

## PERSPECTIVE OPEN



# The human right to climate adaptation

Autumn Bordner<sup>1</sup>✉, Jon Barnett<sup>1</sup> and Elissa Waters<sup>1</sup>

We demonstrate that a right to climate change adaptation exists in a bundle of pre-existing human rights norms. This existing right provides clear principles to guide the implementation of climate adaptation in ways that are equitable and effective, obliging States to, *inter alia*, prioritise those whose rights are most at risk from climate change; maximise the adaptive capacity of individuals; preserve territory to protect the sovereign rights of peoples; and ensure that adaptation practices themselves do not harm human rights. Human rights law requires that these obligations be fulfilled without discrimination on any grounds, including economic judgements about the cost effectiveness of adaptation in small or remote countries or communities.

*npj Climate Action* (2023)2:43; <https://doi.org/10.1038/s44168-023-00079-w>

## INTRODUCTION

In September of 2022, the United Nations Human Rights Committee found that Australia's failure to protect Torres Strait Islander people against the impacts of climate change violated their human rights. In March of 2023, the United Nations General Assembly, spear-headed by the Republic of Vanuatu, adopted a Resolution to seek an advisory opinion from the International Court of Justice on, among other things, the human rights obligations of States in respect of climate change<sup>1</sup>. These examples suggest that human rights law has the potential to drive actions that achieve climate justice.

Climate change already impinges on fundamental human rights, including rights to health, life, food, water, culture, and self-determination<sup>2,3</sup>. While these impacts are felt throughout the world, certain geographies—most notably small island states—are disproportionately affected. For the purpose of this special issue, we focus particularly on the intersection of climate change and human rights in Oceania, where long histories of colonisation and extraction coupled with challenging geographic circumstances have resulted in extreme vulnerability to climate impacts. Already, sea-level rise threatens to render low-lying nations such as Kiribati, the Marshall Islands, and Tuvalu uninhabitable, violating individual rights and permanently limiting their peoples' rights to self-determination<sup>4</sup>. While climate adaptation has the potential to prevent such irreparable damage<sup>5</sup>, current approaches to adaptation are piecemeal and insufficient to meet global needs, especially of the most vulnerable: least developed countries, small island states, non-self-governing territories, Indigenous peoples, and other marginalised communities<sup>6,7</sup>. A transformational shift towards more effective and just adaptation is needed to avoid further catastrophic climate impacts<sup>5,8</sup>.

In this commentary, we build on recent scholarship and legal actions to demonstrate that a right to adaptation *already exists* as a *sine qua non* of existing human rights norms, including individual rights and the peoples' right to self-determination. We argue that these norms oblige States to undertake rights-protective adaptation domestically and—in the case of colonial and/or developed States—internationally. We show that human rights provide clear principles to guide implementation of adaptation that prioritises human dignity and well-being. And we explain how a rights-based approach to adaptation has the potential to achieve a step change in the magnitude, scale, and

efficacy of adaptation policy and practice, which is key to advancing climate justice. While our focus is on Oceania—as the region perhaps most immediately and severely threatened by climate change—the principles advanced by this article have broad applicability that can inform the way adaptation can and should be implemented throughout the world.

## INDIVIDUAL HUMAN RIGHTS NORMS REQUIRE CLIMATE ADAPTATION

An individual right to adaptation can be found in well-established human rights norms, including the right to health, life, food, water, and culture. Every individual holds these rights, is legally entitled to protection against interference with their rights, and is guaranteed an effective remedy if their rights are violated<sup>9</sup>. Given existing concentrations of greenhouse gases in the atmosphere, these human rights are and will continue to be impinged by climate impacts regardless of the most ambitious mitigation actions<sup>6</sup>.

Under the primary international human rights treaties, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), ratifying States assume binding legal obligations to uphold, protect, and effectuate the human rights of their citizens. Virtually all States have ratified these conventions. As such, they are obligated to undertake adaptation sufficient to protect all of their citizens against human rights harms that are already occurring and that are foreseeably threatened by climate change<sup>10,11</sup>. With respect to economic, social, and cultural rights, the principle of progressive realisation acknowledges that not all states have equal capacity and resources and therefore requires States to make maximum efforts towards fulfilling these rights at a rate that is commensurate with available resources and capacity. In any case, because States are obligated to ensure continuous progress towards the full enjoyment of all human rights, adaptation should not only preserve the status quo but facilitate improvement of human rights conditions. States must also ensure that adaptation actions themselves do not cause additional or incidental human right violations, requiring adaptation processes that are transparent, fair, and participatory<sup>2,11,12</sup>.

