

A Rising Tide: The Implications of Climate Change Inundation for Human Rights and State Sovereignty

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Abstract

Climate change has adverse implications for a wide range of human rights. Low-lying, socio-economically disadvantaged small island developing states are among those most vulnerable to climate change harms – including rising sea levels and extreme weather events – which threaten the habitability of their territory and the enjoyment of basic human rights, including the right to self-determination. Customary international law and international human rights law establish extraterritorial obligations with regard to the fulfilment of those economic, social, cultural and collective rights threatened by climate change inundation. However, the international legal framework has been constructed around a system of legal and political governance that is premised on state sovereignty and designed to mediate the vertical relationship between state and citizen. The disappearance of a low-lying small island state without an immediate successor has serious implications for statehood, sovereignty, self-determination and the protection of basic human rights. While this does not necessarily entail the abandonment of the human rights project as a response to climate change harms, it does require a re-conceptualisation of the existing human rights framework. The human rights regime must embrace forward-looking, trans-boundary mechanisms of monitoring and protection that no longer rely on the state as the central domain of moral concern, or risk becoming obsolete.

Keywords: *Climate change inundation; self-determination; state sovereignty*

1. Introduction

As is now widely recognised, climate change¹ is almost certainly causing – and will continue to cause – serious harm across the globe.² These harms include rising sea levels and water temperatures, and increased incidence of heat waves, drought, flooding, and other extreme weather events, and are predicted to impact upon various facets of human life.³ While these broad facts are commonly known, their implications for the realisation of fundamental, internationally recognised human rights tend to be less widely acknowledged or understood.

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¹ The term ‘climate change’ will be used throughout to refer to ‘a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability’, as per United Nations Framework Convention on Climate Change (UNFCCC), 1771 UNTS 107, 31 ILM 849, 9 May 1992, Article 1(2).

² See, for example, Intergovernmental Panel on Climate Change (IPCC), IPCC Fourth Assessment Report (AR4): Climate Change 2007 - Synthesis Report (2007); Nicholas Stern, *The Economics of Climate Change: The Stern Review* (Cambridge: Cambridge University Press, 2007).

³ IPCC, AR4 Synthesis Report, at 48-53; n2 above.

There is a particular issue within this context that appears to be concealed by a research and policy blind spot. The sea level rise and extreme weather events associated with climate change pose a serious, imminent threat to the human rights of the inhabitants of low-lying, Small Island Developing States (SIDS). By gradually undermining the habitability of vulnerable SIDS through inundation,⁴ climate change jeopardises the enjoyment of individual rights to life, health, food, shelter, education, and participation in the cultural life of the community, as well as the collective right to self-determination. The destruction or disappearance of a state without an immediate successor – and its implications for statehood, sovereignty, self-determination, and the protection of basic human rights – represents an unprecedented challenge to the international community and contemporary human rights framework. And yet, beyond the affected states themselves, there is little recognition or analysis of this issue.⁵ As George Monbiot suggests, with regard to the evacuation of the Carteret Islands, ‘The disaster has begun, but so far hardly anyone has noticed’.⁶

This paper seeks to shed new light on this emerging issue by examining it in the context of an interdisciplinary human rights framework grounded in the right to self-determination and collective transnational obligations. This examination will be informed by an analysis of first-hand case studies, human rights jurisprudence, normative theories of cosmopolitanism, and a sociological understanding of risk. The first section will consider evidence from a number of SIDS regarding the impact of climate change on a range of individual and collective rights – including, particularly, the right to self-determination, a *jus cogens* norm of customary general international law – and examine corresponding extraterritorial obligations. Having identified the relevant rights and responsibilities under international law, the second section will consider various obstacles to the protection of human rights threatened by climate change. These include state reluctance to recognise obligations relating to climate change; inequitable socio-economic and political relations between states; the structural limitations of the existing human rights framework; and, crucially, the implications of the loss of territory and statehood for the realisation of human rights in an international framework premised on state sovereignty.

⁴ The term ‘inundation’ will be used throughout to refer to the particular subset of climate change harms that threaten to undermine the habitability or existence of low-lying SIDS, including not only sea level rise but also extreme weather events, coastal erosion, increased salination, flooding, water shortages, changing water temperatures, and so on. See IPCC, AR4 Synthesis Report, at 52; n2 above.

⁵ As Oliver notes, ‘There is limited material on this subject’ (Selma Oliver, ‘A New Challenge to International Law: The Disappearance of the Entire Territory of a State’ (2009), 16 *International Journal on Minority & Group Rights*, 209 at 211). Hampson concludes that ‘Little appears to be known ... outside the affected states’ (Françoise Hampson, Expanded Working Paper on the Human Rights Situation of Indigenous Peoples in States and other Territories Threatened with Extinction for Environmental Reasons, UN Doc. E/CN.4/Sub.2/2005/28 (2005), at para. 7). Even studies on the human costs of climate change make scarce reference to state extinction and its implications for human rights. See, for example, Stephen Humphreys, *Climate Change and Human Rights: A Rough Guide* (Versoix: International Council on Human Rights Policy, 2008); Office of the UN High Commissioner for Human Rights (OHCHR), Report of the Office of the UN High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights, UN Doc. A/HRC/10/61 (2009); Siobhán McInerney-Lankford, Mac Darrow and Lavanya Rajamani, *Human Rights and Climate Change: A Review of the International Legal Dimensions* (Washington DC: World Bank, 2011); United Nations Development Programme, Human Development Report 2007/2008: Fighting Climate Change (New York, NY: UNDP, 2007); and Kate Raworth, et al., ‘Climate Wrongs and Human Rights: Putting People at the Heart of Climate Change Policy’, Oxfam Briefing Paper No117, available at http://www.oxfam.org.uk/resources/policy/climate_change/downloads/bp117_climatewrongs.pdf (last accessed 30 November 2010).

⁶ George Monbiot, ‘Climate Change Displacement has begun – But Hardly Anyone has noticed’, *The Guardian*, 8 May 2009.

The third section, recognising these practical constraints, redirects our attention towards the normative aspirations of the human rights project and their role in prompting a reconstruction of the existing human rights framework in light of the implications of climate change. Using the sociological concept of risk as the foundation for a global community united by shared vulnerability to climate change threats, the final section seeks to challenge the apparent normative significance of state sovereignty and territorial boundaries in determining right-holders and duty-bearers. In a world in which states are facing imminent extinction, an alternative means of protecting and promoting fundamental human rights – including the right to self-determination – must be sought. The paper will conclude by emphasising the need for the meaningful participation of affected communities in any attempt to reconceptualise the existing human rights framework.

This paper will not examine alternative global frameworks of human rights protection in depth; nor will it address related issues of intergenerational justice, environmental protection or the ethical implications of proposed mitigation and adaptation strategies. While these are of crucial importance, the scope of this paper does not allow for their evaluation in any meaningful way. Instead, it seeks to create space for constructive normative and practical dialogue about an issue that has been largely neglected but has grave and imminent implications for the enjoyment of basic human rights across the globe.

2. Human Rights and Climate Change: Evidence from Small Island States

Despite inadequate research into the human costs of climate change, it has recently been more widely recognised as having ‘generally negative effects on the realisation of human rights’,⁷ including civil, political, economic, social, cultural, and collective rights.⁸ Moreover, these adverse impacts are acknowledged to be ‘disproportionately’ distributed amongst those socio-economically vulnerable and developing regions that have not only made a minimal contribution to the greenhouse gas emissions that cause climate change, but also have the least capacity for mitigation and adaptation.⁹ This unequal distribution of the burdens of climate change is reflected in *Article 3* (otherwise known as the ‘equity principle’) of the UN Framework Convention on Climate Change, which stipulates that full consideration should be given to the needs of developing countries, especially ‘those that are particularly vulnerable to the adverse effects of climate change’.¹⁰

Climate change has particularly serious implications for the realisation of the individual and collective rights of inhabitants of low-lying SIDS,¹¹ which are among those most vulnerable to the threat posed by climate change.¹² In 2008, the Office of the High Commissioner for Human Rights (OHCHR), in accordance with Human Rights Council

⁷ OHCHR, *Climate Change and Human Rights*, at para. 69; n5 above.

