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International human rights obligations in relation to climate change

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Author's Biographical Note

Professor Martin Scheinin worked from August 2020 to February 2025 as British Academy Global Professor at the Bonavero Institute of Human Rights which hosted his research project "Addressing the Digital Realm through the Grammar of Human Rights Law". Before joining the Bonavero Institute, he was Professor of International Law and Human Rights at the European University Institute, a position he had held since 2008. He has had extensive experience in international human rights law, having served as a member of the UN Human Rights Committee from 1997 to 2004, as UN Special Rapporteur on human rights and counter-terrorism from 2005 to 2011 and as a member of the Scientific Committee for the EU Fundamental Rights Agency from 2018 to 2023. After his British Academy Global Professorship at the Bonavero Institute he continues his work as part-time professor at the European University Institute and at Lund University.

Introduction and Executive Summary

In December 2024 the International Court of Justice conducted two weeks of oral hearings in the advisory opinion proceedings concerning the obligations of states in respect of climate change. The hearings constituted the culmination of unprecedented attention and interest in the proceedings, by states that made written submissions, commented on each others' submissions or appeared in the oral hearings, but also by a range of civil society actors and the media.[1] Climate change is an era-defining phenomenon and a grave threat to people in various parts of the world, to the natural environment and to human civilization.

The Court's Opinion is expected in 2025. On the occasion of its oral hearings, the ICJ made public the written submissions and comments it had received, including the extensive evidentiary materials that states and other interlocutors had filed. This Bonavero Report consists of an expert report by Martin Scheinin, British Academy Global Professor at the Bonavero Institute, written at the invitation of the Republic of Vanuatu, a driving force in initiating the request by the UN General Assembly for an advisory opinion and in the ICJ proceedings that followed. This expert report was submitted to the Court as 'Exhibit C' of the written submission by Vanuatu and cited extensively in the submission itself.[2] It addresses the questions posed by the General Assembly to the ICJ, specifically under international human rights law as it stands today.

The first one of the two questions the Advisory Opinion is expected to answer seeks the ICJ to clarify what legal obligations do states have in order to ensure the protection of the climate system and other parts of the environment, such obligations owed to other states and to "present and future generations". Professor Scheinin's expert report addresses the question from the perspective of human rights law, i.e., states' obligations in relation to individuals, communities and peoples. He asserts that all states in the world have through their voluntary ratification of human rights treaties accepted as binding the catalogue of human rights enshrined in the Universal Declaration of Human Rights and that many, if not all, substantive human rights are affected by ongoing climate change. In addressing the General Assembly's first question he discusses not only individual human rights such as the right to life but also the right of indigenous peoples and other communities and peoples to enjoy their own culture and way of life, and the right of all peoples to self-determination. Through an analysis of the Human Rights

[1] International Court of Justice, Obligations of States in respect of Climate Change (Request for Advisory Opinion), https://www.icj-cij.org/case/187

[2] Written statement of Vanuatu (21 March 2024), https://www.icj-cij.org/sites/default/files/case-related/187/187-20240321-wri-06-00-en.pdf

Committee's *Torres Strait Islanders* case,[3] the report demonstrates, *inter alia*, how adverse climate change impacts culminate as human rights violations at different points of time, how the right to a distinct culture and way of life is affected early on in this sequence, and how the intergenerational dimension of that right allows for the operationalisation in legally binding international human rights law of the notion of rights of future generations.

The second question posed by the General Assembly is about the consequences of states acting in breach of their international law obligations in respect of climate change, and not only obligations owed to other states but also when owed to "peoples and individuals of the present and future generations". This question relates to the law of state responsibility in international law which primarily addresses the legal relationship between an injured state and the state that caused the injury through an internationally wrongful act. However, the primarily reciprocal framework concerning inter-state consequences of breaches of international law does not preclude that states can be held, under international law, responsible also in respect of any person or entity other than a state.

In respect of the General Assembly's second question, Professor Scheinin's expert report closes by emphasising that states' breaches of their obligations under international human rights law do constitute internationally wrongful acts that give rise to claims by individuals, communities of individuals, including indigenous and other peoples, as well as by respective states acting as custodians of the human rights of their inhabitants. Under general international law such wrongfulness in the past, at present or in the future gives rise to state responsibility and involves legal *consequences*, including cessation, non-repetition and various forms of reparation (restitution, compensation and satisfaction). Once again, with reference to the *Torres Strait Islanders case,* the expert report asserts that the question of legal consequences for human rights violations in the context of climate change can be operationalized, so as to entail full reparation and adequate compensation for the harm suffered, as well as preventing similar human rights violations from occurring in the future.

The Advisory Opinion proceedings of the International Court of Justice are one important part of local, national, regional and global efforts to engage also the judiciary in efforts to halt or mitigate ongoing climate change, and to determine whether and how humanity will adapt to climate change. Thousands of court cases have been initiated in

[3] Human Rights Committee, Communication No. 3624/2019, *Daniel Billy et al. v. Australia*, 21 July 2022. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f135%2fD%2f3624%2f2019&Lang=en

different parts of the world, often geared towards enforcing a greenhouse gas emission cap in a particular country. Some of this climate change litigation has continued at human rights fora on regional or international level. The case of *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* became the first case where a human rights violation was established by a regional human rights court because of insufficient greenhouse has emissions reduction. Instead of deciding on an emissions cap the European Court of Human Rights, however, entrusted the Committee of Ministers, the main political body of the Council of Europe, to to supervise the adoption of measures aimed at ensuring that Swiss domestic authorities comply with the requirements of the European Convention on Human Rights.[4]

At global level, the Torres Strait Islanders case mentioned above was the first successful climate change case before the UN human rights treaty bodies. In its Views, the Human Rights Committee did address and document the role of Australia as a greenhouse gas emitter but the outcome of the case nevertheless focused on the obligations of Australia to respect and ensure the right of the indigenous peoples of the Torres Strait Islands to enjoy their own their own cultures and to transmit them to next and future generations.

The ICJ advisory opinion proceedings represent a separate track of climate change litigation, as compared to domestic court cases and individual complaints before UN human rights treaties and regional human rights courts. The closest comparator is the May 2024 advisory opinion by the International Tribunal for the Law of the Sea.[5] It remains to be seen to what extent the ICJ will focus on reciprocal rights and obligations of sovereign states in respect of each other, and to what extent it will provide responses to those aspects of the General Assembly's request that pertain to states' obligations in respect of peoples, individuals and future generations.

[4] European Court of Human Rights, Application No. 53600/20, Grand Chamber Judgment of 9 April 2024 , see paragraph 657. https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-233206%22]}

[5] International Tribunal for the Law of the Sea, Advisory Opinion of 21 May 2024. https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf

International Human Rights Law Obligations
in Respect of Climate Change
Expert Report by Professor Martin Scheinin
December 2023

I. The Subject Matter and Outline of This Expert Report

1. On 29 March 2023 the General Assembly, by resolution A/RES/77/276, requested from the International Court of Justice an Advisory Opinion on 'the obligations of States in respect of climate change'. The General Assembly put to this esteemed Court the following questions:

a) What 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;
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?

