Author:
Venn, Alice L

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Laying the Foundations of Climate Justice for Vulnerable States & Peoples

Developing a human rights approach for the South Pacific

Laying the Foundations of Climate Justice for Vulnerable States & Peoples: Developing a human rights approach for the South Pacific

Alice Venn

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Abstract

This thesis critically examines the protections available to climate vulnerable Small Island Developing States (SIDS) and their peoples under international law from a climate justice perspective. It explores how key principles, obligations, and mechanisms of international human rights law and state responsibility can be used to secure effective legal remedies for both SIDS governments and individuals. An interdisciplinary approach to the development of a climate justice framework to inform future law and policy making is adopted, applying and building upon the bodies of political theory and international legal scholarship. The findings of the thesis are closely informed by an empirical case study of the South Pacific region, conducted from May-July 2016 through a visiting researcher position at the University of the South Pacific School of Law in Port Vila, Vanuatu. The case study employs qualitative interviewing alongside desk-based doctrinal analysis of the relevant legal frameworks and policy documents. Twenty-eight semi-structured interviews were conducted across two national sites in Port Vila, Vanuatu and Suva, Fiji, with interviewees from UN bodies, Pacific regional organisations, national governments, civil society organisations, and legal practice.

A climate justice framework is developed, drawing upon two core tenets of distributive and procedural justice and informed inductively by the findings of the empirical case study. This grounded approach to the conceptualisation of climate justice enables the development of a framework capable of addressing the operational, legal and institutional challenges that are encountered by climate vulnerable SIDS and their peoples in practice. The research is driven by the desire, first and foremost, to construct an empowering climate justice framework capable of strengthening climate change responses at the international level for the benefit of SIDS, and, secondly, to contribute to the growing bodies of political theory and legal literature on climate change from an empirically-grounded, rights-focused perspective.

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Finally, I dedicate this thesis to my research participants and to the many incredibly inspiring advocates of climate justice leading by example in the South Pacific.

Author’s Declaration

I declare that the work in this dissertation was carried out in accordance with the requirements of the University's Regulations and Code of Practice for Research Degree Programmes and that it has not been submitted for any other academic award. Except where indicated by specific reference in the text, the work is the candidate's own work. Work done in collaboration with, or with the assistance of, others, is indicated as such. Any views expressed in the dissertation are those of the author.

SIGNED: ..... DATE:.....

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'Laying the Foundations of Climate Justice for Vulnerable States & Peoples: Developing a human rights approach for the South Pacific'

Chapter I – Introduction

I. Exploring Climate Justice for Small Island Developing States: A case study of the South Pacific

'*Climate change presents the single greatest threat to the livelihood, security and wellbeing of Pacific people'*[1]

Pacific Islands Forum (2018)

The South Pacific is one of the world's most vulnerable regions to climate change impacts. Small Island Developing States (hereinafter SIDS) and low-lying coastal regions have been found to be at heightened risk of '*death, injury, ill-health, or disrupted livelihoods*'[2] as a result of rising sea levels, storm surges and the coastal inundation associated with anthropogenic climate change [3]. For the lowest-lying SIDS in the South Pacific including Tuvalu, Marshall Islands, and Kiribati, all of which have a landmass with upwards of 90% standing at less than five metres above sea level[4], the projected increases threaten the unprecedented inundation of entire state territories rendering them uninhabitable to future generations. Climate change is projected to cause tropical cyclones to become increasingly intense[5], undermining the long-established disaster resilience of SIDS communities. The impacts of rising global temperatures upon the oceans, notably the warming and acidification of ocean waters, threaten the loss of over 99% of coral reefs if the 1.5°C threshold is exceeded[6] and the corresponding collapse of

[1] Pacific Islands Forum Secretariat, Forty-ninth Pacific Islands Forum, Forum Communiqué, (3-6 September 2018) Yaren, Nauru, at 4.
[2] Intergovernmental Panel on Climate Change, Working Group II Contribution to the Fifth Assessment Report 'Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects' (2015) available at: https://www.ipcc.ch/report/ar5/wg2/ (accessed 22/08/2019), at 13.
[3] *Ibid.* IPCCC WG II AR5, at 13.
[4] Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLLS) 'Small Island Developing States in Numbers: Updated Climate Change Edition 2017' (2017) at 21.
[5] IPCCC WG II AR5, at 52.
[6] Intergovernmental Panel on Climate Change, 'Global Warming of 1.5°C' Summary for Policymakers (October 2018) IPCC Switzerland, at 10.

marine ecosystems that many island communities depend upon for their food security and livelihoods[7].

It is estimated that SIDS are jointly responsible for less than 1% of global greenhouse gas emissions[8], yet the loss and damage they suffer as a result of climate change impacts is projected to rise, with six South Pacific SIDS facing double the global average losses in GDP[9]. Vanuatu alone is facing more than six times the annual average losses in GDP as a result of climate change impacts[10]. The increasing economic losses incurred by SIDS in responding to climate change impacts will serve to undermine their capacity to pursue the attainment of the sustainable development goals in line with the United Nations 2030 Agenda[11], to strengthen public service infrastructure, and to provide adequate institutional support to their populations in the enjoyment of fundamental rights.

The negative consequences of climate change for the enjoyment of a broad range of fundamental rights merit further exploration. Climate change is projected to disproportionately impact upon vulnerable groups in society already facing socio-economic hardship and structural barriers, notably including women and persons with disabilities[12]. Exposure to food insecurity, water insecurity, health risks, and human insecurity as a result of climate impacts is heightened for members of these groups[13]. The particular vulnerability of SIDS to climate-induced displacement both within and beyond state boundaries is well documented with SIDS estimated to be exposed to the highest levels of displacement risk relative to the size of their populations[14].

At the global level, the immediacy and significance of the threat is further evidenced by the UN Environment Programme's projections of warming of approximately 3°C by the end of the century even if all of the mitigation pledges made by States Parties to the Paris Agreement are

[7] UN-OHRLLS 2017 Report, *supra note* 4, at 14-15.
[8] UN-OHRLLS 2017 Report, *supra note* 4, at 6.
[9] *Ibid*, UN-OHRLLS 2017 Report, at 9.
[10] *Ibid*, UN-OHRLLS 2017 Report, at 9.
[11] United Nations General Assembly Resolution 'Transforming our world: the 2030 Agenda for Sustainable Development' [2015] A/RES/70/1.
[12] UN Women Fiji, 'Why is Climate Change a Gender Issue?' (2014) available at: http://asiapacific.unwomen.org/en/digital-library/publications/2015/1/why-is-climate-change-a-gender-issue (accessed 24/06/2019); and Fred Smith, Mathieu Simard, John Twigg, Maria Kett, and Ellie Cole, 'Disability and Climate Resilience: A Literature Review' (April 2017) Leonard Cheshire Disability & UKAID.
[13] *Ibid*, UN Women Fiji 2014; and Smith et al (2017), at 25.
[14] United Nations Framework Convention on Climate Change Task Force on Displacement, 'Report of the Task Force on Displacement' (17 September 2018) available at: https://unfccc.int/wim-excom/sub-groups/TFD (accessed 13/06/19), at 38.

honoured[15], well beyond both the 1.5°C and 2°C warming thresholds agreed by the States Parties[16]. Prior to the entry into force of the Paris Agreement, eight Pacific SIDS had already denounced the existing framework as being insufficient to keep warming to within the 1.5°C threshold the climate vulnerable group successfully lobbied to have included in the final text in light of the devastating impacts they will experience prior to the 2°C threshold being reached[17]. The Intergovernmental Panel on Climate Change (hereinafter IPCC) 2018 report on climate impacts between 1.5°C and 2°C has authoritatively outlined the severe consequences of exceeding the 1.5°C threshold, including a 0.1 metre rise in sea levels and a further 10 million people at risk of related impacts[18], providing further scientific support for the urgent calls for a more ambitious temperature threshold by SIDS at the UNFCCC 21st Conference of the Parties (hereinafter COP21) negotiations.

This thesis is founded upon a desire to empower climate vulnerable SIDS and their peoples in their pursuit of climate justice for years to come. As such, the analysis of the capacity of international law to provide recourse to justice is grounded in an empirical case study of the South Pacific region. The immediacy of the threats faced by climate vulnerable SIDS and the inequity evident in the disproportionate losses and damages they are continuing to suffer underpin the pragmatic human rights-based approach to climate justice adopted in the present thesis.

II. Addressing lacunae in legal protection: The need for a rights-based approach

> *'Climate change poses an immediate and far-reaching threat to people and communities around the world and has adverse implications for the full enjoyment of human rights*'[19]
>
> UN Human Rights Council (2011)

[15] United Nations Environment Programme, 'The Emissions Gap Report 2018', Executive Summary (November 2018), at 21.
[16] Paris Agreement [2015] signed 12 December 2015) entered into force 4 November 2016, C.N.92.2016.TREATIES-XXVII.7.d of 17 March 2016, Article 2(1)(a).
[17] See Reservations of Marshall islands, Federated States of Micronesia, Niue, Solomon Islands, Tuvalu and Vanuatu, United Nations Treaty Collection, Status of Treaties, Paris Agreement at 13.11.16, available online at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en (accessed 13/11/16)
[18] IPCC 1.5°C Report (2018), *supra note* 6, at 9.
[19] UN Human Rights Council Resolution 18/22 Human Rights and Climate Change (17 October 2011), UN Human Rights Council Eighteenth Session, A/HRC/RES/18/22, at 3.

The international climate change regime under the auspices of the United Nations Framework Convention on Climate Change (hereinafter UNFCCC) fails to provide adequate legal protection or procedural rights for those states most vulnerable to the adverse impacts of climate change, most notably Least Developed Countries and SIDS. The Paris Agreement adopted at COP21 in December 2015, in contrast to its predecessor, the Kyoto Protocol[20], does not provide for any legally binding greenhouse gas emissions reduction targets. Instead, the mitigation obligations contained in the Agreement take the form of voluntary pledges known as Nationally Determined Contributions (NDCs)[21] with a five-yearly global stocktake of States Parties' progress in line with the temperature goals to begin in 2023[22]. The NDCs, when examined alongside the continuing system of voluntary climate finance pledges[23], and the weak, ambiguous wording of the provisions of the Agreement generally[24], evidence a broader move towards a soft law model of climate regulation.

The NDC pledges by States Parties have already been acknowledged by UN bodies to be insufficient to keep us within the 2°C threshold of warming above pre-industrial levels[25] determined by the scientific community as necessary to avoid dangerous anthropogenic interference with the climate system, therefore significantly more ambitious action will be required prior to the commencement of the global stocktake to effectively mitigate climate change. Compliance with the existing NDC targets themselves however has yet to be demonstrated and has been cast into doubt by the formal notification by the United States of an intention to withdraw from the Paris Agreement as one of the largest greenhouse gas emitters globally[26].

In light of the immediacy of the climate impacts being suffered by SIDS, the capacity of the current regime to provide adequate judicial recourse and remedies for climate loss and damage calls for scrutiny. The provisions on loss and damage are designed to respond to the

[20] Kyoto Protocol to the United Nations Framework Convention on Climate Change [1997] United Nations Treaty Series, vol. 2303, p. 162.
[21] Paris Agreement [2015] *supra note* 16, Article 3.
[22] *Ibid*, Paris Agreement, Article 14.
[23] *Ibid*, Paris Agreement, Article 9.
[24] Lavanya Rajamani, 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations' (2016) 28 *Journal of Environmental Law* 337.
[25] See for example UNFCCC 'Updated synthesis report on the aggregate effect of INDCs' (2 May 2016) available online at: https://unfccc.int/process/the-paris-agreement/nationally-determined-contributions/synthesis-report-on-the-aggregate-effect-of-intended-nationally-determined-contributions (accessed 01/11/19) at 13; and UNEP 'Emissions Gap Report 2018' *supra note* 15.
[26] Stéphane Dujarric Spokesman for the United Nations Secretary-General, 'Note to Correspondents on the Paris Climate Agreement' (4 August 2017) available at: https://www.un.org/sg/en/content/sg/note-correspondents/2017-08-04/note-correspondents-paris-climate-agreement (accessed 13/06/19)

unavoidable losses, both economic and non-economic, that climate vulnerable states will continue to experience as a result of current and future impacts regardless of any mitigation action taken. The response of the UNFCCC to loss and damage is provided for in the Warsaw International Mechanism for Loss and Damage which is designed to play a facilitative, advisory role[27] and in the Paris Agreement which similarly recognises the need to address it on a 'cooperative and facilitative basis'[28] only. These provisions do not grant direct access to compensation, or indeed, embed any concrete legal rights or entitlements for climate vulnerable groups and individuals into the climate framework. The scope for legal recourse based upon provisions of the UNFCCC framework is similarly constrained by the limited, hybrid soft law nature of the core provisions on mitigation, climate finance, and most notably, loss and damage[29]. This soft law approach to loss and damage is echoed in the Paris Agreement provisions on human rights, which are restricted to non-binding clauses in the preamble[30] rather than integrated into the main body of the treaty, and compliance, the procedure for which is strictly 'non-punitive'[31] in nature.

The limited UNFCCC response to climate induced displacement represents a further significant lacuna in the protections afforded to SIDS populations, who are at increasing risk as a result of the deterioration of the habitability of areas in light of the impacts of flooding and drought upon settlements, food and income security[32]. Climate induced displacement is an issue the relevance of which the UNFCCC has acknowledged in previous COPs, for example including a clause calling for the development of '*measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation*'[33] within the Cancun Adaptation Framework adopted in 2010. The creation of the Task Force on Displacement at COP21 is a welcome development in formalising and providing additional institutional support for the development of concrete collective responses to climate induced displacement, however, the mandate of the Task Force has thus far been limited to information gathering, making recommendations and facilitating cooperation in support of the

[27] Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts, UNFCCC Decision 2/CP.19, (31 January 2014) FCCC/CP/2013/10/Add.1.
[28] Paris Agreement [2015] *supra note* 16, Article 8.
[29] See for example Rajamani (2016) *supra note* 24.
[30] Paris Agreement, *supra note* 16, Preamble.
[31] *Ibid*, Paris Agreement, Article 15.
[32] J. Campbell and O. Warrick, 'Climate Change and Migration Issues in the Pacific' (2014) United Nations Economic and Social Commission for Asia and the Pacific, Fiji, at 2-3.
[33] United Nations Framework Convention on Climate Change, Decision 1/CP.16, 'The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention' [2010] FCCC/CP/2010/7/Add.1, at 5.

