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Climate change and human rights in the overseas colonized territories of the state¹

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1. Introduction

This chapter examines the intersection between climate change and human rights in territory that is ‘subject to divided competence’ as a result of colonization and the imposition of international law.² In many such territories, climate adaptation is complicated by geographical isolation, histories of colonialization, and intricate layers of legal responsibility. This chapter contends that further research is needed into how the human rights framework can be leveraged to respond to climate change in territories which are geographically, culturally, linguistically, and ethnically distinct from the mainland state with which those obligations rest. It is premised on the idea, confirmed in the most recent report of the Intergovernmental Panel on Climate Change (IPCC), that vulnerability to the impacts of climate change varies markedly and is driven by, among other things, ‘ongoing patterns of inequity such as colonialism ...’.³

¹ This chapter constitutes initial thinking in a project funded by the Independent Research Fund Denmark (grant number 1127-00125B) which will run over 2022–2024 with initial case studies in Greenland and the Cook Islands. It draws on earlier research which examined how Indigenous Peoples living on islands that were subject to colonization are not the focus of international climate change law and suggested that the special procedures of the UN system might offer some, if limited, remedy. See: Miriam Cullen, “‘Eaten by the Sea’: Human Rights Claims for the Impacts of Climate Change on Remote, Subnational Communities” (2018) 9(2) *Journal of Human Rights and the Environment* 171.

² James Crawford, ‘Dependent States and Other Dependent Entities’, in *The Creation of States in International Law* (2nd edn, Oxford University Press 2007) 282.

³ Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation and Vulnerability: Summary for Policy Makers* (2022) 11–12.

The section which follows outlines why these territories warrant further examination in the context of climate change and gives examples of the kinds of places and peoples that this chapter concerns. Thereafter, section 3 describes how the adoption of a human rights approach is of course not without its own weaknesses in this context, including that it too is a product of a Western and anthropocentric legal system, and some of those elements are acknowledged in section 4 as challenges worthy of greater consideration. The chapter argues that further research is needed into *how* human rights are implemented in the context of a colonial history to make responses to climate change in these places more effective. It uses rights to self-determination, land rights and the right to health as examples. This leads to concluding thoughts which encourage interpretations of human rights law through a decolonial lens, and further examination of relationships between rights.

2. Why overseas colonized territories are worthy of attention in the context of human rights and climate change

The term ‘overseas colonized territory’ is not a term of legal art. It is used here to describe territory that is not a state under international law, is geographically separate from the ruling colonial power, and possesses a majority population who identify as culturally, linguistically, and ethnically distinct from their mainland counterparts.⁴ Often these territories are remote from the mainland state, whether as an island or an archipelago. The use of the word ‘territory’ as a demarcation is adopted in this chapter because it reflects the territorialized system of governance in which international law resides. That is so notwithstanding that for many peoples of the world, territory, whether land or sea, cannot so easily be detached from the ecosystems, living creatures, histories and narratives, which are connected to it.

Overseas colonized territories exist across a multitude of legal forms. They are not states in their own right but might enjoy varying degrees of self-government peculiar to their specific legal arrangements with the state,⁵ which may or may not be constitutionally embedded. Various legal monikers have been applied to

⁴ This is not to discount the experiences, historical and present day, of Indigenous Peoples who continue to live in unceded territory, now shared with a majority population who are the descendants of colonial settlers.

⁵ Crawford (n 2) 283.

different forms of such territories including, but not limited to, self-governing territory (Greenland / Denmark; New Caledonia / France), subnational administrative division (American Samoa / United States of America), overseas collectivity (French Virgin Islands / France), unincorporated territory (Guam / United States of America), overseas territory (British Virgin Islands / United Kingdom), or even simply a region (Torres Strait Islands / Australia). These territories warrant further examination both individually and as a collective, because of the combined effects of climate change, histories of colonialism, and the residual governance arrangements to which they remain subject.