⁸ See, for example, OHCHR, *Climate Change and Human Rights*, at paras. 21-39; Hampson, *Expanded Working Paper*, at para. 16-22; Humphreys, *Climate Change and Human Rights*, at 13-14; McNerney-Lankford, et al, *Human Rights and Climate Change*, at 11-18; Raworth, et al, ‘Climate Wrongs and Human Rights’, at 5-8; n5 above for all

⁹ OHCHR, *Climate Change and Human Rights*, at para. 10; n5 above.

¹⁰ UNFCCC, Articles 3(1) and (2); n1 above.

¹¹ See United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLS), *List of Small Island Developing States*, available at <http://www.un.org/special-rep/ohrls/sid/list.htm> (last accessed 1 Aug 2010).

¹² As recognised by Human Rights Council (HRC) Resolution 7/23, *Human Rights and Climate Change*, UN Doc. A/HRC/RES/7/23, 28 March 2008; IPCC, *AR4 Synthesis Report*, at 52, n2 above; UNFCCC, Article 4(8); n1 above.

Resolution 7/23,¹³ called upon states to contribute to its research study into the relationship between climate change and human rights. Submissions from a number of SIDS¹⁴ provide empirical support for the Council's finding that 'climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights'.¹⁵

Those SIDS that are most vulnerable to the effects of sea level rise and other climate change factors¹⁶ typically consist of a large number of low-lying atolls with few natural resources and a Gross Domestic Product (GDP) per capita of as little as US\$800.¹⁷ Their primary sources of income tend to be industries that rely on a particular environmental context like fishing, agriculture, and tourism, and they remain highly dependent on foreign aid, remittances, and imports. The Maldives, for example, consists of around 1,200 islands, 80 per cent of which are less than 1 metre above sea level. Tourism and fishing, both of which are highly vulnerable to climate instability, account for a substantial proportion of GDP and government revenue.¹⁸ Fuel, clothing, and most staple foods must be imported. Although the Maldives is more financially resilient than many other SIDS, its lack of natural resources, exposure to global economic factors such as rising food and fuel prices, and vulnerability to severe weather events mean that it remains highly dependent on foreign loans.¹⁹

SIDS are therefore both geographically and socio-economically susceptible to a range of climate change-related impacts, including rising food and fuel prices; adverse weather events; and sea level rises - which is predicted to range from 0.18-0.59 metres by 2100, and up to 7 metres thereafter.²⁰ These may result in a number of short- and long-term harms, including increased rates of mortality and disease; damage to basic infrastructure; destruction of arable land through salination and erosion; contamination of freshwater supplies; loss of traditional livelihoods and sources of income; temporary or permanent displacement; and, eventually, loss of political sovereignty in the event that a state's territory becomes uninhabitable.²¹

These climate change-related impacts have adverse consequences for a range of internationally recognised human rights.²² These include (but are not limited to) the right to life,²³ which is threatened by an increased incidence of heat waves, drought, vector-borne diseases, malnutrition, and sudden extreme weather events; the right to an

¹³ HRC Resolution 7/23, Human Rights and Climate Change; n12 above.

¹⁴ See Government of the Republic of the Maldives, Submission to the OHCHR Under Human Rights Council Resolution 7/23 (2008); Government of the Republic of the Marshall Islands, Submission to the OHCHR Under Human Rights Council Resolution 7/23 (2008); Government of Mauritius, Submission to the OHCHR Under Human Rights Council Resolution 7/23 (2008).

¹⁵ HRC Resolution 7/23, Human Rights and Climate Change; n12 above.

¹⁶ These include Tuvalu, Nauru, Kiribati, the Maldives and the Bahamas; see Hampson, Expanded Working Paper, at para. 25; n5 above.

¹⁷ Unless otherwise stated, data is sourced from Central Intelligence Agency (CIA), *The World Factbook*, available at <https://www.cia.gov/library/publications/the-world-factbook/index.html> (last accessed 1 Aug 2010) and UN-OHRLS, *List of SIDS*, n11 above.

¹⁸ World Bank, *Maldives: Sustaining Growth and Improving the Investment Climate* (Washington, DC: World Bank 2006), at 60.

¹⁹ *Ibid.*, at 4, 11

²⁰ IPCC, AR4 Synthesis Report, at 45-46; n2 above.

²¹ See, for example, Maldives, Submission to the OHCHR Under HRC Resolution 7/23, at 5, 15, 18-20, 21-24, 67-69 and Marshall Islands, Submission to the OHCHR Under HRC Resolution 7/23, at 4, 7-11; n14 above.

²² For a broad overview, see OHCHR, *Climate Change and Human Rights*, at paras. 21-37; n5 above.

²³ Universal Declaration of Human Rights (UDHR), UNGA Res.217A (III), 10 December 1948, Article 3; International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171, 16 December 1966, entered into force 23 March 1976, Article 6.

adequate standard of living, including an affordable, accessible, and sustainable source of food, shelter, and clean water,²⁴ all of which are adversely affected by the destruction of arable land, freshwater supplies, and housing as a result of rising sea levels; the right to an adequate standard of health,²⁵ which is compromised by the impact of climate change on health infrastructure, nutrition, and access to clean water and sanitation; the right to education,²⁶ which may be adversely affected by the destruction of educational facilities and temporary or permanent displacement; and, finally, the right to ‘take part in cultural life’,²⁷ which is threatened by the impact of climate change on traditional land, ways of life, and living arrangements.

States parties’ obligations under the International Covenant on Civil and Political Rights (ICCPR) are limited to those ‘within its territory and subject to its jurisdiction’, which places limitations on its applicability with regard to the transnational impacts of climate change.²⁸ Obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR), however, are not subject to any jurisdictional limitation and, indeed, require state parties to ‘take steps, individually and through international assistance and cooperation’ towards the full realisation of all relevant rights.²⁹ Many of the General Comments provided by the Committee on Economic, Social and Cultural Rights,³⁰ as well as reports by UN special rapporteurs on the rights to food and health,³¹ have similarly emphasised the role of international assistance and cooperation in realising the rights set out in the ICESCR. In the context of climate change, moreover, the OHCHR has stated that ‘international cooperation is not only expedient but also a human rights obligation, and its central objective is the realisation of human rights’.³²

The ICESCR therefore offers a clear foundation for extraterritorial duties with regard to the fulfilment of a range of economic, social, and cultural rights adversely affected by climate change, including those identified above. These obligations are particularly relevant in the context of climate change, the burdens of which disproportionately affect socio-economically vulnerable regions with a limited capacity for adaptation and mitigation. For these reasons, and in recognition of the fact that ‘global warming can only be dealt with through cooperation by all members of the international community’,³³ developed States have a ‘particular responsibility’ to assist poorer developing States meet their human rights obligations in the context of climate change.³⁴ It is important to note, however, that this obligation is limited to state parties to

²⁴ UDHR, Article 25 (see n23); International Covenant on Economic, Social and Cultural Rights (ICESCR), 993 UNTS 3, 16 December 1966, entered into force 3 January 1976, Article 11; Committee on Economic, Social and Cultural Rights (CESCR), General Comment No.15, UN Doc. E/C.12/2002/11, 20 January 2003.

²⁵ *Ibid.*, Article 12

²⁶ *Ibid.*, Article 13.

²⁷ *Ibid.*, Article 15.

²⁸ *Ibid.*, Article 2(1).

²⁹ *Ibid.*, Article 2(1).

³⁰ See CESCR, General Comment No.3, UN Doc. E/C.12/14/1990, 14 December 1990, at para. 13; CESCR, General Comment No.12, UN Doc. E/C.12/1999/5, 12 May 1999, at para. 36; CESCR, General Comment No.15, at para. 30; n24 above.