Warsaw Mechanism Executive Committee[34]. The 2018 Report of the Task Force has expressly recognised that displacement represents a 'human rights challenge'[35], that non-economic losses are of significance in responding to displacement[36], and that support in this area should focus on those states most vulnerable to climate impacts including SIDS[37]. The discussions and consultations surrounding climate induced displacement that have taken place since the establishment of the Task Force, although indicative of an increasing focus upon the need to provide support for further measures[38], have yet to yield any concrete legal solutions or enforceable rights for climate vulnerable people.

The UNFCCC and Paris Agreement provide for an important institutional structure to facilitate continued international cooperation through the climate negotiations, and significant benchmarks for government action, including the 1.5°C temperature threshold which the IPCC has underlined has great significance for the survival of marine ecosystems and projected sea level rise[39], both of which have highly significant impacts upon SIDS. Furthermore, the soft law approach adopted has successfully garnered ratifications from 187 parties[40] comprised of both developed and developing states that have all committed to increasingly ambitious mitigation action in a paradigm shift away from the previous strict adherence to the binary divide dictated by the common but differentiated responsibility model under the Kyoto Protocol[41]. The common but differentiated responsibility principle embedded in Article 3 of the UNFCCC, recognises the responsibility of developed states for the historic build-up of greenhouse gases in the atmosphere as requiring them to take the lead in mitigation action[42] and had been applied so as to create binding mitigation obligations only for developed Annex I states under the Kyoto Protocol[43].

This approach however failed to prevent global emissions levels from rising beyond the first commitment period as those States Parties participating in mitigation action in accordance with

[34] See UNFCCC Report of the Task Force on Displacement (2018) *supra note* 14; and Terms of Reference of the Task Force on Displacement, adopted at Excom 4 (September 2016) available at: https://unfccc.int/wim-excom/sub-groups/TFD (accessed 13/06/19)
[35] *Ibid*, Report of the Task Force on Displacement (2018), at 5.
[36] *Ibid*, Report of the Task Force on Displacement (2018), at 5.
[37] *Ibid*, Report of the Task Force on Displacement (2018), at 4.
[38] United Nations High Commissioner for Refugees (UNHCR) 'COP23 Key Messages' (2017) available at: https://www.unhcr.org/59fc4e065.pdf (accessed 22/08/19).
[39] IPCC 1.5°C Report (2018), *supra note* 6.
[40] UN Treaty Series, Status of Treaties, Chapter XXVII Environment, 7.d Paris Agreement, status at 14/10/2019.
[41] Kyoto Protocol [1997] *supra note* 20.
[42] United Nations Framework Convention on Climate Change [1992] 1771 UNTS 107, Article 3.
[43] *Ibid*. Kyoto Protocol [1997].

their targets did not meet the shortfall left by the United States failure to ratify[44] or the lack of participation from other large GHG emitters such as China. The absence of adequate enforcement mechanisms however, explored in greater detail in Chapter III, combined with the lack of integration of human rights or access to justice in the Paris Agreement and UNFCCC frameworks generally, in reality leave climate vulnerable states with insufficient recourse to justiciable rights or remedies, necessitating a reliance upon existing human rights obligations and state responsibility frameworks in international law.

Similarly, climate change claims in international environmental law relying upon the no harm principle, precautionary principle, or the common but differentiated responsibility principle as constituting broad customary obligations incumbent upon states to prevent climate change induced harm present significant challenges in terms of their enforceability. The legal status and scope of application of these principles in international law remains uncertain[45] which represents a significant factor restricting the enforcement potential of these avenues. International environmental law does not itself provide for a general theory of collective liability and, in light of the lacunae within the specialised UNFCCC regime, it is necessary to look to other fields of international law to urgently bridge the gaps for climate vulnerable SIDS. Climate change, in light of the range of actors to whom responsibility could be attributed and the correspondingly complex chains of causation, requires a more flexible legal approach than that provided for by environmental law alone. By combining the rules of state responsibility, international human rights obligations and expanded conceptions of legal doctrines such as extraterritoriality and precaution, this thesis develops a broader, more flexible approach to climate responsibility that is more capable of responding to the human challenges faced in practice.

Finally, a clear lacuna exists with respect to the legal protection available to climate displaced persons, with the populations of low-lying SIDS at particularly high risk, as outlined above. At the international level, the bedrock Convention Relating to the Status of Refugees[46] dating back to the 1950s does not recognise climate change or, indeed, any environmental causes of displacement as falling within the definition of refugee status, thereby failing to trigger any of

[44] Jonathan Pickering, Jeffrey S. McGee, Tim Stephens and Sylvia I. Karlsson-Vinkhuyzen, 'The impact of the US retreat from the Paris Agreement: Kyoto revisited?' (2018) *Climate Policy*, 18:7 818-827.
[45] See for example Ole Pedersen, 'From Abundance to Indeterminacy: The Precautionary Principle and its Two Camps of Custom' (2014) *Transnational Environmental Law* 3(32): 323-339; and Roda Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (Martinus Nijhoff Publishers, 2005), at 160.
[46] Convention Relating to the Status of Refugees [1951] United Nations Treaty Series, vol. 189, p. 137.

the contingent rights or duties. In order to be recognised as falling within the internationally accepted definition of 'refugee', individuals need to show that they are outside of their country of nationality and as a result of a '*well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion*'[47] are either unable or unwilling to return to that country.

The narrow framing of this definition calling for a fear of persecution on specified grounds is unsuited to addressing climate induced displacement, an individual or group's vulnerability to which is determined by both the sensitivity of the region to changes in climate, and the capacity of the relevant systems to adapt[48]. Moreover, the Convention definition would likely be incapable of being broadened by judicial interpretation before the courts in line with the ordinary rules of treaty interpretation under the Vienna Convention which dictate a reading in line with the '*ordinary meaning to be given to the terms of the treaty in their context*'[49] and one commensurate with the envisaged purpose and intentions of the States Parties. The specific language of the definition detailing the categories of protected persons is highly unlikely to be interpreted as having been intended to include climate displaced persons. In the absence of the collective political will to amend and extend the definition of refugee to encompass the direct and indirect impacts of anthropogenic climate change, the legal protection available to those displaced beyond state boundaries, including the populations of low-lying SIDS at risk of complete inundation from rising sea levels, remains scant.

The UN Guiding Principles on Internal Displacement[50] were developed with the aim of responding to the lacuna in protections available to internally displaced persons who do not qualify for those afforded by international refugee law. The Guiding Principles are more broadly framed than the provisions of the Refugee Convention, expressly including '*natural or human-made disasters*'[51] as one of the potential causes of displacement within the definition of internally displaced persons. The inclusion of disasters is significant for responding to climate-induced displacement as the increasing exposure of populations to extreme weather

[47] *Ibid.* Convention Relating to the Status of Refugees, Article 1.
[48] Intergovernmental Panel on Climate Change, 'The Regional Impacts of Climate Change: An Assessment of Vulnerability' Summary for Policymakers [1997] available online at: https://www.ipcc.ch/report/the-regional-impacts-of-climate-change-an-assessment-of-vulnerability/ (accessed 23/08/2019).
[49] Vienna Convention on the Law of Treaties [1969] 1155 UNTS 331, Article 31(1).
[50] United Nations Guiding Principles on Internal Displacement (Second Edition) (2004) available online at: https://www.unhcr.org/uk/protection/idps/43ce1cff2/guiding-principles-internal-displacement.html (accessed 30/10/19).
[51] United Nations Economic and Social Council, Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission Resolution 1997/39, Addendum 'Guiding Principles on Internal Displacement' (11 February 1998) E/CN.4/1998/53/Add.2, at 5.

events such as more intense tropical cyclones is predicted to lead to a corresponding increase in internal and external relocation decisions in the Pacific region[52]. The limited scope of the disaster clause itself has been the subject of critique for failing to provide a method to be applied for the multiplicity of climate impacts other than disasters[53]. The scope of the Guiding Principles thereby limits their enforceability in the context of climate change. The Guiding Principles are, by nature, non-binding soft law and despite some commentators pointing to a gradual 'hardening' at the regional level through the adoption of additional implementing instruments[54], at the international level it has been incumbent upon the UN human rights treaty bodies to give greater legal effect to the principles by reading them into existing treaty obligations[55].

Docherty and Giannini have proposed a new specialised convention for climate refugees be drafted to respond to the growing transboundary movements as a result of climate change impacts that would include shared state duties to guarantee minimum human rights protections and humanitarian aid to affected communities[56]. Alternatively, a new protocol under the auspices of the UN Framework Convention on Climate Change has been proposed by Biermann and Boas [57] which would be focused upon providing for the recognition, protection and resettlement of climate change refugees and include the establishment of a new executive committee responsible for its operationalisation[58]. The Task Force on Displacement under the auspices of the Warsaw Mechanism on Loss & Damage however does not establish such a protocol or provide for legally binding rights and obligations.

These proposals merit consideration by policy makers as long-term solutions, however suitable amendments to the 1951 Convention, the drafting of new conventions, and the integration of binding human rights protections into the UNFCCC currently remain absent from the international agenda. The expansion of the Convention definition of refugee at the international level has been rejected as one of the '*least feasible*'[59] solutions to bridge the lacunae and this,

[52] Campbell and Warrick, (2014) *supra note* 32, at 10.
[53] Alice Thomas, 'Human rights and climate displacement and migration' in S. Duyck, S. Jodoin and A. Johl (Eds.) *Routledge Handbook of Human Rights and Climate Governance* (Abingdon, Routledge 2018) at 117.
[54] *Ibid.* Thomas in Duyck, Jodoin and Johl (2018) at 117.
[55] David James Cantor, 'The IDP in International Law'? Developments, Debates, Prospects' (2018) *International Journal of Refugee Law*, 30, 2: 191–217.
[56] B Docherty and T Giannini, 'Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees' (2009) 33 Harvard Environmental Law Review 349, at 350.
[57] F Biermann and I Boas, 'Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees' (2010) *Global Environmental Politics* 10:1.
[58] *Ibid*, Biermann and Boas, at 77.
[59] Sumudu Atapattu, *Human Rights Approaches to Climate Change: Challenges and Opportunities* (Routledge London, 2016) at 173.

in turn, has led some scholars to advocate for a stronger human rights-based approach to provide enhanced protection to climate displaced persons[60]. As such, this thesis argues that we must, as a matter of urgency, seek to strengthen existing human rights protections in both at-risk states and potential receiving states in climate vulnerable regions.

International human rights law offers the greatest benefits in terms of both legal enforceability and providing for the realisation of a climate justice framework. The nine core treaties each currently have a specialised body already responsible for facilitating and monitoring compliance with the rights of many of the groups most vulnerable to climate impacts including women, persons with disabilities, and children recognised as such in the Paris Agreement preamble[61]. Although human rights institutions and obligations encounter their own operational and legal challenges which are addressed at length in Chapter IV, they nevertheless have a more established status in international law generally and offer a broader range of enforcement options. Some commentators have for example argued that certain core rights have in fact attained the highest status of *jus cogens* norms[62] of international law with corresponding state duties flowing from this.

Human rights obligations are multi-faceted, comprising both negative and positive obligations, and offer a wider range of enforcement avenues to climate vulnerable states and peoples, ranging from individual complaints procedures before UN Human Rights Treaty Bodies to collective state responsibility claims and advisory opinions of the International Court of Justice (hereinafter ICJ). The limitations of these alternative avenues, along with the numerous unique benefits offered by a human rights-based approach to climate justice are explored in detail in Chapter III. It is also important to acknowledge that international human rights law itself faces a number of both legal and operational limitations which this thesis shall address in Chapter IV and, informed by the grounded findings of the empirical case study, provide a number of detailed recommendations to address these challenges will be presented in Chapter VII with the aim of promoting more just responses to climate change for SIDS.

[60] See *ibid*. Atapattu (2016); and Thomas (2018) *supra note* 53.
[61] Paris Agreement, *supra note* 16, Preamble.
[62] See for example Margreet Wewerinke [sic] and Curtis F. J. Doebbler, 'Exploring the Legal Basis of a Human Rights Approach to Climate Change' (2011) *Chinese Journal of International Law* 10: 141-160, at 149.

III. Contribution to climate justice literature & policy

The present thesis adopts a unique approach to the development of a climate justice framework informed both deductively by the bodies of climate justice literature in law and political theory, and inductively by an empirical case study and twenty-eight qualitative interviews with key stakeholders in the South Pacific. This section will begin by outlining the need for an interdisciplinary approach to the subject matter before examining the relevant bodies of existing literature within climate law and climate justice theory in order to demonstrate the original contributions this thesis offers to the development of academic scholarship. The theory of climate justice and the methodological approach adopted is outlined in detail in Chapter II, while the scope of the empirical case study, including the methods employed, is explored in greater detail Chapter V. The core areas of focus in the conceptualisation of climate justice and the development of the analytical framework are deductively informed by the literature, however the empirical data gathered over the course of the case study plays an important role in inductively informing the construction of the climate justice framework and recommended future steps in law and policy making to operationalise it. The empirical case study methods and findings follow the doctrinal analysis and are set out in Chapters V and VI.

The interdisciplinary approach adopted is called for in light of the inherent breadth and complexity of global climate change as a transboundary environmental challenge which requires a multisectoral, multiscalar, interdisciplinary, and truly collaborative response to effectively tackle climate change. No single discipline, or indeed, law or policy response, is capable of effectively delivering a solution to the growing climate crisis, particularly in light of the socio-economic ramifications associated with the business as usual versus the global net zero emissions pathways outlined by the IPCC[63]. The core focus upon the disciplines of law and political theory adopted here is not reflective of a prioritisation or indeed, an attempt to exclude other relevant disciplines from the global climate response, but rather a reflection of the need to respond to two specific research questions outlined in detail in Part IV below examining how a climate justice framework can be developed to inform law and policy making and how international human rights law can provide recourse to justice for the benefit of climate vulnerable SIDS and their peoples. While the present thesis is primarily framed by the disciplines of law and political theory, literature incorporating further disciplinary perspectives

[63] IPCC 'Global Warming of 1.5°C' Summary for Policymakers (2018) *supra note* 6.

will be drawn upon as appropriate to inform the arguments being developed, notably including relevant work from climate science[64] and human geography[65] which enable the attribution of responsibility along with the identification of key climate impacts and vulnerabilities, for example to sea-level rise, extreme weather events, food and water insecurity, and displacement.