2. This Expert Report, written pursuant to a request by the Republic of Vanuatu, will address both questions (a) and (b). Its starting point will be the notion of 'obligations of States under international law' as it appears in question (a), which is a *de lege lata* question that also concerns pertinent international *human rights law* obligations. Therefore, the framework of international human rights treaties, including the two Covenants of 1966,[1] is central for the analysis that follows below. That said, question (b) is formulated using the past tense ('have caused') and its scope depends on historical facts concerning anthropogenic emissions and resulting harms to the climate system and other parts of the environment that may precede the entry into force of the two

[1] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3; International *Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

Covenants in 1976 or of other human rights treaties. The discussion of both questions (a) and (b) therefore needs to be open to the possibility that States may have breached their international human rights obligations *before* 1976 which would require assessing, under question (a) the content of such obligations as stemming from customary international law, the United Nations Charter,[2] and as codified into the Universal Declaration of Human Rights in 1948.[3] While this report will not engage in a detailed comparison of the substantive content of States' human rights obligations before and after their ratification of the Covenants of 1966, it notes the general overlap and consistency between the catalogues of human rights in the Covenants and in the Universal Declaration and adopts the view that the latter should be understood as a reflection of how the scope of international human rights, as enshrined in customary international law and as referred to in the Charter was understood in 1948.

3. This Expert Report will give attention to the issue of '*particular vulnerability*' mentioned in General Assembly's question (b)(i), the references in both question (a) and question (b)(ii) to '*present and future generations*', and the reference in question (b)(iii) also to '*peoples*'. This report will explore how international human rights law can help in operationalizing, within the framework of legally binding norms of international law, the ideas of particular vulnerability, rights of future generations, and rights of States, peoples and individuals.

4. This Expert Report will proceed as follows: After a brief recapitulation of the qualifications and credentials of the author (section II), a presentation will follow in section III of the general contours of States' obligations under international human rights law in respect of the harmful impacts of anthropogenetic emissions that cause the ongoing global phenomenon, generally known as climate change. Section IV is devoted to a discussion on the 2022 Final Views by the Human Rights Committee in the case of *Daniel Billy et al. (Torres Strait Islanders) v. Australia*, whereafter main section V of this Expert Report will follow, addressing pertinent dimensions of the questions posed by the General Assembly to the Court, through a structured analysis of five distinct but interdependent issues of international human rights law. Finally, the author will present his conclusions (section VI) and a declaration of integrity and impartiality (section VII).

[2] *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.
[3] *Universal Declaration of Human Rights*, General Assembly Resolution 217 A(III) of 10 December 1948.

II. Qualifications and Credentials of the Expert

5. I have a PhD in law (Helsinki 1991) and have since then worked as a full-time academic scholar, mainly in the field of international human rights law. I have served as full-time professor at the University of Helsinki, Finland (1993-1998), at Åbo Akademi University in Turku, Finland (1998-2008), at the European University Institute in Florence, Italy (2008-2020), and currently at the University of Oxford as British Academy Global Professor (2020-2024).

6. A second main strand of my professional career has been related to the practice of international human rights law and, in particular, under human rights treaties with global reach, adopted by the United Nations General Assembly. In 1997-2004 I served as a member of the Human Rights Committee, the treaty body established under the International Covenant on Civil and Political Rights. Parallel to membership of that Committee, I was the Chairperson of the International Law Association's Committee on Human Rights Law and Practice. In 2005-2011 I was the first holder of the mandate of the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, which mandate included review of national counter-terrorism laws and their application, as to their compatibility with international human rights law.

7. During my career, I have served as expert witness in four cases before the Inter-American Court of Human Rights and in one investor-state arbitration case, as co-counsel in a small number of individual cases before the European Court of Human Rights and -- before being in 1996 elected as member of the Human Rights Committee and again from 2015 when ten years had passed since the end of my term on the Committee -- as counsel in individual communications before the Human Rights Committee and other UN human rights treaty bodies. In the case of *Daniel Billy et al. (Torres Strait Islanders) v. Australia*, to be discussed below, I authored an *amicus curiae* brief at the request by the petitioners. In the case of *Ukraine v. Russia* concerning the CSFT and the CERD, currently pending before this esteemed Court, I wrote at the request of Ukraine an Expert Report concerning the relationship between national security and CERD obligations.

III. Substantive Human Rights Obligations of States in Respect of Anthropogenic Climate Change

8. As stated in paragraph 2 above, the normative framework provided by the two Covenants of 1966, as complemented by other global and regional human rights treaties, forms a natural basis for addressing, as a question of *de lege lata,* General Assembly's question (a) that pertains to 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. As of 31 July 2023, the International Covenant on Economic, Social and Cultural Rights has been ratified by 171 States and the International Covenant on Civil and Political Rights by 173 States. This near universal ratification pattern is complemented by a wide range of universal and regional human rights treaties, to the effect that all States in the world have through their voluntary treaty ratifications accepted the catalogue of international human rights as legally binding State obligations. Most significantly, 196 States have ratified the Convention on the Rights of the Child[4] that in substantive scope covers the whole catalogue of human rights and in personal scope a large share of the world's population of today and in the near future when the harmful effects of climate change upon the enjoyment of human rights are still expected to intensify. It is justified to conclude that all States in the world by 2023 have through their voluntary treaty ratifications accepted as international treaty obligations the whole catalogue of human rights enshrined in the Universal Declaration of Human Rights and in customary international law.[5]

9. What follows from the general overlap between current treaty law, the Universal Declaration of Human Rights and customary norms of international human rights law[6] is that irrespective of the treaty ratification patterns of States or the period of time under

[4] United Nations, Treaty Series, vol. 1577, p. 3.

[5] The only qualification that is needed in respect of the conclusion made in the last sentence of the paragraph relates to the United States of America that has ratified neither the Covenant on Economic Social and Cultural Rights nor the Convention on the Rights of the Child. As a consequence, its acceptance as treaty obligations of some of economic and social rights is based on other treaties it has ratified, such as certain Conventions of the International Labour Organization and the International Convention on the Elimination of All Forms of Racial Discrimination (United Nations, Treaty Series, vol. 660, p. 195).

[6] For the methodology for and outcome from determining customary norms of international human rights law, see, William A. Schabas, *The Customary International Law of Human Rights*, Oxford University Press 2021. For methodology, see Chapter 3. As to substantive scope, Schabas writes in Chapter 2.F: 'There is today considerable authority for the view that much if not all of the [Universal Declaration of Human Rights] constitutes a codification of customary international law.'

assessment – at least since 1945-1948 – the *substantive* human rights obligations of different States to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases are by and large the same. The catalogue of human rights in the Universal Declaration provides a sound basis for identifying the substantive human rights obligations of all States, affirmed as a matter of law through the adoption of the UN Charter in June 1945 and then receiving their authentic interpretation in the Universal Declaration in 1948. As will be explained soon below, differences between States as to their human rights obligations are by and large *jurisdictional* in nature, relating to the competence of various human rights treaty bodies or courts to examine reports or complaints concerning alleged breaches of substantive obligations. Importantly, they do not affect the ability or duty of the International Court of Justice, holistically and reflecting the principles of the indivisibility and interdependence of all human rights, to address the substantive human rights obligations of all States in the current Advisory Opinion proceedings.