Climate change disproportionately impacts small islands and Arctic territories, places which have usually also been subject to colonialization. In many such territories, natural resource dependence increases exposure and sensitivity to climate change. It is now well-known that climate change disproportionately disadvantages Indigenous Peoples,⁶ who usually constitute the majority population in the colonized territories that are the subject of this chapter. Changing weather patterns can both erode traditional knowledge and compromise effective resource management.⁷ Access to adequate food is a common concern, as is the potential loss of cultural heritage and identity. Indeed, there is little dispute that in many of these places, ‘climate-change-induced dislocation, attenuation of cultural attachment to place and loss of agency’ has already disadvantaged Indigenous mental health and community identity.⁸ Finally, and

⁶ Kyle Powys Whyte, ‘Indigenous Women, Climate Change Impacts, and Collective Action’ (2014) 29(3) *Hypatia* 599; Karen Engle, ‘On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights’ (2011) 22 *European Journal of International Law* 141; Charlotte K. Whitney and others, ‘“Like the Plains People Losing the Buffalo”: Perceptions of Climate Change Impacts, Fisheries Management, and Adaptation Actions by Indigenous Peoples in Coastal British Columbia, Canada’ (2020) 25(4) *Ecology and Society* 33; Intergovernmental Panel on Climate Change (n 3) 10, 11, 24, 28.

⁷ Nicole Latulippe and Nicole Klenk, ‘Making Room and Moving Over: Knowledge Co-Production, Indigenous Knowledge Sovereignty and the Politics of Global Environmental Change Decision-Making’ (2020) 42 *Current Opinion in Environmental Sustainability* 7; Rebecca Tsosie, ‘Indigenous Peoples and Global Climate Change: Intercultural Models of Climate Equity’ (20) 25 *Journal of Environmental Law and Litigation* 7.

⁸ Cullen (n 1), 171, 178 referring to A. Reisinger and R.L. Kitchen, ‘Australasia’, in Christopher Field et al. (eds), *Climate Change 2014: Impacts, Adaptation and Vulnerability*. Part B: Regional Aspects. Working Group II Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (2014) 1371, 1375 and 1405.

importantly, climate change amplifies pre-existing vulnerabilities to its effects and having been subject to a colonizing power *is* a driver of vulnerability.⁹

The International Trusteeship System was established under the UN Charter in 1945 to advance self-government in overseas colonized territories not least to avoid potential threats to international peace and security that arose from territorial disputes. Trust territories were those the peoples of which had not yet attained a fully measure of self-government and were voluntarily placed under UN administration by the state, or were detached from an ‘enemy state’ as a result of the Second World War, or those which were held under mandate.¹⁰ The states that declared trust territories were under an obligation to undertake a process of decolonization which was ultimately geared towards if not complete independence, then at least self-government. By 1994 all trust territories had lost that status, usually – but not always¹¹ – by gaining independence. However, many overseas colonized territories did not fall within the trust territory system and nevertheless their people retained an identity, ethnicity, language and culture entirely distinct from the people with whom they share citizenship but not land territory. For example, by law the Torres Strait Islands form part of the state of Australia. Yet, they are a seven-hour flight from the closest major airport on the Australian mainland, their people speak a language not spoken by mainland Australians, and their culture, ethnicity and identity are connected to the islands which they have inhabited for at least the last 2,500 years.

Under international law, it is the state which has ‘an obligation to take measures to mitigate climate change, to prevent negative human rights impacts, and to ensure that all persons, particularly those in vulnerable situations, have adequate capacity to adapt to the growing climate crisis’.¹² But they have a high

⁹ Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation and Vulnerability: Summary for Policy Makers* (2022) 11. See also: Daphina Misiedjan, ‘Separate but Equal in the Protection Against Climate Change: The Legal Framework of Climate Justice for the Caribbean Part of the Kingdom of the Netherlands’ (2022) *The Geographical Journal* (accepted manuscript).

¹⁰ Charter of the United Nations, Art 77.

¹¹ One exception is Greenland which transitioned from ‘trust territory’ status, not through the realization of independence but rather by being subsumed into the Danish state.