The relevant literature in the fields of law and political theory can largely be split into two camps. The first camp examines the ways in which law can be used to address global climate change including the potential legal avenues for climate change claims before the courts. The second camp applies climate justice theory to examine the allocation of rights and responsibilities between states and individuals in climate policy responses. The literature specialised in examining the unique position of SIDS in climate change responses similarly merits consideration here. The existing literature exploring climate liability and the potential avenues for climate litigation is a relatively young and fast-developing field, with much of the literature produced so far predominantly relying either upon the obligations embedded within the UNFCCC and the Paris Agreement or upon the no-harm principle in international environmental law[66]. The potential of the rules of state responsibility and human rights obligations in providing recourse to justice are however beginning to garner more detailed attention[67].

At the domestic level, public law, property law, and tort law have been explored as the core basis for potential claims against both public authorities and private companies with large greenhouse gas outputs[68]. Illustrative examples can be found in the analysis of claims against

[64] See for example: Jeremy I. Gilbert, *Climate Change in Southeast Asia and the Pacific Islands* (Nova Science Publishers, 2011); Stephen Henry Schneider, Armin Rosencranz, Michael D Mastrandrea, Kristin Kuntz-Duriseti, *Climate Change Science and Policy* (Island Press, 2010); Katherine Richardson, *Climate change : global risks, challenges and decisions* (Cambridge University Press, 2011); Martin J Bush, *Climate Change Adaptation in Small Island Developing States* (John Wiley and Sons, 2017); and Richard Heede, 'Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854-2010' (2014) *Climatic Change*, Vol.122: 229-241.

[65] See for example: Neil Adger and Mick Kelly, 'Social Vulnerability to Climate Change and the Architecture of Entitlements' (1999) *Mitigation and Adaptation Strategies for Global Change* 4, 3-4: 253–266; Lisa Reyes Mason and Jonathan Rigg, *People and Climate Change: Vulnerability, Adaptation and Social Justice* (Oxford Scholarship Online, 2019); and Jon Barnett and Saffron O'Neill, 'Maladaptation' (2010) *Global Environmental Change*, 20 (2): 211-213.

[66] See for example Jacob David Werksman, 'Could a Small Island Successfully Sue a Big Emitter? Pursuing a Legal Theory and a Venue for Climate Justice' in Michael B. Gerrard and Gregory E. Wannier (Eds.), Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate (Cambridge University Press 2013), 409-431, and Jacqueline Peel, 'Unpacking the elements of a state responsibility claim for transboundary pollution' in S. Jayakumar, Tommy Koh, Robert Beckman and Hao Duy Phan (Eds.) *Transboundary Pollution: Evolving Issues of International Law and Policy* (Edward Elgar 2015), 51-78.

[67] See for example: Margaretha Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights Under International Law* (Hart, 2019); and Atapattu (2016) *supra note* 59.

[68] See for example: Richard Lord, Silke Goldberg, Lavanya Rajamani and Jutta Brunnée (Eds.) *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press 2012); Michael Faure and Marjan

national governments on the basis of the doctrine of public trust by Wood[69], the potential of judicial review proceedings in English law explored by Goldberg and Lord[70], and the scope of tort claims against high emitting private corporations explored by Grossman[71]. At the international level, the links between human rights obligations and the rules of state responsibility as a basis of climate recourse have been explored in detail by Wewerinke-Singh[72], while Strauss has explored the process and potential of referring climate change claims to the ICJ specifically, relying on obligations of international environmental law[73]. Similarly, in the field of human rights law, climate litigation generally has been explored for example by Vollmer[74] and by a number of others in the context of selected regional or domestic case studies in which rights have been invoked with varying degrees of success[75]. In general, the legal literature exploring human rights and climate change however has focused upon the challenges of using human rights-based approaches[76] and posited human rights as policy guidelines rather than the basis of legal claims at the international level[77].

A more comprehensive analysis of human rights-based approaches to climate change has been conducted by Atapattu[78] examining, inter alia, the interaction of rights with environmental

Peters (Eds.), *Climate Change Liability* (2011) Edward Elgar; David A Grossman, 'Tort-Based Climate Litigation' in William C.G. Burns and Hari M. Osofsky (Eds.) Adjudicating Climate Change: State, National and International Approaches (Cambridge: Cambridge University Press, 2009) 193 – 229; and Kim Bouwer, 'The Unsexy Future of Climate Change Litigation' (2018) *Journal of Environmental Law* 30: 3, 483-506.

[69] Mary Christina Wood, 'Atmospheric Trust Litigation' in Burns and Osofsky (2009) *supra note* 67, 99-125.

[70] Silke Goldberg and Richard Lord QC, 'England' in Lord, Goldberg, Rajamani and Brunnée (2012) *supra note* 67, 449-456.

[71] Grossman in Burns and Osofsky (2009) *supra note* 68.

[72] Wewerinke-Singh (2019) *supra note* 67.

[73] See for example Andrew Strauss 'Climate Change Litigation: Opening the Door to the International Court of Justice' in William C.G. Burns and Hari M. Osofsky (Eds.) Adjudicating Climate Change: State, National and International Approaches (Cambridge: Cambridge University Press, 2009) 334 – 356.

[74] Abby Rubinson Vollmer, 'Mobilizing human rights to combat climate change through litigation' in Sebastien Duyck, Sebastien Jodoin, and Alyssa Johl (Eds.) Routledge Handbook of Human Rights and Climate Governance (Abingdon: Routledge, 2018) 359 – 371.

[75] See for example Hari M. Osofsky 'The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples' Rights' in William C.G. Burns and Hari M. Osofsky (Eds.) Adjudicating Climate Change: State, National and International Approaches (Cambridge: Cambridge University Press, 2009) 271 – 291; Petra Minerop, 'Integrating the 'duty of care' under the European Convention on Human Rights and the science and law of climate change: the decision of The Hague Court of Appeal in the Urgenda case' (2019) *Journal of Energy & Natural Resources Law*, 37, 2: 149-179; and Analisa Savaresi and Juan Auz, 'Climate Change Litigation and Human Rights: Pushing the Boundaries' (2019) *Climate Law* 9: 3.

[76] See for example Stephen Humphreys, 'Climate change and international human rights law' in Rosemary Rayfuse and Shirley V. Scott, *International Law in the Era of Climate Change* (Edward Elgar Publishing, 2012), 29 – 57.

[77] See for example Siobhan McInerney-Lankford, 'Human Rights and Climate Change: Reflections on International Legal Issues and Potential Policy Relevance' in Michael B. Gerrard and Gregory E. Wannier (eds.), Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate (Cambridge University Press 2013) 195 – 241.

[78] Atapattu (2016), *supra note* 59.

principles, justice and the climate regime, along with the rights of particularly climate vulnerable groups including displaced persons, women, and indigenous peoples. Atapattu further addresses human security and the adjudication of climate change using rights-based approaches[79]. Atapattu's book however is designed to provide a general and broad-based overview of the relevance of human rights law to addressing climate change, utilising a number of different thematic examples, rather than to delve deeper into an empirical analysis of the challenges associated with accessing and implementing human rights based approaches in a specific context, which is the aim of this thesis.

Similarly, Atapattu's examination of rights-based adjudication is very broad-based and includes brief sections on a loss and damage mechanism under the UNFCCC, examples of regional and domestic litigation, and a brief consideration of claims before the ICJ at the international level[80]. The present thesis is more specifically focused upon SIDS, facilitating recourse to international human rights mechanisms as a response to the economic and non-economic loss and damage being suffered, and the construction of a climate justice framework which takes into account the priorities and challenges emerging from the empirical case study in the South Pacific.

This thesis examines the scope, benefits and challenges of rights-based approaches to climate change and the ICJ as one of the potential avenues for legal recourse, however it ventures beyond the existing literature, using a climate justice framework to compare and contrast the rights-based avenues for legal recourse at the international level beyond the UNFCCC. The analysis also extends beyond the ICJ to include an appraisal of the potential of seeking recourse through UN Human Rights Treaty Body procedures, and through the Permanent Court of Arbitration. The doctrinal analysis of recourse to climate justice in international law is uniquely grounded by an empirical case study conducted over the course of three months in two climate vulnerable South Pacific SIDS. The empirical work, comprising an examination of the law and policy landscapes at the regional and domestic levels, is informed by a series of qualitative interviews with key stakeholders from government, legal practice, civil society, regional and UN bodies in the fields of climate policy, human rights and justice. The findings of the case study in turn, are combined with the findings of the doctrinal analysis of international law to

[79] *Ibid.* Atapattu (2016).
[80] *Ibid.* Atapattu (2016).

form the basis of an empirically grounded set of recommendations for future steps to secure access to rights-based climate justice, not only in law, but in policy and practice.

The legal and empirical analysis is complemented by political theory. The existing political theory literature predominantly focuses upon the question of how rights and responsibilities should be allocated at the global level to inform a just response to anthropogenic climate change. To this end, a growing body of climate justice literature has emerged critically examining the historic and current responsibility of large emitters for the build-up of greenhouse gases in the atmosphere and the disproportionate burdens being borne by climate vulnerable states who have contributed comparatively very little to that build-up. The majority of the climate justice literate employs a distributive justice lens to argue for a polluter pays or ability to pay approach to redressing these global inequities that would see those states holding greatest responsibility for causing climate impacts and with the greatest ability to pay for the loss and damage caused take the lead in the response[81]. Some authors have further explored the extent to which individual or collective moral responsibility for climate change can be considered fair[82], the responsibilities and duties owed to future generations[83], and to a lesser extent, procedural fairness within the international climate change regime[84]. The relationship between rights and climate justice is also increasingly in focus in the political theory literature, with many authors outlining the need for a rights-based approach to guarantee an equitable response generally[85] or for the creation of new rights capable of more concretely framing an equitable division of the burdens and benefits of climate change[86]. This thesis applies the climate justice literature linking rights and equity at the global level to frame a doctrinal analysis of the relevant law and policy frameworks, along with a qualitative empirical analysis of the views of key stakeholders. The analysis of the data in turn feeds into the conceptualisation of the climate justice framework proposed to guide the development of a

[81] See for example Ruchi Anand, 'International Environmental Justice: A North-South Dimension (Ashgate, 2004); Simon Caney, 'Cosmopolitan justice, responsibility and global climate change' in Stephen M. Gardiner, Simon Caney, Dale Jamieson, and Henry Shue, (Eds.) *Climate Ethics: Essential Readings*, (Oxford University Press 2010) 122-145.; Alix Dietzel, *Global Justice and Climate Governance: Bridging Theory and Practice* (Edinburgh: Edinburgh University Press 2019); and Henry Shue, Climate Justice: Vulnerability and Protection, (Oxford University Press 2014).
[82] Steve Vanderheiden, *Atmospheric Justice: A political Theory of climate change* (Oxford: Oxford University Press, 2008)
[83] See Catriona McKinnon, *Climate Change and Future Justice: Precaution, compensation and triage* (Abingdon: Routledge, 2012).
[84] See Vanderheiden (2008) *supra note* 82.
[85] See for example Shue (2010); Dietzel (2019) *supra note* 81; and D. Bell 'Does anthropogenic climate change violate human rights?' (2011) *Critical Review of International Social and Political Philosophy*, 14: 2, 99-124.
[86] See for example Tim Hayward, 'Human Rights Versus Emissions Rights: Climate justice and the equitable distribution of ecological space' (2007) Ethics and International Affairs, Vol. 21 (4), 431–450.

more just approach to law and policy making in the future, one that, crucially, is grounded in the practical challenges faced by SIDS in practice.

Turning to the existing literature examining SIDS, the focus has been on law and policy questions surrounding their role in climate policy making processes, along with the potential responses in international law and policy more broadly to the anticipated territorial, economic and non-economic losses associated with climate impacts. Barnett and Campbell for example have focused on the unique policy-making position of SIDS and the barriers restricting effective climate adaptation[87]. Authors in the field have already explored the important questions surrounding the impacts that a loss of sovereign territory in low-lying SIDS at greatest risk of inundation from rising sea levels will have upon their statehood and the ways in which international legal doctrines of statehood may be adapted to respond to these challenges[88]. Similarly, the UN Convention on the Law of the Sea (hereinafter UNCLOS) as a basis of climate-related claims by SIDS has been explored with respect to the adverse effects of climate change upon shifting marine territorial boundaries and fisheries[89]. Finally, with respect to the increasing levels of climate loss and damage being experienced by SIDS, authors have previously explored the need for an effective international mechanism capable of meeting present and future needs and the form this should take, for example, through a compensation fund[90] or insurance mechanism. The latter arguments in favour of the provision of compensation to climate vulnerable SIDS for loss and damage are convincing and form the basis of the analysis of the capacity of the international human rights-based legal avenues to provide remedies for climate loss and damage in Chapter VII.

The body of social science literature examining climate adaptation responses for SIDS also merits consideration here. Barnett and O'Neill have examined the links between adaptation strategies and vulnerability, revealing the risks frequently associated with the implementation

[87] Jon Barnett John Campbell, *Climate Change and Small Island States: Power, Knowledge and the South Pacific* (Earthscan Routledge, 2010).
[88] See for example Maxine A. Burkett, 'The Nation Ex-Situ' in Michael B. Gerrard and Gregory E. Wannier (eds.), Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate (Cambridge University Press 2013) 89 – 121; and Emily Crawford and Rosemary Rayfuse, 'Climate change and statehood' in Rosemary Rayfuse and Shirley V. Scott, International Law in the Era of Climate Change (Cheltenham: Edward Elgar Publishing, 2012), 243 – 253.
[89] See for example Rosemary Rayfuse, 'Climate change and the law of the sea' in Rosemary Rayfuse and Shirley V. Scott, International Law in the Era of Climate Change (Cheltenham: Edward Elgar Publishing, 2012), 147 – 174.
[90] Sam Adelman, 'Climate justice, loss and damage and compensation for small island developing states' (2016) *Journal of Human Rights and the Environment*, 7,1: 32-53.

of adaptation responses. They argue, drawing on the work of Burton[91] and others, that certain adaptation strategies may have the effect of exacerbating rather than reducing vulnerabilities, increasing greenhouse gas emissions, increasing costs or of limiting the choices available to future generations, resulting in so-called 'maladaptation'[92]. This view is further supported by the work of Adger, Arnell and Tompkins who argue that adaptations can generate costs as well as benefits, and can even act as contributory causes of climate change, giving the example of increasing demands for energy-intensive air conditioning in transport and housing as a response to rising temperatures[93].

