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Leiden  
The Netherlands

# Collective human rights as an (onto)logical solution to climate change: reconceptualizing, applying and proceduralizing an overlooked category of human rights

Holtz, J.I.

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## 6 Conclusion

This study explored the potential of collective human rights in the climate context by analysing current theories on collective rights and ultimately providing a coherent ontological theory of collective human rights, which was then applied substantively and procedurally from a climate perspective. This concluding chapter summarises this study's most significant findings and key take-aways. Before turning to this assessment, it first positions the approach taken in the current climate discourse and formulated approaches to the climate crisis, before turning to the guiding questions of this research and a summary of its scope and limitations.

### 6.1 SETTING THE SCENE

As climate change worsens, multiple approaches have been employed to tackle this 'super-wicked' problem.<sup>1</sup> The multifaceted, temporally and geographically complex issue has been tackled through the UNFCCC, but also other approaches hinging on environmental law, economics, or justice principles. All such approaches, however, lack in their effectiveness as they fail to account for some, if not all, of climate change's super-wicked characteristics. Generally, these approaches are restricted through the state centrality, integration of economic considerations and/or the lack of compliance or monitoring mechanisms. More broadly, they – the economic, environmental and UNFCCC in particular – are lacking due to the uncritical incorporation and embeddedness of dominant paradigms such as capitalism, individual humanism and neoliberalism that are driving forces behind climate change by severing humanity from the natural world.<sup>2</sup>

Human rights to a degree address the super-wicked facets of climate change that the other approaches do not. A human rights approach can rely on a relatively stable monitoring and compliance mechanism, it shifts the focus from solely states to the human experience, and its universal character contributes to a familiarity with and perceived gravity of the discourse that can

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1 Characteristics of the super-wicked problem applied to climate change can be found in section 1.2.

2 Sections 1.3.1 and 1.3.2.

spur more urgent climate action.<sup>3</sup> However, individual rights in particular are predominantly regarded as held vis-à-vis the state and extraterritoriality or accountability for transnational conduct and entities is limited. Moreover, individual humanism is integral to the individual rights regime and can provide a strong, central foothold for dominant paradigms around the human experience. This is further strengthened by the uncritical universalisation of human rights.<sup>4</sup> Together, these shortcomings were held to impair the response to climate change as they are based on biased perceptions that are also central within root causes of climate change: colonialism, imperialism and capitalism.

*Prima facie* collective human rights diverged from these critiques by 1) undoing itself from its individualist connotations, instead focusing on community, 2) moving beyond the individual/state dichotomy, 3) departing from a Western gaze by encompassing the indigenous context (and arguably the peasant context), 4) implicating the commons or common good, and 5) invoking concepts calling for the integration of nature within the rights regime.<sup>5</sup>

Given this identified semblant potential of collective human rights, this research explored this potential to ultimately answer the question:

*How should collective human rights be conceptualized, interpreted, and applied in order to contribute to a more effective human rights approach to climate change?*

Effectiveness in this question is measured through distilled criteria from climate change as a ‘super-wicked’ problem, which include limited capitalist temporality, the dominance of one particular narrative where there are many, enforcement issues and political paralysis impairing (urgent) action, related to the dominance of statehood for the climate response.<sup>6</sup>

To fully study this effectiveness, this research followed a ‘lifecycle-approach’ to collective human rights. Accordingly, the study contains three different dimensions: conceptualization, application and proceduralization.<sup>7</sup> As the overlooking of collective human rights is tied to the ambiguity and sensitivity surrounding the concept, this study first set out a general theory of collective human rights to reveal why we should have collective human rights and who and/or what is not protected without such rights, with a particular emphasis on the climate context. This was then compared and contrasted to the current practice regarding substantive collective rights. Having provided conceptual clarity, the next section applied this theory to practice through the review of common Article 1(2), particularly the prohibition that ‘in no case may a people be deprived of their means of subsistence’,

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3 Section 1.3.2.4.

4 Section 1.4.1.

5 Section 1.4.2.

6 Sections 1.2 and 1.5.

7 For methodologies attached to each phase see section 1.6.2.

revealing the potential of the absolute norm in the climate context. The effectiveness of concept and use in the climate context would be further enhanced if it can be brought into practice, which is what the last part concentrated on. Together, this lifecycle revealed the (need for) ontological flexibility within collective human rights and for a corresponding epistemological shift in practice.

While this approach served to address the main research question of this study, various limitations of choosing such an approach and several caveats warrant explicit recognition. As stressed throughout, the choice of creating ontological flexibility *within* the rights discourse means the admission to a biased dominant system. The omission of a reconfiguration or reimagining of the whole rights tradition similarly implies that collective rights in this research are not an alternative to individual rights or an implicit rejection of individual rights – it sought to clarify the differences between the two and more clearly expose and therefore position individual rights as representing not a universalism but a specific ontology. In addition, whilst this study attempted to concretise the collective rights discourse, it hinges on the central role of Indigenous rights. Given this researcher's positionality, and the tendency to romanticise the 'noble savage', the theory and application of collective human rights is an outline in order to not constrain, restrict or make assumptions about the Indigenous perspective.<sup>8</sup> Instead it distilled main characteristics that recognised and allowed space for specific Indigenous ontologies and epistemologies.

Within this frame, this conclusion answers the research question and sub-questions corresponding to the three phases of the lifecycle approach. Each of these corresponding sections highlights the main findings and major takeaways. Particular attention is paid to the general theory of collective human rights as this theory is central to the whole study. Having provided the key points of each 'phase', this conclusion answers this study's main research question by assessing the ability of the collective human rights approach to climate change to 1) address the urgency, 2) abandon the dependency on the state for providing solutions, 3) provide and enforce consequences to climate damaging activities, 4) address climate change's temporal and spatial scope, and 5) reduce the 'wickedness' of choices by circumventing one-dimensional 'solutions' which can be assessed through its link with (the pursuit of) global justice. On the basis hereof, the study ends with some general reflections and directions for future research, to identify the available pathways to work towards this identified effectiveness, and to reimagine the climate change response to contribute towards tackling this defining issue of our time.

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8 Kent H Redford, 'The Ecologically Noble Savage' (1991) 15 *Cultural Survival Quarterly* 46. See also section 1.6.2.

## 6.2 CONCEPTUALIZATION: A GENERAL THEORY OF COLLECTIVE HUMAN RIGHTS

The ambiguity around collective human rights is aided by a general lack of a coherent theory behind these rights that not only addresses their historical roots, but also fits within more contemporary articulations of collective human rights. Collective human rights received the most heat around the time of Vasak's coining of collective rights as 'solidarity' rights. Indeed, after the 2000s, few theories of the category of collective rights can be found. Even early accounts were identified as predominantly focused on why we *should not* have collective human rights, particularly from an individual rights perspective, instead of focusing on why we *should* have collective rights and the protection gaps that remain when abandoning this category of rights. Chapter 2 accordingly focused on this conceptualization of collective human rights.

As this more overarching analysis did not yet include an analysis of the existing collective rights discourse, Chapter 3 conducted such an analysis. Combined, these two chapters answered the question:

*In light of climate change, how should collective human rights be conceptualised and to what degree is this reflected in the current collective rights discourse?*

The answer is found in the study of ontology, being with the world, framing collective rights as a space for ontological flexibility. However, it similarly found that the dominant ontological force – that of naturalism – is strong within the rights discourse and that, to varying degrees, existing collective rights diverge or are diverging from such an ontological flexible interpretation – with potentially detrimental effects for their potential to address climate change.

### 6.2.1 Collective Rights as a Vehicle for Ontological Flexibility

The collective has always been a space for resistance, from the centrality of self-determination during decolonisation to Indigenous peoples' rights, there is a David versus Goliath character inherent to this category of rights. Relatedly, the attributes often associated with collective rights – an abandoning of the state-individual dichotomy by focusing on a collective instead of the individual and its assumed relation to the state – fit uncomfortably within the predominantly individual rights tradition that centralises the state/individual dichotomy.<sup>9</sup> It is this discomfort that has led to collective rights

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<sup>9</sup> Section 2.2.2.

only being considered as compared/contrasted to this individual and the state.<sup>10</sup>

Exploring these tensions, it is found that the universalisations of human rights are a fallacy as they are based on the philosophical traditions of the West. Collective human rights must be regarded outside of the ambit of these enlightenment universalisations.<sup>11</sup> This must be done by elevating collective rights as an alternative ontological space and with this levelling the playing field with the dominant Western ontology: naturalism.<sup>12</sup> The exclusion of anthropology in the formulation of the Bill of Rights has been a contributing factor to enabling the dominance of one ontology within individual rights. Conversely, anthropology played a defining role in formulating a coherent theory of collective human rights. Together with collective iterations of rights in the African, Indigenous and peasant context Chapter 2 defined 'the necessary conditions of saying 'we'.'<sup>13</sup>

This comprehensive analysis of different, but largely overlapping conceptions of the collective revealed characteristics that together form the backbone of a general theory of collective human rights.<sup>14</sup> First, 'peoples' as rights-holders cannot be separated from the external world and are a hybrid entity of object and subject, a reflection of multi-species entanglements.<sup>15</sup> Second, and relatedly, this hybrid is strongly associated with a place-based existence and thus has a strong locality, the scope of which must be determined by a 'closeness' to a 'common good'.<sup>16</sup> Third, as for such entities there is no social contract with the state, it goes hand-in-hand with an expansion of duty bearers. Fourth, many other ontologies encompass a different temporality, whether based on a different historical perspective, closer ties to ancestors and future generations, or different conceptions of 'progress' and development.<sup>17</sup> All these aspects are under increasing pressure from naturalism, further embedding the found relevance of elevating these discussions to an ontological level.

Not only will the elevation enhance the 'humanness' of rights instead of undercutting it, it is argued that collective human rights hold promise for the climate context specifically. This is related to the abandonment of the universalisations of individual human rights which in part embed climate change's 'super wickedness'.<sup>18</sup> A large promise is the centralising of human/nature

10 See, in particular, the critiques to collective human rights summarised in section 2.5.

11 Sections 2.2.1 and 2.2.2.3.

12 Naturalism is defined and contrasted to three other ontologies by Philippe Descola, *Beyond Nature and Culture* (University of Chicago Press 2013).