¹² ‘Understanding Human Rights and Climate Change, Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change’ (Office of the High Commissioner 2015) 26 <https://www.ohchr.org/sites/default/>

degree of flexibility in terms of *how* to go about that, and can delegate responsibility, while retaining oversight. When the system of public administration and projected climate impacts are taken together, it allows one to problematize the extent to which people are at the mercy of the national governmental apparatus to ensure the realization of their human rights, notwithstanding that their representation within that system is either none or meagre, and also notwithstanding extant and varied self-governing arrangements. Since these territories are not states under international law, their representatives do not participate in multilateral processes by right but by invitation, and often remain at the margins of the international legal system, which itself does not necessarily align with local conceptions of regulation or governance.

3. The possibilities and paradoxes of a human rights approach

The human rights framework is one of few legal regimes that can attempt to respond to the complex social, cultural, economic and political consequences of climate change.¹³ It has established systemic mechanisms, from UN bodies to the participation of civil society, the processes of which can improve minority inclusion.¹⁴ What becomes difficult within the context of overseas colonized territories is not only the identification of where legal responsibility lies, but also how to ensure rights are implemented in ways that are sensitive to the distinct contexts within which they must be realized.

The current human rights framework has been described as anthropocentric, dominated by Western ideology and therefore a perpetuation of colonialism.¹⁵

files/Documents/Issues/ClimateChange/COP21.pdf accessed 21 February 2022; Stephen Humphreys, 'Introduction: Human Rights and Climate Change' in Stephen Humphreys (ed), *Human Rights and Climate Change* (Cambridge University Press 2009) 1–4; Simon Nicholson and Daniel Chong, 'Jumping on the Human Rights Bandwagon: How Rights-Based Linkages Can Refocus Climate Politics' (2011) 11 *Global Environmental Politics* 121.

¹³ 'Understanding Human Rights and Climate Change, Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change' (n 12) 26.

¹⁴ Ibid.

¹⁵ Juan José Guzmán, 'Decolonizing Law and Expanding Human Rights: Indigenous Conceptions and the Rights of Nature in Ecuador' (2019) *Deusto Journal of Human Rights* 59, 64; Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge University Press

It has also been criticized for failing to account for the struggles and knowledge of Indigenous Peoples, and for missing the mark when attempting to integrate Indigenous Peoples' views of the world.¹⁶ Human rights serve as both a tool of protection through which to challenge the most egregious of abuses and concurrently perpetuate a system within which many peoples of the world are not members. A preliminary question, then, is whether one can or should use a system that directly or indirectly, emerged from European legal and moral philosophy – human rights – to the benefit of the peoples the subject of this chapter. Who defines the 'benefit'? 'Protection' too is loaded, implying a protector and a recipient of protection, reinforcing the boundaries of those possessed and dispossessed of power.

On the basis of these recognized flaws, the past two decades have seen significant shifts in the interpretation and application of international law towards modalities that attempt to dilute the philosophical leanings from which they came. Non-Western and 'historically marginalized and excluded epistemologies' including 'indigenous legal concepts' have slowly made their way into interpretations of human rights law.¹⁷ This includes efforts to incorporate Indigenous views in climate governance such as the creation of the Local Communities and Indigenous Peoples Platform of the United Nations Framework Convention on Climate Change.¹⁸ But it is difficult to know the extent to which this is anything more than lip service in a context within which Indigenous Peoples cannot meaningfully participate in the actual legal negotiations as of right but rather only with the permission and to the extent the state apparatus permits. The inherent flaws and limitations of the human rights framework do not justify its dismantling. Rather, the system's defects should

2003) 108; John Mubangizi and Hassan Kaya, 'African Indigenous Knowledge Systems and Human Rights: Implications for Higher Education, Based on South African Experience' (2015) 10(2) *International Journal of African Renaissance Studies - Multi-, Inter- and Transdisciplinarity*, 125.

¹⁶ Guzmán, *ibid.*, 61; Engle (n 6); Jeff Corntassel and Tiffanie Hardbarger, 'Educate to Perpetuate: Land-based Pedagogies and Community Resurgence, (2019) 65 *International Review of Education* 87.

¹⁷ Lieselotte Viaene, 'Indigenous Water Ontologies, Hydro-Development and the Human/More-Than-Human Right to Water: A Call for Critical Engagement with Plurilegal Water Realities' (2021) 13 *Water* 1660, 3.