10. Special consideration must, however, be given to the right of all peoples to self-determination, a right that has its basis in a *principle* of international law recognized *inter alia* in the UN Charter and was reaffirmed as a *human right* in the Covenants of 1966. The emergence and progressive evolution of the law of self-determination have been examined by this esteemed Court in its *Advisory Opinion on the Separation of the Chagos Archipelago*,[7] where the Court characterised the adoption in 1960 of the General Assembly resolution 1514 (XV)[8] as a 'defining moment' that had clarified the content and scope of the customary law right of self-determination,[9] respect for which is an obligation *erga omnes*.[10] The United Nations is based on the sovereign equality of States which form the basis for rights and obligations in inter-State relations.[11]Article 1(2) of the UN Charter establishes as one of the purposes of the United Nations to 'develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'. As a matter of positive treaty law, the Covenants of 1966 further clarified the status of peoples as the beneficiaries of the right of self-determination, consisting of a range of dimensions reflected in paragraphs 1 to 3 of common Article 1 of the Covenants. Peoples are entitled to invoke that right in respect of the State where they live, or in respect of other States or the international community

[7] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965,* Advisory Opinion, I.C.J. Reports 2019, p. 95.
[8] *Declaration on the Granting of Independence to Colonial Countries and Peoples*, 14 December 1960, A/RES/1514(XV)
[9] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965,* Advisory Opinion, I.C.J. Reports 2019, paras. 150, 152, see also 154
[10] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965,* Advisory Opinion, I.C.J. Reports 2019, para. 180.
[11] See UN Charter, Art 2(1), (2).

as a whole. Importantly, the Charter then provides a solid legal basis for a State acting as custodian of the right to self-determination and other human rights of its population or any segment of its population that qualifies as a people for purposes of the two Covenants.

11. Many, if not all substantive human rights are affected by climate change. Arbitrary deprivations of life, many forms of cruel, inhuman or degrading treatment, denial of many economic, social and cultural rights including the rights to health, food and work, many new and old forms of discrimination, destruction of people's homes and possessions, and many other adverse impacts will result from ongoing and forecasted changes in the global climate system. Many of such adverse effects are imputable to action or inaction by States, often also constituting a breach of their obligations under international law.

12. However, only a subset of all these adverse human rights impacts of climate change could be adjudicated under human rights treaty law. Ratification patterns by individual States and the scope of the jurisdiction of the respective treaty body or regional human rights court to receive individual or inter-State complaints, as well as a whole range of admissibility requirements under such procedures, including the victim requirement[12] and the requirement of exhausting domestic remedies,[13] further narrow down the subset of adjudicated cases. Furthermore, actual victims of the potential human rights violations that could in principle be adjudicated in respect of a specific State, may be unable or unwilling or lack the resources needed for taking their case to international human rights bodies, usually requiring first the exhaustion of domestic remedies.

13. A graphic illustration of the consequences of jurisdictional and related challenges to adjudicating climate change even where a case might be strong as to substantive human rights obligations, relates to the most sacrosanct of all human rights, the right to life. As will be discussed in the following section, individual cases related to climate change and the right to life have by now reached three of the United Nations human rights treaty bodies but in none of these cases has a violation of that right been established. This does not, however, mean that multiple States would not have acted in breach of their international obligations to respect and ensure the right to life of their inhabitants and other members of humankind in respect of GHG emissions and the

[12] See e.g., *Optional Protocol to the International Covenant on Civil and Political Rights* (GA res. 2200A (XXI), adopted 16 December 1966) UNTS, vol. 999, p. 171 (OP-ICCPR), art 1; *Optional Protocol to the Convention on the Rights of the Child on a communications procedure* (GA res. 66/138, adopted 19 December 2011), UNTS, vol. 2983, p. 135, A/RES/66/138 (OP-CRC), art 5(1).
[13] See e.g., OP-ICCPR, art 5(2)(b); OP-CRC, art 7(e).

effects of climate change, thereby violating their obligations under international human rights treaties or customary norms of international human rights law. To illustrate the wide range of well documented situations where climate change has resulted in loss of human lives some examples are listed below. The fact that these, or other, situations have not been adjudicated before human rights bodies does not mean that there would not have been a breach of positive or negative human rights obligations under the right to life, attributable to one or more States.

- For as early as for summer 2003, it has been shown that anthropogenic climate change increased the risk of heat-related mortality in Central *Paris* by~70% and by~20% in *London*, which then experienced lower extreme heat when respectively, 64 deaths were attributable to anthropogenic climate change in London, and 506 in Paris.[14]
- In June–July 2016, extreme rainfalls in the Yangtze–Huai region of *China*, attributed to preceding 2015/16 El Niño conditions with strong anthropogenic factors, resulted in 833 reported deaths.[15]
- In August 2017, Hurricane Harvey caused unprecedented rainfalls in parts of the *United States* and over 80 reported deaths.[16]
- In September 2017, *Puerto Rico* was hit by Hurricane Maria, resulting in estimated 5 740 excess deaths.[17]
- A July 2018 heatwave in *Japan* that 'would never have happened without human-induced climate change' caused 1032 deaths.[18]
- In June-August 2022, heavy rains and resulting flooding affected over 33 million people in *Pakistan*, destroyed 1.7 million homes, and nearly 1500 people lost their lives, when the maximum rainfalls over the provinces Sindh and Balochistan were

[14] Daniel Mitchell et al., Attributing Human Mortality During Extreme Heat Waves to Anthropogenic Climate Change 11 ENVTL. RES. LETTERS 1, 1 (2016), https://iopscience.iop.org/article/10.1088/1748-9326/11/7/074006/pdf.

[15] Qiaohong Sun & Chiyuan Mao, Extreme Rainfall (R20mm, Rx5day) In Yangtze– Huai, China, In June–July 2016: The Role Of Enso And Anthropogenic Climate Change, Bulletin of the American Meteorological Society (January 2018), http://www.ametsoc.net/eee/2016/ch20.pdf and https://www.climatesignals.org/events/china-floods-june-july-2016.

[16] Geert Jan van Oldenborgh, Attribution of extreme rainfall from Hurricane Harvey, August 2017, Environmental Research Letters 12 124009 (2017), https://iopscience.iop.org/article/10.1088/1748-9326/aa9ef2.

[17] WMO Atlas Of Mortality And Economic Losses From Weather, Climate And Water Extremes (1970–2019), World Meteorological Organization WMO-No. 1267 (2021), https://library.wmo.int/doc_num.php?explnum_id=10989, p. 75.

[18] Yukiko Imada et al., The July 2018 High Temperature Event in Japan Could Not Have Happened without Human-Induced Global Warming, SOLA Volume 15A 8-12 (2019), https://www.jstage.jst.go.jp/article/sola/15A/0/15A_15A-002/_pdf/-char/en.

about 75% more intense than they would have been had the climate not warmed by 1.2 C.[19]

- In January and February 2022, the storms Ana and Batsirai caused at least 250 documented deaths across *Madagascar, Mozambique, and Malawi,* with greenhouse gas and aerosol emissions shown in part responsible.[20]
- At a more general level, the World Meteorological Organization has reported that between 1970 and 2019 weather, climate and water hazards accounted for more than two million deaths,[21] and that between 2005 and 2015 only, there were 700 000 deaths.[22]

IV. The Case of *Daniel Billy et al. (Torres Strait Islanders) v Australia* and its Significance for the Advisory Opinion

14. So far, only a narrow subset of internationally wrongful acts that amount to breaches of the *substantive* human rights obligations of States have been adjudicated as actual human rights violations that pass the various *jurisdictional* preconditions for international human rights adjudication and have materialized as human rights violations in respect of identifiable individuals who meet the 'victim' requirement under respective human rights treaties. Before the landmark case of the *Torres Strait Islanders* decided in July 2022 by the Human Rights Committee,[23] it had in 2021 been established by the Committee on the Rights of the Child that now living children may meet *the victim requirement* in respect of a number of States they call into account under international human rights law, even if their petitions were declared inadmissible for other reasons.[24]

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[19] Friederike E. L. Otto, et. al, Climate Change Likely Increased Extreme Monsoon Rainfall, Flooding Highly Vulnerable Communities in Pakistan, World Weather Attribution (Sept. 15, 2022), https://www.worldweatherattribution.org/climate-change-likely-increased-extreme-monsoon-rainfall-flooding-highly-vulnerable-communities-in-pakistan/

[20] Friederike E. L. Otto et al., Climate change increased rainfall associated with tropical cyclones hitting highly vulnerable communities in Madagascar, Mozambique & Malawi, World Weather Attribution (2022), https://www.worldweatherattribution.org/wp-content/uploads/WWA-MMM-TS-scientific-report.pdf.