In the case of climate vulnerable SIDS, these maladaptations include adaptive responses centred upon the large-scale resettlement of low-lying island populations at risk from rising sea-levels[94]. Barnett and McMichael have further applied this lens to examine adaptive responses to climate-induced displacement in the South Pacific, including in Fiji, to conclude that forced migration should be avoided in light of the '*inseparable bond between Pacific peoples and their lands and seas—from which they derive not just their livelihoods but also their identity*'[95] and attention should instead turn to the development of policies that facilitate mobility on a voluntary basis. The adaptation literature underpins the need for an interdisciplinary approach to the development of a climate justice framework to inform future law and policy making. The focus of the present thesis is more specifically on the development of a rights-based approach to climate justice and the facilitation of legal recourse for climate loss and damage experienced by SIDS and their peoples. A rights-based approach offers important benefits, not only in responding to climate loss and damage, but also in the avoidance of maladaptation by placing the rights of individuals, including socio-economic and cultural rights, at the centre of law and policy responses.

In respect of the legal literature focusing on the South Pacific region, there have been analyses of the interplay between environmental law and human rights, including the development of environmental rights and procedural aspects such as the potential usefulness of an Aarhus

[91] I. Burton, 'Vulnerability and adaptive response in the context of climate and climate change' (1997) *Climatic Change*, 36: 185-196.
[92] Jon Barnett and Saffron O'Neill, 'Maladaptation' (2010) *Global Environmental Change*, 20 (2): 211-213.
[93] W.Neil Adger, Nigel W.Arnell and Emma L.Tompkins, 'Successful adaptation to climate change across scales' (2005) *Global Environmental Change*, 15(2): 77-86.
[94] Jon Barnett and Saffron O'Neill, 'Islands, resettlement and Adaptation' (2012) *Nature Climate Change*, 2: 8-10.
[95] Jon Barnett and Celia McMichael, 'The effects of climate change on the geography and timing of human mobility' (2018) *Population and Environment*, 39: 339-356.

Convention for the Asia-Pacific[96]. Farran has also produced a comprehensive analysis of the regional approach to human rights and the relevant challenges associated with engagement with international human rights faced by governments[97] which will inform the regional case study presented in Chapters V and VI, particularly from an access to justice perspective. The application of human rights to climate change has however been limited, the potential of human rights obligations to specifically provide recourse in the aftermath of climate-related disasters including Cyclone Pam in Vanuatu and Cyclone Ian in Tonga[98] has been explored in a special issue of the Journal of South Pacific Law. Both analyses however rely primarily upon existing UNFCCC obligations and although relevant human rights obligations were referred to, they were once again principally viewed as guiding principles, reinforcing existing obligations within the climate change regime and framing the adoption of the Paris Agreement.

Aonima and Kumar for example expressly reject the idea that their analysis should '*explicitly examine whether or not human-induced climate change is a violation of human rights from an international law perspective*'[99] and focus instead on how principles can be invoked to support existing UNFCCC obligations. The reliance upon the UNFCCC as the core legal basis of climate change claims however overlooks the fact that liability and compensation were expressly excluded in the Paris Agreement negotiations, thus it is very unlikely to be interpreted as giving rise to claims on the basis of the ordinary rules of treaty interpretation[100]. Atapattu has explored the position of Tuvalu in the South Pacific, alongside the Maldives in the Indian Ocean, as illustrative examples of SIDS particularly vulnerable to the severest impacts of rising sea-levels, including a potential loss of statehood, that have also taken a very active role in lobbying for climate action at the international level[101]. These analyses however have not appraised the potential of international human rights claims before UN human rights bodies, international courts and tribunals, or analysed the suitability and accessibility of international human rights mechanisms as a response to climate loss and damage in South Pacific SIDS.

[96] Ben Boer (ed.), *Environmental Law Dimensions of Human Rights* (Oxford University Press 2015).
[97] Sue Farran, *Human Rights in the South Pacific: Challenges and changes* (Routledge Cavendish 2009)
[98] Fitilagi Fa'anunu, 'A Breach of Fundmaental Human 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' [2015] Journal of South Pacific Law, Vol. 2015, 1. and Calvy Aonima and Shivanal Kumar, 'Could Vanuatu Claim Reparations under International Law for Damages Sustained from Cyclone Pam?' [2015] Journal of South Pacific Law, Volume 2015, 1.
[99] *Ibid*, Aonima and Kumar (2015), at A-27.
[100] Vienna Convention on the Law of Treaties [1969], *supra note* 49.
[101] Atapattu (2016), *supra note* 59, at 227-241.

This thesis will make an original contribution to knowledge by utilising the climate justice literature in the field of political theory to inform the construction of a pluralistic climate justice framework for the law and policy analysis conducted using both doctrinal and qualitative empirical methods. This framework will be linked to human rights and will inform the legal analysis with the aim of identifying the rights-based claims avenues with the greatest potential to fulfil the core requirements of a climate just approach. The interdisciplinary nature of the analysis is unique, invoking a climate justice lens informed deductively by theory and inductively by the empirical data gathered over the course of a case study in order to identify the legal avenues with the greatest potential to fulfil the needs of SIDS and the policy steps required to render them both accessible and enforceable. This thesis will therefore contribute to the advancement of a more grounded approach to the conceptualisation of climate justice in relation to human rights in the literature on the one hand, and to the development of a clear framework to guide more just climate law and policy making into the future on the other.

IV. Research questions, aims and outline

This thesis will address two key research questions, namely:

1) What are the defining features of a climate just approach to law and policy making for South Pacific SIDS?

2) How can international human rights law provide greater recourse to justice to climate vulnerable SIDS and their peoples?

In line with the overarching aim of developing a more grounded climate justice framework informed by human rights to shape the development of future law and policy making, Chapter II shall begin by setting out the theoretical underpinnings of climate justice tracing the literature back to its origins in distributive and procedural notions of justice. Corrective justice will not form one of the core pillars of the climate justice framework, owing to its principal focus on individual liability at the domestic level, however it does inform aspects of the distributive justice approach including for example the importance of remedying climate loss and damage. The methodological approach and the relationship between climate justice and human vulnerability to climate change impacts will be further elaborated, highlighting the suitability of a pluralistic approach to justice in addressing climate change.

In order to illuminate the ways in which international human rights law is capable of providing recourse to justice to SIDS and their peoples, the thesis will examine in detail the benefits and legal challenges associated with utilising a human rights-based approach to climate change claims in Chapters III and IV. Chapter III will include an analysis of the relationship between climate justice and human rights, along with the status of human rights norms in the international legal order. The links between international human rights obligations and the rules of state responsibility will subsequently be explored, examining issues including the attribution of responsibility and the recognition of a plurality of both respondent and victim states. Finally, an appraisal of the key enforcement avenues before UN treaty bodies, international courts and tribunals is provided to enable the identification of the enforcement avenue with the greatest potential to respond to the climate justice challenges faced by SIDS and their peoples, including notably, climate loss and damage.

Chapter IV will then address the legal challenges and critiques of a human rights-based approach to climate change, focusing in particular upon the arguments surrounding the exclusivity of climate law, the attribution of responsibility to states, the extraterritorial application of human rights obligations, and the operational challenges facing the international human rights regime itself. By addressing the core benefits and challenges of applying international human rights law to the challenge of global climate change, the international mechanisms most capable of providing recourse to SIDS and their peoples shall be identified.

In order to develop a climate justice framework for law and policy makers that is reflective of the barriers to justice encountered by SIDS and to shed light upon the best strategies to address them at the international level, an empirical case study incorporating the findings of three months of fieldwork in Vanuatu and Fiji conducted from May – July 2016 has been conducted. The South Pacific case study is set out in Chapters V and VI examining climate justice at the regional and national levels, drawing upon the empirical and doctrinal evidence gathered during a visiting research position with the University of the South Pacific School of Law and through a series of qualitative interviews with key stakeholders from government, civil society, regional organisations, UN bodies, and the legal profession around the themes of climate change, human rights, and justice.

The findings of the empirical case study, together with the legal analysis of the benefits and challenges of human rights-based approaches, will inform the development in Chapter VII of a series of recommendations for future steps towards the realisation of a new framework for

law and policy making informed by climate justice. These recommendations are split into two broad categories, namely, those requiring action at the international level, and those that can be implemented by national governments in collaboration with regional, UN and civil society organisations. The first section will focus upon identifying the international forum best suited to receiving inter-state climate claims in reliance upon human rights obligations, comparing and contrasting three main avenues before the ICJ, the Permanent Court of Arbitration, and UN human rights treaty bodies. Chapter VII will then outline the steps required at the international level to enable more effective and universal engagement with the human rights regime amongst climate vulnerable SIDS, and to develop more just responses to climate loss and damage. Strengthening the procedural rights and the recognition of climate vulnerable SIDS in international law and policy making is similarly crucial and will be explored with reference to the relevant lacunae in rights protections identified.

Secondly, Chapter VII will present the law and policy recommendations for the realisation of a climate justice framework at the national level. Drawing upon the empirical findings of the case study, a series of grounded suggestions for increasing the availability of human rights enforcement avenues will be presented. Procedural climate justice goals including the strengthening of access to information, access to justice in climate matters, and the recognition of role of climate vulnerable communities in policy processes will be further explored in the final section. The thesis will then conclude in Chapter VIII with a discussion of the unique contribution made to the development of knowledge in the field of climate justice and the core findings that have emerged from the qualitative empirical data and the doctrinal analysis of law and policy. These findings will guide the construction of a climate justice framework to inform future research, climate litigation, and policy making in order to achieve the aim of empowering and strengthening the diplomatic and legal position of climate vulnerable SIDS through legally enforceable rights.

Chapter II – Theory & Methodology

The present chapter engages with climate justice, defining the key concepts of environmental justice at its origins and exploring their relevance to the overarching research aims and objectives of the thesis. It primarily explores two core concepts of justice, namely, distributive and procedural justice, presenting the case for a pluralistic conceptualisation of climate justice that incorporates the most relevant aspects of both. In light of the broad capacity of a combined distributive and procedural approach to climate justice to effectively tackle many of the same questions posed by a corrective justice framework, corrective justice is engaged with far more briefly.

This view has been supported by scholars such as Kuehn who has argued that corrective justice '*may be subsumed within claims for distributive or procedural justice*'[102]. This argument is convincing in light of the more global focus of distributive climate justice in responding to the questions of which states will disproportionately bear the burdens resulting from adverse climate change impacts, which leading emitters could be held responsible in inter-state claims and how climate loss and damage can be responded to. Corrective justice, by contrast, has a narrower focus upon providing remediation for harm sustained on a more direct causal and individualised level, without examining the overarching distributive questions that justify models of collective state responsibility for leading emitters.

First, the chapter presents a brief history of the environmental justice movement and its emancipatory agenda, followed by a more detailed exploration of the core justice concepts and how they apply in the climate change context. Second, the two core concepts of distributive and procedural justice are set out, beginning with Rawlsian conceptions of distributive justice and the manner in which they have been adapted and applied in the context of global climate justice. This is followed by an examination of procedural justice and the need for a pluralistic approach to climate justice incorporating the tenets of distributive and procedural justice best suited to tackling the complex justice barriers and challenges encountered by climate vulnerable states and communities. Thirdly, the relationship between climate vulnerability and the climate justice framework is analysed in order to further underline the necessity of a flexible approach. It is argued that climate justice broadly conceived in a pluralist manner is capable of

[102] Robert R. Keuhn, 'A Taxonomy of Environmental Justice' (2000) *Environmental Law Reporter* 30: 10681-10703, at 10693.

responding both to global burden sharing questions, as well as to challenges such as access to justice, participation in decision-making and institutional capacity that emerge in practice. Finally, the present chapter links the theoretical framework to the wider methodological approach employed in order to outline the need for a combined doctrinal and empirical analysis.

I. Environmental justice: overview of the origins and evolution of the movement

The environmental justice movement originated in the United States in the late 1980s and early 1990s in response to what were perceived as environmentally racist corporate and policy decisions, which saw numerous highly polluting factories and waste plants situated in '*predominately black neighbourhoods and indigenous people's reservations*'[103]. It should therefore be distinguished at the outset from the environmental movement, the focus of which, as Pastor underlines, was entirely different[104]. The birth of environmental justice represented a fundamental shift in terms of both the actors involved, with minority groups leading the campaigning, and the issues addressed, from more traditional concerns with nature conservation, to the exploration of environmental questions of social justice. The 'environment' in this context was accordingly interpreted very broadly as extending beyond conventional ecological elements such as natural resources and biodiversity, to encompass urban areas and community needs, linking society and nature. As Schlosberg underlines, the movement was concerned with shining a light on the environment in which communities and individuals live their '*everyday lives*'[105]. In this sense, the environmental justice movement paved the way for a far more holistic conceptualisation of the environment with community, human rights and social justice concerns at its heart.

The movement itself grew out of a series of localised community protests resisting the decisions to locate toxic waste facilities in their vicinity. Increasing awareness of and resistance to such policy decisions was accompanied by research which subsequently identified clear discriminatory trends. Two analyses conducted by the United States General Accounting

[103] C. Stephens, S. Bullock, and A. Scott, 'Environmental Justice: Rights and means to a healthy environment for all' (2001) ESRC Special Briefing No. 7, at 3.
[104] M. Pastor, 'Environmental Justice: Reflections from the United States' in J. Boyce, S. Narain, and E. Stanton, (Eds.) *Reclaiming Nature: Environmental Justice and Ecological Restoration*, (Cambridge University Press, 2012) 351-378, at 353.
[105] David Schlosberg, 'Theorising environmental justice: the expanding sphere of a discourse' (2013) *Environmental Politics* 22:1, 37-55, at 39.

Office in 1983[106] and the United Church of Christ Commission for Racial Justice in 1987[107] concluded that there existed clear links between the proportion of Black or minority residents in the local communities and increased exposure to environmental risks. Initially the studies conducted were more narrowly focused on the location of hazardous waste plants and the demographics of the communities in the vicinity of these plants. It was found that the plants were located in predominantly Black or Hispanic neighbourhoods[108] and that although socio-economic hardship was a significant factor[109], race nevertheless proved to be the most significant variable linking the communities in the vicinity of the waste plants[110]. The principal issues the movement addressed at the outset were those surrounding the unequal distribution of environmental burdens between different racial groups, as well as between those from poorer socio-economic backgrounds and the more affluent. Several famous studies were carried out in the United States which gave rise to a great deal of debate and marked the beginning of the consolidation of the environmental justice movement[111].