¹⁸ 'Local Communities and Indigenous Peoples Platform of the United Nations Framework Convention on Climate Change' <https://unfccc.int/LCIPP#:~:text=The%20Local%20Communities%20and%20Indigenous,a%20common%20concern%20of%20humankind> accessed 1 April 2022; 'Permanent Forum on Indigenous Issues Report on the Twentieth Session (19–30 April 2021)' (Economic and Social Council 2021) E/2021/43-E/C.19/2021/10, para 12 <https://undocs.org/E/2021/43> accessed 1 April 2022.

be accounted for in the interpretation and manifestation of human rights as practice. The below section elaborates how the rights to self-determination; rights to and *of* the land;¹⁹ and the right to health (taking into account determinants of planetary health), could serve as a basis for further research in this context.²⁰ These rights are selected both for their relevance in the context of climate change but also because scholarly development of their interpretation illustrates the potential for valuable innovation. At the same time, it is important to note that the human rights framework depends in part on the recognition that each human right operates as part of an overarching system that works best when rights are treated as indivisible. Indeed, a key argument of this chapter is that there is a need to reexamine not only the interpretation and implementation of human rights, but also the relationship *between* them.

4. Examples of human rights that could prove useful

4.1 Self-determination and participation

The very first sentence of the International Covenant on Civil and Political Rights provides that ‘all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.’ Many scholars tend to stop there, but there are two other paragraphs in the provision, and it is the interpretation and development of these later subparagraphs with which this chapter is especially concerned. Subparagraph 2 begins by acknowledging that all peoples have the right to freely dispose of their resources and then adds, ‘In no case may a people be deprived of its own means of subsistence.’ Subparagraph 3 sets out an obligation that states parties with responsibility for non-self-governing and trust territories ‘shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations’.

Traditionally, self-determination was perceived as a freedom to choose political destiny, but it has evolved to encompass a broader set of norms involving individual and collective rights to pursue economic, social and cultural development. Questions arise as to how the human right of self-determination

¹⁹ Nicholas P. Simpson and others, ‘Decolonizing Climate Change–Heritage Research’ (2022) 12 *Nature Climate Change* 210.

²⁰ Nicole Redvers and others, ‘The Determinants of Planetary Health: An Indigenous Consensus Perspective’ (2022) 6 *The Lancet Planetary Health* e156.

can be harnessed as a tool for climate adaptation in the overseas colonized territories of the state, even without the achievement of statehood nor, perhaps, even a collective desire for it. In its 2022 report, the Intergovernmental Panel on Climate Change found that successful climate adaptation has the potential to not only ‘improve ecosystem health’ but also ‘address current and historical inequities’.²¹

In the context of climate change, Indigenous Peoples’ right of self-determination has manifested predominantly in their participation in international, national and local forums.²² Through participation in the climate change and adaptation debate, Indigenous Peoples have moved from being perceived as passive victims of climate change impacts, to being recognized as ‘stewards of precious natural environments’,²³ the knowledge of whom contributes to climate change mitigation and adaptation.²⁴ That participation is not without pitfalls. Among them is the associated financial and personal costs.²⁵ Another is that participation can be manipulated as ‘instruments of mitigation by more powerful actors’.²⁶ The latter point raises associated questions about how Indigenous knowledge is used. If Indigenous Peoples are to be heard, this should be done in a way which does not replicate the ‘extractive’ mentality that has prevailed in the relationship between colonial states and Indigenous Peoples.²⁷ Thus, a distinction should be made between, on the one hand, gathering Indigenous knowledge to produce data to be slotted into Western models used for decision making, and on the other hand, recognizing such knowledge as carrying ‘governance value’ to Indigenous Peoples themselves.²⁸

²¹ Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation and Vulnerability* (2022) (accepted version, subject to final edits) Ch 3, 137.

²² Latulippe and Klenk (n 7).

²³ Emily Polack, ‘A Right to Adaptation: Securing the Participation of Marginalised Groups’ (2008) 39 *IDS Bulletin* 16, 19–20.

²⁴ Paris Agreement 2015, Art 7, para 5; Victoria Reyes-García and others, ‘Recognizing Indigenous Peoples’ and Local Communities’ Rights and Agency in the Post-2020 Biodiversity Agenda’ (2022) 51 *Ambio* 84.