13 Peter Skafish, 'The Metaphysics of Extra-Moderns, On the Decolonization of Thought – A Conversation with Eduardo Viveiros de Castro' (2016) 22 *Common Knowledge* 393, 414.

14 Section 2.4.

15 Sections 2.2.2, 2.3.1.1, 2.3.1.5, 2.3.2.1, 2.3.3.2 and 2.4.1.

16 See for example sections 2.4.1, 2.3.1.2, 2.3.1.2 and 2.3.3.

17 Sections 2.3.1.3, 2.3.1.4 and 3.3.1.2.

18 Section 2.2.1.

interconnections, where the human is no longer regarded separated from and superior to nature. This human/nature split – as also clear from conceptualisations of the Anthropocene and Capitalocene – is regarded an important driver of climate change. Another promise concerns the expansion of both spatiality and temporality associated with different ontologies, abandoning capitalist frames of short-term economic gain. The ability to more directly address non-state actors further enhances its potential.<sup>19</sup>

While it was found that this theory holds up against dominant critiques of collective human rights, these promises are tempered due to practical and ideological constraints.<sup>20</sup> Practically, justiciability of collective human rights poses enforcement constraints. Ideologically, at every turn, the incessant dominance of naturalism within law pushes concepts around which normative unclarity exists towards assimilation into the dominant discourse. This aspect is reflected throughout this study in relation to the general discourse, as well as specific provisions (e.g. common Article 1(2)) and procedural thresholds.

The next two sections briefly summarize the foundations of the main tenets of the general theory of collective human rights as a vehicle towards ontological flexibility to clarify their respective take-aways.

#### 6.2.1.1 *Hybridity of Object and Subject*

The early exclusion of the field of anthropology in human rights law enabled the universalisation of a particular subject, one which emanates from Western philosophical conceptions of personhood. This subject is firmly separated from the object and implies a mind/matter hierarchy where the material world is subjugated to the human *ratio*. The analysis additionally showed that this ratio is highly exclusionary, where it has historically been conducive to racism, misogyny, colonialism and capitalism.<sup>21</sup>

While anthropology distanced itself from the human rights discourse early on, the field similarly confirmed it did not believe in such a universalisation as the human condition is manifold. Indeed, other disciplines also show that there is no such a human/nature separation as humanity is inextricably linked and part of the material world. Descola's anthropological account verifies this as it poses naturalism – this dominant way of thinking as apparent through human rights' subject – as only one ontology where other-than-naturalist ontologies do not recognise such a separation of the human from the material world.<sup>22</sup> This artificial disconnect in naturalism also means a general dis-

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19 Sections 2.4.2 and 2.6.

20 Critiques can be found in section 2.5.

21 Or these universals were created to maintain and promote capitalism as held by Jason W Moore, 'The Capitalocene, Part I: On the Nature and Origins of Our Ecological Crisis' (2017) 44 *The Journal of Peasant Studies* 594.

22 Section 2.2.2.1.

connect from the environment – creating a greater distance and therefore complicating a response to environmental problems, including climate change. Indeed, it is this radical detachment of modernity from both culture and nature and drives environmental disasters. Law's ontological singularity accompanies and maintains the current environmental crises, including climate change.

An important signifier for the reflection of ontological variety – and thus an abandonment of naturalism – is the Indigenous rights discourse where their struggle with the naturalist system has led to marginalisation and insufficient rights protection. The position of collective rights in these instruments connect to their alternative ontology. An analysis hereof revealed that the mind/matter dichotomy is replaced by a hybrid entity defined by relationality – where being is intertwined with reciprocal relationships with human/non-human relatives. The Indigenous instruments are found to have conceded to naturalism in several ways, for example by miscategorising the relationship to land in terms of ownership and the incessant emphasis on participation. However, there is similarly evidence of the interconnections of Indigenous ontology and discretionary space for a relational understanding of Indigenous rights.<sup>23</sup>

In the African rights system, collective rights are an integral part of the total body of rights. An analysis of ontology and the inclusion of collective rights within the African system found an alternative conception of personhood within the (Sub-Saharan) African context.<sup>24</sup> Some authors hold that collective rights should be read in conjunction herewith, where it creates space for African conceptions of human rights and therefore personhood. If regarded as such, the ACHPR supported a reading of 'peoples' as a hybrid entity as these conceptions focused on the community and their 'basket of goods'.<sup>25</sup> Instead of interconnections in the form of relationality, there is a strong emphasis on communal responsibilities to define the hybrid – something that can similarly be retrieved from the Charter.<sup>26</sup>

This focus on relations and responsibilities is also retrieved from the UNDROP, albeit in a different form. This instrument, despite being relatively new and containing some ambiguity, is the result of years of resistance against the dominant economy and the need for protection of the peasant way of life, revolving around a special dependency on and attachment to the land. While parallels have been drawn with the Indigenous context, the peasant context is found to be broader and includes a stronger individual context.<sup>27</sup> However, in its expressions of collective rights – the rights to food sovereignty and land in particular – a closer relationship to nature is apparent, where new relation-

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23 Section 2.3.1.4.

24 Section 2.3.2.1.

25 Motsamai Molefe, 'Personhood and Rights in an African Tradition' (2018) 45 *Politikon* 217, 226.

26 Section 2.3.2.3.

27 Since it is part of the definition of peasants contained in Article 1 UNDROP.



ships based on reciprocity and respect are central. Again, this bolstered the finding of a central role for hybridity to define the collective.<sup>28</sup>

For those (Indigenous) ontologies that centralise relationality – but also other other-than-naturalist ontologies to a lesser degree – the lifeworld contained within these relationships also implicates a different temporal experience. Where naturalism exclusively abides by a linear or monochronic temporality – even more constrained through the dominance of capitalism – the Indigenous context in particular is patterned by circularity and polychronic temporality.<sup>29</sup> As a result, relationality also stretches beyond presentism and engages in a close relationship to future generations. This different relationship to time and the future departs from ‘wicked’ notions such as irrational discounting and was held to change the outlook on how to approach the ‘urgency’ contained in climate change. However, the current collective discourse tends to only superficially reflect this – separated from the material world.

A hybrid understanding of ‘peoples’ is additionally vital for an ontological elevation of contexts that have often been discounted to solely cultural contexts. Naturalism is the only accepted ontology in human rights law with a nature and culture to which all other ontologies are subjugated under the banner of culture – ‘[t]wo against one – a very unfair situation! We should have a culture and a nature on both sides of the comparative fence, and thus both an epistemology and an ontology on both sides as well’.<sup>30</sup> Indeed, this hybridity was found to face an uphill battle as law itself is by and large an expression of naturalism and space for other ontologies is often framed in terms of culture.

Therefore, while this study encountered support for a hybrid object/subject, structural barriers remain. To provide the best tools for overcoming such barriers, the formulated general theory of collective rights ultimately opted to anchor itself in the notion of the ‘common good’ but reinvent it to focus it on the natural world and make it compatible with other-than-naturalist ontology. The closeness hereto, in turn, can be fulfilled with the various forms of relationships to the environment and nature – from relationality to reciprocity and responsibility.

#### 6.2.1.2 *A Global Problem Demanding a Local Solution*

Related to the observed universalisation of the exclusionary subject, two other universalisations of human rights were identified. First, the universalisation of the state/individual dichotomy, originally premised on the idea of the social contract. Here, rights are formulated as entitlements in exchange for sacrificing a measure of individual freedom to avoid a war of all against all. This universalisation is found in two central tenets of human rights, 1) states as

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28 Section 2.3.3.

29 Section 2.6.3.

30 Skafish (n 13) 395.

the only duty bearers, and 2) rights as entitlements most clearly found in civil and political rights as a close expression of this contract. Second, with the centrality of mind of matter, the Earth was implicated in a similar manner. As boundaries to the human experience only exist where the mind could not enter, this rationality supports a global geography. As a result, the whole Earth became a 'thing' that could be exploited by the human mind. This not only helped create the Anthropocene or Capitocene and thus climate change, but also divided the human rights regime into scales of individual – state – global community. While, as described, other categories have been identified, it is these scales that were found to be most comfortable to the human rights regime and falling back into such scales constitutes falling back into a naturalist state – such as the identification of the state as the collective for the purpose of collective rights.<sup>31</sup>

Other-than-naturalist ontologies were found to differ from these universalisations in several ways. First, the Indigenous, African and peasant contexts through their focus on relationships – whether in the form of relationality, reciprocity or responsibility – draw upon the local context to delineate their way of life. Indeed, particularly in the Indigenous and peasant contexts, land was identified as having a pivotal role in the reach and interpretation of provisions and for their survival. Second, all contexts to a degree reflected a different relationship to the state. Indigenous peoples not only predate the modern idea of statehood and governance, the resistance against the subjugation to and exploitation by these entities is central to their context. In other words, they have not agreed to a social contract with the state.<sup>32</sup> For peasants, it is by and large the capitalist system creating the marginalisation and perceived inferiority of their subsistence way of life. The state therefore did not provide freedom to these communities but acted as a system of oppression.<sup>33</sup> Instead of the focus on individual gain as enabled by the state, the UNDROP requires a different contract enabling welfare equality. The African rights tradition also provided a different view of the social contract due to its reflection of the continent's history with colonialism. This causes the relationship to the state being caught in two minds – either collective rights aid in the creation of a strong naturalist state or they shield communities from foreign intervention, be it by states or other entities – providing a type of Global North/Global South contract outside the scope of its regional system.

Indeed, the tension with Global North actors, whether state or non-state, was apparent in all three systems.<sup>34</sup> While the implication of non-state entities is evident within the human rights discourse at large through the decades long battle to bind businesses to human rights, the combination with the alternative

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31 Sections 2.2.1.2 and 2.2.1.3.

32 As apparent through the role of self-determination, *see* section 2.3.1.4.

33 Section 2.3.3.1.

34 Sections 2.3.2.2. and 2.3.2.3.

relationship to state<sup>35</sup> was held to be a strong indication of an inherent expansion of duty bearers within the notion of collective rights.