These findings gave rise to a movement centred around civil rights and the promotion of coordinated resistance to the environmental racism demonstrated by policy decisions surrounding the location of the toxic waste plants. In 1992 the United States Environmental Protection Agency[112] later broadened the scope of the movement by extending the factors considered to include air pollutants, lead and other contaminants in the workplace as well as in community neighbourhoods, along with the health implications for those affected[113]. The movement has been backed by research suggesting that '*institutional racism*'[114] is behind the

[106] United States General Accounting Office (1983) 'Siting of Hazardous Waste Landfills and Their Correlation With Racial and Economic Status of Surrounding Communities' (1 June 1983) GAO/RCED-83-168, available online at: http://www.gao.gov/assets/150/140159.pdf , accessed 06/04/16.
[107] United Church of Christ Commission for Racial Justice (1987) 'Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-economic Characteristics of Communities with Hazardous Waste Sites', available online at: http://webhost.bridgew.edu/ramey/www/g333pdf/TWR_UCC1987.pdf , accessed 06/04/16.
[108] *Ibid.* UCC Report (1987) at 14; and US GAO Report (1983) *supra note* 100, at 3.
[109] *Ibid*. US GAO Report (1983), at 3
[110] UCC Report (1987) *supra note* 107, at 13.
[111] See for example United States Environmental Protection Agency (1992) 'Environmental Equity: Reducing Risk for All Communities' (May 29 1992) EPA230-R-92-008, available online at: http://infohouse.p2ric.org/ref/32/31476.pdf (accessed 06/04/16); and R.D. Bullard and B. H. Wright, 'The Politics of Pollution: Implications for the Black Community' (1986) Clark Atlanta University, Phylon 47: 1, 71-78.
[112] United States Environmental Protection Agency (1992) 'Environmental Equity: Reducing Risk for All Communities' (May 29 1992) EPA230-R-92-008, available online at: http://infohouse.p2ric.org/ref/32/31476.pdf , accessed 06/04/16.
[113] *Ibid* US EPA report (1992), at 9.
[114] R.D. Bullard and B. H. Wright, 'The Politics of Pollution: Implications for the Black Community' (1986) Clark Atlanta University, Phylon 47: 1, 71-78, at 78.

policy decisions leading to the concentration of environmental pollution in minority communities. Bullard and Wright argue that decision makers simply '*followed "the path of least resistance"*'[115] in this respect which, in view of minority and poorer communities' lack of established capacity to oppose such policy decisions, has meant that they have been on the receiving end of the majority of the risk from pollution.

This injustice, it is argued, was further compounded by the fact that the environmental movement originally reflected the concerns of '*middle- and upper-class whites*'[116], while minorities remained largely voiceless. The environmental justice movement therefore sought to make room for a more inclusive approach to tackling environmental issues and decision-making, which gave adequate weight to the concerns of different ethnic, cultural and socio-economic groups. Accordingly, advocates of the movement have called for the facilitation of greater participation of communities in decision-making, greater respect for the knowledge of the communities themselves, and for the promotion of diversity[117]. These objectives resonate clearly with many of the objectives of the civil rights movement in securing greater inclusion, equality and respect for minorities, both institutionally and in society more broadly.

Environmental justice's roots in the civil rights movement have seen it evolve with a particularly strong emancipatory agenda, intended to amplify the voices and ensure greater equality for disadvantaged groups in society. However, it is also important to highlight the environmental aims, as the movement has sought more than a straightforward balancing of the burdens placed on minority communities, instead campaigning for pollution to be tackled and for more environmentally sound policies to be adopted at the level of government[118]. This holistic agenda has not only been a theme running through the grassroots campaigns of civil society, but can also be found in the theoretical literature surrounding the academic development of environmental justice[119].

Nevertheless, an important distinction must be drawn between the evolution of the environmental justice movement, driven by coordinated activism and the academic development and conceptualisation of environmental justice, the focus of which has been far more theoretical. The academic literature has been concerned with developing inclusive

[115] *Ibid.* Bullard and Wright (1986), at 78.
[116] *Ibid.* Bullard and Wright (1986), at 78.
[117] David Schlosberg, 'Reconceiving Environmental Justice: Global Movements and Political Theories' (2004) *Environmental Politics*, 13:3, 517-540, at 522.
[118] Pastor (2012) *supra note* 104, at 372.
[119] See for example Karen Bell, *Achieving Environmental Justice: A cross-national analysis* (Bristol: Policy Press, 2014).

notions of justice which are capable of serving as frameworks for more equitable policy approaches. In spite of these differences, research has been shown to have a very important role to play in the development of the movement, as Pastor underlines, there are many examples of activism and research going 'hand in hand' in respect of environmental justice[120]. Schlosberg in particular advocates for closer collaboration between theory and practice in this field, with theorists taking stock of the successful variety approaches adopted by the grassroots movements in order to develop a more multi-faceted and nuanced concept of environmental justice[121]. This marrying together of civil society-driven activism and academic theory represents a very important benefit of an environmental justice framework, particularly in the context of climate change where civil society activism plays an essential role in giving voice to the needs and concerns of those most vulnerable to its impacts.

II. Core notions of justice intrinsic to climate justice

i. Corrective justice

Corrective justice is commonly invoked in the environmental justice literature, most often with respect to the polluter pays principle which is of particular pertinence in the context of establishing liability for climate change redress. Corrective justice has been defined by Kuehn as demanding fairness in '*the way punishments for lawbreaking are assigned*'[122] and in the manner in which harm is addressed. Crucially, fairness in corrective justice entails a '*duty to repair losses*'[123] in the form of rectification or compensation. Corrective justice has its origins in private rather than public law, in structuring the duties and remedies owed between individuals in tort law claims. Weinrib for example has defined it as the '*relational structure of reasoning in private law*'[124], tracing this back to concepts developed by Aristotle on the obligations arising from an injury caused[125]. This gives rise to an analysis of the '*correlative structure*'[126] of the relationship between the tortfeasor and the plaintiff in the attribution of

[120] Pastor (2012) *supra note* 104, at 355.
[121] David Schlosberg, *Defining Environmental Justice: Theories, Movements and Nature* (Oxford: Oxford University Press, 2007) at 165.
[122] Keuhn (2000) *supra note 102*, at 10693.
[123] *Ibid.* Keuhn (2000) at 10693.
[124] Ernest J. Weinrib, Corrective Justice (Oxford: Oxford University Press, 2012) at 2.
[125] *Ibid.* Weinrib (2012).
[126] *Ibid.* Weinrib (2012) at 87.

duties and in the function of remedies which Weinrib argues are designed to '*operate simultaneously against the defendant and in favour of the plaintiff*'[127] in order to ensure that justice is adequately served.

Although corrective justice has been applied beyond the tort law context, for example in guiding the development of environmental law in attributing duties to remedy harms caused, its origins remain firmly rooted in domestic tort law, and indeed, at the individual level. Freeman has underlined that significant differences persist between corrective and distributive justice, the most fundamental of which is that '*distributive justice operates on a global level and tort law locally, between two persons*'[128], as such he argues that distributive justice is ill-suited compared to corrective justice in addressing questions of tort law at the individual scale. The inverse logic applies in respect of using a predominantly corrective justice lens to address climate change at the global level, as climate change impacts take the form of transboundary harms necessitating the development of collective models of attribution of responsibility and law and policy responses at the level of national governments.

Nevertheless, in the context of environmental law, the corrective justice approach can be seen to be embodied by the polluter pays principle which finds expression in Principle 16 of the 1992 Rio Declaration in the following terms '*the polluter should in principle bear the costs of pollution*'[129]. This relatively simple principle has been invoked in an array of commentaries from both the environmental justice and environmental law bodies of literature, including crucially in the growing body of climate justice literature at the global level[130]. Caney for example argues that aspects of corrective justice should inform a broader distributive justice approach to tackling climate change through the application of the polluter pays principle, however he advocates for a more nuanced application that takes into account the 'ability to pay' and the responsibility of individuals[131].

McKinnon has conceptualised corrective justice as the framework of principles enabling a response to the question of '*who owes what (if anything) to whom when transactions between parties do not conform to standards independent of the principles of corrective justice*

[127] *Ibid.* Weinrib (2012) at 87.
[128] Michael Freeman, *Lloyd's Introduction to Jurisprudence* (Ninth Edition) (Sweet & Maxwell, 2014), at 524.
[129] Principle 16, Report of the United Nations Conference on environment and Development [12 August 1992] (Rio de Janeiro, 3-14 June 1992) available online at: http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm (accessed 11/04/16).
[130] See for example McKinnon (2012) *supra note* 83; and Dietzel (2019) *supra note* 81.
[131] Caney (2010) *supra note* 81.

themselves'[132]. This articulation provides a useful framing of the role of corrective justice in informing remedies for breaches of international obligations and ethical duties in the context of global climate change. The framework of international climate obligations stemming from the UNFCCC and the Paris Agreement are carefully framed to avoid giving rise to liability and entitlements to remedies for loss and damage in line with corrective justice principles[133]. The UNFCCC framework similarly does not make reference to the polluter pays principle as one of the core principles guiding the international response.

The UNFCCC does however include the principle of common but differentiated responsibility (CBDR) which recognises the historic responsibility of developed states for the build-up of greenhouse gas emissions in the atmosphere, along with the various capabilities and accordingly attributes the primary responsibility for taking steps to tackle climate change to those states[134]. The attribution of responsibility for remedying the harms of climate change impacts has clear undercurrents in the CBDR principle. The duties that arise from this principle however are far less clear-cut than those emerging from the more common polluter pays principle of environmental law to remediate the harm caused.

Moreover, the binary distinction in responsibility drawn by climate change law between developed and developing states under the CBDR principle can be subject to critique for failing to recognise the present responsibility of many rapidly developing states for very significant portions of global greenhouse emissions[135]. A shift of approach away from the CBDR principle and towards the more universal, soft law obligations of all states to take increasingly ambitious steps to tackle climate change through Nationally Determined Contributions to mitigation efforts is evident in the Paris Agreement itself[136]. This recent paradigm shift away from CBDR leaves the door open to the development of a broader and more context-specific responsibility framework based for example upon individual states' emissions data, mitigation efforts, climate finance and loss and damage measures as benchmarks for making determinations upon the breach of international obligations.

Aspects of corrective justice underpin the reasoning surrounding the state responsibility frameworks invoked in the present thesis, particularly by way of attempting to secure an

[132] McKinnon (2012) *supra note* 83, at 74.
[133] See for example UN Framework convention on Climate Change, Decision 1/CP.21 Adoption of the Paris Agreement, FCCC/CP/2015/10/Add.1 (29 January 2016), at 8, Para. 51.
[134] United Nations Framework Convention on Climate Change [1992] *supra note 42*, Article 3(1).
[135] Michaelowa and Michaelowa, 'Do rapidly developing countries take up new responsibilities for climate change mitigation?' (2015) *Climatic Change* 133 (3).
[136] Paris Agreement [2015], *supra note* 16, Article 4.

effective remedy for the loss and damage climate vulnerable SIDS and their peoples will continue to incur as a result of adverse climate change impacts. The need to address climate loss and damage more effectively has given rise to increasing lobbying efforts in the international climate negotiations, particularly by groups of climate vulnerable developing states such as the Climate Vulnerable Forum.

This movement and the need to increase loss and damage support has been acknowledged, albeit not in terms of compensation or restitution, at the level of the UNFCCC negotiations in the establishment of the Warsaw International Mechanism for Loss and Damage. The limitations of this response, along with the greater suitability of rights-based approaches in addressing the impacts upon vulnerable groups and ensuring greater access to international justice are explored in detail in Chapter III. The principal focus of the present thesis is upon distributive justice which, although capable of incorporating corrective justice considerations such as causation and remedies, is crucially better adapted to addressing questions of global inequality, along with climate loss and damage in a broader, rights-based form which includes non-economic loss and a consideration of the impacts upon vulnerable groups.

ii. Reparative justice

Reparative justice is similarly of relevance in the framing of appropriate responses to climate loss and damage. Reparative justice in contrast to the notions of corrective justice discussed above, is conceptualised more broadly around repairing moral rather than economic losses. Margaret Walker has written extensively on reparative justice and has conceptualised it as '*moral repair*'[137] entailing '*process of moving from the situation of loss and damage to a situation where some degree of stability in moral relations is regained*'[138]. Walker acknowledges that in attempting to repair these types of harms full restoration will not always be possible, so as a result, the victim will be expected to *'[absorb] some irreparable loss, pain, and anger*'[139] in the process, with corresponding costs for both the wrongdoer and for the community as a whole who bear duties to monitor the allocation of responsibility and the enforcement of standards. This is of particular pertinence in guiding the law and policy responses to climate change at the global level with respect to the irreparable loss and damage increasingly being suffered by SIDS, for example through the permanent loss of territory as a result of rising sea levels. These types of losses cannot be remedied by financial compensation alone, particularly in light of the threats to natural and cultural heritage[140].

[137] Margaret Urban Walker, *Moral repair: reconstructing moral relations after wrongdoing* (Cambridge University Press, 2006) at 6.
[138] *Ibid.* Walker (2006) at 6.
[139] *Ibid.* Walker (2006) at 6.
[140] UN-OHRLLS 2017 Report, *supra note* 4, at 34.

In the context of climate change specifically, Almassi has called for a closer focus on providing for intergenerational reparative climate justice[141] that would be capable of repairing the moral harms arising from climate impacts. In Almassi's view this extends beyond compensation to '*the contrition and amends needed to renew the trust and hope on which morally healthy cross-generational relationships can be rebuilt*'[142]. The focus is therefore upon providing for reparation at a deeper moral level, rather than at a purely economic one. Burkett has explored climate reparations in detail, exploring the theoretical underpinnings of reparations as including the objective that '*perpetrators to return wronged individuals to the status quo ante*'[143] or that they compensate them where this is not possible. This is said to include obligations stretching into the future to '*improve the lives of the victims*'[144] which are of particular relevance in the context of the impacts on climate-displaced persons who may be deprived of the opportunity to return to their homes or livelihoods as coastal areas are rendered uninhabitable by sea-level rise and by the associated salinization of the soil and fresh water supplies[145]. Such obligations to provide continuing support post-displacement, for example in the reestablishment of livelihoods and in making provision for continuing cultural and religious practices will be of great importance in guiding the response to non-economic climate loss and damage.

iii. Distributive justice

Distributive justice represents the most entrenched and established notion of environmental justice. It has been defined in both a broad sense in terms of the need to ensure '*an equitable distribution of environmental 'goods'*'[146] and, more restrictively, as requiring adequate protection from environmental harm '*for all socioeconomic groups*'[147]. Distributive justice remains a strong focus of the majority of the literature in the field, particularly with regard to questions of social justice. As Schlosberg underlines, often analyses have centred around the unfair environmental burdens placed on poor, indigenous and minority communities[148]. In order to fully understand the notion of distributive justice however, it is first necessary to explore its origins. The most common construction of distributive justice invoked in the environmental justice literature can be found in the Rawlsian conception of justice as 'fairness'

[141] Ben Almassi, 'Climate Change and the Need for Intergenerational Reparative Justice' (2017) *J Agric Environ Ethics*, 30:199–212.
[142] *Ibid.* Almassi (2017) at 205.
[143] Maxine Burkett, 'Climate Reparations' (2009) *Melbourne Journal of International Law*, 10(2): 509-542, at 522.
[144] *Ibid.* Burkett (2009) at 522.
[145] UN-OHRLLS 2017 Report, *supra note* 4.
[146] Bell (2014) *supra note* 119, at 1.
[147] *Ibid.* Bell (2014), at 1.
[148] Schlosberg (2007) *supra note* 121, at 4.

and the difference principle requiring the distribution of inequalities for the benefit of the most disadvantaged.