A human rights approach to adaptation also has the potential to address the transboundary nature of climate harms. Recent developments in international law suggest that, under the

<sup>1</sup>School of Geography, Earth and Atmospheric Sciences, University of Melbourne, Melbourne, VIC, Australia. ✉email: [abordner@student.unimelb.edu.au](mailto:abordner@student.unimelb.edu.au)

transboundary harm principle, States predominantly responsible for greenhouse gas emissions may be obligated to redress extraterritorial climate-related human rights harms. The prohibition on transboundary harm is a principle of customary international law that prohibits States from harming other States through their domestic conduct. In recent years, human rights bodies including the Inter-American Court on Human Rights and the United Nations Human Rights Council have relied on this principle to hold States responsible for human rights violations outside of their jurisdictions, especially in the case of environmental harm<sup>10,13</sup>. The application of the transboundary harm principle to address human rights harms is just beginning to emerge, and actual implementation of this principle will require clarification of complex legal questions, including the scope and nature of conduct that may constitute a breach. Nevertheless, the aforementioned developments suggests that a rights-based approach has the potential to promote climate justice by requiring those states most responsible for climate impacts to provide a remedy for resultant human rights harms beyond their borders. Application of human rights law and the transboundary harm principle to address climate harms has the potential to overcome the limitations of the United Nations Framework Convention on Climate Change (UNFCCC)/Paris Agreement, which impose no meaningful obligations on States to remediate harms caused by their contributions to climate change (Box 1).

#### Box 1 Transnational human rights harms in the Republic of the Marshall Islands

- Comprised entirely of low-lying atolls, the Republic of the Marshall Islands (RMI) is one of the most climate-vulnerable nations in the world<sup>4</sup>.
- From 1944 to 1986, the RMI was administered by the United States as part of a United Nations' mandated protectorate, under which the United States held "sacred trust" obligations to ensure the welfare of the Marshallese people<sup>4</sup>.
- During this time, the United States conducted nuclear weapons tests on Marshallese lands and bodies, violating Marshallese human rights and causing widespread damage to human health and the environment.
- The United States has never provided adequate reparations for these violations, leaving RMI's newly-formed government to grapple with the consequences of the U.S. nuclear testing programme<sup>4</sup>.
- Today, Marshallese human rights are further compromised by climate change impacts including sea-level rise, extreme weather events, drought, and increased disease vectors. The lingering consequences of the U.S. nuclear testing programme leave Marshallese more vulnerable to climate hazards, magnifying the severity of resultant human rights harms<sup>4</sup>.
- The RMI Government is not responsible for the harms that climate change causes to its citizens' human rights nor for the underlying vulnerability induced by nuclear testing and colonialism. Yet under the conventional approach to human rights, the RMI is solely responsible for safeguarding its citizens' human rights.
- The emerging possibility of applying the transboundary harm principle to climate-related human rights harms could allow for equitable reallocation of responsibility, requiring countries primarily responsible for climate change to provide financial and technical assistance to the RMI so that it may undertake adaptation sufficient to protect the rights of its citizens.
- Arguably, the United States may have additional obligations because of the human rights violations it perpetrated while territorial administrator of the Marshall Islands.



Similarly, by virtue of their duty to cooperate, all States have a responsibility to move towards the universal realisation of human rights. In particular, developed States have obligations to assist developing States in realising the economic, social, and cultural rights of their citizens<sup>2</sup>. In the context of climate change, this duty suggests that developed States have a responsibility to assist with rights-protective adaptation.

#### THE PEOPLES' RIGHT TO SELF-DETERMINATION REQUIRES INTERNATIONAL CLIMATE ADAPTATION

A peoples' right to adaptation can be found in their collective and immutable right to self-determination. The right to self-determination extends to all peoples—which can include the populations of states and territories, as well as groups of individuals who share a common identity, such as Indigenous peoples in settler societies. Self-determination ensures all peoples' inalienable rights to political independence and self-governance, territorial integrity, and permanent sovereignty over their natural resources<sup>14</sup>.

Climate change impacts such as flooding, drought, and coastal erosion are degrading marine and terrestrial natural resources, depriving affected peoples of permanent sovereignty over the same<sup>4,15</sup>. Sea level rise is already compromising territorial integrity, and is predicted to divest entire States, colonised peoples, and Indigenous peoples of their territories, thereby impeding political independence, self-governance, and full expression of sovereignty<sup>4,15</sup>. While there is much debate about the effect that loss of a habitable territory would have on the sovereignty of an affected state/people, it is clear that a deterritorialized people—even if legally recognised as sovereign entity—would be unable to enjoy full expression of that sovereignty. This is because territory is inextricably linked with core aspects of sovereignty, such as the ability to exercise criminal and civil jurisdiction, the ability to control borders, and the ability to manage and make use of natural resources. Moreover, the ability of a people to be self-governing would necessarily be limited if they are forced to reside within the territory of another sovereign.