From an ontological angle, therefore, the rationale at the root of climate change is abandoned by renouncing naturalism's universalisations instead relying on a different framework for the determination of the reach and content of collective rights. In line with human rights' general occupancy with correcting power imbalances, duty bearers towards the hybrid entity of the collective encompass those powerful, *de jure* entities created outside their ontological reality but impacting this reality. In effect, this would bring transnational corporations but also international (financial) institutions within the realm of duty bearers. This emphasis on most notably the transnational corporation, moreover, represents the overcoming of an important hurdle in the climate context given the disproportionate contribution of a handful of corporations to global emissions.<sup>36</sup>

Beyond collective rights, it was discovered that this ontological lens could aid in conceptualising and positioning new 'solutions' offered in the climate and its broader environmental context and assess and possibly enhance their effectiveness. An important example described in this study is rights of nature. The duality within its application – either in conjunction with predominantly Indigenous peoples or a constitutionally anchored right – can be clarified with the dependence on a particular ontological lens. In the Indigenous conception, it is not necessarily 'nature' that has rights but the hybridity with Indigenous peoples. This reading of rights of nature would thus be encompassed in the theory of collective rights. In its constitutional form, it was held to not only be subjected to dominant forces by failing to specify who can represent nature, but also to mostly neatly fit within naturalism as it represents the other side of the dichotomous coin of human/nature.<sup>37</sup> This can be beneficial within this dominant paradigm as it more clearly provides an antidote but becomes highly problematic when framed as an 'Indigenous' solution and as a justification to further encroach upon the space for other-than-naturalist ontologies.<sup>38</sup>

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35 This is also in line with Vasak's well-known definition of collective rights, the realization of which, according to him, would require the concerted efforts of a myriad of actors. Karel Vasak, 'For the Third Generation of Human Rights: The Rights of Solidarity' (1979) 2 Inaugural lecture to the tenth study session of the International Institute of Human Rights, Strasbourg.

36 Paul Griffin, 'The Carbon Majors Database: CDP Carbon Majors Report 2017' [2017] CDP Report 1; Greenpeace Southeast Asia and Philippine Rural Reconstruction Movement, 'Petition to the Commission on Human Rights of the Philippines Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change' (2015).

37 A parallel can be drawn here with the earlier observations on a different relationship to future generations – they are either presented as a separate category of rightsholders vulnerable to power deficiencies through a representational paradigm or can be an integral part of ontology and of a hybrid entity.

38 Section 2.3.1.5.

Still, the representation of climate change as a global problem demanding a global solution paired with the lack of a critical ontological analysis of rights forms a strong countercurrent to the protection and empowerment of the local. Nevertheless, the advancement of bottom-up solutions has proved to be more sustainable and can permeate the global order. This is also identified in the sustainability ingrained in the UNDROP and the widely recognised importance of Indigenous knowledge. Altogether, the category of collective rights when abiding by this theory can usher a transformation from within the rights system but significant hurdles remain – not in the least in the current collective rights discourse and the proceduralization thereof.

## 6.2.2 Ontological Flexibility in Practice: Climate (dis)Advantages

The tendency to frame climate change as different to ‘classic’ environmental and other problems due to its spatial (global) and temporal (urgent/linear) character is discovered as having seeped into the practice of collective human rights. This is further problematized by the significant ambiguity and (Global North) resistance that is surrounding all reviewed collective rights – the right to self-determination, to development and to a healthy environment.

Conversely, this ambiguity is identified as beneficial to the ontological interpretation of these rights, particularly the right to self-determination and the RHE as this lens can clarify some of the contentious issues constraining these rights. An ontological review of the RtD, on the other hand, found no such ontological flexibility due to the inherent incompatibility of the notion of ‘development’ with other-than-naturalist ontologies. Altogether, Chapter 3 determined that the right to self-determination contains the largest degree of compatibility with collective rights as a vehicle towards ontological flexibility in line with Chapter 2 as it is closely connected to the flexible term of ‘destiny’. To clarify these points, some of the main detected (in)compatibilities to the ontological frame in light of climate change are summarized for each of the three collective rights – the spatiality, hybridity, and, comparatively, their identified added human rights value.

### 6.2.2.1 *Spatial Scope: Resistance to Universalisations*

Self-determination has always had a diverging spatial scope from individual rights, not in the least due to its attachment to the broader legal principle associated with secession. As the right was classically regarded the norm guiding decolonisation, it moves beyond the state-individual dichotomy of rights, abandoning its attached universalisations. After the decolonisation period, the right has been used to highlight the struggle of Indigenous peoples. An examination of the relationship with ontology revealed the connection between self-determination and the pursuit of one’s destiny. Pursuit here has

been tied to procedural rights – an interpretation often seen through for example FPIC – but reveals more coherence when viewing it from an anthropological lens. If destiny is regarded a form of ontological freedom, the control over the destiny can guide the content of self-determination. In creating such space, the local spatial expressions consistent with Chapter 2's theory can be expressed through self-determination.<sup>39</sup>

The found relevance and consequent invocation of self-determination in the climate context, however, reveals a push to transform the right into another naturalist universalisation. While early on the right was utilised in the Indigenous struggle against climate change,<sup>40</sup> over time this initial focus eroded. The beyond-the-state characteristic at the core of the finding of *prima facie* ontological flexibility has also gained traction as holding potential for the global. The global character attributed to climate change, then, would benefit from a right that holds more global potential. This transformation can be tied to its invocation in the context of SIDS, where the often-regarded 'state level' of this issue has spurred the use of self-determination to implicate extraterritorial state obligations. Instead of framing this as a land for well-being claim in line with early Indigenous explorations, this discussion has made its way into predominantly academia to elaborate on the position of the state in international (human rights) law. From here, this beyond-the-state potential has similarly been invoked to tie climate activities to the world's population and future generations with a particular emphasis on the role of the PA.<sup>41</sup>

These different spatial scopes – local, national, global – reveal an inability or unwillingness to tie local impacts to beyond-the-state obligations, which results in the elevation beyond the local level. This was also observed in discussions on the RHE which, contrary to self-determination, is regarded both an individual and collective right. Here, the added value of its collective iteration is sought in 'a universal value that is owed to both present and future generations.'<sup>42</sup> Its recognised connection to RoN is a further testament to the potential for universalisation and the erasure of the Indigenous context if the right is not approached from an ontological lens.

Regionally, the practice of the RHE did reveal an emphasis on the Indigenous context, indicative of the ontological translation that can occur when 'internationalising' the right and bringing it into the Western context.<sup>43</sup> Moreover, while the application of collective rights to the Indigenous context under pressure from climate change seems promising, the limited work done in this area – the Billy case in particular – shows an inadequate protection of the local

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39 Section 3.2.1.

40 Section 3.2.2.1.

41 Sections 3.2.2.1 and 3.2.2.2.

42 IACtHR, 'Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights' [2017] para 59.

43 Section 3.4.1.3.

and equation to the general population. That being said, this was found to be partly attributable to the individual framing as self-determination is not justiciable at the CCPR.<sup>44</sup>

Despite relevance of the Global South roots of the RtD to understand its collective iteration and position as a space of resistance from the Global North, as a collective human right it will likely only further Global North dominance due to its identified ontological inflexibility. This inflexibility was tied to its naturalist and disembodied spatial scope. While the 2022 DCRD does recognise the right 'is understood not simply in terms of economic growth, but also as a means to widening people's choices to achieve a more satisfactory intellectual, emotional, moral and spiritual existence rooted in the cultural identity and the cultural diversity of peoples',<sup>45</sup> further incorporation hereof was absent and academic contributions focus on formulating alternatives *to* development. More potently, it was noted that the term's strong neoliberal and capitalist connotations were not sufficiently mitigated, leaving the right highly susceptible to appropriation by those associated with the development discourse – states.<sup>46</sup> From a climate lens, its link to equity and CBDR further elevated the right to either a state or global level – also emphasised by the consistent reference to development in the UNFCCC and PA.<sup>47</sup> This incompatibility of the term with the human rights discourse and the local in particular is further ingrained by the identified role of the local interpretation of collective rights to shield other-than-naturalist ontologies from development activities.

The identification of a trend towards finding another universalisation within the notion of collective rights is also a manifestation of a misconception on the expansion inherent within collective rights. All three rights inherently challenged the state as sole duty bearer. Instead of focusing on the expansion of duty bearers, the analysis of all three rights associated this challenge with the expansion of subjects – one cannot be elevated beyond state borders without the other doing so – contrary to this study's found benefits for climate change in focusing on the 'local' or embodied experience.

At the international level, therefore, a (large) degree of assimilation to the naturalist discourse was observed that elevates the spatial scale beyond the local, hybrid, relationality-defined collective to either states or an undefined world community that on the basis of representing an average of sorts further undermines marginalised communities in closer connection to their environments. While for the RHE and self-determination an ontological lens was held to be able to clarify its various interpretations due to some ontological flexibility within the rights, the RtD can only further 'naturalise' the collective rights

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44 Section 3.2.2.1.

45 DCRD [2022], preamble para 17.

46 Section 3.3.1.

47 Section 3.3.2.

discourse, eradicating ontological difference and elevating spatiality to abstract universalism.

#### 6.2.2.2 Hybridity: the Role of the Environment

Related to this globalising tendency is the changing relationship of collective human rights subjects – peoples – with nature (the ‘object’). The further globalised collective rights are, the more the relationship between subject and object erodes – instead opting for the world’s community or international community of states protecting the common concern of humankind. The environment consequently becomes more and more abstract, fitting within the idea of naturalism and subject to manipulation to fit their dominant paradigms – enhancing its super-wickedness.

This abstracting (or removing) of the environment was most clearly detected in the ontological analysis and subsequent climate use of the RtD. Despite sustainable development being the unavoidable paradigm that is regarded leading in the interpretation of the RtD<sup>48</sup> – supposedly moving development beyond an economic term to one embedding social and environmental dimensions – it does little to avoid its use for ‘the annihilation of epistemic diversity’.<sup>49</sup> Indeed, the discourse has brought social and environmental aspects into the economic idea of development without altering its neoliberal core. As a result, it further advances the exploitative relationship to nature and reliance on the rationalist, market-based ‘solutions’ for tackling climate change. Sustainable development’s integral role within the UNFCCC combined with the global abstraction of the collective is perhaps regarded as giving effect to the non-binding PA commitment but this is again far removed from embodied experience and thus hybridity.<sup>50</sup>

Therefore, a bias was detected within sustainable development and the RtD, centralising the naturalist, exploitative and rational subject separated from the material world. As a result, its incorporation of intergenerational equity through the role of future generations is similarly discerned as separate. Indeed, it appeared that for all three assessed collective rights, future gen-

48 As coined by Virginie Barral, ‘Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm’ (2012) 23 *European Journal of International Law* 377.