²⁵ Nina Lakhani, ‘“A Continuation of Colonialism”: Indigenous Activists Say Their Voices Are Missing at Cop26’ *The Guardian* (3 November 2021) <https://www.theguardian.com/environment/2021/nov/02/cop26-indigenous-activists-climate-crisis> accessed 12 May 2022.

²⁶ Polack (n 23) 20.

²⁷ Latulippe and Klenk (n 7) 7.

²⁸ Kyle Whyte, ‘What Do Indigenous Knowledges Do for Indigenous Peoples?’ in Daniel Shilling and Melissa K Nelson (eds), *Traditional Ecological Knowledge: Learning from Indigenous Practices for Environmental Sustainability* (Cambridge University Press 2018).

As explained by Latulippe and Klenk: '[Indigenous knowledge] has an integral role in the resurgence of Indigenous governance and related legal orders, land-based practices, diplomatic protocols, and other collective capacities that promote the wellbeing of lands and peoples.'²⁹ In this context, Indigenous scholars have called for 'knowledge sovereignty'³⁰ in the realization of Indigenous Peoples' rights of self-determination and participation. As climate change forces adaptation in overseas colonized territories, which are uniquely exposed and vulnerable to its physical impacts, the manner and form of the realization and protection of human rights must also adapt and do so as a concomitant part of the right of self-determination.

4.2 Land rights

For many Indigenous Peoples, connection to land is part and parcel of their culture, identity and lifestyle.³¹ The right of self-determination includes within its tenets the right to freely pursue one's cultural development and not to be arbitrarily deprived of one's means of subsistence. The impacts of climate change do just that *through* the loss of land and consequently means of subsistence, and to particularly egregious effect for Indigenous Peoples. Because many overseas colonized territories are small islands, sea-level rise and more frequent and intense weather events has meant that the key consequences of climate change include a loss of land territory, the salinization of soil and degradation and loss of subsistence agriculture. For Arctic territories, such as Greenland, climate change means shorter hunting seasons due to a loss of reliable sea ice, and melting permafrost compromises traditional food storage. Rapid ice melt has led to localized tsunamis and marine biodiversity is both declining and fish stocks shifting, meaning that traditional knowledge is compromised. Climate change impacts therefore lead to both a loss of subsistence as well as a loss of identity, community, and intangible cultural heritage, such as hunting methods and traditional methods of building,³² all of which threatens physical displacement from island and Arctic homelands.

At the same time, the central concept of land rights, that of ownership, sits in stark contrast to alternative conceptions of land, and indeed of nature itself, as a living entity, indivisible from human personhood, which prevails in some

²⁹ Latulippe and Klenk (n 7) 7; Whyte (n 28).

³⁰ Latulippe and Klenk (n 7) 10.

³¹ Gaetano Pentassuglia, 'Towards a Jurisprudential Articulation of Indigenous Land Rights' (2011) 22 *European Journal of International Law* 165, 165–166.

³² *Ibid.*

Indigenous Peoples' cultures.³³ By design, human rights oppose culture to nature, by recognizing human beings as subjects of rights, while seeing nature as a passive entity, namely a resource that can be used as property and for human satisfaction.³⁴ This has been translated in the context of climate change into the recent recognition of a human right *to* (rather than *of*) a healthy environment.³⁵ This anthropocentric view contrasts with that shared by many of the world's peoples, namely that nature is a living entity, inseparable from its human counterparts.³⁶ This means that when land, water and biodiversity are affected by climate change, so too is culture, and personal identity.³⁷

Still, so long as this system of land ownership remains and predominates, Indigenous Peoples ought to be able to realize their rights within it. Indeed, the Declaration on the Rights of Indigenous Peoples demands that states provide effective mechanisms to prevent and redress any action which has the effect of dispossessing Indigenous Peoples of their lands, territories, or resources.³⁸ Although not legally binding, for those states which have endorsed it, the Declaration can serve as a source of interpretation for the right of self-determination. Indeed, implementation of the right of self-determination, provides a mechanism through which to ensure the meaningful recognition of rights *to*, and potentially *of*, land informed by broader perceptions of the world. The latter is important not only because it would better recognize the more diverse conceptualization of the rights-based system and therefore better ensure the protection of all peoples, but also because Indigenous stewardship of land has been shown to ensure 'protection and conservation of the planet's ecosystems'.³⁹ The UN Special Rapporteur on the Rights of Indigenous Peoples has reported that Indigenous Peoples are custodians to 80 per cent of the