³¹ See Paul Hunt, Report of the Special Rapporteur on the Right of Everyone to the Highest Attainable Standard of Health, UN Doc. A/HRC/7/11, 18 May 2009; Jean Ziegler, Report of the Special Rapporteur on the Right to Food, UN Doc. E/CN.4/2005/47, 24 January 2005.

³² OHCHR, Climate Change and Human Rights, at para. 99; n5 above.

³³ *Ibid.* See also HRC Resolution 7/23, Human Rights and Climate Change (see n 12); Human Rights Council (HRC) Resolution 10/4, Human Rights and Climate Change, UN Doc. A/HRC/RES/10/4, 25 March 2009.

³⁴ OHCHR, Climate Change and Human Rights, at para. 85; n5 above.

the ICESCR (a notable exception being the US) and is therefore, until recognised as a norm of customary international law, not universally applicable.

Climate change related impacts also have implications for a number of collective rights. Of particular concern is the threat posed by climate change to the enjoyment of the right to self-determination; a right which is unique on several counts. First, unlike other collective rights (including emerging rights to development and a healthy environment), the right to self-determination is firmly entrenched as a peremptory norm of customary international law. Its significance is reflected in its prominent inclusion in the International Bill of Rights: Articles 1(2) and 55 of the UN Charter require ‘respect for the principle of equal rights and self-determination of peoples’,³⁵ while Common Article 1 of the ICCPR and ICESCR stipulates that ‘all peoples have the right of self-determination’, in virtue of which they ‘freely determine their political status and freely pursue their economic, social, and cultural development’. Its role as a fundamental principle of international law and practice has also been recognised by the UN General Assembly and International Court of Justice.³⁶

Second, the right to self-determination is recognised as a foundational principle of international law that is both indivisible from and a prerequisite for the realisation of all other human rights. Its prominent inclusion in both international covenants emphasises its role as ‘an essential condition for the effective guarantee and observance of individual human rights’,³⁷ including those civil, political, economic, social, and cultural rights whose realisation is threatened by the impacts of climate change, as discussed above. Without self-determination, which underpins territorial and political sovereignty, access to a means of subsistence, and the capacity for economic, social, and cultural development, states – the primary guarantors of human rights within the international legal framework³⁸ – will inevitably struggle to ensure the enjoyment of citizens’ basic human rights. The right to self-determination is therefore both inherently and instrumentally valuable; both as a right in and of itself, and as a tool for securing the enjoyment of other rights.

Third, the right to self-determination is a collective right held by groups of individuals in virtue of their status as peoples. Although it also has an internal dimension, of primary concern here are the effects of climate change on the external dimension of the right to self-determination; that is, the right of peoples ‘to determine freely their political status and their place in the international community based on the principle of equal rights’.³⁹ In its external form, the right to self-determination necessarily entails extraterritorial obligations on the part of the broader international community to ensure its realisation.⁴⁰ It has in fact been recognised as an *erga omnes* obligation⁴¹ and, therefore,

³⁵ While defined as a ‘principle’ rather than a ‘right’, self-determination is nevertheless recognised in the Charter as one of the foundational tenets of the UN.

³⁶ See General Assembly Resolution 637A (VII), The Right of Peoples and Nations to Self-Determination, 20 December 1952; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Notwithstanding Security Council Resolution 276*, International Court of Justice (ICJ) Advisory Opinion (ICJ Reports 1971), 313-312 at paras. 52-53; *Western Sahara*, ICJ Advisory Opinion (ICJ Reports 1975), 31-33 at paras. 54-59.

³⁷ Human Rights Committee, General Comment No.12, UN Doc. HRI/GEN/1/Rev.6, 13 March 1984, at para. 1.

³⁸ See, for example, Kofi Annan, In Larger Freedom: Towards Development, Security and Human Rights for All, UN Doc.A/59/2005, 21 March 2005, at para. 19.

³⁹ Committee on the Elimination of Racial Discrimination, General Recommendation No.21, UN Doc. A/48/18, 23 August 1996, 113 at para. 4.

⁴⁰ See, for example, Hector Gros Espiell, ‘Introduction: Community Oriented Rights’ in Mohammed Bedjaoui (ed.), *International Law: Achievements and Prospects*, 1167 at 1170 (Paris: UNESCO 1991); John Knox, ‘Climate Change and Human Rights’ (2009), 50 *Virginia Journal of International Law*, 163 at 205.

as ‘the concern of all States’ and a source of ‘obligations ... towards the international community as a whole’.⁴² Further, the Human Rights Council has explicitly recognised that Article 1(3) of the ICESCR ‘imposes specific obligations on States parties, not only in relation to their own peoples, but vis-à-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination’.⁴³ These obligations include both a negative duty to ‘respect’ the right to self-determination, and a positive duty to ‘promote’ its realisation.⁴⁴

The right to self-determination, therefore, is unique among human rights in virtue of a combination of three key features: (i) it is recognised as a *jus cogens* norm of customary general international law; (ii) it is valuable not only in its own right, but also as a prerequisite for the realisation of other human rights; and (iii) it is a collective *erga omnes* right that places an extraterritorial obligation on all states to respect and promote its fulfilment. Under contemporary international law, it is also – in its external dimension, at least – inextricably linked with territorial sovereignty.⁴⁵ Whether this is a necessary condition of self-determination is a question that will be returned to in subsequent sections.

The impacts of climate change – particularly those which threaten the existence of low-lying SIDS with inundation and thus extinction – have adverse implications for the realisation of the right to self-determination.⁴⁶ Françoise Hampson, author of a UN report on human rights and state extinction in the face of climate change, notes that ‘[t]here will come a point at which life is not sustainable’ in a number of states, which has implications for a variety of human rights, including the right to self-determination.⁴⁷

Significant loss of territory undermines the enjoyment of a range of fundamental human rights, including freedom of movement; personal integrity; property; a traditional livelihood; an adequate standard of living, including access to basic health care, education, and shelter; and participation in a particular cultural way of life.⁴⁸ Most importantly, however, loss of territory jeopardises a people’s recognition as a state under international law⁴⁹ and, as a consequence, their enjoyment of the right to self-determination. Without territory – and, potentially, statehood – the individual and collective rights of a people are no longer adequately protected by their state, and are thus increasingly vulnerable to potential violations. Climate change therefore has a dual impact on the fulfilment of human rights: on the one hand, it poses a direct threat as a result of extensive environmental and financial harm; and on the other, it poses an indirect threat by undermining the existence of the primary framework for the promotion

⁴¹ See *East Timor (Portugal v. Australia)*, ICJ Judgment 102 (ICJ Reports 1995), at para. 29.

⁴² *Barcelona Traction*, ICJ Judgment 32 (ICJ Reports 1970), at para. 33.

⁴³ HRC, General Comment No.12, at para. 6; n37 above.

⁴⁴ *Ibid.*; ICCPR and ICESCR, Article 1(3) (see n23-24); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, ICJ Advisory Opinion (ICJ Reports 2004), 171-2 at para. 88.

⁴⁵ See the Montevideo Convention on the Rights and Duties of States, 26 December 1933, Article 1, which sets out four criteria of statehood, including a defined territory.

⁴⁶ See, for example, Alliance of Small Island States (AOSIS), Declaration on Climate Change, 21 September 2009, Preamble; Walter Kälin, ‘The Climate Change Displacement Nexus’, UN Economic and Social Council Panel on Disaster Risk Reduction and Preparedness, 16 July 2008; Jane McAdam, ‘Environmental Migration Governance’ in Alexander Betts (ed.), *Global Migration Governance*, (forthcoming 2010), available at <http://law.bepress.com/unswwp/flrps09/art1/> (last accessed 1 Aug 2010), at 14-16; OHCHR, Climate Change and Human Rights, at paras. 40-41; n5 above.

⁴⁷ Hampson, Expanded Working Paper, at para. 5, n5 above.

⁴⁸ Maldives, Submission to the OHCHR Under HRC Resolution 7/23, at 21; n14 above.