[21] WMO Atlas Of Mortality And Economic Losses From Weather, Climate And Water Extremes (1970–2019), World Meteorological Organization WMO-No. 1267 (2021), p. 16.

[22] Idem, p. 71.

[23] *Daniel Billy et al. v. Australia* (Communication No. 3624/2019) CCPR/C/135/D/3624/2019.

[24] *Chiara Sacchi et. al. v. Argentina, Brazil, France, Germany and Turkey* (Communication Nos. 104-108/2019), CRC/C/88/D/104/2019, CRC/C/88/D/105/2019, CRC/C/88/D/106/2019, CRC/C/88/D/107/2019, CRC/C/88/D/107/2019. The Committee's establishment of the petitioners meeting the victim requirement was formulated as follows: '… the Committee concludes that the authors have sufficiently justified, for the purposes of establishing jurisdiction, that the impairment of their Convention rights as a result of the State party's acts or omissions regarding the carbon emissions originating within its territory was reasonably foreseeable. It also concludes that the authors have established prima facie that they have personally experienced real and significant harm in order to justify their victim status. Consequently, the Committee finds that it

Importantly, the Committee also adopted the position of the Inter-American Court of Human Rights in its 2017 advisory opinion on the environment and human rights where the Court recognized the extraterritorial reach of states' human rights obligations in the context of *transboundary harm,*[25] and applied it in the context of climate change. While the *Torres Strait Islanders* case engaged only the territorial state, Australia, the *Sacchi* cases retain their relevance concerning the potential scope of extraterritorial human rights obligations in respect of harmful effects of climate change.[26] Furthermore, the Committee applied the principle of *common but differentiated responsibilities* by stating that the 'collective nature of the causation of climate change does not absolve the State party of its individual responsibility that may derive from the harm that the emissions originating within its territory may cause to children, whatever their location'.[27]

15. In 2019, the Human Rights Committee had declared admissible a petition, *Ioane Teitiota v. New Zealand*,[28] alleging a violation of ICCPR Article 6 (i.e., the right to life) if a person was returned to a Kiribati, as he faced '*a real risk of impairment* to his right to life'[29] under ICCPR Article 6 due to the impact of climate change and associated sea level rise on the habitability of Kiribati and on the security situation on the islands. On the merits, however, the Committee concluded that this real risk of impairment had not (yet) amounted to a violation of Article 6 by New Zealand:

> 9.12 In the present case, the Committee accepts the author's claim that sea level rise is likely to render Kiribati uninhabitable. However, it notes that the time frame of 10 to 15 years, as suggested by the author, could allow for intervening acts by Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population. The Committee notes that the State party's authorities thoroughly examined that issue and found that Kiribati was taking adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms. Based on the information made available to it, the Committee is not in a position to conclude that the domestic authorities' assessment that the measures taken by Kiribati would suffice to protect the author's right to life under article 6 of the Covenant was clearly arbitrary or erroneous in that regard, or amounted to a denial of justice.

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is not precluded by article 5 (1) of the Optional Protocol from considering the authors' communication.' (para 10.14 of *Chiara Sacchi et al v. Argentina*).

[25] Inter-American Court of Human Rights, Advisory Opinion OC-23/17 on the environment and human rights. See, in particular, paras. 95-104.

[26] Paras. 10.5 and 10.7 of *Chiara Sacchi et al v. Argentina.*

[27] Para. 10.10.

[28] (Communication No. 2728/2016) CCPR/C/127/D/2728/2016.

[29] Para. 8.6 (emphasis added)

16. It needs to be noted that the time frame of 10 to 15 years 'as suggested by the author' had been presented in a submission of December 2016. Hence, the Committee's reference to 10 years only extends to the end of 2026 which at the time of writing this Expert Report is *less than three and a half years ahead*. Equally importantly, the question whether returning the petitioner to Kiribati could already at the time of the Committee's assessment in 2019 qualify as a form of inhuman treatment in violation of ICCPR Article 7 was *not* adjudicated in *Teitiota.* This observation begs the question whether a violation of Article 7 may be triggered earlier in time than a violation of Article 6: returning someone to a known and inevitably approaching threat to their life may be an inhuman act earlier than it constitutes an actual violation of the right to life. Following the approach of the Human Rights Committee in the case of the *Torres Strait Islanders* case, my answer to that question is affirmative.

17. The remaining part of this section will focus on several highly significant features of the case of *Daniel Billy et al v. Australia* (the *Torres Strait Islanders* case), decided on the merits by the Human Rights Committee in July 2022. The first one of such features relates exactly to the issue of whether the adverse impacts of climate change upon different human rights may materialize as adjudicable (justiciable within a specific jurisdiction) human rights violations at different points of time. For the first time, the Human Rights Committee established violations of the ICCPR because of the actions or omissions by a State in respect of the harmful impact of climate change. While the right to life claim was, similarly to *Teitiota*, declared admissible but concluded on the merits as a non-violation with reference to a similar 10-15 years' timeframe in which the State party could take action,[30] the Committee held that certain adverse effects upon other human rights had already materialized as human rights violations. The ICCPR provisions established as violated were Articles 17 (right to privacy, home and family life) and 27 (right to enjoy a minority culture). The Committee's differentiation of how States' actions or omissions in

[30] See, para. 8.7 of the Views in the *Torres Strait Islanders* case (footnote 23) where the reasons for a non-violation of Article 6 were expressed as follows:'… The Committee takes note of the other adaptation and mitigation measures mentioned by the State party. The Committee considers that the time frame of 10 to 15 years, as suggested by the authors, could allow for intervening acts by the State party involving taking affirmative measures to protect and, where necessary, relocate the alleged victims. The Committee also considers that the information provided by the State party indicates that it is taking adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms on the islands. Based on the information made available to it, the Committee is not in a position to conclude that the adaptation measures taken by the State party would be insufficient and therefore represent a direct threat to the authors' right to life with dignity.' Notably, also here the timeline of 10-15 years refers to the petitioners' submission which for instance of the islands of Boigu and Masig was 10 years from September 2020 (see, paras. 5.1 and 5.3).

respect of climate change causing human rights harm may materialize as human rights violations at different points of time is of immense significance.