³³ Susana Borràs, 'New Transitions from Human Rights to the Environment to the Rights of Nature' (2016) 5 *Transnational Environmental Law* 113, referring to the Universal Declaration on the Mother Earth Rights, Cochabamba (Bolivia)", 2010, 113; Robin Kimmerer, *Braiding Sweetgrass: Indigenous Wisdom, Scientific Knowledge and the Teachings of Plants* (Milkweed Editions 2013).

³⁴ Susana Borràs, 'New Transitions from Human Rights to the Environment to the Rights of Nature' (2016) 5 *Transnational Environmental Law* (n 33) 113–114, 127. ³⁵ *Ibid.*, 114.

³⁶ Guzmán (n 15) 62.

³⁷ *Ibid.*, 78–79.

³⁸ UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295, Art 8(2).

³⁹ Redvers and others (n 20) e160.

planet's remaining biodiversity, over 22 per cent of the surface of the planet,⁴⁰ a conservatorship which has been recognized in international agreements, including the Convention on Biological Diversity and the Nagoya Protocol.⁴¹

To meaningfully realize the right of self-determination and land rights in the context of climate change will require paradigm shifts in legal philosophy, some of which are already occurring. The UN Human Rights Council's recent recognition of a human right to a healthy environment is a step forward, but domestic legal approaches appear to be more ambitious, with some having shifted away from the anthropocentric right 'to' a healthy environment, to a right 'of' the environment by giving legal personhood to elements of nature.⁴² Recognition of the legal personhood of bodies of water in New Zealand,⁴³ Colombia⁴⁴ and India⁴⁵ are examples, so too the constitutional recognition of the rights of nature.⁴⁶ These developments are a manifestation of some Indigenous Peoples' view of nature as a living entity into their conceptualization within the legal systems of the state.⁴⁷ While giving legal personhood to elements of nature is in some respects a 'tremendous conceptual advance',⁴⁸ it too has been criticized as being a Western construct, which rests on the human/nature dichotomy, and seeks to individualize elements of nature. This is in contrast with some Indigenous Peoples' views, which do not see elements of nature as separate and distinct but as part and parcel of an indivisible ecosystem.⁴⁹ Moreover, to herald the legal innovation of 'rights of nature', is to

⁴⁰ V. Tauli-Corpuz, 'Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples' (2016) 7 para 14 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/241/09/PDF/N1624109.pdf?OpenElement> accessed 25 May 2022.

⁴¹ Ibid.

⁴² Redvers and others (n 20) e158.

⁴³ Viaene (n 17).

⁴⁴ Constitutional Court of Colombia, *Principio de precaución ambiental y su aplicación para proteger el derecho a la salud de las personas – Caso de comunidades étnicas que habitan la cuenca del río Atrato y manifiestan afectaciones a la salud como consecuencia de las actividades mineras ilegales* (2016) Sentencia T-622/16.

⁴⁵ Michael Safi, 'Ganges and Yamuna Rivers Granted Same Legal Rights as Human Beings' *The Guardian* (21 March 2017) <https://www.theguardian.com/world/2017/mar/21/ganges-and-yamuna-rivers-granted-same-legal-rights-as-human-beings> accessed 16 May 2022.

⁴⁶ Constitution of the Republic of Ecuador 2008, Art 10, 74–75.

⁴⁷ Safi (n 46).

⁴⁸ Guzmán (n 15) 74.