⁴⁹ Per Montevideo Convention, Article 1; n45 above.

and protection of rights – the state – without which ‘there is no framework for the protection or realisation of all other human rights’.⁵⁰

Having thereby established some of the implications of climate change inundation for the realisation of the right to self-determination for low-lying SIDS – and, as a corollary, the ‘full range of rights for which individuals depend on the State for protection’⁵¹ – the next section will examine the nature of corresponding legal and moral obligations in further depth. Drawing on the claim made by the OHCHR that, despite a lack of clear legal precedence, states nevertheless have an obligation to take action, both individually and collectively, to ‘address and avert’ the threat posed by climate change to the right to self-determination,⁵² the next section will consider how – and indeed whether – this obligation can be realised within the contemporary framework of sovereign nation states.

3. Constraints and obstacles

The previous section established two important points with regard to the relationship between climate change and human rights in the context of small island developing states: first, that the impacts of climate change have adverse implications for a broad range of individual and collective rights, including the right to self-determination; and, second, that a significant number of these rights correspond to an extraterritorial obligation under the ICESCR or, with regard to the right to self-determination, under general international law.

Former High Commissioner for Human Rights, Mary Robinson, argues that a human rights approach to climate change serves to highlight ‘countless weaknesses’ in the contemporary international institutional framework.⁵³ With that in mind, this section will examine the constraints hindering the recognition of these rights and their corresponding extraterritorial obligations in the context of climate change.

Despite evidence that responding swiftly to climate change makes good economic sense,⁵⁴ many developed states remain reluctant to invest substantial resources in adaptation or mitigation to address the threat posed by climate change to fundamental human rights. McAdam suggests that ‘no state wants to be the first to offer a solution’ for fear of attracting pressure from vulnerable states or establishing some kind of duty under customary international law.⁵⁵ This reluctance to act is compounded by what Cassese describes as the ‘lukewarm attitude’ of many states towards the human rights regime more generally,⁵⁶ reflecting a reluctance to accept the judicial scrutiny or potentially onerous burdens associated with international human rights obligations.

The United States (US) government, for example, has stated that, while it agrees with the Human Rights Council that climate change ‘has implications for the full enjoyment of human rights’, it feels that ‘a human rights based approach to climate change would be impractical and unwise’ and ‘unlikely to be effective’.⁵⁷ With brutal honesty, the US points out that, in the context of climate change, most states ‘would almost certainly not enforce human rights-based determinations against them[selves]’,

⁵⁰ Maldives, Submission to the OHCHR Under HRC Resolution 7/23, at 40; n14 above.

⁵¹ OHCHR, *Climate Change and Human Rights*, at para. 40; n5 above.

⁵² *Ibid.* at para. 41

⁵³ Cited in Humphreys, *Climate Change and Human Rights*, at iv; n5 above.

⁵⁴ See, for example, Stern, *Economics of Climate Change*; n2 above.

⁵⁵ McAdam, ‘Environmental Migration Governance’, at 11; n46 above.

⁵⁶ Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2005), at 386.

⁵⁷ Government of the United States, Submission to the OHCHR Under Human Rights Council Resolution 7/23, at paras. 4, 14, 17.

and that any attempt to impose such determinations would – in light of likely non-compliance – only serve to undermine respect for the legitimacy and effectiveness of the human rights regime as a whole.⁵⁸ In doing so, it highlights the fact that, while international human rights law places certain limitations on state behaviour, its effectiveness remains constrained by the state-centric nature of the international institutional framework, an issue that will be returned to shortly.

In a further attempt to avoid acknowledging any obligation associated with the adverse impacts of climate change on human rights, the US insists that climate change may in fact *improve* the realisation of rights through, for example, a localised increase in crop yields.⁵⁹ Perhaps, if some utilitarian calculation of rights were used, this attempt at what Pogge might describe as ‘morality avoidance’⁶⁰ would be relevant. It would be possible (assuming the availability of supporting evidence) to argue that, for every one right to adequate food that is threatened by climate change-related sea level rise, there are another ten such rights that have been fulfilled by climate change-related precipitation and, therefore, that the relatively small *lack* of adequate food is compensated for – or cancelled out – by the relatively larger *enjoyment* of adequate food. However, basic human rights – particularly those that are recognised as non-derogable *erga omnes* norms, like the right to self-determination – are not the type of thing that can be weighed against each other to determine the extent of one’s corresponding obligations. The obligation to respect and promote the right to self-determination in the face of climate change harms applies universally, regardless of any calculation of overall utility.

The issue of state reluctance remains a significant practical obstacle to the recognition of obligations arising from the impact of climate change on the enjoyment of human rights. It is, moreover, exacerbated by the fact that the global order is characterised by massive economic and structural inequity, which has a ‘disproportionately negative effect on developing countries’⁶¹ and, as recognised in the previous section, these developing countries bear a large proportion of existing climate change burdens. Given that those whose rights are threatened by climate change tend to be both socio-economically and politically marginalised within the international community,⁶² their capacity to engage in international processes of negotiation is inevitably inferior to that of affluent developing states, with whom the primary decision-making power – and primary responsibility for greenhouse gas emissions – lies. By predominantly affecting those who are disadvantaged by pre-existing inequalities (including inadequate access to natural resources, substantial reliance on foreign aid, a lack of effective lobbying power, insufficient infrastructure, and poor human rights protections), climate change is therefore ‘intertwined deeply with global patterns of inequality ... [and] acts as a multiplier of existing vulnerabilities’.⁶³

⁵⁸ *Ibid.*, at para. 26.

⁵⁹ *Ibid.*, at para. 15.

⁶⁰ Thomas Pogge, *World Poverty and Human Rights* (Cambridge: Polity Press, 2002), at 6.

⁶¹ World Bank, *World Development Report: Equity and Development* (Washington, DC: World Bank, 2006), at 16. See also, for example, Rainer Forst, ‘Towards a Critical Theory of Transnational Justice’ in Thomas Pogge (ed.), *Global Justice* (Malden, MA: Blackwell Publishing, 2003), 169 at 175-76; Pogge, *World Poverty and Human Rights*, at 175-76, *Ibid.*

⁶² See text accompanying n9-19.

⁶³ Robin Mearns and Andrew Norton, ‘Equity and Vulnerability in a Warming World’ in Robin Mearns and Andrew Norton (ed.), *Social Dimensions of Climate Change: Equity and Vulnerability in a Warming World* (Washington, DC: World Bank, 2010), 1 at 2. See also Ulrich Beck, *World at Risk* (Cambridge: Polity Press, 2009), at 57-58; Humphreys, *Climate Change and Human Rights*, at 1, 5 & 8; n5 above; and Jesse Ribot, ‘Vulnerability Does Not Fall from the Sky: Toward Multiscale, Pro-Poor Climate Policy’ in Robin Mearns and Andrew Norton (ed.), *Social Dimensions of Climate Change* (Washington, DC: World Bank, 2010), 47 at 48-50.

This exacerbation of existing inequalities has a number of implications for the continued fulfilment of human rights affected by climate change. First, it undermines the capacity of vulnerable developing states to meaningfully engage in international forums of negotiation and decision-making and thereby counteract the reluctance of developed states to recognise and fulfil obligations relating to climate change harms.⁶⁴ For example, while SIDS may formally announce that they are ‘profoundly disappointed by the lack of apparent ambition within the international climate change negotiations to protect SIDS and other particularly vulnerable countries’ from the impacts of climate change,⁶⁵ this declaration goes largely unheeded by those states with greater financial and political resources, which prefer to treat the harmful side effects of industrialisation as “invisible” and “unintentional”.⁶⁶

Second, it undermines the capacity of vulnerable developing states to implement effective mitigation and adaptation strategies. Despite taking a range of measures to protect the rights of their citizens from the effects of climate change,⁶⁷ ‘the global character of the problem makes it impossible for individual [SIDS] ... to promote and protect threatened rights on their own’.⁶⁸ As Beck observes, ‘local’ threats (like the inundation of cities and states) are no longer merely local, but require global cooperation, particularly in a world in which ‘both wealth and risks are radically unequally distributed’.⁶⁹ Without a commitment on the part of the international community to the fulfilment of extraterritorial obligations with regard to climate change harms, socio-economically and ecologically vulnerable SIDS remain unable to protect the individual and collective rights of their citizens.