49 Darina Petrova and Tomaso Ferrando, ‘Three Enclosures of International Law: Commoning Premises, Processes and Aims’ in Usha Natarajan and Julia Dehm (eds), *Locating Nature: Making and Unmaking of International Law* (Cambridge University Press 2022) 265. Esteva reminds us of this ontological bias when holding that ‘for two-thirds of the people on earth (...) is a reminder of what they are not. It is a reminder of an undesirable, undignified condition. To escape from it, they need to be enslaved to others’ experiences and dreams’; Gustavo Esteva, ‘Development’ in Wolfgang Sachs (ed), *The Development Dictionary: a Guide to Knowledge as Power* (Zed Books 1992) 10.

50 See for the ontological analysis of sustainable development section 3.3.1.1.

erations are brought in when first globalising and thus disembodimenting the collective. Instead of addressing future generations through being absorbed within the hybrid collective, it is yet another tool to generalise interest and further the dominant global paradigms.

For the RHE, the link to the environment was more apparent as the right is forwarded to emphasise humanity's dependence on the natural environment. However, this link is mostly embodied in its individual iteration which leads to the continued reliance on subjectivity as separate from the environment. In its collective form, it consists of a collectivisation of this individual context and therefore does not embody the hybridity of this study.<sup>51</sup> As was argued in Chapter 2, the RHE from an ontological lens is inherent in the collective context and in the individual context the environment would be better served through the recognition of RoN to represent a *contrat naturel* as the counterpart of the centrality of the subject.<sup>52</sup>

Surprisingly, the right to self-determination is not often invoked in the environmental context beyond the interlinkage with Indigenous peoples despite its second paragraph arguably coming closest to reflecting nature through its emphasis on natural resources. Notwithstanding, the paragraph was found to reflect the materiality needed for one's destiny and its central role and invocation in the Indigenous context carries potential for hybridity.<sup>53</sup>

Indeed, the review of the (environmental and climate) practice of all three rights reveal their application in the Indigenous context. They, moreover, place increasing emphasis on the relationship to or reflection of the Indigenous way of life, moving from only a subject-based discourse to one more closely reflecting subject/object interconnections.

Still, the general lack of a coherent theory has meant that the Indigenous context is not necessarily leading for the interpretation of these rights but appears brought into the discourse, as evidenced by the analysis of the (lack of) use of self-determination in the Indigenous discourse at the UNFCCC. This results in an easier abandonment of this context in favour of naturalist constructs of subjectivity and spatiality.

#### 6.2.2.3 Added Collective Value within Human Rights

Taken together, the RtD's potential in the climate context is limited due to the wielding of the term 'development' which shows no advancements towards the radical conceptualisation needed in order to act as a vehicle towards ontological flexibility. Moreover, the limited practice of its collective iteration revealed little added value as it largely demanded local participation for its

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<sup>51</sup> Section 3.4.1.

<sup>52</sup> As argued by Michel Serres, *Le Contrat Naturel* (François Bourin 1990). A short analysis can be found in section 2.2.2.1.

<sup>53</sup> Sections 3.2.1. and 3.2.2.1.



realisation – something similarly found in the right to self-determination and the RHE. These two rights also contain more flexibility but some notable differences were identified.

First, the RHE is sometimes individual and sometimes collective while the right to self-determination is regarded solely a collective right. As the collective iteration of the RHE and its safe climate component are not sufficiently clarified at the international level, it is more susceptible to naturalist assimilation. This was, in part, already observed in relation to the abandonment of its regional (Indigenous) application and elevation to the climate system as a whole.

Second, the status of the RHE in international law is not as accepted as that of self-determination and its international ‘blank page’ status is more subjected to power imbalances. The right to self-determination, on the other hand, is historically a right against these powerful entities and the subjugation thereto of marginalised communities.

The right to self-determination was identified as the most coherent and ontologically flexible right. This is not to say the RHE in particular cannot support the ontological theory of this study, but many of the protection gaps filled by this study’s theory of collective rights could be filled by utilising self-determination’s flexibility. As both the RHE and the RtD are at different stages of being developed, ongoing discussions could benefit from the ontological theory of collective rights. There are anchor points to do so, particularly the focus on the Indigenous context and expansion of duty-bearers. However, their limited practice and interpretation shows the challenges in doing so with it particularly being cumbersome for the RtD.

### 6.3 THE PRACTICE: A CLOSER LOOK AT SUBSTANTIVE PROVISIONS – CLIMATE CHANGE & MEANS OF SUBSISTENCE

Chapters 2 and 3 revealed the possibilities but also constraints of having collective human rights account for other-than-naturalist ontologies. Still, they similarly showed the overlap with the idea of self-determination as self-determination contains the most normative clarity. It can hence provide the foundations for second phase of the lifecycle: the transition to practice.

In answering the second sub-question of this study

*What is the substantive potential of existing collective international and regional human rights norms in relation to climate change (if any)?*

Chapter 4 focused on self-determination’s second paragraph on the free disposal of natural resources, specifically the prohibition ‘in no case may a people be deprived of their means of subsistence’. The analysis found a clear overlap with the theory of collective human rights and substantive potential to create space to allow protection of other ontologies under increasing pressure of

climate change. It, moreover, further affirmed the Global North bias contained within the interpretation of subsistence and presented a case for tailoring the interpretation to have the term adapted to different ontological contexts. It revealed what the 'ontological sliding scale' of a closeness of a common good can look like in a particular collective rights case.

The prohibition provides practical grounding of the inherent beyond-the-state character of collective rights that Chapter 2 conceptualised as implying duties beyond the dominant state-individual dichotomy. Based on an analysis of the Billy and Teitiota cases it found that in the climate context a narrow, economic approach is taken to subsistence that alters levels of severity and temporality to impair the effectiveness of the climate response. More generally, these cases again reiterated the shortcomings of individual rights frame and revealed the differences if approached from varying ontological contexts – lowering the threshold for deprivation to spur more preventative action. Indeed, it is concluded that particularly in the context of Indigenous peoples of SIDS deprivation of means of subsistence might already take place and that action taken to operationalise the prohibition could implicate a myriad of states based on the principle of CBDR and/or transnational corporations– overcoming significant hurdles to the effectiveness of the rights approach to climate change.

### 6.3.1 An Overlooked Prohibition: Problems and Potential

The prohibition of deprivation of means of subsistence historically took a backseat to discussions around other components to the right to self-determination. With this, the prohibition similarly inherited a history of (de)colonisation and hence the creation of a 'strong state' mirroring Global North states whilst at the same time acting as a protective agent against the influence of such states. After years of economic (and ecological) plunder, the term was regarded as essential in the protection of newly established states – but ultimately peoples – from foreign interference by odious capitalists. This led to the qualification of its second paragraph as economic self-determination. Still, limited practice revealed a focus on the protection of peoples, including from decisions by their own states – obtaining increasingly local connotations.

The inclusion of means of subsistence within self-determination was thus partly explained from such a decolonial perspective. The absolute character was held to hold up against any interference to avoid 'a weak or penniless government from seriously compromising a country's future by granting concessions in the economic sphere'.<sup>54</sup> Based on a strong Global South consensus, the right was included but how means of subsistence and the threshold for deprivation should be conceived was not sufficiently clarified. The only

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54 Ben Saul, *The International Covenant on Economic, Social and Cultural Rights: Travaux Préparatoires 1948-1966*, Vol. II (Oxford University Press 2016) 1667.

given clarification in the *travaux* was that the displacement of an Indigenous tribe from their ancestral lands and the plundering of minerals of Nauru by foreign companies would be a violation of the prohibition.<sup>55</sup>

While at the time not accepted, consequent practice was identified as having accepted that displacement of Indigenous peoples indeed does constitute the deprivation of means of subsistence – although this has never been brought under article 1(2). As to the content of means of subsistence, this remained ambiguous, giving the term a level of self-evidence perhaps equating it to dictionary understandings of minima and self-sufficiency.

What the history of the prohibition and limited practice does show, is that early on it was implied that its reach was not only vis-à-vis states but could extend to non-state actors too. The inherent resistance within the norm to capitalist expansion can similarly be reconceived as an ontological struggle and indeed showed many similarities to the ontological analysis of Chapters 2 and 3 where it concerned defining peoples' own terms of being or choosing of a destiny. However, the analysis similarly showed the power struggles contained within the norm and the conflation with the state, leading to naturalist assimilation rather than ontological autonomy.<sup>56</sup>

As climate change has been associated with human mobility – from displacement to migration and planned relocation- and more generally has a complex spatial scope and a myriad of (disproportionality) contributing actors, its position and interpretation within self-determination was held to maintain and build on the *prima facie* climate compatibility of the prohibition.

### 6.3.2 Threshold of Deprivation: Approaches and Parameters

Drawing on the work of international and regional rights bodies, Chapter 4 identified three different approaches to means of subsistence that correspond with both the differences between the collective/individual context and with ontological diversity, revealing different standards of deprivation in different contexts. These are the economic, environmental and survival approach. It finds these approaches can be divided according to both their developed/developing regional disparities as well as their ontological flexibility with the economic approach containing least flexibility, the environmental approach leaving too much ambiguity diminishing its flexibility and the survival approach embodying the most flexibility.

First, the economic approach is exclusively utilised by the ECtHR and most commonly invoked by HRTBs pertaining to developed states. It entails a legal expression of the universalised relationship between state and individual and thus of naturalism. The means of subsistence in this conception is money,

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<sup>55</sup> Section 4.4.