The threats that climate change poses to self-determination are immediate for many of the small islands in Oceania. Without swift and large-scale adaptation, the lowest lying island states may be uninhabitable later this century<sup>6</sup>. Adaptation could prevent such rights violations, but the most threatened largely lack the resources to undertake necessary interventions<sup>4,15</sup>.

Any violation of a peoples' right to self-determination is impermissible under international law. In addition to its codification in the joint first articles of the ICCPR and ICESCR, self-determination is broadly recognised as a *ius cogens* norm, meaning that all States are obligated to uphold the principle, with no exceptions permitted<sup>16</sup>. These obligations are owed *erga omnes*: by the entire international community to each member and vice versa<sup>15</sup>. Thus, it follows that the right to self-determination contains an absolute right to adaptation sufficient to preserve territorial integrity and full sovereignty—regardless of cost or difficulty. Likewise, the self-determination principle instills the entire international community with absolute legal obligations to provide the assistance necessary to achieve the required level of adaptation (Box 2).

#### A RIGHTS-BASED APPROACH CAN TRANSFORM CLIMATE ADAPTATION POLICY

As we have argued, and as legal actions are increasingly demonstrating, a right to adaptation exists as an indispensable element of human rights law. Recognition and application of this right could have a transformational effect on both the efficacy and equity of adaptation practice.

### Box 2 Tuvalu's inalienable right to self-determination

- Tuvalu is a least developed country and is highly dependent on outside aid to adapt to climate change. Yet finance for adaptation in Tuvalu falls far short of needs<sup>7</sup>.
- Instead, Tuvalu is often touted as the 'poster-child' for climate migration, on the assumption that loss of the entire nation to rising seas is inevitable. This assumption is made without robust evidence of future island responses to sea-level rise, and without considering possibilities for in situ adaptation<sup>24</sup>.
- In other low-lying places such as the Netherlands and the Maldives (another atoll state), large-scale adaptation is underway to ensure continued survival. These interventions are expensive, and the difference may reflect the perception that large-scale adaptation is not economically viable for a country as small and poor as Tuvalu<sup>4</sup>.
- From a human rights perspective, however, migration against the wishes of the affected people is not adaptation. Loss of habitable territory would divest Tuvalu of the full expression of its sovereignty, including through loss of territorial integrity as well as marine and terrestrial natural resources. This constitutes an irreparable violation of the Tuvaluan people's right to self-determination.
- The international community has *erga omnes* legal obligations to uphold Tuvalu's right to self-determination, which likely means assisting with territory- and sovereignty-preserving adaptation.
- Self-determination also implicates the fundamental principle of sovereign equality—that all sovereign states are of equal status and worth. Under this principle, in situ adaptation cannot be denied because of the size or perceived economic value of a country. Legally, the continued survival of all states is worth the same and that worth is priceless.



Human rights provide an ethical framework to guide adaptation—one grounded in human dignity, equity, and justice, rather than prevailing economic and ecological values. Moreover, a rights-based approach means that adaptation can no longer be regarded as voluntary and aspirational, as it is under the UNFCCC/Paris Agreement, but is in fact legally binding. In short, existing human rights obligations already require States to undertake adaptation actions.

A human rights-based approach to adaptation could also promote more effective and equitable adaptation by addressing underlying vulnerabilities. The limited adaptive capacity and disproportionate climate vulnerability of developing states and marginalised peoples are not innate characteristics but are instead the result of colonisation, dispossession, and appropriation of resources by the same nations who are primarily responsible for the accumulation of greenhouse gases in the atmosphere<sup>4,8,17,18</sup>. Yet these underlying causes of climate vulnerability have been largely overlooked in mainstream approaches to adaptation, which tend to focus on technical responses to physical hazards. This results in incomplete and unfair solutions<sup>4,8,17</sup>.

Within States, a rights-based approach has the potential to address *both* underlying vulnerabilities and the impacts of climate change through genuine implementation of the human rights principles of non-discrimination and equality. These principles do not require States to provide the same level of support to all citizens. Instead, because the human rights of marginalised and vulnerable groups are already more compromised, States are obligated to take extra care to ensure their protection<sup>2,12</sup>. In reality, implementation of these principles has often been poor.