In addition to reluctance on the part of developed states, and an inability on the part of developing states to overcome existing global inequities, there are also significant legal and institutional barriers to the recognition and fulfilment of human rights obligations related to climate change harms. Under current international law, and given current scientific knowledge, it is ‘virtually impossible’ to establish a direct causal relationship between the actions of one state and a particular climate change effect – and its implications for human rights – in another.⁷⁰ This is due to a number of factors, including the difficulty of (i) identifying an anthropogenic cause for a particular climate event; (ii) establishing a concrete extraterritorial obligation, particularly in a global context involving a range of public and private actors; (iii) calculating the relative contribution of each state to overall greenhouse gas emissions; (iv) distinguishing current (or at least recent) from past greenhouse gas emissions; and, finally, (v) disaggregating collective responsibility – over both space and time – to identify a single causal relationship between right-holder and duty-bearer.⁷¹

These issues also reflect the fact that the contemporary human rights framework is structured to address past or imminent violations of individual rights by a specific state, typically within that state’s territory or jurisdiction.⁷² As the US government points out,

⁶⁴ See, for example, Marshall Islands, Submission to the OHCHR Under HRC Resolution 7/23, at 13-14; n14 above.

⁶⁵ AOSIS, Declaration, Preamble; n46 above.

⁶⁶ Beck, *World at Risk*, at 164; n63 above.

⁶⁷ See, for example, Maldives, Submission to the OHCHR Under HRC Resolution 7/23, at 44-45, 52, 54, 59; Marshall Islands, Submission to the OHCHR Under HRC Resolution 7/23, at 12; Mauritius, Submission to the OHCHR Under HRC Resolution 7/23, at 3-4; all n14 above.

⁶⁸ Maldives, Submission to the OHCHR Under HRC Resolution 7/23, at 45; *Ibid.*

⁶⁹ Beck, *World at Risk*, at 3 & 19; n63 above.

⁷⁰ OHCHR, Climate Change and Human Rights, at para. 70; n5 above.

⁷¹ See, for example, Humphreys, *Climate Change and Human Rights*, at 4-6; n5 above.

⁷² The Human Rights Committee, for example, has stated that: ‘For a person to claim to be a victim of a

human rights law ‘requires identifiable violations, identifiable harms attributable to the violations, and for remedies to be provided by the government to individuals within its territory and jurisdiction’.⁷³ However, unlike standard rights violations, the rights threatened by climate change harms tend to be global, collective, and future-oriented. Moreover, those rights that are primarily at stake (notably economic, social, cultural, and collective rights) are generally considered difficult to enforce due to a lack of adequate procedural mechanisms and relevant jurisprudence. Therefore, the OHCHR concludes that ‘it is doubtful ... that an individual would be able to hold a particular State responsible for harm caused by climate change’.⁷⁴

The issues raised so far – state reluctance to acknowledge obligations relating to climate change, inequitable relations of power and influence between states, and the legal and institutional constraints of the current human rights framework – all arise, at least in part, from the state-centric nature of the contemporary international order. This leads us to one final issue (prefigured in the previous section), which is unique to the context of climate change.

Goodman-Gill and McAdam, observing the state-centric character of the international political and human rights framework, argue that, ‘*a priori*, individuals and groups ought to be free to enjoy human rights in the territory with which they are connected by the internationally relevant social fact of attachment’.⁷⁵ Given that the current international order is constructed around principles of state sovereignty, political and territorial autonomy, and non-intervention,⁷⁶ and that human rights norms typically apply to the relationship between the state and those within its jurisdiction,⁷⁷ it makes sense for the rights of the individual to be protected by the government of the territory in which he or she lives.⁷⁸

However, as discussed earlier, the rising sea levels, increasing salination and extreme weather events associated with climate change threaten the very existence of many low-lying SIDS. The inhabitants of the Carteret Islands, for example, have begun evacuating due (primarily) to rising sea levels and salination caused by climate change.⁷⁹ Tuvalu is predicted to become the first island state to become uninhabitable due to rising sea levels.⁸⁰ As previously established, this has significant implications for the realisation of a range of individual and collective rights. As the people of the Maldives explain, ‘The loss of land and State renders all other rights, political and civil as well as economic, cultural, and social rights, unattainable. Climate change ... undermines the inherent dignity of the Maldives people as members of the human family [and] the very foundation and purpose of human rights as enshrined

violation of a right protected by the Covenant, he or she must show either that an act or an omission of a State party has already adversely affected his or her enjoyment of such right, or that such an effect is imminent’; *Aalbersberg v. The Netherlands*, Decision, UN Doc. CCPR/C/87/D/1440/2005 14 August 2006, at para. 6.3.

⁷³ US, Submission to the OHCHR Under HRC Resolution 7/23, at para. 24; n57 above.

⁷⁴ OHCHR, *Climate Change and Human Rights*, at para. 72; n5 above.

⁷⁵ Guy Goodman-Gill and Jane McAdam, *The Refugee in International Law* (Oxford: Oxford University Press 2007), at 4.

⁷⁶ See, for example, Charter of the United Nations, 1 UNTS XVI, 26 June 1945, Articles 2(1) and (7).

⁷⁷ See, for example, ICCPR, Article 2(1); n23 above.

⁷⁸ See also Erica-Irene Daes, *Status of the Individual and Contemporary International Law* (New York: United Nations, 1992), at 35.

⁷⁹ See John Stewart, *Rising Seas Force Carteret Islanders out of Home* (ABC Television 2007).

⁸⁰ See Rebecca Jacobs, ‘Treading Deep Waters: Substantive Law Issues in Tuvalu’s Threat to Sue the United States in the International Court of Justice’ (2005), 14 *Pacific Rim Law & Policy Journal*, 103-104; CIA, *World Factbook*; n17 above.

in the UDHR ... [T]he extinction of their State would violate the fundamental right of Maldivians to possess nationality and the right of the Maldives people to self-determination.⁸¹

Persons whose land has been rendered uninhabitable by the effects of climate change ‘find themselves in the unprecedented situation of being citizens of a state that no longer has territory’.⁸² Without territory (one of the fundamental criteria of statehood⁸³) what was once a state may in fact no longer qualify as such. Similarly, the right to self-determination and political autonomy is unlikely to be recognised within the international community without the corresponding capacity for territorial autonomy. Inhabitants of inundated states therefore enter a type of purgatory or ‘de facto statelessness’, in which they ‘formally [have] a nationality, but which is ineffective in practice’.⁸⁴ This, the OHCHR notes, raises a number of questions relating to the legal status of the individuals concerned and the protections available to them under human rights law.⁸⁵ Many of these questions, however, remain unanswered by the current legal regime, in which the loss of a state without a direct successor is unprecedented.⁸⁶

In addition to the issues of political reluctance, global inequity, and institutional inadequacy identified above, then, peoples whose rights and territory are threatened by the effects of climate change face a further, seemingly insurmountable obstacle. Without territory, they cannot enjoy self-determination. Without self-determination – which, in its external form, remains tied to the framework of the contemporary sovereign state – they cannot enjoy statehood. Without self-determination or statehood, they no can longer depend on the state to protect their fundamental rights and interests, nor call for the recognition and enforcement of extraterritorial obligations relating to climate change harms. Territory – and, with it, statehood – are ‘in this sense, fundamental precursor[s] to the enjoyment of all other rights’⁸⁷ within the contemporary international order, including the right to self-determination.