<sup>56</sup> Section 4.4.1.2.

where the amount is determined on an individual basis considering the minimum of what is required for the social contract. This separates the individual from the environment by excluding the material world and entails the further removal from environmental effects on natural resources. As a result, only when environmental issues affect the economy is the deprivation of means of subsistence triggered. The only collective emphasis is on the state and combined with the object – the economy – this would implicate the state's economy as necessary to the assessment of deprivation. Indeed, deprivation would constitute the collapse of a state's economy and could be preceded by serious environmental damage and climate change effects due to its disembodied nature.<sup>57</sup>

Second, the environmental approach was found to more fully address the material world – regarding land as means of subsistence. However, coinciding with developments around the RHE, it either overlapped with a particular identity as a form of hybridity or was universalised to reflect a more 'Earth System'-approach. This reflects the tensions found throughout this research of trying to find the solution to climate change within the dominant system – such as a 'global approach' aims to do – or finding it in contrast to this system – as the identity-based interpretation alludes to. Solely regarding the environmental aspect of it was found to ingrain the separation between human/nature further. Equating the collective with the global in light of the RHE would sacrifice those most vulnerable on the altar of Western epistemology as such a scale will similarly raise the threshold for deprivation.<sup>58</sup>

The third approach is both most specific as well as in line with ontology – combining the land-as-subsistence characteristic to identity, creating a more 'hybrid' approach. The Inter-American rights system identified three aspects that must be considered for subsistence and consequently its deprivation: physical, spiritual and intergenerational. This is in line with aspects of ontology identified in this study and ensures subsistence is not a poverty-based approach but can similarly protect a wealth, or ontology. It moreover, largely mirrors the conducted anthropological analysis of subsistence.<sup>59</sup>

Combining the anthropological analysis with the Inter-American approach several aspects were identified that gauge the level of impact on means of subsistence (land/nature) and thus deprivation. First, physical impacts are simply the climate effects on a place and severity can increase as it impacts seasonality, geography, length of subsistence activities and diversity thereof. Second, spiritual accounts should focus on local epistemologies and include the impacts on practices and traditions that are often attached to a place. Third, intergenerational impacts must be accounted for, such as the loss of traditional

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57 Section 4.3.1.

58 Section 4.3.2.

59 Section 4.2. and 4.3.3.

knowledge and the maintenance of relationships to future generations. Fourth, the type of economy in question and related the 'closed-ness' of a community and reliance on subsistence. Mixed economies have more alternatives and adaptive capacity, while 'closed economies' are fully dependent on the one place for their subsistence. The former thus increases the threshold, where the latter lowers it with the lowest threshold found in the case of IPVI. Fifth, temporality also plays a role considering historical contexts and legacies of subjugation. This criterium can also be supplemented with Indigenous accounts such as 'going back to the future' and climate change as the intensification of colonial violence.<sup>60</sup>

### 6.3.3 Small Island States, Climate Change and Self-Determination

Both the Teitiota and Billy case of the CCPR refer to subsistence. However, while the one case addresses the individual context (Teitiota) and the other the Indigenous/collective context (Billy), the CCPR did not adjust their approach to the collective context. Indeed, it is revealed that its approach to subsistence can be described as largely economic as the Committee emphasises the presence of financial aid (Teitiota) and (ontological) alternatives (Billy). This finding is further strengthened by the CCPR's use of temporality. In both cases it is held that the prospect of full inundation and its effects on subsistence do not meet the severity threshold of 'real and reasonably foreseeable'. Moreover, while the Committee notes the specificities of the Indigenous context, it does not take it seriously in considering this threshold. This again shows the limits of naturalism in grasping with climate change.<sup>61</sup>

While this analysis saw to thresholds for a violation of the right to life, the prohibition would encompass such a claim as a prerequisite right. If similar claims are approached from an ontologically flexible approach – as summarized – the severity on subsistence is much higher in these cases as they show a myriad of physical, spiritual and intergenerational effects. While there are no details as to the subsistence economy specifically, the additional parameters of temporality for many island states reveal a continuation of colonial violence and a prospect of severing intergenerational ties. Relatedly, the irreversibility should similarly play a role in the case of SIDS. Based on the application of these criteria, it is concluded that it is likely that there are cases where threshold of deprivation is being met. This is particularly true in the Indigenous context where the standard is more easily met but could extend to the entire population of SIDS – albeit the more naturalist, the higher the threshold. As the collapse of a SIDS' economy is conceivable, a more 'naturalist' invocation

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<sup>60</sup> Section 4.3.4.

<sup>61</sup> Section 4.5.1. and 4.5.2.

will ultimately be possible, likely coinciding with standards of individual rights but potentially benefitting from the absolute nature of the right.

While there is no practice of the prohibition, leaving a large hypothetical space, there is nothing to suggest this would not impose obligations on a myriad of actors responsible for the climate crisis. If the threshold is currently met it, moreover, requires more preventative action than the current scholarly discourse on self-determination and climate change reveals – which often solely focuses on worst-case-scenarios.<sup>62</sup>

More broadly, the analysis showed that the theory of ontological flexibility should be regarded as a sliding scale – where the closest relationships to a common good are tackled most preventatively and comprehensively with adjusting thresholds for mixed systems and, ultimately, but in extremis, providing collective protection of naturalist systems. Given the focus on the identified ‘closeness’, though, collective rights remain predominantly aimed at other ontologies.

#### 6.4 THE PROCEDURE: COLLECTIVE HUMAN RIGHTS CLIMATE LITIGATION: JUMPING PROCEDURAL HURDLES?

The analysis of preceding Chapters provides the most climate potential when collective rights can (successfully) be adjudicated, which is what the third phase of the lifecycle sees to. Judicial avenues for the vindication of collective rights are more limited and contain biases that amount to a dual system of translation. First, during judicial proceedings, different ways of knowing and producing knowledge are discounted and only taken into account when verified by ‘rationalist’ accounts. Second, these knowledge biases are also contained within procedural norms themselves. In other words, judicial bodies contain little epistemological flexibility. Epistemology is the necessary companion of ontology and sees to the ways of producing knowledge. To support an ontological theory as defined in this study, epistemological flexibility must be provided in the proceduralization of collective rights.

Chapter 5 touched upon the second element of translation through its conducted analysis of those procedural elements that pose hurdles in climate litigation – legal standing, extraterritorial jurisdiction and redress. By reviewing these elements it answered the question:

*What is the added value of litigating on the basis of collective human rights compared to individual rights-based climate litigation (if any)?*

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62 Section 4.5.3.

The analysis revealed many of such translations that ultimately further the assimilation into naturalism as observed conceptually and substantively in this study. However, it also identified various developments and rationales that provided foundations for an epistemological flexible reading of all three elements.

Legal standing proved essential to allow hybrid collectives access to justice, and found expansions of subjectivity in each jurisdiction, some spurred by climate change, but all interpreted in line with dominant ideas around subjectivity at each respective jurisdiction. Extraterritoriality, analogous to development, is inherently naturalist as the notion of territory is inextricably linked with the state and hard to expand towards a beyond-the-state character. However, the state focus in relation to accountability is not universal and a relational approach that focuses on power and influence paramount. Redress is first dependent on the scope of the other two elements but, when broadened, provides a relatively fertile ground for collective measures. En masse, the proposed *lex ferenda* for all three hurdles would not only allow the jumping thereof but would more accurately reflect the temporal and spatial scope of climate change and thus enhance the effectiveness of the rights approach hereto.

#### 6.4.1 Standing Together, Stronger: A Collective Reading of Legal Standing

Under pressure of climate change and its difficult-to-attribute characteristics, international and regional human rights bodies are found to slowly change their position vis-à-vis highly individualised ‘victims’ and their subsequent standing. The analysis of both *lex lata* approaches to standing – restrictive and expansive – revealed their respective flexibility towards reinterpreting standing to avoid state impunity for those actions severely threatening human rights.

However, without an epistemological lens to standing and the created flexibility, the latter is again prone to be interpreted along dominant ideas of affectedness, individual harm and on the basis of criteria guided by the Western ideals of ‘reasonableness’ and rationality. Having provided such a lens, the analysis found several anchor points within the *lex lata* on standing in climate cases to create a collective approach to standing. Such an approach is sensitive to the ontological context, which in turn carries potential for climate litigation through the integral incorporation of interests of nature and future generations.

##### 6.4.1.1 The Climate ‘Victim’ in Practice

Whereas the expansive approach was found to already abandon any excessive individualist connotations through its focus on the relationship to the content of the supposed violation, the restrictive approach centralised the individual

victim requiring a high threshold of personal affectedness. With the expansive approach mostly being attributed to the Inter-American and African rights system, there similarly appeared a connection to the incorporation of collective rights and standing. For the restrictive approach, such a connection could be made in the absence of collective rights. Still, those adhering to the restrictive approach – HRTBs and the ECtHR – do have jurisdiction over collectives (particularly Indigenous peoples) but it could not be found that this resulted in changes to standing criteria. Indeed, it is clear from the cases dealing with these contexts, there is a clear subjugation to the dominant ontological framework.<sup>63</sup>

Through the restrictive approach's focus on individualism and criteria only fulfilled by reference to the supremacy of the ratio of the West, its ontological and epistemological shortcomings were clear: it centred around the disembodied, biased individual and promoted short-term and thus economically tainted thinking. The latter was particularly clear in the reasoning of climate cases in front of the CCPR and its findings of a lack of imminence of impacts in both the individual and collective contexts.<sup>64</sup>

The expansive approach too revealed ontological pitfalls. While the Inter-American system is flexible in their approach to standing, alluding to an expansion in the environmental and climate contexts that would provide standing to nature, its focus on substance also implies a focus on individual rights and thus a measure of individualisation. In addition, the link to the RoN movement risks the critiques already expressed in Chapter 2. The African system due to practical restraints is often faced with cases brought by NGOs, which risks a departure from the aims and experiences of those it represents as it is not the NGO that is the victim, but those it represents.<sup>65</sup>

This is also an important criticism of the approach that can be distilled from the first climate cases of the ECtHR, where it chose to grant standing to an NGO as a victim – seemingly conflating *locus standi* and victimhood. Notwithstanding such a critique, the chosen approach could perhaps also be regarded in line with the narrow, epistemologically biased view of victimhood of the restrictive approach. First, it abides by the public/private dichotomy as an attribute of naturalism. Second, it fails to recognise intersectional harm and vulnerability, ingraining the exclusionary individual. Third and relatedly, this is further found affirmed in cases where stakeholders were granted standing – favouring a disembodied entity over embodied experience of a group and reiterating the risk of misuse of human rights by, most notably, corporations.