18. The second feature of immense significance of the *Torres Straits Islanders* case is the unprecedented and clear identification of indigenous peoples, as individuals and communities, as victims of adverse impacts of climate change, amounting to actual human rights violations by the respondent State – which in this particular case was both a major emitter of GHGs and the territorial State. Building upon its long line of case law related to the right of members of an indigenous people to enjoy their 'own culture' in community with other members of the group, including the practice of their traditional or otherwise typical nature-based forms of economic livelihood, the Committee held (footnotes omitted):

> 8.13 … The Committee also recalls that, in the case of Indigenous Peoples, the enjoyment of culture may relate to a way of life which is closely associated with territory and the use of its resources, including such traditional activities as fishing or hunting. Thus, the protection of this right is directed towards ensuring the survival and continued development of cultural identity. The Committee further recalls that article 27 of the Covenant, interpreted in the light of the United Nations Declaration on the Rights of Indigenous Peoples, enshrines the inalienable right of Indigenous Peoples to enjoy the territories and natural resources that they have traditionally used for their subsistence and cultural identity. Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion.
>
> 8.14 The Committee notes the authors' assertion that their ability to maintain their culture has already been impaired by the reduced viability of their islands and the surrounding seas, owing to climate change impacts. The Committee notes the authors' claim that those impacts have eroded their traditional lands and natural resources that they use for traditional fishing and farming and for cultural ceremonies that can be performed only on the islands. The Committee further notes their claim that the health of their land and the surrounding seas is closely linked to their cultural integrity. The Committee notes that the State party has not refuted the authors' arguments that they could not practice their culture on mainland Australia, where they would not have land that would allow them to maintain their traditional way of life. The Committee considers that the climate impacts mentioned by the authors represent a threat that could have reasonably been foreseen by the State party, as the authors' community members began raising the issue in the 1990s. While noting the completed and ongoing seawall

> construction on the islands where the authors live, the Committee considers that the delay in initiating these projects indicates an inadequate response by the State party to the threat faced by the authors….

19. But the Human Rights Committee did not stop here by establishing a violation of ICCPR Article 27 on account of simply relying on its earlier case law on Article 27 and indigenous peoples. Instead, as a third important feature of the case, the Committee took the necessary and logical step of identifying as an aspect of 'the right to enjoy one's own culture', the right *to transmit* a culture inherited from earlier generations to new generations, including both those already living and those yet to be born. The closing part of paragraph 8.14 reads (emphasis added):

> … the Committee considers that the information made available to it indicates that the State party's failure to adopt timely adequate adaptation measures to protect *the authors' collective ability to maintain their traditional way of life and to transmit to their children and future generations their culture and traditions and use of land and sea resources* discloses a violation of the State party's positive obligation to protect the authors' right to enjoy their minority culture. Accordingly, the Committee considers that the facts before it *amount to a violation of the authors' rights under article 27 of the Covenant.*

20. The relevance of the *Torres Strait Islanders* case is not limited to the important specific case of indigenous peoples whose traditional lands and resources, as well as enjoyment and transmission to future generations of their distinct culture, are threatened by rising sea levels or other unprecedented changes caused by anthropogenetic climate change. A fourth immensely significant feature of the case is in the Committee's finding concerning violations of the universally applicable provision of ICCPR Article 17, namely that the petitioners' right to privacy, home, or family life had been disrupted and violated through the adverse impacts of climate change. These were not violations of minority rights, but of rights belonging to any member of society. . These violations had already materialized in respect of the Torres Strait Islander petitioners, in addition to the violation of their Article 27 right to enjoy their own culture. The Committee held as follows (footnote omitted):

> 8.12 … The Committee also notes the authors' specific descriptions of the ways in which their lives have been adversely affected by flooding and inundation of their villages and ancestral burial lands; destruction or withering of their traditional gardens through salinification caused by flooding or seawater ingress; and decline of nutritionally and culturally important marine species and associated coral bleaching and ocean acidification. The Committee further notes the

> authors' allegations that they experience anxiety and distress owing to erosion that is encroaching on some homes in their communities and that the upkeep and visiting of ancestral graveyards is associated with the very heart of their culture, which requires experiencing feelings of communion with deceased relatives. The Committee notes the authors' statement that their most important cultural ceremonies are meaningful only if performed on native community lands. The Committee considers that when climate change impacts, including environmental degradation on traditional [indigenous] lands in communities where subsistence is highly dependent on available natural resources and where alternative means of subsistence and humanitarian aid are unavailable, have direct repercussions on the right to one's home, and the adverse consequences of those impacts are serious because of their intensity or duration and the physical or mental harm that they cause, the degradation of the environment may then adversely affect the well-being of individuals and constitute foreseeable and serious violations of private and family life and the home. The Committee concludes that the information made available to it indicates that, by failing to discharge its positive obligation to implement adequate adaptation measures to protect the authors' home, private life and family, the State party violated the authors' rights under article 17 of the Covenant.

21. As the case was brought by indigenous Torres Strait Islanders, it is natural that also the factual basis of the Article 17 violation was closely linked to their distinctive indigenous identity. Irrespective of that, the Committee's finding is of more general significance as it opens the possibility that also non-indigenous groups, communities, families or persons may present their own factual and legal arguments concerning their particular vulnerability, in order to substantiate a claim that their Article 17 rights have been violated. Similarly to the Article 27 finding, this aspect of the case demonstrates that climate change related violations of ICCPR Article 17 may materialize much earlier in time than some other human rights violations, such as violations of the right to life.

22. A fifth and final immensely important feature of the Human Rights Committee's Views in the Torres Strait Islanders case relates to the Committee's pronouncement on the authors' *right to an effective remedy* under Article 2, paragraph 3, of the ICCPR. Here, the way the Committee addressed the legal obligations of the respondent state under the ICCPR is instructive of how international human rights law addresses the *consequences* of states' breaches of their international obligations in the context of climate change. In particular, the Committee held that Australia was required to make 'full reparation' and, inter alia, to 'provide adequate compensation to the authors for the harm that they have suffered, engage in meaningful consultations with the authors' communities in order to conduct needs assessments; continue its implementation of

measures necessary to secure the communities' continued safe existence on their respective islands; and monitor and review the effectiveness of the measures implemented and resolve any deficiencies as soon as practicable.' Australia was also under an obligation to 'take steps to prevent similar violations from occurring in the future'[31].

23. Another Human Rights Committee case where a double violation of Articles 17 and 27 was established in respect of members of an indigenous community, is *Benito Oliveira Pereira et al. v. Paraguay* (Communication No. 2552/2015).[32] While the case was not about the adverse human rights impacts of climate change, it nevertheless addressed the State party's obligations in respect of the destruction of the natural environment and livelihoods of the indigenous group, in this case through large-scale fumigation with toxic agrochemicals. The Committee's two findings of violation were formulated as follows:

> 8.4 In the present case, the Committee notes that the State party did not adequately monitor the illegal activities at the source of the contamination, which have been widely documented (para. 2.7), observed by the State party itself (paras. 2.13–2.23) and even acknowledged by both of the accused farm owners (para. 2.21). By inadequately monitoring the activities, the State party failed to prevent the contamination. This failure in its duty to provide protection made it possible for the large-scale, illegal fumigation, including with banned agrochemicals, to continue for many years, not only causing health problems among community members – including children, as the fumigation was carried out mere metres from the school during school hours – but also contaminating the community's waterways, destroying its subsistence crops, killing its livestock and triggering the mass extinction of fish and bees, all basic components of the members' private life, family life and home. The Committee notes that the State party has not provided an alternative explanation to contradict the alleged causal link between the fumigation with agrochemicals and the aforementioned harm. When contamination has direct repercussions on the right to one's privacy, family life and home, and its consequences are serious, then the degradation of the environment adversely affects the well-being of individuals and constitutes a violation of privacy, family life and the home. Consequently, in the light of the information that it has before it, the Committee concludes that the events at issue in the present case disclose a violation of article 17 of the Covenant.