What implications do these obstacles have for the enjoyment of human rights in the face of climate change harms, and for the recognition and fulfilment of the extraterritorial obligations established in section two? Is the structure of the contemporary international order – a community of territorially bounded sovereign states – a barrier to the protection and promotion of human rights in the face of climate change inundation? Will the human rights regime become obsolete as environmental factors compel us to rethink traditional notions of self-determination and global interaction?

Rather than abandon the human rights project in the face of these obstacles, the next section will explore some of the reasons why we might defend a human rights approach to climate change or attempt to reconfigure the human rights framework to provide a more adequate response to new challenges.

4. Why take a human rights approach?

There is on-going debate about whether or not the adverse effects of climate change identified in section two can in fact be legally classified as human rights violations.⁸⁸

⁸¹ Maldives, Submission to the OHCHR Under HRC Resolution 7/23, at 21; n14 above.

⁸² Humphreys, *Climate Change and Human Rights*, at 25; n5 above.

⁸³ See n45.

⁸⁴ McAdam, ‘Environmental Migration Governance’, at 17; n46 above.

⁸⁵ OHCHR, *Climate Change and Human Rights*, at paras. 40-41; n5 above.

⁸⁶ See, for example, Hampson, Expanded Working Paper, at paras. 11-12; Kälin, *Climate Change* (see n 46); Oliver, ‘A New Challenge to International Law’, at 210; n5 above.

⁸⁷ Maldives, Submission to the OHCHR Under HRC Resolution 7/23, at 21; n14 above.

⁸⁸ See, for example, OHCHR, *Climate Change and Human Rights*, at para. 70; n5 above; Government of the United Kingdom, Submission to the OHCHR Under Human Rights Council Resolution 7/23 (2008), at 3; Government of the United States, Submission to the OHCHR Under Human Rights Council

There are no binding international human rights instruments that explicitly refer to climate change and, thus far, no legal cases relating to climate change have successfully invoked human rights law.⁸⁹ Moreover, even if climate change were recognised as a human rights violation, it remains unclear what – if any – legal duties this would entail, particularly on the part of the international community. Nevertheless, while it is reluctant to classify it as a violation of human rights, the OHCHR acknowledges that climate change ‘remains a critical human rights concern and obligation under international law’, and that ‘legal protection remains relevant as a safeguard against climate change-related risks’.⁹⁰ In other words, the absence of formal recognition of climate change as a human rights violation does not preclude an attempt to address climate change harms within the framework of international human rights law.

An analysis of the issues raised in section two through the lens of human rights law is useful for several reasons. First, it lends legitimacy and authority to what might otherwise be dismissed as implausible idealism or toothless moralising. As Sengupta notes with regard to the issue of poverty eradication, to redefine an issue in terms of human rights standards is to ‘convert moral values into rights as claims on those in authority and power in a society’ and, conversely, to ensure that the legitimacy of both domestic and international authority is predicated on the recognition and fulfilment of such claims.⁹¹

Second, it appeals to a body of internationally recognised human rights principles in order to motivate widespread agreement and action. As Nickel argues, ‘law can achieve what morality cannot’; that is, the recognition, protection, and enforcement of a set of basic human rights at an international, cross-cultural level.⁹² It can also achieve what the United Nations Framework Convention on Climate Change (UNFCCC) cannot, including the implementation of transnational mechanisms for protecting and promoting fundamental rights, enforcing accountability, and compensating individuals and communities for climate change harms. And, despite the vocal opposition of countries like the US, the international community is broadly supportive of a human rights approach to climate change: 88 UN member states supported Human Rights Council Resolution 10/4, which called for greater involvement by expert human rights bodies in the UNFCCC process.⁹³

Third, by emphasising the need for procedural safeguards like accountability, transparency, participation, and consultation; a human rights approach to climate change harms facilitates the recognition and inclusion of those who are most vulnerable to its impacts, particularly where they are already socio-economically and politically marginalised. It places individual – and, where collective rights are implicated – community wellbeing at the heart of any deliberation about how best to respond to

Resolution 7/23 (2008), at para. 25.

⁸⁹ In 2002, Tuvalu threatened to bring a lawsuit in the ICJ against states that had not ratified the Kyoto Protocol but was advised otherwise. (See Piers Moore Ede, ‘Come Hell or High Water: Rising Sea Levels and Extreme Flooding Threaten to Make the South Pacific’s Tuvalu the First Victim of Global Warming’ (2003), 29 *Alternatives Journal*, 1 at 2; Humphreys, *Climate Change and Human Rights*, at 47; n5 above; Jacobs, ‘Treading Deep Waters’, at 103; n81 above.) In 2005, the Inuit submitted a complaint to the Inter-American Commission on Human Rights alleging US responsibility for climate change-related violation of human rights, which was subsequently declined. (*Inuit Case*, Petition to the Inter-American Commission on Human Rights (2005); see also Knox, ‘Climate Change and Human Rights’, at 191-192; n40 above.)

⁹⁰ OHCHR, *Climate Change and Human Rights*, at para. 96; n5 above.

⁹¹ Arjun Sengupta, ‘Poverty Eradication and Human Rights’ in Thomas Pogge (ed.), *Freedom from Poverty as a Human Right* (Oxford: Oxford University Press, 2007), at 323, 325.

⁹² James Nickel, *Making Sense of Human Rights* (Malden, MA: Blackwell, 2007), at 92. See also Humphreys, *Climate Change and Human Rights*, at 8; n5 above.

⁹³ McInerney-Lankford, et al, *Human Rights and Climate Change*, at 9; n5 above.

climate change harms, rather than allowing them to be side-lined by utilitarian calculations of global well-being.

Finally, the basic, internationally recognised set of rights provides a common platform from which new interpretations and obligations may emerge, both within and across national boundaries, in response to new issues, interests, and needs. The human rights framework is neither static nor unresponsive to the political, social and environmental context in which it operates. It initially emerged in response to a particular set of harms and has continued to evolve to address new sets of harms ever since. However, while the human rights regime need not be abandoned yet, the concerns raised above encourage us to reconsider the ways in which it – and the international political framework more generally – is conceptualised and constructed. The beauty of the dynamic, responsive, pragmatic nature of the human rights framework is that it provides us with the space to do so.

5. The re-conceptualisation of existing frameworks

If the existing social and international order is no longer able to ensure the realisation of the rights and freedoms set forth in the International Bill of Rights,⁹⁴ what next? Without claiming to offer an in-depth analysis of alternative scenarios, this final section will examine some of the implications of climate change inundation for state sovereignty and the existing human rights regime, and consider the role that human rights discourse – whether normative, sociological or pragmatic – might play in this discussion.

In the preceding sections, the role of human rights law as a substantive framework for the elucidation, implementation, and enforcement of human rights norms was emphasised. However, it is also important to recognise the ‘ought’ that underlies and gives purpose to the ‘is’, and the way in which existing human rights standards have been – and continue to be – framed around normative considerations relevant to the changing needs and interests of individuals and communities.⁹⁵ It is also essential, as Eide notes, to approach human rights law as a work in progress rather than a static institutional framework, and to acknowledge that ‘[w]hat counts, in the end, is whether human rights are realised in practice’⁹⁶ – that is, whether the ‘is’ provides an adequate framework for the recognition and fulfilment of the ‘ought’. Human rights law and practice must therefore continue to be ‘enhanced, developed, and diversified’ in response to the normative concerns that emerge from changing social, political, and environmental conditions.⁹⁷

As discussed in the previous section, the existing international human rights regime provides insufficient protection for the inhabitants of SIDS threatened with extinction as a result of climate change inundation. Among other reasons, it takes a backward-looking, remedial rather than forward-looking, preventative approach, and is typically activated only *after* a particular, identifiable rights violation has occurred. It therefore fails to acknowledge or address the fact that many climate change impacts – such as the destruction of an entire state – are irreversible and may not be adequately compensated for.⁹⁸ It is also structured to address individual rather than collective rights

⁹⁴ Per UDHR, Article 28; n23 above.

⁹⁵ See, for example, arguments put forward by Sengupta, ‘Poverty Eradication and Human Rights’, at 339 (see n 92); Henry Shue, ‘Ethics, the Environment and the Changing International Order’ (1995), 71 *International Affairs*, 453.