That being said, this 'comfortableness' with the disembodied, did result in the Court expanding victimhood (through the entity of the NGO) to future

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63 Sections 5.2.1.1 and 5.2.2.1.

64 Section 5.2.1.3.

65 Section 5.2.2.3.



generations. This more-than-the-sum-of-its-parts approach departs from its previous factual or tangible assessment, and its inclusion could change assessments of short-term economic thinking that have impaired climate litigation.<sup>66</sup>

Ultimately, taken together, the analysis of both approaches showed that the individual victim had long been departed, even before its notable expansion in the climate context. For the expansive approach, NGOs and collectives were already found to have standing. The restrictive approach was found to acknowledge victimhood of the legal fiction of the stakeholder – a (biased) flexibility now expanded in the climate context.

#### 6.4.1.2 *An Epistemological Flexible Reading of Standing*

This finding of standing for various entities formed the core of the third, *lex ferenda* approach. Both the restrictive and expansive approach ultimately emphasised the importance of representation and provided a form of collectiveness within standing. The collective approach to standing needed to reflect differences in subjectivity and temporality in order to be compatible with this study.

For subjectivity, the approach was held equipped to encompass hybridity when building on the content focus found within the expansive approach. The inclusion of hybridity, moreover, reflects (academic) discussions on the need to abandon legal subjectivity as it ingrains the exclusive subject at its core and thus contains inflexibility towards more accurate, local representations of affectedness. The relationality or closeness found within this hybridity found tentative support in the recognition of representation of future generations within the entity of the NGO, as well as victimhood of those ontologically ‘close’ to the victim such as family members. As a result, nature and impacts on nature would be reflected within standing and climate effects more accurately identified and interpreted at value.<sup>67</sup>

This ‘closeness’ paradigm was identified to extend to alternative temporalities. In particular, Chapter 2 expressed the closeness of some collectives to future generations related to different temporal experiences. Again, tying this to the discourse on rights of future generations, a broader ‘closeness’ paradigm was observed where children are held closest in age and thus are endowed with representative powers. As a result, inclusion of future generations with the hybrid entity could abandon identified shortcomings of the naturalist lens to victimhood by changing interpretations to dominant standards such as imminence and foreseeability.<sup>68</sup>

Ultimately, this approach is not radical as it was built on the identified *lex lata* and accurately reflects different experiences of victimhood. The

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<sup>66</sup> Section 5.2.1.2.

<sup>67</sup> Section 5.2.3.1.

<sup>68</sup> Section 5.2.3.2.

approach's promise, however, remains dependent on external epistemological flexibility provided by judges. This includes the judiciary's stance towards the representational paradigm which – in the absence of own models of representation – might benefit from an intersectional lens to again avoid a form of individualisation.

#### 6.4.2 The Fallacy of 'Extra' Territory: A Discourse of Power

Climate change is difficult to frame within the dominant notion of territoriality and human rights' limited extraterritoriality poses another procedural hurdle to effective climate litigation. Dominant perceptions of 'territory', while reflecting a piece of the material Earth, couple the term to power, creating the related notion of jurisdiction. This power is inextricably linked to the state – without territory, no state.<sup>69</sup> Consequently, next to the *prima facie* climate incompatibility, such incompatibility is also observed in relation to collective rights as it constrains its beyond-the-state character.

An analysis of the practice of extraterritorial jurisdiction discovered an expansion applicable in the climate context more accurately reflecting the globalised world and thus different entities and exertions of power. However, it also encountered significant push-backs to any real expansion of the notion, particularly for the most powerful states. As a result, human rights bodies with jurisdiction over Global North states are highly restrictive in their approach, impairing the expression of CBDR.

##### 6.4.2.1 Climate Change and the Exercise of Extraterritorial Jurisdiction

The two *lex lata* approaches – the state control and alternative control approach – require exceptional circumstances for the exercise of extraterritorial jurisdiction. The dominant state control model requires a proximate link between the violation and the conduct attributable to the state, with the state exercising effective control over either territory or an individual.<sup>70</sup> These requirements are incompatible with climate change's causes and effects. Additionally, their focus on the state instead of the victims leaves a large vacuum for the vindication of human rights. A climate expansion is thus warranted but the ECtHR in its *Duarte* case neglected to do so, arguing for a highly state-based effective control interpretation and disqualifying the climate context as an exceptional circumstance warranting an adapted approach.<sup>71</sup> Epistem

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<sup>69</sup> In principle, but as discussed in relation to inundation of SIDS this idea might require updates in the current epoch. Jörgen Ödalen, 'Underwater Self-Determination: Sea-Level Rise and Deterritorialized Small Island States' (2014) 17 Ethics, Policy & Environment 225.

<sup>70</sup> Sections 5.3.1.1. and 5.3.1.2.

<sup>71</sup> Section 5.3.1.3.

ologically, this identified strict adherence to the state was argued to be even more problematic as it 1) excluded territory as materiality, 2) constituted an express product of naturalism through the central role of the state/individual dichotomy, and 3) enabled (Global North/Global South) power discrepancies.<sup>72</sup>

The incompatibility of climate change with the notion of territorial jurisdiction and the exceptional circumstances it embodied was held to justify and expansion by the IACtHR who formulated the alternative control approach. The Court adapted jurisdiction to the environmental context, warranting solely effective control over the activities that caused the harm for extraterritorial jurisdiction.<sup>73</sup> This approach was classified as more compatible with climate change as approving large fossil fuel projects could fall within the orbit of effective control. The approach does still require a causal link, but the handful of decided climate cases generally recognise a causal link. This potential was reiterated in the CRC's (inadmissible) *Sacchi* case, where this test was duplicated and the Committee held that it was indisputable that such control was present where states have the ability to regulate GHG emissions. Additionally, it found causality in the notion of shared responsibility.<sup>74</sup>

Still, both approaches remain state-centric which can be attributed to the nature of human rights. Epistemologically, the alternative approach was found to only expand the restrictive approach and thus naturalism instead of significantly altering its epistemological roots. While it established more space towards regulation of non-state actors, it falls back onto the entity of the state at every turn.<sup>75</sup>

#### 6.4.2.2 *An Epistemologically Flexible Reading of Extraterritoriality*

The *lex ferenda*, relational, approach needed to abandon the centrality of territory to provide epistemological flexibility. Similar to the conclusions pertaining to a RtD, 'territory' is a naturalist invention and thus serves as an assimilation into naturalism instead of allowing ontological flexibility to penetrate human rights procedure. Furthermore, to abide by the rationale expressed in Chapter 2 of elevating other-than-naturalist ontologies to the level of naturalism, procedural norms similarly must avoid naturalist subjugation and further empire-building. For territoriality, this entailed the inclusion other sovereignties and centralising effects on the local, embodied context and thus encompassing an influence-based approach in line with Haraway's 'response-ability'.<sup>76</sup> This

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<sup>72</sup> Section 5.3.1.4.

<sup>73</sup> Section 5.3.2.1.

<sup>74</sup> Section 5.3.2.2.

<sup>75</sup> Section 5.3.2.3.

<sup>76</sup> A term inspired by Sara L. Seck, 'A Relational Analysis of Enterprise Obligations and Carbon Majors for Climate Justice' (2021) 11 *Oñati Socio-Legal Series: Climate Justice in the Anthropocene* 254. For an analysis of the concept of response-ability see section 2.XX.

was found to better reflect today's global, complex networks of influence and power, including climate change. By abandoning central ideas of statehood, a collective-based perspective on jurisdiction could provide a focus on the causes of adverse effects instead of requiring a naturalist translation to ultimately end up with a handful of enforceable cases that are true to these naturalist boundaries.<sup>77</sup>

Such an approach found support in broader judicial practice centring connections, contracts or ties for which the alternative control-approach is regarded a first step. It also found support within the notion of collective rights, which already contained extraterritorial connotations and the expansion of duty bearers. A relational approach does not represent a general overhaul of extraterritorial jurisdiction in human rights law but is applicable where it concerns collective rights. This approach coincides with Chapter 2's theory and with the colonial legacies of collective rights and the emphasis on ontological existence.<sup>78</sup>

For climate change, this entailed the 1) practicability of an expansion of duty bearers,<sup>79</sup> 2) a better judicialization of CBDR and thus narrowing of the Global North/Global South gap, and 3) the expansion of extraterritorial obligations in line with the dispersed causes and effects of climate change.<sup>80</sup>

#### 6.4.3 Redressing Climate Harms

The temporality, (multi-actor) nature and spatial scope of climate change makes restitution impossible and leads to specific questions as to how to redress climate harm. These difficulties were found to be expounded where it concerns collective rights. Not only are there very few avenues in which to vindicate these rights, those that do, do not support the required spatial scope for the standing and extraterritorial *lex ferenda*. More so, practical impairments to access to justice remain.

Still, redress measures at all jurisdictions have encompassed more general measures which support the fallacy of the individual case but similarly allow room for the collective. As these collective measures are identified as largely working within the individual/public dichotomy, epistemological flexibility would require an integrative approach and an awareness of epistemology and ontology offered different interpretations of 'classic' general measures as well as heightened obligations in the climate context.

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<sup>77</sup> Section 5.3.3.1.

<sup>78</sup> Sections 5.3.3.2 and 5.3.3.3.

<sup>79</sup> As discussed in section 6.4.3, this is not necessarily supported by judicial avenues for redress.

<sup>80</sup> Section 5.3.3.4.