[31] Para. 11.
[32] CCPR/C/132/D/2552/2015

8.8 In the present case, the Committee notes that the authors and other members of the community exercise the right to enjoy their culture through a way of life that is closely linked with their territory and the use of the natural resources found therein. The Committee also notes that the large-scale fumigation with toxic agrochemicals presents a threat which the State party could reasonably have foreseen. Not only were the competent State authorities notified of the activities and their impact on the community members, but the prosecutor's office found that the acts fully met the definition of the offence (para. 2.23) and the accused themselves acknowledged their liability (para. 2.21). Yet, the State party did not put a stop to the activities, thus allowing the continued contamination of the rivers in which the authors fish, draw their water, bathe and wash their clothing, the further death of their livestock, a source of food, and the ongoing destruction of their crops and the resources in the forest where they forage and hunt. The Committee further notes that the State party has not provided an alternative explanation of what happened or demonstrated having taken any steps whatsoever to protect the right of the authors and other community members to their cultural life. The Committee accordingly finds that the facts before it disclose a violation of article 27 of the Covenant with regard to the Campo Agua'ẽ indigenous community.

V. What are the Obligations of States under International Human Rights Law to Ensure the Protection of the Climate System?

24. Building upon the *Torres Strait Islanders* case and other case law by the UN human rights treaty bodies, this main section of this Expert Report will now move to a discussion of five distinct but interrelated issues of direct relevance for addressing the questions (a) and (b) put to this esteemed Court by the General Assembly. Here, an effort is made to identify some of the most pertinent *substantive* norms of international human rights law that entail obligations of States 'to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases' or that govern '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', in respect of *peoples and individuals of the present and future generations* affected by the adverse effects of climate change, including those *injured* or *specially affected by* or *particularly vulnerable to* the adverse effects of climate change. The following discussion seeks to address some of the most pertinent substantive rights in order to assist the esteemed Court in addressing the questions put to it by the General Assembly, in respect of diverse beneficiaries of human rights obligations of States.

***Issue 1:** The specific case of indigenous peoples and the human rights obligations of States*

25. Anthropogenetic emissions of greenhouse gases have caused rapidly escalating changes in the climate system that entail adverse effects upon human rights protected by international law. Many indigenous peoples are, due to the geographical location of their traditional lands and the total dependency of their distinct economies, livelihoods, communities, cultures, and ways of life upon the natural resources and conditions of specific geographic areas, especially vulnerable to such adverse effects. As the *Torres Strait Islanders* case by the Human Rights Committee demonstrates, these adverse effects may materialize as adjudicable human rights violations by identifiable States much earlier than other negative consequences of climate change in respect of members of the dominant population would in the same countries. This is primarily because of the distinct right, enshrined in Article 27 of the ICCPR, of members of ethnic or other minorities, including indigenous peoples, to enjoy their own culture in community of other members of their group, as well as the jurisdictional availability of the right of complaint under the Optional Protocol to the ICCPR to a large proportion of indigenous peoples in the world.[33] As was established in the *Torres Strait Islanders* case, a violation of ICCPR Article 27 occurs when the elders in an indigenous group are because of climate change unable to transmit its distinct culture, based on local natural resources and traditional or otherwise typical forms of livelihood, to new generations.

26. This important conclusion by the Human Rights Committee in the *Torres Strait Islanders* case is not an isolated finding. As the author of this Expert Report demonstrated in an *amicus curiae* brief in that case,[34] that position is based on multiple legal sources and interpretive practice, including General Comment No. 23[35] and case law[36] by the Human Rights Committee itself, the best known and widely accepted *José*

[33] The ICCPR-OP has been ratified by 116 States which by far exceeds the number of States that have accepted any other international procedure of complaint under human rights treaties.

[34] Amicus Curiae Brief by Professor Martin Scheinin in the Case of 'Daniel Billy et al. (Torres Strait Islanders) v. Australia' by the UN Human Rights Committee, subsequently published as Bonavero Report No. 2/2022 (November 2022).

[35] See, opening phrase of paragraph 6.2 of General Comment No. 23 which affirms protection for 'the ability of the minority group to *maintain* its culture…' (emphasis added) and final paragraph 9 of the same General Comment is clear in that the protection of article 27 rights 'imposes specific obligations on States parties … directed to *ensur[ing] the survival and continued development* of the cultural, religious and social identity of the minorities concerned' (emphasis added), a formulation that clearly recognizes the intergenerational dimension of the right, even if not employing notions such as 'to transmit' or 'future generations'.

[36] See, *Ángela Poma Poma v. Peru* (Communication No. 1457/2006) CCPR/C/95/D/1457/2006*:* '7.3 In previous cases, the Committee has recognized that the rights protected by article 27 include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong. In the present case, it is undisputed that the author is a member of an ethnic minority and that *raising llamas is an essential element of*

Martínez Cobo definition of the notion of indigenous peoples,[37] and ILO Convention No. 169 on Tribal and Indigenous Peoples.[38] These elements of the intergenerational dimension of indigenous people's rights are also reflected in the United Nations Declaration on the Rights of Indigenous Peoples,[39] academic literature,[40] as well as case law under regional human rights treaties.[41]

Issue 2: *The wider case of similarly situated or otherwise particularly vulnerable groups*

27. The fact that indigenous peoples often become victims of adjudicable human rights violations related to climate change earlier in time than other individuals or groups, does not mean that the adverse effects of climate change would not have

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the culture of the Aymara community, since it is a form of subsistence and an ancestral tradition handed down from parent to child…' (emphasis added). For other support for the intergenerational dimension of indigenous peoples' rights in case law, see *Chief Bernard Ominayak and the Lubicon Lake Band v Canada* (Communication No. 167/1984) CCPR/C/38/D/167/1984; *Sandra Lovelace v Canada* (Communication No 24/1997) CCPR/C/13/D/24/1977; and *Ioane Teitiota v New Zealand* (Communication No 2728/2016) CCPR/C/127/D/2728/2016; see further at paragraphs 16-19 in the *amicus curiae* brief mentioned above in footnote 34.

[37] UN document E/CN.4/Sub.2/1986/7/Add.4: 'Indigenous communities, peoples and nations are those which, having a *historical continuity* with pre-invasion and pre-colonial societies that developed on their territories, consider themselves *distinct* from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and *transmit to future generations* their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.' (paragraph 379; emphasis added)

[38] The intergenerational nature of indigenous peoples' rights and the and importance of cultural transmission to new generations is reflected, *inter alia*, in article 1 (1)(b) ('who are regarded as indigenous on account of their descent… and who … retain…') and in article 29 ('imparting of general knowledge and skills that will help children belonging to the peoples concerned to participate fully…').

[39] Most importantly, see UNDRIP Article 25 that reads: 'Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to *future generations* in this regard.' (emphasis added) See, also, Articles 11 (1) and 13 (1).

[40] See, James S. Anaya, Indigenous Peoples in International Law (2nd edition, Oxford University Press 2004) pp. pp. 66-67 and 131-141; William Schabas, p. 892 in the 3rd revised edition of *Manfred Nowak's CCPR Commentary* (N.P.Engel 2019); and Martin Scheinin at p. 162 in Francesco Francioni and Martin Scheinin, eds., Cultural Human Rights, Martinus Nijhoff 2008.

[41] See, Inter-American Court of Human Rights, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay* (Judgment of 29 March 2006) paragraph 222; *Case of the Yakye Axa Indigenous Community v. Paraguay* (Judgment of 17 June 2005) paragraph 124, 131 and 203; and *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Judgment of 31 August 2001) paragraph 149. Also, see African Court of Human and Peoples' Rights, the case of the *Ogiek Community (Commission v. Kenya)* (Case No. 6/2012, Judgment of 26 May 2017) paragraphs 103, 106, 155, 165 and 179.

already materialized as human rights violations in respect of anyone else. Indigenous peoples often are in situations of specific vulnerability in respect of changes in the climate system but there may be other groups that share those same vulnerabilities. There is plenty of authority in support of an understanding that on account of the concrete factual circumstances, international law protections typically afforded to indigenous peoples also apply in respect of many other vulnerable groups that do not identify themselves as indigenous peoples or lack one or some of the characteristics on account of which groups may by a State or an international actor be recognized as indigenous peoples, such as the criterion of having arrived on a geographical area earlier in time than another culture.