⁴⁹ Virginia Marshall, 'Removing the Veil from the "Rights of Nature": The Dichotomy between First Nations Customary Rights and Environmental Legal Personhood' (2019) 45 *Australian Feminist Law Journal* 234–235.

treat as novel approaches that have been part of some Indigenous systems of governance for millennia.⁵⁰

Although giving rights to nature is a step removed from a purely anthropocentric construction of law, it is still only the tip of a metaphorical iceberg. It cannot be construed as automatically representing all Indigenous Peoples, nor serving their diverse interests.⁵¹ The design and implementation of solutions to threats derived from climate change impacts are more effective when they are not just inclusive of but also led by the people directly affected. The right of self-determination provides a mechanism through which climate resilience can be fostered in a way that embraces Indigenous knowledge, while respecting sovereignty over both that knowledge itself and the land and resources connected to it.

4.3 The right to health

Climate change has dramatically affected the health of people living in overseas colonized territories who have endured varying degrees of subjugation at the hands of a foreign governing authority. Many of these people are Indigenous, the health of whom we know is also disproportionately impacted by climate change.⁵² In overseas colonized territories, climate change has impeded hunting, fishing, subsistence farming, and food storage making it more difficult to rely on wild or caught food for sustenance. As a result, people have sought alternative sources of food. Given the distance from mainland suppliers, food sourced from elsewhere is often highly processed and highly calorized, which has contributed to increasing rates of obesity and diabetes among some Indigenous Peoples.⁵³ Beyond physical health, existing mental health issues, rooted in a traumatic colonial past, have been compounded by climate change.⁵⁴

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Rhys Jones, 'Climate Change and Indigenous Health Promotion' (2019) 26 *Global Health Promotion* 73, 75.

⁵³ Nicola L. Hawley and Stephen T. McGarvey, 'Obesity and Diabetes in Pacific Islanders: The Current Burden and the Need for Urgent Action' (2015) 15 *Current Diabetes Reports* 29.

⁵⁴ Miriam Cullen, 'Climate Change in Greenland and the Complexity of Human Rights Protection in Practice' in Petra Butler and Jean Pierre Gauci (eds), *Small States and International Law* (Brill 2023); Margaretha Wewerinke-Singh and Melina Antoniadis, 'Climate Displacement and the Right to Mental Health' in Avidan Kent and Simon Behrman (eds), *Climate Refugees: Global, Local and Critical Approaches* (Cambridge University Press 2022), 158.

Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) defines the right to health as ‘the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’.⁵⁵ States have the obligation to realize the right to health progressively, and to address the underlying determinants of health, which include social determinants and a healthy environment.⁵⁶ General Comment No. 14 on the Right to Health recognizes that Indigenous Peoples have ‘the right to specific measures’. These include culturally appropriate health services, and the provision of resources by the state, which enable Indigenous Peoples to ‘design, deliver and control’ such services.⁵⁷ General Comment No. 14 also recognizes that ‘in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension’, and recognizes that displacing Indigenous Peoples away from their land against their will has a ‘deleterious effect on their health’.⁵⁸ Indeed, for many Indigenous Peoples, health is primarily understood as ‘holistic, collective and relational’, and as reflecting a reality in which all elements are ‘connected or related’.⁵⁹

This contrasts with the prevailing biomedical approach used in the West, in which health is typically viewed as indisputably individual, measured in terms of the signals and symptoms of each human body.⁶⁰ Although public health has a collective dimension and recognizes social determinants of health,⁶¹ it largely fails to recognize that health is also co-dependent on communities, ecosystems and planetary health, which for many cultures necessitates a relationship with, and generosity to, nature.⁶² Scholars have noted the paucity of research on the variety and complexity of factors which impact Indigenous Peoples’ health in the context of climate change.⁶³ Further research is needed on the cultural

⁵⁵ International Covenant on Economic, Social and Cultural Rights 1966, Art 12(1).

⁵⁶ UN Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) 2000 para 4.

⁵⁷ *Ibid.*, 27.

⁵⁸ *Ibid.*

⁵⁹ Danielle Johnson, Meg Parsons and Karen Fisher, ‘Engaging Indigenous Perspectives on Health, Wellbeing and Climate Change. A New Research Agenda for Holistic Climate Action in Aotearoa and Beyond’ (2021) 26 *Local Environment* 477, 478; Doris Leal Hill, ‘Sense of Belonging as Connectedness, American Indian Worldview, and Mental Health’ (2006) 20 *Archives of Psychiatric Nursing* 210.