### 6.4.3.1 *A Variety of Forms of Climate Redress*

Generally, rights bodies were found to either abide by a state-centric or victim-centric approach. In the state-centric approach, the focus on the state resulted in plenty of state discretion which was analysed as detrimental to climate cases as it embedded the super-wicked characteristics of leaving the solution (largely) with those that caused it in the first place. Still, the separation of powers doctrine has spurred rights bodies to allow such space to circumvent arguments that climate change is best left to the executive branch. The state in this approach is not neutral but equated to the naturalist state as further emboldened by the finding of a propensity within this approach to monetary compensation. Collective measures, then, mostly serve to further ensure state discretion such as warranting legislative changes and guarantees of non-repetition.<sup>81</sup> More so, the collective measures generally constituted a broad-strokes approach to the needs of the 'public', disregarding the position of those marginalised.<sup>82</sup>

Both the Billy and KlimaSeniorinnen cases are classified as containing such an approach. The Billy case only required adaptation and a duty to prevent similar violations in the future. This was held to not only being incongruent with climate science but also as constituting the top-down imposition of naturalist 'remedies' where the Indigenous context is solely represented through a procedural, participatory lens. Additionally, by not demanding mitigation, the prevention of similar violations lost any real impact as this at a minimum would require mitigation measures. This represented a tendency to not step on the state's toes. The KlimaSeniorinnen case chose state-centric forward-looking measures of legislative changes, which constituted the duplication of environmental cases and its general subsidiary approach to redress. As a result, it did little to adjust to the climate context, failing to translate earlier findings of expanded standing and the inclusion of future generations into more stringent redress.<sup>83</sup>

Victim-centric remedies were held to offer more possibilities to avoid naturalist assimilation. The focus on the victim – and thus case specificity – resulted in a wide variety of adopted redress measures. This included the adaption to the Indigenous context and taking due regard to their laws and customs. The focus on (potential) victims was also found to encompass a willingness towards preventative measures.<sup>84</sup> While no climate cases have been decided within this approach, advantages in the climate context are hypothetical but were identified as multiple. First, redress measures could (indirectly) extend to non-state actors which would help bridge the Global

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<sup>81</sup> Section 5.4.1.1.

<sup>82</sup> Section 5.4.1.3.

<sup>83</sup> Section 5.4.1.2.

<sup>84</sup> Section 5.4.2.1.

North/Global South gap. Second, the option of provisional measures would aid with the precaution required to avoid reaching the Earth system's 'tipping points'. Third, it could limit the possibilities of harmful climate response measures by recentring the voices of those most impacted.<sup>85</sup>

This approach was therefore held to be more promising but also plagued by compliance issues with the state-centric approach boasting higher compliance percentages. Moreover, the approach was found to engage in translation when restricting the external epistemological space and focusing excessively on participation within the dominant system. Additionally, the required causal link can impair epistemological space when restrictively interpreted.<sup>86</sup>

#### 6.4.3.2 *Epistemologically Consistent Remedies*

Collective redress measures were identified as common within both approaches as they both encompassed two tracks – individual and general. The latter often reflected the public at large. Centering peoples' stories and the maintenance of relationships to places, and not the role of the state and position of the individual, means there is only one track focusing on the collective. Listening to other's stories of harm was identified to lead to heightened (preventative) obligations in the climate context as it has been widely recognised climate change is impacting peoples' way of life or ontology. It would also circumvent the identified tendency for top-down measures that guide others within the dominant narrative.<sup>87</sup>

The common redress measures of cessation and non-repetition should be reconceived in light of climate change which could range from a non-retrogression of climate policies to multi-actor continuing obligations to abide by the PA to, most radically, a non-intervention principle based on cessation of colonialism as a driver of climate change.<sup>88</sup>

All these aspects, however, remained dependent on the preceding analysis of standing and jurisdiction. When standing is conceived as introduced in this study, the inclusion of future generations and (relationships to) nature would indeed enhance obligations as impacts are worse(ning). If extraterritoriality shifts to a relational understanding of power and influence, cessation and non-repetition could borrow from this wider scope. Fundamentally, each procedural norm contains naturalist biases and each could narrow the scope for the next procedural norm. For true epistemological flexibility all hurdles and their interaction need to be expanded or reconceived.

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<sup>85</sup> Section 5.4.2.2.

<sup>86</sup> Section 5.4.2.3.

<sup>87</sup> Section 5.4.3.1.

<sup>88</sup> Section 5.4.3.2.

#### 6.4.4 Cumulative Procedural Potential

These fundamental interconnections between all three procedural elements not only show their interdependencies, but also serious caveats. As pointed out, avenues for redress for collectives to vindicate their collective rights are limited. Moreover, those jurisdictions that were identified as containing a more lenient *lex lata* tend to face more practical and compliance issues. The problematic nature of these differences is heightened in the climate context as these difficulties reflect the Global North/Global South gap. The European system, most notably, is on the (highly) restrictive and naturalist side of all aforementioned substantive and procedural interpretations but is a highly relevant jurisdiction to achieve the necessary GHG reductions. Implications of an epistemologically flexible collective rights case in line with this study, would be sweeping and, particularly if aimed at states, significantly test states' adherence to human rights. Still, the overarching need to better protect other-than-naturalist ontologies can be pursued within the current international law discourse which can help working towards the full ontological flexibility envisaged – as discussed in this study's final reflections.

#### 6.5 FINAL REFLECTIONS

The chapters cumulatively identified the potential contribution of collective human rights to the effectiveness of the human rights approach to climate change. To both specify and flesh out this potential, these final reflections serve to 1) answer the main research question on the basis of the five identified components of 'effectiveness', and 2) identify the available avenues in practice to take the findings regarding each of the three phases of the lifecycle forward – which are divided into collective human rights as a sword and as a shield. Together, these available avenues provide a basis to work towards the overhaul required for true ontological flexibility of the rights discourse and thus the materialization of the potential to enhance the effectiveness of the human rights approach.

##### 6.5.1 Addressing Super-Wicked Climate Change: The Role of Collective Human Rights

The elevation of collective human rights to the level of ontology and the necessary abandonment of naturalism and associated dominant paradigms provides clear advantages to help overcome climate change's 'super-wickedness'. By positioning collective human rights as a vehicle for ontological flexibility, it becomes neither another expression of the imperial Western legal tradition, nor of local (Indigenous) laws but acts as a bridge between the local

and global as expressed through human rights' universalisations.<sup>89</sup> By providing such a bridge, this study reimagined and transformed current paradigms. As these paradigms reflect an uncritical extension of European dualistic ideals, it offered a space to explore 'nature' for those relegated to a specific culture under the superior human nature of the 'developed' West. By viewing this 'other' side, this study avoids the stubborn logics of capitalism and neoliberalism that lead to one-dimensional solutions anchored in the exclusionary logic of naturalism. Ontological flexibility is essential towards global justice and brings to the fore essential needs and interests that are overlooked by human rights.

This shift in thinking also has implications for some of the other aspects of effectiveness. First, the ability to respond to the urgency is enhanced by viewing the 'other'. Most clearly for temporality this entails abandoning linear, capitalist conceptions of time for polychronic, circular patterns. Specifically, the inclusion of future generations both substantively (through accounting for loss of intergenerational aspects of life) and procedurally (by accounting for future generations through legal standing) lowers and changes assessments of foreseeability, requiring more preventative action and heightened state obligations. The 'other' similarly includes nature as embodied by the hybrid entity, again spurring more ambitious and transformative climate action.

Second, collective human rights implicate an abandonment of state-centricity by including non-state actors within its orbit as well as through their existence outside the social contract between state and individual of naturalism. Instead, they are applicable in absence of such a contract and their realization should focus on who influences and controls the rights violations (as anchored in the proposed *lex ferenda* for extraterritoriality).

Third, these aspects have consequences for addressing the spatial and temporal complexities of climate change. Specifically, this study identified the value of the local for the global and the fallacy and pitfalls of universalising for the purpose of addressing this spatial scope. Moreover, and relatedly, as spatiality is often used to express abstract space, the emphasis on the embodied context helps ground the discourse and draws its attention to that what matters: nature.

That being said, by conceptualising collective human rights as a vehicle towards ontological flexibility within naturalist human rights law, this research found the implementation of these findings faces an uphill battle as for each phase of the lifecycle a tendency was identified to use discretionary space to ultimately assimilate other-than-naturalist ontologies into the dominant paradigm, which will undercut the effectiveness. Generally, a local, hybrid collective must resist the universalising tendencies which are magnified under a climate change lens. Particularly, there are fewer available avenues in which

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89 Compare also Martuwarra RiverOfLife and others, 'Yoongoorrookoo: The Emergence of Ancestral Personhood' (2021) 30 Griffith Law Review 505, 518.



to pursue collective rights. Ambiguity persists and non-naturalist adjudicative paradigms are plagued by non-compliance, which diminishes collective rights' potential. Nevertheless, self-determination is a well-recognised and accepted collective right and the growing discourse on the RHE could similarly be utilised to pursue the compliance with collective rights. Collective rights can, moreover, build on a growing understanding of the interlinkages of human rights and climate change and on the mainstreaming of the Indigenous context in various streams of international law.

Therefore, this research did not only divulge the clear moral implications when failing to provide ontological space, it also revealed the intrinsic link between climate change's 'super-wickedness' and an uncritical universalisation of a single ontology. Ultimately, '[t]here is no escape from the radical connectedness of the human with its relations of exteriority – it is only that these relations have been radically reworked in our present contemporaneity. This is the 'ontological' (or, should one say, the 'ecological'?) condition of the anthropos in its corporeal immanence of thought.'<sup>90</sup> It is time human rights caught up with this ontological truth and, as subsequently discussed, there are several pathways through which to do so.

### 6.5.2 Collective Rights as a Shield

Ontological flexibility requires the elevation of collective rights beyond the state but the fact that human rights as a system almost exclusively focuses on statehood easily places the collective in a subordinate position. The nation state as the guiding entity for international law more broadly is a hard to change paradigm. As a starting point, therefore, the value of collective human rights as a vehicle for ontological flexibility at a minimum is equipping it with a stronger, less ambiguous overarching theory to enhance their use as a strong protection measure against the expansion of naturalism, and ultimately the assimilation into naturalism as envisaged by enlightenment ideals at the root of human rights. Only when sufficiently protecting other-than-naturalist ontologies can their way of life further inform human rights law and help usher a move from naturalism to include other ontologies and help create further climate advantages.

The need for the protection of the local is ever more pressing in light of climate change as naturalist expansion is not only visible through climate effects on the ground, but also through climate response measures flowing from naturalist dichotomies.<sup>91</sup> Capitalist solutions tend to encroach upon local

90 Olli Pyyhtinen and Sakari Tamminen, 'We Have Never Been Only Human: Foucault and Latour on the Question of the Anthropos' (2011) 11 *Anthropological Theory* 135, 148.