Rawls advocates for a conception of 'justice as fairness' in which rational individuals placed in the 'original position' of equality, that is a hypothetical situation in which they are completely unaware of their social status, their 'fortune in the distribution of natural assets and abilities' or even their 'conceptions of the good', would agree upon the same fundamental principles of justice[149]. Behind this so-called 'veil of ignorance', Rawls argues that rational individuals would agree on two core justice principles. The first dictates that '*each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others*'[150] in the sense of classic civil and political freedoms such as freedom of speech and political participation rights.

The second relates directly to distribution in holding that '*social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all'*[151]. This gives rise to Rawls' so-called 'difference principle' whereby inequalities should be distributed to the '*greatest benefit of the least advantaged'*[152], with the distribution not only of wealth, but of '*primary social goods*'[153] including rights, liberties and the capacity to hold positions of responsibility. It is argued that the second justice principle need not entail equal distribution of wealth in a strict sense, rather the distribution of 'primary goods' more generally should be 'to everyone's advantage' and the first justice principle is given equal weight, preventing the second from being used to justify a departure from the first[154].

In respect of the application of the difference principle, justice is primarily measured institutionally, entailing an analysis of whether there exists an 'alternative institution' which would better cater for the most disadvantaged groups[155]. Although wealth is not considered to be the only marker of inequality, it nevertheless plays an important role in Rawls' theory in determining who belongs to the least advantaged groups. The second principle also includes

[149] John Rawls, *A Theory of Justice* (Cambridge Massachusetts: The Belknap Press of Harvard University Press, 1971) at 12.
[150] *Ibid*. Rawls (1971).
[151] *Ibid*. Rawls (1971), at 60.
[152] N. Daniels, *Reading Rawls: Critical Studies on Rawls' A Theory of Justice* (Stanford: Stanford University Press, 1989) at 192-193.
[153] *Ibid*. Daniels (1989), at 192-193.
[154] Rawls (1971) *supra note* 149, at 61.
[155] Daniels (1989) *supra note* 152, at 192.

the provision for equal access to '*positions of authority and offices of command*'[156] in order to guarantee fairness in representational terms. These principles are relied upon to support the broad conclusion that injustice shall arise out of '*inequalities that are not to the benefit of all*'[157], thereby rendering the Rawlsian conception of justice as fairness highly transferrable to the analysis of many social justice questions.

Rawls' theory of justice is capable of being employed to analyse the fairness of current institutional and social structures. In the original position, the principles of justice agreed upon would accordingly give rise to a system of institutions and laws founded upon them, therefore Rawls argues that our social system can be found to be just if, in the original position, we '*would have contracted into the general system of rules that defines it*'[158]. In the context of distributive environmental justice, it is Rawls' second principle that is clearly of greatest relevance, particularly in terms of fair burden sharing. Although Rawls specifically discusses 'social and economic inequalities', the uneven distribution of environmental burdens and threats has a profound effect on the socio-economic status of people and it is this exacerbation of socio-economic hardship, experienced predominantly by vulnerable and minority groups in society, with which the environmental justice movement has traditionally been concerned.

While the foundation principles and central ethos of Rawls' theory of justice therefore have an important role to play in constructing the foundations of any distributive justice based approach, to respond to the research questions of the present thesis there is a need to focus in on more suitably adapted global conceptualisations within the climate justice literature. For these reasons, although the traditional Rawlsian conception of distributive justice is important in forming the foundations of an effective climate justice analysis, it will be relied upon only to the extent of informing a more specialised conceptualisation of the distributive elements of a climate justice framework.

Distributive justice also relies upon an underlying notion of equality or inequality as Bell underlines[159], in respect of which any number of definitions could be invoked. Rawls' definition of equality rests upon the distribution of 'primary goods' entailing both wealth and other factors such as the capacity to hold positions of responsibility. While this conception of equality offers certain benefits in the development of a distributive climate justice framework,

[156] Rawls (1971) *supra note* 149, at 61.
[157] *Ibid,* Rawls (1971) at 62.
[158] *Ibid.* Rawls (1971) at 13.
[159] Bell (2014) *supra note* 119.

it is Schrader-Frechette's definition which encapsulates two clearly defined elements in the form of economic and political equality[160], which is the most useful to this end.

There are clear parallels to be drawn between Schrader-Frechette's two-fold definition of equality and that of Rawls. Both the first element of political equality, defined primarily as entailing '*equality of treatment under the law'*[161], and the second of economic equality, defined as '*equality in the distribution of wealth'*[162], resonate with Rawls' equality of primary goods which expressly refers to wealth along with the opportunity to hold positions of responsibility. The elements of political equality in particular however, can be seen to go beyond this to encapsulate a liberal conception of equality in the need for governments to treat all citizens with equal concern and respect, especially those from marginalised groups.

Schrader-Frechette importantly underlines the interdependence between the two elements and emphasises that the need for political equality arises out of the fact that '*all humans have the same capacity for a happy life*'[163], the same reasoning in terms of quality of life and dignity that underpins the consecration of universal, inalienable human rights. In light of the paramount role human rights will play in the present climate justice analysis, particularly at the community level, this conceptualisation of equality is of particular relevance. Schrader-Frechette further advocates for viewing political equality as a '*presupposition of all schemes involving justice, fairness, rights and autonomy*'[164], along with reinforcing the principle of equality of all persons under the law.

These underlying justifications form the foundations for what is termed a principle of prima facie political equality (PPFPE), including both distributive and participatory justice elements, which is designed to have the effect of shifting the burden of proof for defending inequality onto those advocating for it, in favour particularly of the poor and vulnerable[165]. Not only does the principle embody distributive justice elements, but it importantly also encompasses procedural justice concerns, including the need to guarantee citizens and stakeholders an equal say in environmental decision-making. Schrader-Frechette advocates for the establishment of '*institutional and procedural norms'*[166] that ensure equal opportunity for all in order to prevent

[160] Kristin Shrader-Frechette, *Environmental Justice: Creating Equality, Reclaiming Democracy* (Oxford: Oxford University Press, 2002)
[161] *Ibid.* Schrader-Frechette (2002) at 24-25.
[162] *Ibid.* Schrader-Frechette (2002) at 24-25.
[163] *Ibid.* Schrader-Frechette (2002) at 26.
[164] *Ibid.* Schrader-Frechette (2002) at 26.
[165] *Ibid.* Schrader-Frechette (2002) at 27.
[166] *Ibid.* Schrader-Frechette (2002) at 28.

the further marginalisation of disadvantaged groups. The argument for a more multifaceted approach to the conceptualisation of equality has clear roots in the arguments of scholars such as Young who advocates strongly for a shift in focus beyond a narrow distributive justice paradigm[167], and, indeed, Young's work is expressly referred to in support of Schrader-Frechette's argument on the need to include participatory elements in the PPFPE principle[168]. These arguments will be examined in greater detail in relation to procedural environmental justice below. As a consequence, the capacity of Schrader-Frechette's twofold definition of equality, along with her corresponding prima facie political equality principle to accommodate both distributive and procedural justice elements, renders it far better suited to addressing the multi-faceted questions surrounding the research of recourse to rights-based justice for climate vulnerable SIDS.

Aside from questions surrounding the definition of equality adopted in distributive environmental justice approaches however, inequality in the distribution of benefits and burdens themselves can manifest itself in a variety of different ways. It not only deals with more classic questions surrounding the distribution of burdens resulting from environmental harms, but as Bell underlines, also extends to the distribution of environmental goods[169]. Questions relating to the distribution of benefits and burdens resulting from the enactment of environmental protection laws have also been critically explored. Although environmental protection laws are typically seen as positive from both the eco- and anthropocentric standpoints in terms of the benefits they can confer in securing for example better air and water quality, Lazarus convincingly argues that these laws nevertheless have distributional effects[170].

These effects include for example increases in product and service prices resulting from the regulation of environmentally harmful products, along with increases in property prices resulting from a cleaner environment which, in turn, can be seen to have a more severe impact upon minority groups[171]. In light of the evidence suggesting that minority groups and poorer communities are likely to disproportionately bear the burdens resulting from environmental protection, any effective distributive approach to climate justice would need to take factors

[167] Iris Marion Young, *Justice and the Politics of Difference*, (Princeton University Press, 1990).
[168] Schrader-Frechette (2002), *supra note* 160, at 28.
[169] Bell (2014) *supra note* 119.
[170] R. J. Lazarus, 'Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection' (1993) *Northwestern University Law Review* 87: 3, 787-857.
[171] *Ibid.* Lazarus (1993) at 793-5.

such as the economic impact of climate mitigation and adaptation policies upon different groups into account.

Overall, distributive justice provides a valuable analytical lens in the context of climate change along with crucial grounding for the argument that climate vulnerable states and communities should not have to face disproportionate environmental burdens as a result of its adverse impacts. This argument has been explored extensively by authors such as Shue who advocates strongly for the establishment of a distributive justice-based approach to the sharing of climate change burdens at the global level[172]. A distributive justice lens can serve to further illuminate the way in which climate change impacts exacerbate existing socio-economic inequalities, as well as the way in which the distribution of the benefits resulting from strengthened environmental protection or climate action may need to be called into question in practice.

The potential of this approach in terms of its application at the global level and its capacity to effectively tackle questions of climate justice is explored in greater detail in Section III(i) below. Distributive justice however is not well-adapted to addressing issues of procedural fairness which have a significant impact upon the ability of climate vulnerable groups to participate effectively in climate decision-making processes and, crucially, also upon their ability to exercise fundamental rights through access to justice. Procedural justice is therefore required to complement distributive justice in the construction of a climate justice framework to guide future climate law and policy making. These concepts are presented as mutually reinforcing in that procedural climate justice lays the foundations for distributive justice questions such as climate loss and damage to be tackled to more effectively, with more informed participation of those groups most affected, and with more secure access to justice to exercise the fundamental rights that concepts of equality in distributive justice call for.

iv. Procedural justice

Procedural justice represents a commonly explored concept in the environmental justice literature and an essential analytical lens for examining the challenges faced by climate vulnerable states and communities in practice. It has been broadly defined in terms of the 'fair

[172] Henry Shue, 'Global Environment and International Inequality' (1999) *International Affairs* 75, 3: 531-545.

and equitable institutional processes of a state'[173], as well as in terms of 'transparency'[174] in decision-making, although it has many different facets. The facilitation of the effective participation of all members of society is seen as crucial to ensure that decisions taken on environmental issues are fair and advocates of procedural environmental justice have therefore frequently focused their critiques on the exclusion of certain groups, often minorities, from such participation[175]. This emancipatory agenda focusing on the empowerment of minority or vulnerable groups is of particular relevance to climate change as groups 'who are socially, economically, culturally, politically, institutionally, or otherwise marginalized'[176] also experience increased vulnerability to climate change impacts.

Procedural justice is a well-established concept beyond the realms of environmental justice and has been explored extensively in developing theories on the importance of procedural legitimacy in securing compliance with the law[177] and normatively, on the need for deliberative democracy and 'ideal speech' in decision-making processes which should be underpinned by consensus[178]. The basic principle of ensuring decision-making processes are participatory and inclusive in nature has been further elaborated upon by Habermas in relation to the legitimacy of law and human rights in particular. It is argued that human rights are not merely objective moral standards that emerge but are shaped by citizens' political autonomy and the '*legal institutionalisation of those discursive processes of opinion- and will-formation in which the sovereignty of the people assumes a binding character*'[179]. The processes behind decision- and law-making are therefore crucial in guaranteeing justice and legitimacy. Legitimacy in Habermasian procedural justice terms is primarily defined according to the ability of 'all possibly affected persons'[180] to participate openly in discourse on an issue, from which inter-subjective truths can be drawn that form the basis of future political and legal action. In the climate change context, this theoretical standpoint underpins the need to secure the

[173] Schlosberg (2007) *supra note* 121, at 25.
[174] Bell (2014), *supra note* 119, at 19.
[175] See for example Keuhn, (2000) *supra note* 102; and Alice Kaswan, 'Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice"' (1997) *The American University Law Review*, 47, 221-301.
[176] Intergovernmental Panel on Climate Change (IPCC) 'Climate Change 2014: Impacts, Adaptation and Vulnerability' [2014] Working Group II Contribution to the Fifth Assessment Report, Summary for Policymakers, at 6.
[177] See for example Tom R. Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) *Crime and Justice* 30: 283-357.
[178] Jürgen Habermas, *The Theory of Communicative Action, Volume 1, Reason and the Rationalization of Society*, (Beacon Press 1984).
[179] Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy, translated by William Rehg, (Massachusetts Institute of Technology Press 1996), at 94 and 104.
[180] *Ibid*, at 107.

participation of particularly climate vulnerable communities in national policy discourse, and in turn, to give more voice to SIDS in international policy discourse.

Habermas however has been the subject of criticism for failing to recognise the difficulties faced by disadvantaged groups who are not able to participate in discourse on an equal footing. Young for example critiques his '*assumption of a discussion situation free from domination*'[181] along with the '*generalizable interests*'[182] his theory assumes will emerge out of open participation in discourse from a feminist perspective. It is logically argued that his theory overlooks the challenges facing certain groups in society who have been subject to domination. The risk is that existing inequality is simply reproduced in the group discussion setting[183]. This is what Young calls 'internal' exclusion.

Indeed, Young differentiates between the external and internal exclusion of certain groups in the context of participatory democracy[184]. External exclusion concerns more widely acknowledged situations in which groups are prevented from engaging with institutions or in decision-making procedures due to inherently discriminatory policies or structural factors restricting their ability to engage[185]. Internal exclusion, by contrast, concerns situations in which groups are included in institutions and processes but their concerns are not granted equal consideration and they '*lack effective opportunity to influence the thinking of others*'[186] coming from the dominant group. Internal exclusion hinders the achievement of a Habermasian inter-subject truth.