⁹⁶ Asbjorn Eide, ‘Obstacles and goals to be pursued’ in Asbjorn Eide, Catarina Krause, and Allan Rosas (ed.), *Economic, Social and Cultural Rights: A Textbook* (Dordrecht: M Nijhoff, 2001), 553 at 553.

⁹⁷ Espiell, ‘Community Oriented Rights’, at 1168; n40 above.

⁹⁸ See, for example, Mearns and Norton, ‘Equity and Vulnerability’, at 14, n63 above; Beck, *World at Risk*,

violations, and tends to approach the issue of climate change as a series of separate harms rather than a global threat to human rights requiring transnational coordination and cooperation.⁹⁹ Finally, it is designed to mediate the vertical relationship between state and citizen, not the multi-layered, trans-boundary relationships entailed by climate change harms, which ‘show no respect for borders, sovereignty, political authority or government’.¹⁰⁰

The contemporary human rights regime is therefore unable to address the issue at hand – that is, the inundation of territory, the destruction of statehood, and the denial of fundamental human rights, including self-determination, as a result of collective global action (and inaction). A framework of human rights protection that is premised on state sovereignty as a prerequisite for self-determination must fail in a world in which states themselves are facing extinction. As Beck notes, in the face of the global risks associated with climate change, ‘single-state solutions are like Stone Age answers to the questions of the industrial age’.¹⁰¹ The human rights regime must therefore embrace alternative ways of recognising the self-determination of peoples and forward-looking, trans-boundary mechanisms of protection and enforcement that go beyond current forms of international cooperation and assistance, or risk becoming obsolete.

One way to more adequately (re)frame the issue of climate change harms might be through the lens of Beck’s concept of risk.¹⁰² The risks or ‘bads’ associated with climate change, while predominantly affecting socio-economically and environmentally vulnerable peoples, have global reach. A sea level rise of 7 metres, for example, will affect everyone, regardless of nationality, culture, wealth, or territorial and generational boundaries. In virtue of their omnipresence or ‘delocalisation’, climate change risks unite individuals and peoples across the world within a ‘global community of threats’¹⁰³ characterised by transnational interdependence.¹⁰⁴ Despite the absence of a shared language, religion, culture, or political community, they force us to recognise, empathise, and interact with distant others who turn out to share our own vulnerabilities.¹⁰⁵ Global risks, for Beck, become real ‘against the backdrop of an emerging global solidarity’,¹⁰⁶ within which ‘the secular religion of threat forces everyone into concerted action’.¹⁰⁷ Similarly, Linklater argues that trans-boundary harms like climate change provide ‘one of the strongest reasons for widening the boundaries of moral and political communities to engage outsiders in dialogue’ about matters of mutual concern.¹⁰⁸

While Beck is primarily concerned with risks that are unpredictable, ambiguous, and incalculable, this paper confines itself to the reasonably predictable (if not precisely calculable) threat posed by climate change to the existence of low-lying SIDS.¹⁰⁹ This

at 52; n63 above.

⁹⁹ Knox, ‘Climate Change and Human Rights’, at 211-212; n40 above.

¹⁰⁰ Beck, *World at Risk*, at 166; n63 above.

¹⁰¹ *Ibid.* at 8

¹⁰² See Ulrich Beck, ‘The Reinvention of Politics: Towards a Theory of Reflexive Modernization’ in *Reflexive Modernization: Politics, Tradition and Ethics in the Modern Social Order* (Cambridge: Polity Press, 1994), 1 at 6; and Beck, *World at Risk*, at 13; n63 above.

¹⁰³ Compare with the notion of ‘overlapping communities of fate’ in David Held, ‘Regulating Globalisation? The Reinvention of Politics’ (2000), 15 *International Sociology*, 394 at 400.

¹⁰⁴ Beck, *World at Risk*, at 8, 52-54, 162, 181; n63 above.

¹⁰⁵ *Ibid.* at 56-61

¹⁰⁶ *Ibid.* at 13

¹⁰⁷ *Ibid.*, at 64.

¹⁰⁸ Andrew Linklater, *The Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era* (Cambridge: Polity Press, 1998), at 86.

¹⁰⁹ See, for example, predicted timeline in John Barnett and W. Neil Adger, *Climate Dangers and Atoll Countries*, 61 *Climate Change* (2003), at 321.

identifiable and unambiguous risk makes concrete the anticipated global threat of climate change – whether in the present (for the Carteret Islanders and Tuvaluans), the imminent future (for other low-lying SIDS), or the foreseeable future (for countless other states that may be rendered inhabitable by climate change-related sea level rise, drought, floods, or disease). By enabling the recognition of mutual vulnerability to climate change risks, it provides a more tangible basis for a ‘global community of threats’ than Beck’s broader theory allows.

But what is the point of such a community? How can it more adequately address the issues at hand than the principle of ‘priority for compatriots’,¹¹⁰ according to which one’s positive obligations of assistance apply only – or at least primarily – towards fellow members of a bounded society? How can it ensure the recognition of basic human rights in a world in which the nexus between territorial sovereignty, political autonomy, and self-determination is becoming increasingly uncertain?

Most importantly, it provides a normative basis for an inclusive, flexible, cosmopolitan framework with the capacity to address issues of inundation, loss of sovereignty, and denial of basic human rights more effectively than a rigid, compartmentalised system premised on state sovereignty. By understanding distant others as ‘compatriots’ in a global community united by mutual vulnerability to climate change risks, individuals become – at least morally – able to extend their sphere of empathy and responsibility beyond the borders of our national community. In doing so, they create a space in which it is possible to conceive of individuals and communities across the globe as morally significant, regardless of the territorial boundaries that separate them.

By rethinking the role of the state as the central domain of moral concern and primary guarantor of human rights, it becomes possible to consider a range of alternative mechanisms for the fulfilment of rights for those who no longer have a state. In other words, by recognising a new ‘ought’ – that those who are denied basic human rights as a result of climate change impacts should count as part of a global community of moral concern in which state boundaries no longer function as a constraint on the fulfilment of human rights – it is possible to pave the way for a new ‘is’.

The first section of this paper identified existing obligations of international assistance and cooperation with regard to economic, social, and cultural rights, and an international duty to respect and promote the right to self-determination. The second section identified barriers to the recognition of such obligations, including state unwillingness; global inequity; the structural constraints of contemporary human rights adjudication and enforcement mechanisms; and the unprecedented denial of self-determination and loss of statehood threatened by climate change, and its implications for the continued realisation of basic human rights. These issues, however, are largely symptomatic of the current emphasis on the role of state sovereignty as a cornerstone of the international community, and may be addressed by the move towards a reframing and reconstruction of the human rights regime proposed here.

Firstly, the expansion of the sphere of moral concern *outwards* towards a global community of mutual risk provides both foundation and motivation for alternative mechanisms of human rights implementation, monitoring, and enforcement that go beyond the borders of the sovereign state. Secondly, the acknowledgement of shared vulnerability to *future* risks entails recognition of the need for mechanisms of human rights protection that go beyond present or imminent to (reasonably foreseeable) future harms. Thirdly, the extension of normative and political consideration to all those who

¹¹⁰ See Henry Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (Princeton: Princeton University Press, 1980), at 132-134.

are mutually vulnerable to climate change risks requires that they be incorporated into processes of negotiation and decision-making regarding the distribution and mitigation of trans boundary harms. As Pogge argues, ‘persons have a right to an institutional order under which those significantly and legitimately affected by a political decision have a roughly equal opportunity to influence the making of this decision’.¹¹¹ Through these processes, it becomes possible to address the global democratic deficit identified earlier, as a result of which those who are socio-economically or politically marginalised (including vulnerable SIDS) are excluded from meaningful participation in transnational processes of decision-making.

