

HUMAN RIGHTS AND CLIMATE CHANGE LAW: ADDED VALUE TO PACIFIC ISLAND STATES

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We're not talking about the growth [of] GDP, we're not talking about what it means in terms of profit and losses of the large corporations, we're talking about our survival.

Anote Tong, President of Kiribati¹

Climate change is often referred to as the defining challenge of our time, and it is well known that Pacific Island States are particularly vulnerable to the adverse effects of climate change. Indeed, these adverse effects are already very tangible for most communities across the region. Coastal features are visibly changing, with rising sea-levels, higher king tides and storm surges, saltwater intrusion and changing weather patterns posing an increasing threat to the livelihoods of Pacific Island communities. The threats are amplified by extreme weather events becoming more intense and more damaging as a result of climate change, with Cyclone Pam recently causing loss of human life and catastrophic damage in Vanuatu, and to a lesser extent in the Solomon Islands, Tuvalu and Kiribati.² While communities and governments—assisted by regional, international and non-governmental organisations—are proactively building resilience and adapting to climate change, there is a real risk of much more severe and damaging impacts materialising in the coming decades.³ The threats are so severe that most, if not all, Pacific Island States face the threat of losing some or all of their habitable territory as a result of climate change, with related risks of the loss of traditional livelihoods and large-scale involuntary displacement.⁴

This Special Issue of the *Journal of South Pacific Law* aims to provide insight into the role of international law in addressing the short-term and long-term challenges posed by climate change to Pacific Island States and their populations. It focuses on the two international legal frameworks that were designed to protect the Earth's climate system and the human person: international climate change law on the one hand, and international human rights law on the other. These two frameworks contain lofty principles with moral, political and indeed legal significance: the *United Nations Framework Convention on Climate Change* (UNFCCC) was adopted to 'prevent dangerous anthropogenic interference with the climate system [...] within a timeframe sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food security is not threatened'.⁵ International human rights law, on the other hand, aims to protect the human person against preventable interferences with a range of rights, and to provide victims of human rights violations

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¹ Interview with Radio Australia's Pacific Beat, 13 June 2014, available at <http://www.abc.net.au/news/2014-06-13/pacific-presidents/5521478> (accessed 29 October 2015).

² As discussed in detail by Calvy Aonima and Shivanal Kumar in their contribution to this Special Issue.

³ See Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2014: Synthesis Report* (CUP, 2014) 67 (stating that some small island States 'are expected to face very high impacts that could have associated damage and adaptation costs of several percentage points of gross domestic product').

⁴ *Ibid.* 65.

⁵ *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 19 June 1993) (UNFCCC), Article 2.

that have occurred with adequate and effective remedies.⁶ It is important to note that Pacific Island States first started raising concerns about climate change at international human rights forums more than a decade ago.⁷ This has not, of yet, resulted in the action and international cooperation needed to prevent climate change-induced interferences with human rights.

Understanding how the UNFCCC and international human rights law currently support Pacific Island States and local communities in the struggle against climate change is key to ensuring effective responses. In this regard, a key point to note is that existing international law not only requires that action to address the threats posed by climate change is effective, but also that it is equitable. The Nobel Peace Prize winning Intergovernmental Panel on Climate Change (IPCC) has stated unequivocally in numerous reports that human activities that produce greenhouse gases--especially the burning of fossil fuels--are the primary cause of climate change.⁸ We also know that the impacts of climate change that are being experienced today can be traced back to greenhouse gas-emitting activities that have fuelled the development of what are now high-income States.⁹ Their contributions to global emission stocks are in sharp contrast to those of Pacific Island States, which amount to less than 0.03% of the total.¹⁰ The region's contribution to emission flows remains extremely low.¹¹