91 HRC Res 54/47, 'Impact of New Technologies Intended for Climate Protection on the Enjoyment of Human Rights' [2023] UN Doc. A/HRC/54/47.

communities and Indigenous peoples' lands and climate response measures – particularly through market-based mechanisms and new technologies – are often framed within the (sustainable) development discourse which – as analysed in Chapter 3 – fundamentally constitutes an expansion of naturalism. The shield function thus does not necessarily address climate change explicitly. Measures under this function range from protection from climate effects to, more realistically, protection from such 'naturalist expansion' projects and/or utilise climate change as a threat multiplier to the way of life – adding another layer of marginalisation to create a stronger shield for communities.<sup>92</sup>

In this light, it is important to emphasize the position of Indigenous peoples within this study. As apparent throughout, the Indigenous context is often the starting point as it provides the clearest connection of alternative ontology and needed rights protection. It is also the category of rightsholders that is most unequivocally linked to collective rights and is regarded both in need of efficient rights protection as well as vital to the environmental and climate discourse through their epistemologies. Their position is therefore a starting point to strengthen the discourse and to a degree the broader connotations of this study's theory of collective rights must be seen as an extension of this particular context.

This strengthening is twofold. First, it abandons an excessive emphasis on traditionality and identity politics by a move towards hybridity. This can better reflect the different forms of Indigenous communities and subsequent affectedness. Second, it is their relationship to the land and nature that has always been at the core of their rights protection and, as Chapter 3 in particular revealed, all collective rights ultimately concern land and nature and their position within the rights discourse. A better consideration of this relationship could help formulate an independent or strengthen a subsumed collective right to land that abandons the paradigm of ownership and property to better reflect ontological diversity.<sup>93</sup> As it is often individual property rights that are

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92 This is what recent views of both the CRC and CESCR do, they use climate change as a threat multiplier to emphasise the increasing need of sufficient protection of Indigenous land rights and, in these cases, FPIC. CRC, 'M.E.V., S.E.V. and B.I.V. v Finland' [2024] UN Doc. CRC/C/97/D/172/2022- Unedited version paras 3.4, 9.2; CESCR (n 56) paras 2.12, 2.17 and 12.5.

93 As expressed in the CESCR GC, there is no recognised right to land but many human rights touch upon land in one way or another but this similarly makes it susceptible to again power dynamics apparent in the rights discourse, CESCR, 'General Comment No. 26: Land and Economic, Social and Cultural Rights' [2022] UN Doc. E/C.12/GC/26. This can also have a spill-over effect into other discourses adding a consistency to the Indigenous peoples/land connection, for example in cultural heritage law.

recognised, the strengthening of an antidote to this imperial, exclusionary and capitalist notion is vital.<sup>94</sup>

Strengthening and diversifying human rights' relationship to land is also needed as land is under increasing pressure from climate change. In 2019, the IPCC in a report concerning land was clear in that '[l]and provides the principal basis for human livelihoods and well-being including the supply of food, freshwater and multiple other ecosystem services, as well as biodiversity'<sup>95</sup> and that '[c]limate change creates additional stresses on land, exacerbating existing risks to livelihoods, biodiversity, human and ecosystem health, infrastructure, and food systems (...) [and] [i]ncreasing impacts on land are projected under all future GHG emission scenarios.'<sup>96</sup> On the other hand, the report held that '[s]ustainable land management can contribute to reducing the negative impacts of multiple stressors, including climate change, on ecosystems and societies' and that the local level, including community-based tenure systems, is important for tackling climate change – both from a mitigation and (sustainable) adaptation lens.<sup>97</sup>

As it currently stands, the ever-growing acknowledgment of both the relationship of Indigenous peoples with their lands and their importance to tackling climate change is not accurately reflected in both theory and practice. Consistent emphasis on the use of Indigenous knowledge disregarding their rights in the UNFCCC, coupled with the emphasis on their participation all lead to concessions to the dominant paradigms of naturalism. Even in proceedings where this relationship is recognised – most clearly the Billy case – the procedural requirements do not accurately reflect this and external epistemological space is similarly restrained. If the current discourse does not recognise and shift the lens in such cases, it will add to ontological and epistemological erasure. As epistemology presupposes ontology, the protection of the ontological context is vital to ultimately 'reap the benefits' of epistemology, as international legal frameworks often aim to do.

A heavy emphasis is therefore placed on the Indigenous context and the better protection hereof that can be aided by changing the narrative to allowing capacity for ontological and epistemological difference and elevating the issue accordingly. From there, an extension can occur in the further integration and application of the UNDROP and ultimately a vulnerability perspective that

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94 See generally on these tensions Corina Heri, 'The Human Right to Land, for Peasants and for All: Tracing the Social Function of Property to 1948' (2020) 20 Human Rights Law Review 433; Christophe Golay and Ioana Cismas, 'Legal Opinion: The Right to Property from a Human Rights Perspective' [2010] <<https://ssrn.com/abstract=1635359>>.

95 IPCC, 'Climate Change and Land: An IPCC Special Report on Climate Change, Desertification, Land Degradation, Sustainable Land Management, Food Security, and Greenhouse Gas Fluxes in Terrestrial Ecosystems' (2019) SPM at A.1.

96 *ibid* SPM at A.5.

97 *ibid* SPM at B6.1., C1.2 and B1.3.

more clearly reflects the Global South/Global North disparities – accompanied by the needed (and conceptually congruent) expansion of duty bearers.

### 6.5.3 Collective Rights as a Sword

Without an accompanied sword function of collective rights, its shield function will come under growing strain. As indicated, the Global South/Global North climate cause/effect gap will not be considerably narrowed when solely shielding communities from developments activities. Indeed, if the potential of collective human rights is only maintained at this level and not integrated throughout the human rights and climate discourse, the gap will widen and increased pressure will be exercised on other-than-naturalistic ontologies.

To elucidate, as climate change worsens, based on the current human rights approach to climate change, Global North states are likely to be taken to the courts with increasing success but this success is tied to a limited territorial scope and leaves a wide margin of discretion to states – likely only demanding the reduction of GHG emissions. In this way, the state is likely to increase its efforts but also more likely to do so by capitalist impositions on the Global South.<sup>98</sup> This, in turn, will presumably be detrimental to those already marginalised and collective rights' shield function increasingly important – particularly when considering the role allocated to the 'public' in human rights law to further justify and ultimately allow such measures. It is also important considering that the imposition of capitalist measures will be expected to only enhance climate change's 'super-wickedness'.

The question then is how long the shield can offer protection until it shatters. A sword function, therefore, sees to further permeating the human rights order and help shape conceptions by 'forg[ing] alliances and coalitions between local and global knowledges, across the many divisions and hierarchies produced by the dualistic arrangements of difference of the dominant discourse.'<sup>99</sup> There are several avenues through which to do so.

First and foremost, the need for and force behind changing the narrative must not be underestimated, as Otto indicates '[a]cknowledging the European positionality of human rights law is an essential step towards reconceiving it.'<sup>100</sup> Not only will this provide a lens through which to assess the bias contained in climate 'solutions' and their potential to lead to sustainable outcomes, it can also inform many current discussions that in one way or another try to grapple with issues at the core of this study. In this way, existing

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98 This is even more likely if the currently discussed DCRD is given the green light (although this is questionable given the long history of articulating this right).

99 Dianne Otto, 'Rethinking Universals: Opening Transformative Possibilities in International Human Rights Law' (1997) 18 *Australian Year Book of International Law* 1, 35.

100 *ibid* 15.

ambiguities, as well as new discussions can provide anchor points towards merging this narrative with the discourse.

Some examples of such discussions have already been mentioned. One includes unclarity around the concept of local communities. While the use of this term is growing, what is encompassed by local communities is unclear but they are often associated with Indigenous peoples.<sup>101</sup> The previous aim and necessity of forwarding the Indigenous discourse and allowing an expansion in line with this research from there, could happen through this notion. Relatedly, the incorporation of the UNDROF could achieve a similar goal.

Chapter 2 had already applied an ontological lens to RoN to reveal its compatibility with the naturalist system where it could have its greatest impact by embodying the other half of the human/nature dichotomy. Representation from this perspective could draw from the superior position of the ratio and include environmental scientists. In this way, a naturalist top-down solution could alter the position of nature and – combined with a bottom-up elevation of the local human/nature interrelationship – ultimately change our view of the relationship between humans and nature and our legal framework(s).

The continued advocacy around the RHE and its persistent ambiguity as individual or collective right – as analysed – is yet another avenue in which this ontological narrative can permeate. Additionally, while already well underway – the upcoming ICJ AO on human rights and climate change as an initiative of SIDS will likely touch upon a myriad of the issues covered in this research from the status of SIDS and their possible inundation to the position of development and future generations and potentially extraterritoriality or obligations *erga omnes*.<sup>102</sup> In further work on the AO but also the continuation of discussions once the ICJ has issued its findings, a firm position of the collective and collective rights is similarly paramount and openings can likely be found to forward the ontological narrative.

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<sup>101</sup> Section 2.7.

<sup>102</sup> This is given the guiding questions of the request for an AO, which are a) '[w]hat are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations?', and b) 'What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to: (i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change? (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?'. See 'Obligations of States in respect of Climate Change, Request for Advisory Opinion' (International Court of Justice, 12 April 2023).

Perhaps this AO, as well as the pending AO at the Inter-American Court,<sup>103</sup> combined with cases such as the *Milieudefensie v Shell* case<sup>104</sup> can finally further open up discussions on a beyond-the-state interpretation of duty bearers or at a minimum link collective issues – albeit avoiding the generally identified globalization tendency – to an expansion of extraterritorial obligations but in particular the expansion of duty bearers to corporations. This has been long discussed in relation to human rights but has yet to have a breakthrough despite it being vital from the angle of this research to help close the Global North/Global South gap and battle the primacy of capitalism impairing the effectiveness of approaches to climate change.

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103 See 'Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile' (9 January 2023).

104 Compare and contrast *Rechtbank Den Haag*, 'Milieudefensie c.s. v Royal Dutch Shell' [2021] ECLI:NL:RBDHA:2021:5337 (awarded) and *Gerechtshof Den Haag*, 'Milieudefensie c.s. v Royal Dutch Shell' [2024] ECLI:NL:GHDHA:2024:2099 (rejected).