015) para 50.

13 Report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage Associated with Climate Impacts, UN Doc FCCC/SB/2014/4, Annex II (24 October 2014) 11.

14 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150 ('Refugee Convention').

15 Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 ('Refugee Protocol'). See further Vikram Kolmannskog and Lisetta Trebbi, 'Climate Change, Natural Disasters and Displacement: A Multi-Track Approach to Filling the Protection Gaps' (2010) 92 *International Review of the Red Cross* 713, Walter Kälin, 'Conceptualising Climate-Induced Displacement' in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart 2010), Bonnie Docherty and Tyler Giannini, 'Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees' (2009) 33 *Harvard Environmental Law Review* 349 and Michel Prieur, Jean-Pierre Marguenaud, Gérard Monediaire, Julien Betaille, Bernard Drobenko, Jean-Jacques Gouguet, Jean-Marc Lavieille … Agnès Michelot, 'Draft Convention on the International Status of Environmentally Displaced Persons' (2008) 4 *Revue Européenne de Droit de l'Environnement* 395.

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

18 For ratification status, see https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en (accessed 23 March 2017).

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20 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

21 Universal Declaration of Human Rights, General Assembly Resolution 217 A(III) (adopted 10 December 1948), UN Doc A/810 at 71 (1948) (UDHR), Art 27(1).

22 Article 15(1)(a) ICESCR.

23 Expressions of cultural rights are also found inter alia in the 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).
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25 Human Rights Committee (HRC), General Comment No 23: The Rights of Minorities (Art 27) adopted 8 April 1994, UN Doc CCPR/C/21/Rev1/Add5 HRC para 16.
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27 General Comment No 21: Right of Everyone to Take Part in Cultural Life (Art 15, para 1 (a), of the ICESCR) adopted 21 December 2009, UN Doc E/C12/GC/21 CESCR, para 9.
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32 See HRC, General Comment 23, para 5.2.
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34 HRC, General Comment No 23, para 3.2.
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41 Ibid.
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43 Ibid. para 9.3.
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63 ICCPR, Article 2(1). See also HRC, General Comment No 31, para 6.
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72 Ibid. paras 9.5–9.7.
73 *Jouni E. Länsman et al. v Finland* (671/1995), Views, CCPR/C/58/D/58/D/671/1995 (1996).
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91 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 9 para 111.
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94 *Tatar C. Roumanie* (judgment of 5 July 2007) (App No 67021/01) ECtHR para 84.
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97 Article 47, ILC Articles on State Responsibility.
98 I have elaborated this possibility elsewhere. 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).
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