The disparities in responsibility for climate change and capacity to address it have both practical and legal implications for climate change action. Practically speaking, a result of the economic benefits reaped from high-carbon industrialisation, developed States still have the greatest capacity for (i) making deep cuts in their domestic emissions of greenhouse gases; and (ii) supporting developing States in achieving a transition to sustainable and inclusive development.¹² For this reason, the UNFCCC prescribes climate action in accordance with the principle of common but differentiated responsibilities and respective capabilities (CBDRRC).¹³ More specifically, the UNFCCC requires that developed States take the lead in combating climate change and the adverse effects thereof, including by sharing technologies and providing financial support to developing states in a manner that promotes the right to sustainable development.¹⁴ The UNFCCC also requires developed States to support developing States in building local capacities,¹⁵ and to provide finance for adaptation in developing States that are particularly vulnerable to the adverse effects of climate change.¹⁶

⁶ See, for example, *Airey v Republic of Ireland* (1979) 305 Eur Court HR (ser A) 2 [32] (where the European Court of Human Rights found that the provisions of human rights treaties should be interpreted and applied in a way that makes its safeguards practical and effective).

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

⁸ See, for example, IPCC (2014), above n 3, 40.

⁹ Ibid 44. See also Climate and Development Knowledge Network (CDKN), (2014), *The IPCC's Fifth Assessment Report: What's in it for Small Island Developing States?* 6 http://cdkn.org/wp-content/uploads/2014/08/IPCC-AR5-Whats-in-it-for-SIDS_WEB.pdf (accessed 23 November 2015).

¹⁰ Secretariat of the Pacific Regional Environment Programme (SPREP), (2014), *Climate Change* <https://www.sprep.org/international/climate-change> (accessed 23 November 2015). See also the United Nations Permanent Forum on Indigenous Issues, (2015), *The Pacific Region 1* <http://www.un.org/esa/socdev/unpfii/documents/2015/media/pacific.pdf> (accessed 23 November 2015).

¹¹ SPREP, (2014), above n 10.

¹² CDKN (2014), above n 9, 28.

¹³ UNFCCC, Preamble and Article 3(1).

¹⁴ UNFCCC, Article 3(1), 3(4), 4(4) and 4(5).

¹⁵ UNFCCC, Article 4(5) and 5.

¹⁶ UNFCCC, Article 4(3).

The contributions to this Special Issue demonstrate, amongst other things, that international human rights law underscores rather than replaces the need for compliance with the principle of CBDRRC and the above-mentioned obligations: non-compliance with these obligations not only increases the threats to the enjoyment of human rights caused by the adverse effects of climate change, but also perpetuates historical inequities that continue to hamper the full and non-discriminatory realisation of human rights across the globe. As international human rights law is based on the premise that all human beings are equal in dignity and rights, action to correct, rather than perpetuate, historical inequities is required. This mutually reinforcing nature of UNFCCC principles and commitments and human rights obligations is apparent from all contributions to this Special Issue.

This Special Issue is launched ahead of the 21st Conference of the Parties to the UNFCCC (COP21) from 30 November to 11 December 2015 in Paris.¹⁷ As the contributing authors demonstrate, the inter-relationship between climate change law and human rights law has important implications for negotiations towards a new legally binding agreement under the UNFCCC, which is expected to be adopted at COP21. At the same time, however, the comprehensive legal framework discussed in this Special Issue is comprised of existing international laws. As such, it could be relied upon by Pacific Island States and beneficiaries of human rights obligations in legal action outside the UNFCCC process, including in climate change litigation. This realisation is important as it signals the existence of multiple strategies to address climate change through the invocation of international laws; a reality that could inform Pacific Island States' negotiating positions and strategies.