A more contextual conceptualisation of procedural justice that takes into account socio-economic and structural barriers to effective participation is therefore needed. In the field of climate change, the recognition of the particular vulnerability of groups in both scientific climate change impact exposure and socio-economic terms is essential. Factors including education, awareness of climate and human rights issues, gender, and socio-economic status range widely between different climate vulnerable communities. This is particularly true of the South Pacific where rich, diverse cultures, languages and geographic remoteness contribute to a broadening of the socio-cultural gaps between groups both within and beyond state boundaries. This diversity can however be viewed as an advantage in combatting complex,

[181] Young (1990) *supra note* 167, at 106.
[182] *Ibid*. Young (1990), at 107.
[183] Bell (2014), *supra note* 119, at 20.
[184] Iris Marion Young, *Inclusion and Democracy* (Oxford University Press, 2000)
[185] *Ibid*, Young (2000), at 55.
[186] *Ibid*, Young (2000), at 55.

multi-faceted environmental challenges such as climate change and has been convincingly advocated for in relation to improving the participation processes of marine conservation law.[187]

Recognition represents an important component of procedural environmental justice in respect of encouraging effective participation which authors such as Schlosberg have advocated strongly for. Recognition has been defined in terms of the '*diversity of the participants and experiences in affected communities*'[188] as well as in terms of respect for different cultural backgrounds and approaches. Young argues that a consideration of cultural diversities should form one of the core non-distributive elements of social justice, citing the need to tackle cultural imperialism and to give different cultural perspectives equal voice[189]. She defines cultural imperialism as the '*universalization of a dominant group's experience and culture*'[190] to the extent that it becomes regarded as the norm in society. This dominance of a certain cultural standpoint therefore leads to many other standpoints being underrepresented or, in the worst cases, completely disregarded. In turn, this dominance of a specific set of cultural norms and experiences can, she argues, be seen to lead to the further exclusion and stereotyping of others[191]. This enables the continued oppression of these marginalised cultural groups and restricts their ability to give voice to their concerns.

In the environmental justice context, tackling cultural imperialism and recognising different perspectives is of great importance particularly with regards to climate change, which most severely impacts upon minority and often marginalised groups such as indigenous communities who often do not have a voice in policy making. However, it is argued by Schlosberg (2004) that recognition as an essential component of environmental justice is overlooked by a body of literature that has shown itself to be wedded to traditional Rawlsian distributive notions of justice, examining the distribution of environmental burdens and benefits [192]. The argument that the recognition of diverse perspectives is an essential prerequisite for tackling both distributional inequality and the many challenges associated with ineffective participation is nevertheless convincing. It is emphasised that recognition, in contrast to distribution, cannot

[187] Margherita Pieraccini, 'Rethinking Participation in Environmental Decision-Making: Epistemologies of Marine Conservation in South-East England' (2015) *Journal of Environmental Law*, 27, 45-67.
[188] Schlosberg (2004) *supra note* 117, at 517.
[189] Young (1990), *supra note* 167, at 23-24.
[190] *Ibid*. Young (1990), at 59.
[191] *Ibid.* Young (1990), at 59.
[192] Schlosberg (2004), *supra note* 117, at 518 and 529.

simply be remedied by the state but is also dependent upon the 'social, cultural and symbolic realms'[193] as social context is of great significance here.

If a group is not recognised in a social context and is marginalised as a result, it follows that they will be less likely to engage politically or to assert their rights. A lack of recognition, together with structural factors such as education, the awareness levels, access to information and geographic remoteness therefore come together to externally exclude climate vulnerable communities from decision-making in spite of the formal legal recognition for the customary norms of indigenous communities, the rights of women and some minority groups in Vanuatu for example. Recognition represents an issue that is being increasingly engaged with by government and civil society organisations in the South Pacific and interlinks strongly with human rights in terms of demonstrating compliance with obligations through, for example, more inclusive gender and disability-based policies. This recognition should, in turn, be extended to remote, particularly climate vulnerable communities in the climate justice context whose future enjoyment of human rights is also at greatest risk.

A balanced approach to procedural environmental justice is needed with a strong focus on the recognition of the value of contributions from different organisations, communities and their traditional knowledge, alongside the facilitation of participation. Young argues convincingly that 'participation in public discussion and processes of democratic decision making'[194] is a crucial foundation for social justice alongside other more distributive aspects including meeting people's basic needs, for example for food and shelter. Distributive and procedural justice guarantees can be viewed as mutually reinforcing elements of a climate justice framework as, by securing climate vulnerable communities and states a stronger voice in policy making and access to legal processes, distributive justice can be more effectively advocated for in the light of the needs of those most affected by the impacts.

Similarly, stronger distributive justice guarantees of, for example, increased funding or compensation for climate impacts could be used to strengthen participatory processes and overcome some of the structural barriers through awareness programmes, strengthening links with remote communities or increased legal support. Importantly, Young is careful to stress the fact that her model of social justice does not reject distributive elements of justice, rather it seeks to broaden the approach adopted, to go beyond mere considerations of the distribution of

[193] *Ibid.* Schlosberg (2004), at 521.
[194] Young (1990) *supra note* 167, at 91.

material resources and wealth and incorporate additional key factors[195]. For Young 'institutional context' is crucial, defined very broadly as including '*any structures or practices* [and] *the rules and norms that guide them*'[196], not merely of the state but also including for example institutions of family and civil society.

The examination of the facets of inequality embedded in existing institutional structures reflects the core underlying ethos of the development of procedural justice, as well as an important aspect of any comprehensive climate justice analysis, particularly in terms of the representation and empowerment of climate vulnerable communities. Young's social justice model highlights three core additional non-distributive factors that need to be addressed in the form of '*decision-making structure and procedures, division of labour and culture*'[197]. The division of labour is referred to as the process of allocation of employment roles and opportunities, while culture is referred to as encompassing factors such as '*symbols, images, meanings, habitual comportments, stories*'[198] which are relied upon by individuals as points of reference in communication and can affect social standing. All three of these factors are of relevance in unpicking the social and institutional structures which may serve as barriers to effective participation, with cultural differences in particular being of great significance in underlining the need for the recognition of different groups outlined above, and the need to secure a rights-based approach that includes cultural rights.

It is however the first aspect of decision-making structures and procedures that is of greatest relevance to the examination of procedural environmental justice here. In examining the decision-making structure, Young convincingly argues that questions surrounding unequal distribution cannot be answered without examining the way in which decision making and often economic power is held institutionally, as well as the operational rules and procedures that apply in the process[199]. In climate justice terms, this demands an exploration of which groups are represented in decision-making structures and of the reasons for any exclusion of climate vulnerable communities from political and legal institutions, as well as an examination of the procedures which govern those institutions.

[195] *Ibid*. Young (1990), at 16.
[196] *Ibid.* Young (1990), at 22.
[197] *Ibid*. Young (1990), at 22.
[198] *Ibid.* Young (1990), at 23.
[199] *Ibid*. Young (1990), at 22-23.

The ability of individuals and groups to participate effectively in state processes, including in environmental decision making, has been shown to have important implications for the quality of the environment[200]. To this end, studies such as that by Barrett and Graddy have demonstrated that there exists a strong link between the quality of the environment and the civil and political freedoms experienced in different countries. They found that 'the promotion of freedoms will in many cases actually lead to improvements in environmental quality', highlighting the need for the corresponding promotion of 'a more democratic process'[201]. It is anticipated that many of the world's most climate vulnerable communities will experience challenges with regard to both effective participation in decision making processes and in exercising their rights and freedoms, due to socio-economic hardship, remoteness and other country-specific factors. A rights-based procedural environmental justice approach which focuses on the need to facilitate the enforcement of human rights and freedoms, including the freedom to participate in decision making, is therefore an appropriate lens for this analysis.

Strengthening institutions which represent local community interests, as well as the standing of civil society organisations working with those communities at a grassroots level, will form an important part of an effective procedural justice-based approach to climate change. The aim of procedural climate justice in this sense would be to give communities a voice in decision making and climate policy by governments, while at the same time guaranteeing them access to justice enabling them to turn to the courts if they wish to challenge those decisions from a human rights perspective. The ability to challenge the failure of other states to respect their human rights through international or regional mechanisms will also need to be explored in this respect. Access to justice is a core theme running through the thesis, particularly at the level of community claims in light of the challenges that many climate vulnerable communities face in practice. The courts have a crucial role to play in securing climate justice for these communities, be it through judicial review of decisions or through securing respect for both political rights and the core human rights jeopardised by adverse climate change impacts.

The importance of access to justice as a core element of procedural environmental justice, along with some of the practical challenges which impact upon it, has been recognised in the literature, particularly by Bell. She argues that 'access to legal justice' is crucial where a

[200] Bell (2014) *supra note* 119, at 21.
[201] S. Barrett, and K. Graddy, 'Freedom, growth, and the environment' (2000) *Environment and Development Economics* 5, 433-456, at 455.

person's rights 'concerning information or participation have not been respected'[202], however, she importantly also acknowledges that the 'costs of legal actions'[203] constitute a significant barrier to securing procedural environmental justice in practice. A lack of access to legal representation, institutional support or legal aid schemes for poor communities are all factors which are likely to severely restrict access to justice for climate vulnerable communities. It is therefore these kinds of practical barriers which this thesis examines, employing a procedural environmental justice lens to inform my approach.

The express inclusion of 'free access to legal redress'[204] on Bell's list of procedural environmental justice indicators for the purpose of measuring the extent to which environmental justice is guaranteed in different countries, represents an acknowledgement of the pertinence of these bases of analysis. Access to justice in the context of climate vulnerable states involves several material and institutional barriers, including the availability of legal aid and representation, awareness of legal rights and geographic remoteness from the relevant institutions. The establishment of access to justice as a core element of procedural justice in the literature has closely informed the construction of the interview templates for the case study contained in the Annexes to the present document, and will certainly form a crucial part of the overarching conceptualisation of climate justice.

Ensuring that diverse climate vulnerable communities are recognised, that they, and the civil society organisations working with them, have a voice in decision-making, along with channels to make their needs heard, is essential. Guaranteeing them access to justice, a means of enforcing legal rights, and increased institutional support similarly represent important emerging themes which a procedural environmental justice lens can serve to illuminate. Finally, a more nuanced approach to procedural justice is needed to ensure that socio-economic factors do not undermine effective participation and that the diversity and value of the traditional knowledge of South Pacific communities is provided for.

III. Suitability for addressing climate change

[202] Bell (2014) *supra note* 119, at 29.
[203] *Ibid*. Bell (2014), at 29.
[204] *Ibid*. Bell (2014), at 31.

i. Tackling questions of global injustice and climate change

Environmental justice has shown itself to be a framework that is capable of being applied to the global level. Kuehn underlines that the scope of environmental justice has extended from the local to the national and international levels, tackling for example questions relating to the exploitation of indigenous communities and developing countries[205]. Newell has explored the role played by race and class in global environmental inequality more specifically, concluding that the patterns of inequality in the distribution of environmental benefits and burdens observed at the local level can also be found to exist at the global level[206]. Building on these core foundations, environmental justice can more recently be seen to have given rise to a growing body of climate justice literature.

Climate justice in this context is typically founded upon distributive foundations and entails a critical examination of the fact, as Bell underlines, that *'people in low-income countries and future generations are likely to be adversely affected by climate change caused by high-income countries and previous generations*'[207], thus it may involve both international and intergenerational elements. It has been argued convincingly that not only is increased vulnerability to climate change dependent upon underlying socio-economic factors, but that tackling global poverty will necessarily require that environmental burden sharing be addressed, particularly vis-a-vis the poorest countries[208]. These ideological links between classic instances of distributive environmental injustice and climate vulnerability have been translated by scholars such as Shue and Caney into detailed conceptual frameworks for climate justice.

Shue advocates strongly for the establishment of a distributive justice-based model for the sharing of environmental burdens at the global level[209]. He bases his approach upon a concept of equity which he defines according to three central principles: the first relating to the unfair advantage gained in creating an environmental cost to others, the second relating to the ability to pay for the damage caused, and the third relating to the need to guarantee to all people an

[205] Keuhn (2000) supra note 102, at 10681.
[206] Peter Newell, 'Race, Class and the Global Politics of Environmental Inequality' (2005) *Global Environmental Politics* 5(3): 70-94, at 90.
[207] Bell (2014), *supra note* 119, at 18.
[208] Stephens, Bullock, and Scott (2001) *supra note* 103, at 2.
[209] Shue (1999) *supra note* 172; and Shue (2014) *supra note* 81.

'adequate minimum' of the resources they need for a decent life.[210] This thesis, drawing on the procedural justice insights discussed above, contends that an adequate minimum for climate justice should be defined more broadly than in the simple distribution of material resources or wealth, incorporating further procedural justice aspects such as providing a platform for those who suffer the severest impacts of climate change to have a voice in decision-making and securing them greater access to justice to ensure that fundamental rights guaranteeing universal minimum standards for human dignity can be enforced. The conceptualisation of equity Shue argues is fundamentally based on an ordinary sense of '*fairness*'[211] as opposed to classic philosophical notions of justice, although his overall approach can be seen to be one clearly based on distributive justice. He argues that this conception of equity should inform our response to global environmental challenges, including climate change, underlining that as rich states have benefitted from the activities which caused the environmental damage and have thereby imposed an unfair burden on poor states, it is right that they should bear additional burdens in addressing that damage.[212]

Shue further underlines that rich states are in a better position in terms of their ability to pay and bear the environmental burdens, while his third principle of equity demands that those in poor states who are bearing the heaviest burdens as a result of climate change still be guaranteed an adequate minimum for a decent life. The interaction between global inequality and environmental burdens is a clear theme running through Shue's arguments and he concludes that all of the equity principles lead to the inescapable conclusion that when action on global environmental threats such as climate change is necessary, '*costs should initially be borne by the wealthy industrialised states*'[213]. The equitable principles underpinning Shue's approach to distributive climate justice therefore provide theoretical justifications to underpin claims by climate vulnerable states under international law by pointing to the need to address the unfair environmental burdens placed on those states and to the ability of the wealthiest big emitters to pay, along with the need to guarantee to their people an 'adequate minimum' to live decent lives in the future.