⁶⁰ Olena Hankivsky and others, ‘The Odd Couple: Using Biomedical and Intersectional Approaches to Address Health Inequities’ (2017) 10 *Global Health Action* 73, 74.

⁶¹ Michael Marmot and Richard Wilkinson, *Social Determinants of Health* (OUP Oxford 2005).

⁶² Redvers and others (n 20) e156.

⁶³ Johnson, Parsons and Fisher (n 59) 477.

determinants of health in particular,⁶⁴ as well as the framing of ‘land as a fundamental determinant’ of human health, and the need to ‘understand the myriad connections between land and human well-being’.⁶⁵ This includes recognizing ecological elements of health,⁶⁶ including planetary health.⁶⁷ In addition, giving autonomy and leadership to Indigenous Peoples has been recognized as itself a health determinant.⁶⁸ The complexity of these factors, as well as their relationship with each other, demands better scientific understanding.

The right of self-determination can be used as a principle through which to facilitate conceptualizations of the right to health that more fully recognize and address the multiple determinants of Indigenous Peoples’ health in the context of climate change. The participation of Indigenous Peoples in that process is paramount if holistic, collective and relational perspectives on health and wellbeing are to be taken into account in health promotion and climate adaptation policies.⁶⁹

5. Conclusion

The unique and climate sensitive geomorphology of overseas colonized territories combined with the recognized vulnerabilities of Indigenous Peoples to climate impacts renders further research both necessary and important. This chapter has suggested that such research ought to grapple with the tensions that exist between the protection that human rights might offer and the colonial notions that underpin the system of law and governance within which human rights reside. To this end, there is room for closer examination of how third world approaches to international law, the food sovereignty movement, and decolonial studies, can inform the implementation of human rights

⁶⁴ Robert Nesdole and others, ‘Reconceptualizing Determinants of Health: Barriers to Improving the Health Status of First Nations Peoples’ (2014) 105 *Canadian Journal of Public Health* e209; Mason Durie, ‘An Indigenous Model of Health Promotion’ (2004) 15 *Health Promotion Journal of Australia* 181; Kathleen Wilson and Mark W. Rosenberg, ‘Exploring the Determinants of Health for First Nations Peoples in Canada: Can Existing Frameworks Accommodate Traditional Activities?’ (2002) 55 *Social Science & Medicine* 2017.

⁶⁵ Jones (n 52) 78.

⁶⁶ *Ibid.*, 77–78.

⁶⁷ Redvers and others (n 20).

⁶⁸ Durie (n 64) 183–184.

⁶⁹ Johnson, Parsons and Fisher (n 59) 477; Durie (n 64); Jones (n 52) 77, 78.

protections in places that are both uniquely vulnerable to climate change and dispossessed of the sovereignty through which to respond.

The combined impacts of colonialism and climate change in these territories also reveals the need to re-examine the relationships *between* rights and to consider how the right of self-determination as a principle can fortify the manifestation of other rights in this context. Fundamentally, the right of self-determination should underpin legal mechanisms through which to promote and restore Indigenous Peoples' agency, even without independence from a dominant state, and should be undertaken in a way that recognizes and respects local and Indigenous knowledge and knowledge-holders as part of the solution.⁷⁰ Moreover, whatever form future research takes, it must be alive to the inherent fragilities of the human rights regime,⁷¹ and consciously account for the cultural values on which the rights-based legal system is formed, by questioning its assumptions and thinking more inclusively about how rights are interpreted and realized.

⁷⁰ Igor Krupnik, Jennifer T. Rubis and Douglas Nakashima, 'Indigenous Knowledge for Climate Change Assessment and Adaptation: Epilogue' in Douglas Nakashima, Igor Krupnik and Jennifer T. Rubis (eds), *Indigenous Knowledge for Climate Change Assessment and Adaptation* (Cambridge University Press 2018); 'Understanding Human Rights and Climate Change, Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change' (n 12) 24.

⁷¹ Marie-Bénédicte Dembour, 'What Are Human Rights? Four Schools of Thought' (2010) 32 *Human Rights Quarterly* 1; Malcolm Langford, 'Rights, Development and Critical Modernity' (2015) 46 *Development and Change* 777, 800.