Each of the contributions to the Special Issue sheds light on a different aspect of the UNFCCC, international human rights law and/or the inter-relationship between these frameworks. The first article by Dr. Curtis Doebbler, 'Ensuring Consistency with Existing International Law of Another Climate Change Agreement', provides insight into legal challenges arising in the context of negotiations to strengthen ambition in the pre-2020 period and to agree on a new climate change agreement under the UNFCCC that would enter into force in 2020. The latter agreement is expected to replace parts of the *Kyoto Protocol*—which sets legally binding quantified emission reduction targets for developed country Parties—and contribute to the implementation of the UNFCCC. Doebbler analyses the Draft Agreement and accompanying Draft Decision that form the basis for negotiations under the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP) in Paris, focusing on the key elements of the COP21 outcome: (1) the Preamble; (2) Definitions (Art. 1); (3) General (Art. 2 and 2bis); (4) Mitigation (Art. 3); (5) Adaptation and loss and damage (Arts. 4 and 5); Finance (Art. 6); Capacity building (Art. 8 and 8bis); (9) Transparency (Art. 9); (10) Timeframes and implementation (Arts. 10 and 11); (11) Procedures, institutions and decision-making (Arts. 12-15 and 22) and Other provisions (Arts. 16-21 and 23-26). Although the structure of the Draft Agreement resembles that of a treaty, its draft provisions remain more of a compilation of options reflecting the widely diverging views of States than a blueprint for a new treaty. Hereby, many articles include 'no text' options or options that would, when adopted and implemented, be insufficient to achieve the full, effective and sustained implementation of the UNFCCC itself. Moreover, the texts contain options that seem aimed at blurring the distinction between developed and developing States, which could undermine both the fairness and the effectiveness of the climate change regime. It is therefore perhaps not surprising that even the reiteration of existing principles has become controversial, as is clear from brackets around a provision in the 'Purpose' section of the Draft Agreement (Art. 2) that highlights the principle of CBDR; the (bracketed) addition of 'in

¹⁷ See COP Decision 1/CP.17, UN Doc. FCCC/CP/2011/9/Add.1 (15 March 2012), establishing a negotiation process with a mandate to "develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties." COP21 also serves as the 11th Meeting of the Parties to the Kyoto Protocol (CMP11).

the light of national circumstances’; a bracketed reference to ‘the principles and provisions of the Convention’; and a ‘no text’ option for this same article.¹⁸

As far as human rights are concerned, it is worth recalling that the link between climate change and human rights has been recognised in a series of resolutions of the UN Human Rights Council, all of which build on the recognition 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’.¹⁹ The link between climate change and human rights has also been set out in an analytical report produced by the UN Office of the High Commissioner for Human Rights (OHCHR) at the request of the Council²⁰; and in statements and press releases from human rights treaty bodies.²¹ Moreover, all 194 State Parties to the UNFCCC acknowledged in a 2010 decision of the Conference of the Parties (COP) that ‘States should, in all climate change-related actions, fully respect human rights’.²² However, the references to human rights in the operative part of the Draft Agreement are all bracketed—indicating a lack of consensus on their inclusion. In his discussion of cross-cutting issues in the Draft Agreement, Doebbler attributes this lack of consensus to a division amongst States between two human rights visions, with the first emphasising participatory civil and political rights and the second insisting on a broader perspective that includes economic, social and cultural rights and the right to development.²³ This division is just one out of many that would need to be overcome in order to achieve an outcome in Paris that is fully consistent with existing international law. More generally, the draft Agreement and Decision reflect a risk that the Paris outcome could downgrade and weaken existing international laws rather than strengthening and implementing it.

Following Doebbler’s analysis of the Draft Agreement and Draft Decision, Calvy Aonima and Shivanal Kumar provide a comprehensive analysis of the potential implications under international law of Cyclone Pam, a category 5 cyclone which hit Vanuatu, Tuvalu, Kiribati and the Solomon Islands in March 2015. As mentioned above, Vanuatu was particularly badly affected, as the cyclone—dubbed ‘a monster’ by Vanuatu’s President Baldwin Lonsdale—claimed at least 15 human lives, destroyed thousands of homes, crippled much of Vanuatu’s infrastructure and left some of the outer islands almost completely without food sources. The estimated damage and loss caused to Vanuatu’s social, infrastructural and economic sectors exceeds \$US443 million, equivalent to around 64% of the country’s gross domestic product (GDP).²⁴ For meeting these costs, Vanuatu relied primarily on its own resources, supplemented by humanitarian aid provided by other governments and non-governmental organisations on a charitable basis.