### Box 3 Human rights and adaptation in the Torres Strait

- Torres Strait Islanders are Indigenous Australians who have been living on their islands for at least 7000 years.
- European colonisation resulted in prolonged violations of Torres Strait Islanders' human rights<sup>20</sup>.
- Today, the human rights of Torres Strait Islanders remain compromised relative to non-Indigenous Australians as they continue to enjoy much lower levels of access to public goods and social opportunities<sup>20</sup>.
- The Torres Strait Islands are experiencing rapid climate change, and consistent with their performance on the provision of other services, the Australian government has been slower to support adaptation for Torres Strait Islanders relative to other, non-Indigenous communities<sup>19</sup>.
- Australia has affirmative human rights obligations to afford Torres Strait Islanders the same level of rights-protective adaptation as other citizens; the fact that Torres Strait communities are small and remote does not justify a lower standard of adaptation.
- In 2019, eight Torres Strait Islanders filed a Complaint before the United Nations Human Rights Committee (UNHCR), alleging, in part, that Australia is violating their human rights by failing to implement adequate adaptation in the Torres Strait. The petitioners sought, among other things, \$20 million for adaptation<sup>25</sup>.
- On September 22, 2022, the UNHCR issued a decision, finding that Australia's failure to provide adequate adaptation to Torres Strait Islanders violated their rights to culture, life, privacy, family and home. As remedy, the UNHCR ordered the Australian government to provide compensation, to undertake consultations to understand local needs, and to undertake adaptation to protect Islanders' rights against future climate harms<sup>25</sup>.



Torres Strait Island Flag, designed by the late Mr. Bernard Namok

The most vulnerable groups often receive lower levels of support from the State, including in the context of climate adaptation<sup>2,19,20</sup>. Nevertheless, these principles have legal force, which vulnerable groups can draw upon to vindicate their rights. Already, the ever-intensifying threats posed by climate change have spurred vulnerable groups to pursue (and prevail in) legal actions to hold States accountable for providing the required level of adaptation support under human rights law (Box 3).

A human rights approach also has the potential to address injustices and inequities that exist between states. Under the conventional approach to human rights, the State is solely responsible for the individual human rights of its citizens—regardless of the source of the violation. Yet for many of the most vulnerable countries, including throughout Oceania, colonisation and exploitation have left the State without the resources and capacity to fulfil or protect the human rights of its people. Climate change exacerbates and reproduces these inequities. The same colonising States are primarily responsible for the climate crisis, while those States still grappling with the harms of colonialism and extraction are also worst affected by and least able to respond to climate impacts. Though still far from settled, the emerging application of the transboundary harm principle in the human rights context has the potential to promote climate justice by imposing greater obligations on those States that are responsible for both high greenhouse gas emissions and for underlying social vulnerability as a consequence of their political and economic empires.

Finally, the international legal norm of self-determination was originally intended to address historic injustices, and can be applied to do so in the climate change context. The right to self-determination was first codified in international law as a remedy

to colonisation<sup>21</sup>. Though now recognised as a universal human right, it continues to carry special force with respect to decolonising peoples, all of whom continue to grapple with the legacy of colonial violence. This implies that States may have responsibilities to provide adaptation as a remedy for climate vulnerability caused by colonial violence<sup>22,23</sup>.

To date, implementation of human rights has largely failed to address the historical injustices and inequities that impair full enjoyment of human rights in most of the world<sup>18</sup>. Nevertheless, human rights law provides a framework capable of doing so, and application of human rights law to the new challenges posed by climate change offers a chance to reevaluate and reform human rights practice in order to achieve outcomes that better align with human rights ideals.

Nevertheless, and as we have demonstrated, it is clear that existing human rights law guarantees all individuals and peoples the right to climate adaptation. With the window of opportunity for effective adaptation rapidly shrinking, it is time for the role of human rights to be acknowledged. Doing so could transform adaptation such that it is comprehensive, effective, and just. Nowhere is this more needed than in the small island states of Oceania.

### Reporting summary

Further information on research design is available in the Nature Research Reporting Summary linked to this article.