28. For instance, ILO Convention 169 applies equally to 'tribal' and 'indigenous' groups and assures to them equal rights, even if in its Article 1 only indigenous peoples are characterized through the criterion of being first.[42] More generally, the vulnerability of indigenous peoples to the natural resources of a particular geographical area, as being the foundation of their distinct culture and way of life and its transmission to new generations, may apply also to, for instance, tribal peoples, ethnic minorities, peasants, fisherpersons, mountain communities, lowland farmers, or city dwellers or even the whole population of an island State or other low-lying country. Reference is made to the established understanding of the notion of indigenous peoples in Africa,[43] to the 2018 United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas,[44] and various policy directives of international financial institutions.[45] All these sources point to the conclusion that States have identical or analogous human rights obligations in respect of many similarly situated groups in addition to indigenous peoples. What matters for those obligations is not the criterion of 'being first' but the *situation of particular vulnerability* to climate change of a people or community with a distinct way of life based on the natural resources of a particular geographical area. Importantly in the context of the current Advisory Opinion proceedings, this conclusion would be applicable to low-lying Pacific Island nations, where the whole population, jointly constituting the people of an independent State or another type or territory, could claim victim status in respect of adverse effects of climate change, and where the Pacific

[42] See ILO Convention No. 169, Art 1: 'who are regarded as Indigenous *on account of their descent from the populations which inhabited the country … at the time of* conquest or colonization or the establishment of present state boundaries…'

[43] See, Report of the African Commission's Working Group on Indigenous Populations/Communities (2003). Adopted by the African Commission on Human and Peoples' Rights at its 28th Ordinary Session.

[44] A/RES/73/165

[45] See, for instance, World Bank Operational Policy 4.10 on Indigenous Peoples (2005), paragraph 4, and Performance Standard No. 7 (2012) by the International Finance Corporation, paragraph 5.

Island State may act as custodian of the human rights of its inhabitants, in adjudication in respect of other States responsible for GHG emissions, climate change and adverse human rights consequences.

29. As the *Torres Strait Islanders* case by the Human Rights Committee demonstrates, the legal basis for the State obligations discussed in the previous paragraph can be found, inter alia, in ICCPR Article 17 on the protection of privacy, family and home, supplementing and expanding the protection afforded by ICCPR Article 27 to minority cultures.[46] Expanding the main rationale of the case of the *Torres Strait Islanders* to tribal peoples, pastoralists, subsistence farmers, fisherpersons or even city dwellers or the whole population of a low-lying State or area should be seen as primarily being a *factual* question concerning the distinctiveness and vulnerability of the way of life of a particular group and the threat climate change constitutes to that way of life and its transmission to new generations, including future ones. As a consequence, communities and peoples in for instance low-lying Pacific Island countries, as well as the States of such countries, acting as custodians of the rights and cultures of their population as a whole, are entitled to invoke the rationale of the *Torres Strait Islanders* case in the substantiation of claims concerning legal obligations of States that, by their acts and omissions, have caused significant harm to the climate system. For instance, they may turn to inter-State adjudication and seek to establish the international *wrongfulness* of the actions or omissions of other States, as pertinent for question (a) by the General Assembly, or to present pursuant to question (b) claims concerning the *consequences* of such wrongfulness, including in respect of cessation, non-repetition and various forms of reparation (restitution, compensation and satisfaction).[47]

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Issue 3: *The relevance of the right of all peoples to self-determination*

30. Since the *Quebec Secession* case by the Supreme Court of Canada (1998),[48] the Human Rights Committee and other human rights bodies have acknowledged that common Article 1 of the twin Covenants of 1966 on the right of all peoples to self-determination also applies to indigenous peoples. Those interpretive developments paved the way for the adoption in 2007 of the Declaration of the Rights of Indigenous Peoples that confirms the same position. A consequence of these developments is that even if many communities, groups and individuals are entitled to invoke the rationale of

[46] The application of ICCPR Article 17 in the *Torres Strait Islanders* case is supported by earlier case law, in particular the cases of *Hopu and Bessert v. France* (CCPR/C/60/D/549/1993/Rev.1) and *Benito Oliveira Pereira et al. v. Paraguay* (footnote 32, above).

[47] Reference is made to Articles 30-31 and 34-37 of the Articles on Responsibility of States for Internationally Wrongful Acts, Annex to General Assembly resolution 56/83 of 12 December 2001 (A/RES/56/83).

[48] [1998] 2 SCR 217.

the *Torres Strait Islanders* case to substantiate their claims concerning legal obligations of States in respect of climate change, such claims may relate to the right of all peoples to self-determination only in respect of beneficiaries that constitute 'peoples' under international law. Such beneficiaries will include whole populations of independent States as 'peoples', as well as distinct groups within a State that identify themselves as and meet the characteristics of being 'peoples'.

31. As enshrined in common Article 1 of the twin Covenants, the right of all peoples to self-determination includes several dimensions or attributes, including internal and external political dimensions (paragraph 1),[49] a resource dimension (paragraph 2),[50] and a solidarity dimension (paragraph 3).[51]

32. States are entitled to invoke, in relation to other States and the international community as a whole, the right of all peoples to self-determination, acting as custodians of the human rights of the members of their population as a whole, as well as in order specifically to claim and protect the rights of a distinct 'people' within the country. Indigenous or other distinct groups qualifying as peoples under international law are themselves entitled to invoke the right of self-determination in respect of the State that exercises sovereignty over the area where the group lives, be it a multi-ethnic local territorial State or the State of a distant country that retains sovereignty over an overseas territory or a colony. The right of self-determination of peoples is relevant in the context of climate change even if, or precisely because, it is a right of peoples and not of individuals, or any community of individuals.

Issue 4: *The question concerning which substantive human rights are most pertinent*

33. It is important to note that the question which kinds of human rights violations related to climate change have been successfully and *first in time* been adjudicated at international level is not indicative of the true scope and magnitude of States' breaches of international human rights obligations in respect of anthropogenic climate change. All human rights are interdependent and indivisible, and as was demonstrated in

[49] '… By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'

[50] 'All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.'

[51] 'The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.'

paragraph 13 above, climate change has by 2023 caused a great number of deaths, many of which most likely entail substantive breaches of the right to life. The right of indigenous peoples to enjoy and transmit their culture is one human right where violations can in some cases already have been established through international adjudication. Furthermore, many 'similarly situated' groups have become subject to the same or analogous forms of human rights violations as indigenous peoples, due to the particular vulnerability of their way of life to the effects of climate change. But these discussions do not justify a conclusion that the most sacrosanct of all human rights, the right to life, would not be pertinent or would not have been violated. Quite to the contrary, as scientific reports, media, social movements and people themselves all point to, ongoing climate change constitutes a real threat to human life and has probably already resulted in two million deaths. International adjudication before human rights treaty bodies or regional human rights courts, or in the form of contentious cases before the International Court of Justice, may follow but by 2023 there should be no reason to doubt that at least a proportion of those two million deaths entail violations by States of their positive or negative human rights obligations under the right to life.