¹⁸ *Draft Agreement and Draft Decision on Workstreams 1 and 2 of the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP): Work of the ADP Contact Group* (edited version of 6 November 2015).

¹⁹ *Human Rights and Climate Change*, UN Human Rights Council Resolution 7/23, UN Doc A/HRC/7/78 (14 July 2008).

²⁰ *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights*, UN Doc A/HRC/10/61 (15 January 2009).

²¹ See, for example, *Statement of the CEDAW Committee on Gender and Climate Change*, adopted at 44th mtg, NY (7 August 2009).

²² *The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention*, FCCC/CP/2010/7/Add.1, Decision 1/CP.15 (2010), para. 8. The UNFCCC has since been ratified by South Sudan, which brings the number of state parties to 195.

²³ Curtis Doebbler, ‘Ensuring Consistency with Existing International Law of Another Climate Change Agreement’ (2015) 1 *JSP*, n 172-176 and accompanying text.

²⁴ See Global Facility for Disaster Reduction and Recovery, *Supporting Resilient Recovery in Vanuatu after Cyclone Pam* (2015), available at https://www.gfdr.org/sites/default/files/publication/Vanuatu_SoI.pdf (accessed 22 November 2015).

This factual situation offers a case study to examine the relevance of existing international climate change law for Pacific Island States that are already feeling the effects of dangerous climate change. The most pertinent question here is whether Vanuatu would have legal grounds under international law to claim reparations for the loss and damage caused by Cyclone Pam from a State or States that indirectly contributed to this damage. This question is particularly relevant in light of ongoing negotiations on a framework for addressing Loss and Damage under the UNFCCC, as it involves the important question of whether Pacific Island States already have a right to reparations for climate change-induced loss and damage under international law, *irrespective* of provisions on Loss and Damage that might be included in a new Agreement under the UNFCCC. Aonima and Kumar suggest that the answer to these questions is affirmative. Following an explanation of the correlation between Cyclone Pam and climate change, the two authors discuss how the UNFCCC itself, as existing international law, can already be used as a legal basis for a State responsibility claim against one or several States that have made material contributions to the accumulated emissions in the global atmosphere. It is legally significant that these emission stocks have in turn increased the likelihood that ‘super cyclones’ such as Cyclone Pam may occur. However, there are significant obstacles to enforcing the right to reparations for internationally wrongful acts that indirectly led to Cyclone Pam. Aonima and Kumar note that there are several avenues to invoke State responsibility, each of which might have its own obstacles, but focus their analysis on the possibility of bringing a contentious case before the International Court of Justice (ICJ). For Vanuatu, one of the greatest obstacles to bringing a case before the ICJ is that Vanuatu has not recognised the jurisdiction of the ICJ as compulsory. Accordingly, Aonima and Kumar recommend that Vanuatu—and any State in a similar position—makes a declaration to recognise the jurisdiction of the ICJ as compulsory in order to overcome this obstacle.

The potential relevance of climate change litigation under international law is also apparent from Fitolagi Fa’anunu’s contribution, ‘A Breach of Fundamental Rights as the Legal Basis for Reparations for Climate Change Damages and Injuries under International Law: Case Study of Ha’apai Islands (Tonga) Following Cyclone Ian’. This article draws on the legal implications of Cyclone Ian, which hit Tonga in January 2014 and affected the communities of the small Ha’apai Islands in particular. These communities maintain a distinct cultural identity and rely primarily on subsistence agriculture and fishing for sustenance. Fa’anunu sets out to demonstrate how these communities can rely on international human rights law to secure remedies for the loss and damage suffered as a result of Cyclone Ian.