Received: 8 March 2023; Accepted: 25 October 2023;

Published online: 24 November 2023

### REFERENCES

1. UNGA Resolution 77/276. *Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change* <https://www.icj-cij.org/sites/default/files/case-related/187/187-20230419-PRE-01-00-EN.pdf> (2023).
2. Robinson, M. & Shine, T. Achieving a climate justice pathway to 1.5 C. *Nat. Clim. Change* **8**, 564–569 (2018).
3. Wewerinke-Singh, M. *State Responsibility, Climate Change and Human Rights under International Law* (Bloomsbury Publishing, 2019).
4. Bordner, A. S., Ferguson, C. E. & Ortolano, L. Colonial dynamics limit climate adaptation in Oceania: perspectives from the Marshall Islands. *Glob. Environ. Change* **61**, 102054 (2020).
5. O'Brien, K. Global environmental change II: from adaptation to deliberate transformation. *Prog. Hum. Geogr.* **36**, 667–676 (2012).
6. Portner, H. et al. *Technical Summary: IPCC WGII Sixth Assessment Report* (Cambridge University Press, 2022).
7. UNEP. *Adaptation Gap Report 2021: The Gathering Storm—Adapting to Climate Change in a Post-Pandemic World* (UNEP, 2021).
8. Eriksen, S. H., Nightingale, A. J. & Eakin, H. Reframing adaptation: the political nature of climate change adaptation. *Glob. Environ. Change* **35**, 523–533 (2015).
9. Wewerinke-Singh, M. Remedies for human rights violations caused by climate change. *Clim. Law* **9**, 224–243 (2019).
10. OHCHR. *Understanding Human Rights and Climate Change*. <https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/COP21.pdf> (2014).
11. Knox, J. H. *Report of the Independent Expert on the issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*. U.N. Doc. JA/HRC/25/53 (United Nations Human Rights Commission, 2013).
12. Burger, M. & Wentz, J. A. *Climate Change and Human Rights* (United Nations Environment Program, 2015).
13. Inter-American Court on Human Rights. *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity—Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*. Advisory Opinion OC-23/17 (2017).
14. International Court of Justice. *Legal Consequences of Separation of Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 2019 I.C.J. Rep. 169 (2019).
15. Frere, T., Mulalap, C. Y. & Tanielu, T. Climate change and challenges to self-determination: case studies from French Polynesia and the Republic of Kiribati. *Yale Law J.* **129**, 648–673 (2020).
16. International Law Commission. *Report on the Work of Its Sixty-sixth Session*, U.N. Doc. A/69/10 (2014).
17. Cameron, E. S. Securing Indigenous politics: a critique of the vulnerability and adaptation approach to the human dimensions of climate change in the Canadian Arctic. *Glob. Environ. Change* **22**, 103–114 (2012).
18. Anghie, A. *Imperialism, Sovereignty and the Making of International Law* 2nd edn (Cambridge University Press, 2012).
19. Barnett, J. et al. From barriers to limits to climate change adaptation: path dependency and the speed of change. *Ecol. Soc.* **20**, 5 (2015).
20. Australian Human Rights Commission. *Aboriginal and Torres Strait Islanders: Australia's First Peoples*. <https://humanrights.gov.au/our-work/education/aboriginal-and-torres-strait-islanders-australias-first-peoples> (2023).
21. Fabry, M. *Recognizing States: International Society and the Establishment of New States since 1776* (Oxford University Press, 2010).
22. International Court of Justice. *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, Judgment, 1992 I.C.J. Rep. 615 (1992).
23. Anghie, A. The heart of my home: colonialism, environmental damage, and the Nauru case. *Harv. Int. Law J.* **34**, 445 (1993).
24. Barnett, J. The dilemmas of normalising losses from climate change: towards hope for Pacific atoll countries. *Asia Pac. Viewp.* **58**, 3–13 (2017).
25. United Nations Human Rights Committee. *Views Adopted by the Committee under Article 5(4) of the Optional Protocol, Concerning Communication No. 3624/2019*. (2022).

### ACKNOWLEDGEMENTS

This paper was written with the support of Australian Research Council grant FL180100040.

### AUTHOR CONTRIBUTIONS

A.B. conceptualised, wrote, and edited the paper, J.B. conceptualised and edited the paper, E.W. conceptualised and edited the paper, All authors read and approved the final manuscript.

### COMPETING INTERESTS

The authors declare no competing interests.

### ADDITIONAL INFORMATION

**Supplementary information** The online version contains supplementary material available at <https://doi.org/10.1038/s44168-023-00079-w>.

**Correspondence** and requests for materials should be addressed to Autumn Bordner.

**Reprints and permission information** is available at <http://www.nature.com/reprints>

**Publisher's note** Springer Nature remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.



**Open Access** This article is licensed under a Creative Commons Attribution 4.0 International License, which permits use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons license, and indicate if changes were made. The images or other third party material in this article are included in the article's Creative Commons license, unless indicated otherwise in a credit line to the material. If material is not included in the article's Creative Commons license and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder. To view a copy of this license, visit <http://creativecommons.org/licenses/by/4.0/>.

© The Author(s) 2023