And finally, the retreat from an emphasis on state sovereignty as the primary framework through which the enjoyment of fundamental human rights is realised creates a space in which new forms of political autonomy, self-determination, and rights protection can emerge. This is significant not only for those whose states are threatened with imminent destruction, but also for those united in a global community in which moral concern extends beyond national boundaries to all those who are mutually vulnerable to climate change risks.

This paper does not seek to dictate the terms of this re-conceptualisation. The nature of the new ‘is’ remains highly contested, as does the identity of those responsible for dictating its terms and ensuring its implementation. The range of emerging responses to climate change inundation – whether pragmatic or hypothetical, political or legal – is vast, complex and controversial. In response to imminent inundation, for example, Tuvalu and the Maldives are negotiating with neighbouring states to resettle their populations elsewhere.¹¹² However, this practical solution has so far failed to address fundamental issues to do with political self-determination, territorial autonomy or cultural integrity, either for the host states or their reluctant guests. At a more theoretical level, lawyers and academics propose the modification of existing international conventions or the creation of new legal instruments for addressing forced climate change migration.¹¹³ Again, however, these come with their own challenges, including the difficulty of identifying so-called ‘climate change refugees’, determining appropriate responses to climate-induced displacement, and allocating responsibility for carrying out those responses. In addition, both of these approaches presuppose the continuation of a state-centric international framework and thus fail to address the challenge posed by climate change to statehood and self-determination more broadly.

Instead, this paper seeks to encourage broader dialogue about the alternative legal, social, and political mechanisms that might emerge in response to the changing environmental order and its implications for the enjoyment of human rights. These are likely to be less radical than one might expect – they do not, for example, entail the creation of a centralised global state, nor the disbanding of existing national

¹¹¹ Pogge, *World Poverty*, at 184; n60 above.

¹¹² Brad Crouch, ‘Tiny Tuvalu in Save Us Plea Over Rising Seas’, *Sunday Mail*, 5 Oct 2008; Andrew Revkin, ‘Maldives Considers Buying Dry Land if Sea Level Rises’, *New York Times*, 9 Nov 2008.

¹¹³ See, for example, Bonnie Docherty and Tyler Giannini, ‘Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees’ (2009), 33 *Harvard Environmental Law Review*, 349; Dana Zartner Falstrom, ‘Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment’ (2001), 6 *Colorado Journal of International Environmental Law and Policy*, 1; Benjamin Glahn, ‘“Climate Refugees”? Addressing the International Legal Gaps’ (2009), 63 *International Bar News*, 17; Angela Williams, ‘Turning the Tide: Recognising Climate Change Refugees in International Law’ (2008), 30 *Law and Policy*, 502; David Hodgkinson, et al., ‘Towards a Convention for Persons Displaced by Climate Change: Key Issues and Preliminary Responses’ (2008), 8 *The New Critic*; and David Hodgkinson, et al., ‘“The Hour When the Ship Comes In”: a Convention for Persons Displaced by Climate Change’ (2010), 36 *Monash University Law Review*, 69.

communities. Following a range of contemporary cosmopolitan theorists,¹¹⁴ it is important to acknowledge the significance of solidarity, participation, and shared attachments within a bounded community. The self-determination of peoples remains an important tool for ensuring meaningful, representative processes of negotiation and decision-making within a local community. What this re-conceptualisation *does* entail, however, is that the state can no longer be the sole – nor primary – framework for the recognition of human rights and self-determination.

A world in which states are disappearing – and in which climate change-related decisions, actions and harms impact upon the realisation of human rights across local, national and regional borders – requires new structures through which both the autonomy *and* interdependence of a range of communities can be recognised and voiced. This overlapping, multi-layered global structure – perhaps it might be understood as ‘cosmotarianism’ or ‘communipolitanism’ – requires transnational institutions of consensus building, cooperation, representation, and regulation that operate both locally and globally.¹¹⁵ It requires multiple intersecting forums of negotiation and decision-making that ensure equal representation for all those significantly affected by the issue at hand.¹¹⁶ And finally, it requires the recognition and fulfilment of obligations of responsibility towards fellow members of a global community of risk – particularly those whose fundamental human rights are severely threatened by the rising tide of climate change impacts.

6. Conclusion

Whatever solution is found, it is essential to ensure the meaningful participation and empowerment of those individuals and communities most affected by climate change inundation, particularly where they are already socio-economically and political marginalised within the global community. Returning once again to the existing legal and political framework (the ‘is’), it is therefore important to protect and promote the procedural rights recognised in human rights and environmental law, including rights of access to information, effective remedy, and public participation in decision-making.¹¹⁷ While domestic institutions provide the primary framework for the realisation of these rights, it is also necessary – given (i) the trans-boundary nature of negotiation and decision-making relating to the distribution of the burdens of climate change, and (ii) the issue of state disappearance and its impact on the enjoyment of basic human rights – to ensure that they are recognised and implemented at a global level.

However, this argument is not universally endorsed, even amongst UN experts. Hampson, while recognising the need for international solutions, suggests that their design and implementation should ‘*preferably* [be] in consultation with the people who will be affected’,¹¹⁸ implying that participation is a privilege rather than an entitlement. In order, perhaps, to circumvent the procedural rights set out in international human rights

¹¹⁴ See, for example, Beck, *World at Risk*, at 66; n63 above; Charles Beitz, ‘Cosmopolitan Ideals and National Sentiment’ (1983), 80 *Journal of Philosophy*, 591 at 599-600; Pogge, *World Poverty*, 178 at n283; n60 above.

¹¹⁵ Per Beck, *World at Risk*, at 92; n63 above; Pogge, *World Poverty*, at 184; n60 above.

¹¹⁶ See, for example, Pogge’s notion of multi-layered sovereignty, in *World Poverty*, at 178, 185-187; *Ibid.*

¹¹⁷ See, for example, ICCPR, Articles 2(3), 14, 19, 25; Rio Declaration on Environment and Development, UN Doc. A/CONF.151/126, 14 June 1992, Principles 10, 13; UDHR, Articles 8, 19, 21; all n23 above; Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 2161 UNTS 447, 25 June 1998; UNFCCC, Article 6; n1 above.

¹¹⁸ Hampson, Expanded Working Paper, at para. 22; n5 above; emphasis added.

law, Hampson suggests that the issue of state inundation and forced displacement 'may be better addressed as a humanitarian issue, rather than as a matter of legal right'.¹¹⁹

However, while political and humanitarian solutions are a crucial part of any reconstruction of the existing global framework, particularly in the short-term, they should complement rather than replace an emphasis on effective, enforceable legal entitlements to information, consultation, and participation. Any response to the climate change-related loss of territorial sovereignty and denial of basic human rights must ensure that it does not 'treat people as units of labour, rather than individuals (and communities) with rights and dignity',¹²⁰ and recognises the significance of the 'unique social and cultural meanings' associated with the territory under threat.¹²¹ The relocation of affected communities like the Carteret Islanders or Tuvaluans offers a short-term solution but fails to address fundamental concerns relating to cultural integrity and community attachment,¹²² or the underlying implications regarding territorial sovereignty, self-determination, and the realisation of human rights within the current international framework.

For the Marshallese,

[L]and is not viewed as interchangeable real estate, but instead as a foundation of national, cultural, and personal identity and spirit ... [The] assertion that a low-lying, remote developing island nation can simply "adapt" to the physical loss of its homeland and nationhood by removing the population to a foreign nation is ... unacceptable as an affront to self-determination and dignity.¹²³

Therefore, a solution premised on mutual vulnerability within a global community of risk must also take into account the shared concerns and cultural integrity of those peoples that are imminently affected.

¹¹⁹ Ibid. at para. 37

¹²⁰ McAdam, 'Environmental Migration Governance', at 22; n46 above.

¹²¹ Ibid. at 31

¹²² See, for example, the concerns of expat Tuvaluans in Alexandra Berzon, 'Tuvalu is Drowning', *Salon*, 31 March 2006.

¹²³ Marshall Islands, Submission to the OHCHR Under HRC Resolution 7/23, at 3, 9-10; n14 above.