Mirroring the discussion of the link between Cyclone Pam and climate change by Aonima and Kumar, Fa’anunu first sets out how Cyclone Ian can be attributed to climate change from a factual and a legal human rights perspective. Her contribution demonstrates how Cyclone Ian has interfered with a range of human rights to which the Ha’apai communities are entitled, including the right to life, the right to an adequate standard of living, the right to food, the right to health, and the right to self-determination. As these rights are legally entrenched in a range of treaties which States have voluntarily signed and ratified, as well as in customary international law, it is virtually undisputed that these rights give rise to legal obligations for all States under international law. However, there is insufficient attention for the inter-relationship between these obligations on the one hand and obligations under the UNFCCC on the other. Fa’anunu takes the position that human rights obligations reinforce the provisions under the UNFCCC that are aimed at preventing dangerous anthropogenic interference with the climate system. Both legal frameworks provide a legal basis for State responsibility claims for internationally wrongful conduct that has contributed to climate change damage. Apart from adding an important moral dimension, international human rights law adds value to climate change law by recognising individuals and peoples as beneficiaries of international obligations. The rights of individuals (and, in some instances, peoples) could be

enforced by States on their behalf. However, members of the Ha'apai communities also have access to international human rights mechanisms, such as the Special Procedures of the UN Human Rights Council, to raise concerns about interferences with human rights resulting from Cyclone Ian or other extreme weather events attributable to climate change.

While observing that climate change already causes human rights violations, we must recall that manifestations of climate change that are being experienced today are the result of a mere 0.85°C of warming since pre-industrialisation.²⁵ The contribution of Dr. Flavia Bustreo, 'Health and Our Shared Responsibility to Deal With Climate Change: a WHO Perspective' underscores the need for urgent action, in accordance with the precautionary principle enshrined in Article 3 of the UNFCCC, to prevent even more pervasive and severe effects of climate change in the coming decades. This imperative for action also follows from international human rights law: as Bustreo points out, an overwhelming body of evidence suggests that climate change has adverse effects on the enjoyment of the right to the highest attainable standard of health. The most vulnerable segments of populations are most severely affected. As developing countries that are particularly vulnerable to the adverse effects of climate change, Pacific Island States bear a disproportionate burden of these health impacts, while being most likely to lack the resources to adequately address these impacts.

Bustreo's contribution is a strong call for a response to climate change that is grounded in human rights standards, including the right to the highest attainable standard of health. Noting that the right to health is protected under the constitution of the World Health Organization (WHO) and a range of human rights treaties, she explains how the WHO can serve as a forum for action on health and climate change. Much like human rights, health is a cross-cutting issue in the negotiations under the UNFCCC which has its own expert forum for discussion and action. And while the UNFCCC is the central forum for international action on climate change, utilising the expertise of forums and mechanisms focused specifically on health and human rights is paramount to ensuring that individual and joint climate action is taken in accordance with human rights standards, including the right to health. One step that could be taken at COP21 in Paris is to include explicit references to the right to health in the Purpose and Adaptation sections of the Paris Agreement, in a manner that demonstrates States' shared commitment to make health a priority in responses to climate change. As Bustreo notes, prioritising health requires mobilising adequate resources to address the adverse effects of climate change on the right to health, with specific attention to the most vulnerable. There is also a need to recognise the synergies between different sectors that help build people's resilience to deal with the increased shocks and disease exposure resulting from climate change. This brings us back to the need for equitable responses to climate change that promote, rather than undermine, the realisation of the right to sustainable development in Pacific Island States and across the globe.

²⁵ IPCC, 'Contribution of Working Group I to the IPCC Fifth Assessment Report' in Thomas F Stocker et al (eds), *Climate Change 2013: The Physical Science Basis* (CUP 2013) 12.