34. Already adjudicated human rights cases themselves point to the relevance of the right to life in the context of climate change. In the *Sacchi, Teitiota and Torres Strait Islanders* cases no violation of the right was yet established as having materialized and proven.[52] Irrespective of that, it was affirmed through these cases that climate change constitutes an ongoing and increasingly severe threat to human life, or life with dignity. States not only have an obligation to refrain from arbitrary deprivations of life, but also an obligation to protect human rights in respect of evolving threats and through active positive measures to maintain and ensure the conditions for human life and life with dignity. Specific positive and negative human rights obligations under the right to life may relate to the elderly, to the young, to people in low-lying areas, to city dwellers, or to people living in poverty.

[52] In *Teitiota*, the Human Rights Committee concluded with a non-violation of Article 6, noting that 'in his comments submitted in 2016, the author asserted that Kiribati would become uninhabitable within 10 to 15 years' (para. 9.10; see also para. 7.1 where the date of the author's submission is given as 29 December 2016) and then itself assessing that 'the time frame of 10 to 15 years, as suggested by the author, could allow for intervening acts by Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population' (para. 9.12). In 2023, soon 7 years of those 10-15 years have passed, and that the actual trajectory presented in 2016 entailed that Article 6 would or might be violated in 3 to 8 years from the submission of this Expert Report.

Issue 5: *Operationalizing the rights of 'future generations': from aspirational moral rights to treaty-based legal rights*

35. The General Assembly's request for an Advisory Opinion includes, in its question (b)(ii) a reference to the rights of 'peoples and individuals of the present and future generations'. Some commentators may seek to misinterpret the request by claiming that rights of future generations should be constrained to being aspirational and moral in their nature, rather than immediate and legal rights. The *Torres Strait Islanders* case has provided a sound basis for dismissing those views. Under the legally binding treaty provision of ICCPR Article 27, the respondent State was found to have violated the rights of the petitioners '*to transmit to their children and future generations their culture and traditions and use of land and sea resources'.* This finding related to the specific case of the right of members of minorities to enjoy their own culture and the inclusion of transmission of a distinct culture to new and even future generations as an attribute of this right, in the specific context of indigenous peoples. That said, the rationale of this interpretation is sound and can be expanded to other contexts, such as other groups than indigenous ones, or even other treaty provisions than ICCPR Article 27. Even without such an expansion that may prove justified in future cases, the *Torres Strait Islanders case* has provided this esteemed Court with a well-founded foundation for operationalizing the protection of future generations in respect of climate change as a legal obligation of States under international law.

VI. Conclusions

36. By the end of 2023, very few cases concerning adverse human rights impacts of climate change have been adjudicated before international human rights treaty bodies or regional human rights courts. Importantly, in the *Torres Strait Islanders* case the Human Rights Committee nevertheless established violations of ICCPR Articles 17 and 27, and also the *Sacchi* and *Teitiota* cases demonstrated that human rights claims may be adjudicable. More importantly, this Expert Report has demonstrated that the scope of breaches of States' positive or negative human rights obligations in respect of anthropogenic climate change is much wider than the relatively narrow subset of claims that by now have been adjudicated - narrow because of different ratification patterns of States, various admissibility requirements or other jurisdictional constraints. On the basis of the assessment that the substantive human rights obligations by States are by and large the same and cover, — through States' voluntary ratification of human rights treaties or on account of customary norms of international law — the whole catalogue of human rights enshrined in the 1948 Universal Declaration of Human Rights, it is very likely that many States have violated or are currently in breach of their legal obligations

under international human rights law on account of their contribution to GHG emissions or failure to respond to climate change.

37. The international wrongfulness of such conduct, either by actions or omissions, that have occurred in the past, continue as of today, or will occur in the future, may be established through individual complaint procedures under human rights treaties, or through inter-State adjudication before the same human rights *fora*, but also by the International Court of Justice. Consequently, the scope of 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, as addressed in question (a) posed by the General Assembly, includes the full catalogue of human rights and both negative and positive State obligations.

38. The right of indigenous peoples, individually and collectively, to enjoy their own culture that is based on coexistence with the specific conditions and natural resources of areas they traditionally occupy, and to transmit that culture from generation to generation, including to future generations, was presented as an issue where it already has been established that adverse impacts of climate change have resulted in human rights violations by a State that is in breach of its positive or negative obligations under international human rights law. ICCPR Article 27 has a prime place as a provision of human rights treaty law that is being violated. This was established by the Human Rights Committee in the *Torres Strait Islanders* case.

39. There are numerous peoples, groups, or communities that are situated similarly to indigenous peoples as to the adverse effects of climate change, due to their particular vulnerabilities. They may be, for instance, tribal peoples, ethnic minorities, peasants, fisherpersons, mountain communities, lowland farmers, city dwellers or the whole population of an island State or other low-lying country. Their way of life, or living culture, and its transmission to new generations, may also be disrupted and made impossible because of the effects of climate change. The finding by the Human Rights Committee in the *Torres Strait Islanders* case, that also Article 17 of the ICCPR had been violated, has wide ramifications in expanding the rationale first established in respect of indigenous communities to apply also in respect of many other groups, communities or peoples.

40. A prime example of how the human rights obligations of States are wider than where human rights violations have already been established, relates to obligations of States under the right to life, enshrined in ICCPR Article 6. In the *Sacchi, Teitiota and Torres Strait Islanders* cases no violation of this right was established as having already

materialized. Irrespective of that, climate change has reportedly caused already two million deaths and constitutes an ongoing and increasingly severe threat to human life, or life with dignity. States not only have an obligation to refrain from arbitrary deprivations of life, but also an obligation to protect human rights in respect of evolving threats and through active positive measures to maintain and ensure the conditions for human life and life with dignity. Irrespective of whether violations of State obligations in respect of the right to life have already resulted in internationally adjudicable claims concerning the deprivation of life, States do have obligations under the right to life to prevent loss of human life, since 1945-1948, right now, and also in the future. Those obligations may in specific forms relate to the elderly, to the young, to people in low-lying areas, to city dwellers, or to people living in poverty.

41. The right of all peoples to self-determination is enshrined in common Article 1 of the ICESCR and ICCPR and is relevant as a legal obligation of States, applicable in the context of climate change. This right includes distinct political, resource and solidarity dimensions. It is applicable both to the benefit of the whole population of a country as a 'people' and to the benefit of distinct groups within a State that under international law qualify as 'peoples'. A State is entitled to invoke, in respect of other States or the international community, the right of self-determination as custodian of the rights of its whole population or the rights of a distinct people within a multi-ethnic country. Also, a people within a State are entitled to invoke the right of self-determination in respect of the territorial State, or another State.

42. Having concluded above that the *substantive* scope of the full catalogue of human rights and both negative and positive State obligations in respect of them, gives rise to State obligations 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 (question a posed by the General Assembly), it is pertinent to close this Expert Report in respect of question (b) by emphasising that breaches of those substantive obligations constitute internationally wrongful acts that give rise to claims by individuals, communities of individuals, including indigenous and other peoples, as well as by States acting as custodians of the human rights of their inhabitants. Under general international law such wrongfulness in the past, at present or in the future, gives rise to State responsibility and involves legal *consequences*, including cessation, non-repetition and various forms of reparation (restitution, compensation and satisfaction). The Human Rights Committee's application in the *Torres Strait Islanders case* of the ICCPR Article 2, paragraph 3, provision on a State party's legal obligation to provide an effective remedy for violations of the ICCPR demonstrates that the question of legal consequences for human rights violations in the context of climate change can be operationalized, so as to entail full reparation and

adequate compensation for the harm suffered, and measures such meaningful consultations, needs assessments, securing people's safe existence, monitoring and reviewing of measures undertaken, as well as preventing similar violations from occurring in the future.[53]

[53] *Torres Strait Islanders* case (footnote 23, para. 11.)