Caney similarly advocates for a distributive approach to 'global environmental justice' which he argues entails a '*global distribution of environmental burdens and benefits'*[214]. This global

[210] *Ibid*. Shue (1999), at 534-41.
[211] Shue (2014) *supra note* 81, at 180.
[212] Shue (1999) *supra note* 172, at 534.
[213] *Ibid.* Shue (1999), at 545.
[214] Caney (2010) *supra note* 81, at 123.

distributive justice framework is applied to climate change and looks in detail at the various unique challenges posed by the multi-faceted, intergenerational and global nature of the challenge. Accordingly, Caney argues that orthodox theories of distributive justice will need to be adapted to be capable of addressing climate change effectively. In particular, three central conflicts must be overcome, including how to value the environment within the 'burdens and benefits' model of a distributive framework, namely, the challenge of extrapolating the distributive justice concept which usually applies to distribution 'within a state' to the international level, and, finally, the challenge presented by the intergenerational impacts of climate change[215]. Although Caney adopts a primarily distributive approach, an examination of climate responsibility through a corrective justice lens is further incorporated, exploring the application of the polluter pays principle.

The polluter pays principle is taken as a starting point for an examination of where the moral responsibility for climate change lies and Caney underlines two key approaches that can be taken in respect of it: first the classic 'micro' version whereby if an individual's actions cause pollution then they should be obliged to pay for that pollution, as well as a 'macro' version in which the actions of a number of polluters contribute to the problem and they should therefore pay the costs proportionally[216]. The macro version of polluter pays is instrumental in overcoming some of the causational challenges associated with applying polluter pays in the context of climate change in that 'one can say that this increase in global warming as a whole results from the actions of these actors'[217]. It is argued that a strict application of the polluter pays principle is too crude to be just and that a more nuanced version of polluter pays, applying only to certain actors who did not have the justification of '*excusable ignorance*'[218] of the implications of their actions. It is therefore argued that only a limited category of polluters should be held responsible and bear the costs of anthropogenic climate change, namely those '*actors who are currently emitting excessive levels of GHGs or have at some point since 1990, emitted excessive amounts*'[219], and that this should be further informed by an 'ability to pay' principle in a similar vein to Shue's distributive justice model.

The conclusion reached is one in which Caney advocates for the application of a more qualified polluter pays principle based on individual quotas which if exceeded, entail a duty to provide

[215] *Ibid.* Caney (2010), at 123.
[216] *Ibid.* Caney (2010), at 125.
[217] *Ibid.* Caney (2010) at 126.
[218] *Ibid.* Caney (2010) at 131.
[219] *Ibid.* Caney (2010) at 135.

compensation, accompanied by an 'ability to pay' principle[220]. The application of which entails additional duties for the 'most advantaged' to reduce their emissions and address the environmental harms resulting from their actions, including through constructing '*institutions that discourage future non-compliance*'[221]. While Caney's application of a distributive climate justice model, along with his articulation of the duty of the most advantaged to take the lead both in mitigation, and addressing the environmental burdens resulting from their actions, provides a firm foundation for the justification of claims by climate vulnerable states, his argument in favour of an 'individualist' as opposed to a 'collective' approach to responsibility does not. The argument in favour of an individualist approach here is based on the perceived unfairness resulting from the attribution of collective responsibility for climate change impacts at the state level, when many individuals within those states will not have participated in the policy decisions taken[222].

This individualistic approach is problematic given both the nature of climate change and our current international political and legal structures. Climate justice needs to be addressed at the level of states in light of the fact that the collectivist model is much better suited to addressing transboundary challenges of this nature. Attempts to establish individual responsibility would face significantly larger stumbling blocks in terms of causation and attribution of responsibility for harm than those faced at the level of states who are already subject to detailed greenhouse gas reporting requirements under the UNFCCC regime[223], along with duties under international environmental law and human rights law more broadly. It disregards the responsibility of states in both national policy-making for failing to raise adequate public awareness or facilitate sufficient action on climate change and for failing to comply with their overarching international obligations. This view coincides with the existing international legal regime which is centred upon states as the primary actors and enables an effective analysis to be undertaken regarding their responsibility for failing to comply with their human rights obligations.

Collective responsibility is appropriate in this context as even if many individuals in the biggest emitting states did not have direct influence or awareness of the policy decisions taken, it would be difficult to argue that they received no shared benefit from the continued emission of greenhouse gases by their state in terms of living standards or the funds available to the state

[220] *Ibid.* Caney (2010) at 136.
[221] *Ibid.* Caney (2010).
[222] *Ibid.* Caney (2010), at 130.
[223] United Nations Framework Convention on Climate Change [1992] *supra note* 42, Article 4(1)(a).

for the support of public services for example. It would furthermore be difficult to argue that governments and citizens had no awareness or knowledge of the effects of excessive greenhouse gas emissions upon the climate in recent years and, to this end, some climate justice scholars have proposed the establishment of an awareness threshold for the purpose of fairly attributing duties to respond to climate change ranging from the mid-1980s to the 1990s when climate science was more widely engaged with in international policy discourse[224]. Caney's proposed model of attribution, by contrast, takes into account the '*excusable ignorance*'[225] of those who cannot reasonably have been expected to be aware of the consequences of GHG emissions and the responsibility of past generations, holding '*the most advantaged*'[226] primarily responsible to pay to tackle climate change. This model of responsibility broadly aligns with the CBDR principle at the international level embedded in Article 3 of the UNFCCC, which provides that developed country parties should take the lead in climate action[227].

Furthermore, in the event that no relevant programmes of education were provided by the state in question, and no information on climate change was made available in the public realm on its impacts, which seems unlikely, the 197 states parties of the UNFCCC nevertheless have an obligation to provide education, training and to raise public awareness on climate change and its effects in accordance with Article 6[228]. A lack of awareness therefore only serves to evidence a failure to fulfil a further international obligation on the part of the state in this context. International law has been built up around the notion of collective responsibility as the most appropriate way to address and secure just outcomes in the face of global challenges, from armed conflicts to transboundary environmental harms. There is no convincing reason to depart from this model in the context of climate change which represents one of the most, if not the most, transboundary and diffuse global challenge of recent times.

Critics such as Posner and Weisbach argue against a distributive climate justice framework on the grounds that it may undermine the conclusion of an effective climate change treaty[229]. It is their view that the climate change regime should be kept separate from questions of inequality

[224] See for example Eric Neumayer, 'In Defence of Historcial Accountability for Greenhouse Gas Emissions' (2000) *Ecological Economics* 33: 185-192; and Peter Singer, *One World: The Ethics of Globalization* (Yale University Press, 2002)
[225] Caney (2010) *supra note* 81, at 136.
[226] *Ibid.* Caney (2010) at 136.
[227] UNFCCC [1992] *supra note* 42, Article 3(1).
[228] *Ibid.* UNFCCC [1992] Article 6.
[229] Eric Posner and David Weisbach, *Climate Change Justice* (Princeton: Princeton University Press, 2010).

and socio-economic hardship which are better addressed through conventional foreign aid[230]. The pragmatic logic behind this argument involving the need to maintain political goodwill in order to conclude an effective climate change treaty as quickly as possible, thereby alleviating the suffering resulting from adverse impacts is clear. It does not however recognise the potential of exploring alternative international legal avenues beyond the UNFCCC regime while the loss and damage responses and recourse to justice options within it remain limited. The world's most climate vulnerable states simply cannot afford to wait for continued negotiations while they continue to face increasingly severe losses of life, land and livelihoods as a result of anthropogenic climate change impacts. Exploring human rights-based recourse to justice represents a crucial further step towards guaranteeing distributive and procedural justice for climate vulnerable states and communities, particularly in the absence of binding rights protections or remedies in the Paris Agreement.

ii. Linking climate vulnerability and justice

The definition of climate vulnerability for the purposes of the current analysis is significant in framing the empirical case study as it has been relied upon in order to identify the South Pacific as the region in which the case study has been conducted and in informing the will play an important role in determining the future beneficiaries of the research outcomes. Vulnerability shall be defined in relation to climate change by taking as a starting point the scientifically accepted definition of 'vulnerability' of the Intergovernmental Panel on Climate Change (IPCC). The IPCC in a 1997 report on the regional impacts of climate change defined vulnerability in terms of the sensitivity of a system whereby '*a highly vulnerable system would be one that is highly sensitive to modest changes in climate, where the sensitivity includes the potential for substantial harmful effects and one for which the ability to adapt is severely constrained'*[231]. The definition therefore focuses on three core elements, namely, of sensitivity to change, the potential for harm and the ability of the system to adapt. These elements can be effectively employed in order to identify the states, regions and communities most vulnerable to climate change impacts.

[230] *Ibid.* Posner and Weisbach (2010).
[231] IPCC 'The Regional Impacts of Climate Change: An Assessment of Vulnerability' Summary [1997] *supra note* 48.

The conceptualisation of climate vulnerability has been the subject of critique in the academic literature, particularly with respect to the risks of narrowly construing it as exclusively focused upon the exposure and sensitivity of systems to climate impacts, excluding the socio-economic, political and structural factors that serve to influence the vulnerability of specific communities and individuals[232]. The corresponding adverse impacts of narrowly conceived approaches to vulnerability upon the construction of climate policy responses have been outlined, for example with respect to the restrictive impact upon adaptation policy that seeks to target certain exposures, rather than serve as a transformative process promoting social change on a wider scale[233].

There are two core approaches to vulnerability that can be identified, on the one hand the 'risk-hazard framework' of vulnerability incorporating a principally scientific assessment of the impacts of external factors upon systems, and on the other hand, the 'social constructivist framework' which is conceptualised as being more keenly influenced by 'socio-economic factors'[234]. The risk-hazard approach to vulnerability is prevalent in the field of disaster management and has been used to map out projected climate impacts to inform future climate adaptation policy[235]. By contrast, the social constructivist approach examines the ability of individuals and groups to respond to those impacts within the context of social and economic factors such as well-being and the 'availability of resources'[236].

Proponents of the social constructivist approach have advocated for a more nuanced and socially contextualised approach to the assessment and conceptualisation of vulnerability that moves beyond the market-oriented and economic development-based models frequently used to determine vulnerability through risk-exposure[237]. Adger and Kelly have developed an 'architecture of entitlements' to inform assessments of social vulnerability to climate change

[232] See for example: Adger and Kelly (1999) *supra note* 64; and Lisa Reyes Mason and Jonathan Rigg, *People and Climate Change: Vulnerability, Adaptation and Social Justice* (Oxford Scholarship Online, 2019).
[233] R.M. Wise, I. Fazey, M. Stafford Smith, S.E. Park, H.C. Eakin, E.R.M. Archer Van Garderen, and B. Campbell, 'Reconceptualising adaptation to climate change as part of pathways of change and response' (2014) *Global Environmental Change* 28: 325–336.
[234] Hans-martin Füssel and Richard J. T. Klein, 'Climate Change Vulnerability Assessments: An evolution of conceptual thinking' (2006) *Climatic Change* 75: 301-329, at 305-6.
[235] See for example Maria Papathoma-Köhle, Catrin Promper and Thomas Glade, 'A Common Methodology for Risk Assessment and Mapping of Climate Change Related Hazards – Implications for Climate Change Adaptation Policies' (2016) *Climate* 4(8).
[236] Adger and Kelly (1999) *supra note* 65.
[237] Reyes Mason and Rigg (2019) *supra note* 65; and Jon Barnett and Elissa Waters, 'Rethinking the Vulnerability of Small Island States: Climate Change and Development in the Pacific Islands' (2016) DOI: 10.1057/978-1-137-42724-3_40, available online at: https://www.researchgate.net/publication/303907425_Rethinking_the_Vulnerability_of_Small_Island_States_Climate_Change_and_Development_in_the_Pacific_Islands (accessed 01/10/2019).

which is centred upon three core tenets, namely, the material sources of entitlements of individuals, the distribution of entitlements at the population level, and the institutional context in which the entitlements are distributed[238]. These entitlements vary between the individual and collective levels and are determined by factors such as the individual's access to resources and their social status on the one hand, and by the institutional, market, and social security context for the collective on the other[239].

Reyes Mason and Rigg frame vulnerability in terms of '*fair access to rights, resources and opportunities*'[240], particularly of marginalised groups, which serve to determine their adaptive capacity and problematising climate 'reductionism' which has seen climate impacts examined in isolation from the other challenges facing marginalised groups[241]. In the context of SIDS specifically, the need for more grounded assessments of the specific vulnerabilities of different island communities at the sub-national level, as opposed to homogenous categorisations of SIDS' vulnerability according to westernised economic models has been convincingly called for[242]. To this end, Petzold and Magnan argue that different types and geographies of island territories, along with the socio-political context, including the role of governance and institutions, are relevant in determining vulnerability and adaptive capacity[243].

Similarly, Barnett and Waters, analysing the predominant approach to framing the vulnerability of SIDS, conclude that the economic development-focused approach tends to be '*simplistic*'[244] and that it often will '*fail to take account of the unique capacities and practices that have existed in small island societies for centuries*'[245]. The significance of guaranteeing adequate consideration of the socio-political and cultural factors influencing vulnerability, including the role played by traditional knowledge and custom practices in bolstering resilience and reducing exposure to climate risks, is closely linked to the establishment of a procedural climate justice framework. The recognition of marginalised groups including, for example, indigenous and displaced communities, along with their substantive socio-economic and cultural rights, and their procedural rights to access climate information, participate in and challenge the decision-making processes on climate change correspond to the core tenets of procedural justice theory

[238] Adger and Kelly (1999) *supra note* 65.
[239] *Ibid.* Adger and Kelly (1999) at 258.
[240] Reyes Mason and Rigg (2019) *supra note* 65, at 4-5.
[241] *Ibid.* Reyes Mason and Rigg (2019).
[242] Barnett and Waters (2016) *supra note* 222.
[243] Jan Petzold and Alexandre K. Magnan, 'Climate change: thinking small islands beyond Small Island Developing States (SIDS)' (2019) *Climatic Change* 152:145–165.
[244] Barnett and Waters (2016) *supra note* 222, at 743
[245] *Ibid*. Barnett and Waters (2016), at 743.

outlined in Section II.ii above. An inclusive approach to climate law and policy making at both the international and sub-national levels is thereby called for which is informed by procedural rights and a broad-based conceptualisation of climate vulnerability, taking into account the socio-economic and cultural aspects that underpin it, as well as the more mainstream hazard-risk and economic aspects.

The IPCC's approach to the conceptualisation of vulnerability is itself being increasingly informed by the socio-economic, cultural and structural barriers that serve to affect the adaptive capacity of specific populations and groups. This shift from a hazard-risk to a broader and more socially constructed approach to climate vulnerability remains gradual and the IPCC approach has previously been critiqued in the academic commentary for failing to adequately examine the social factors influencing vulnerability and adaptive capacity in the face of climate impacts, such as inequality[246]. A shift in approach is however evident with more recent IPCC reports referring to 'structural conditions' and 'inequality' as factors influencing vulnerability to climate impacts[247]. A combined risk-hazard and socially constructed approach to the question of vulnerability assessment is best suited to analysing the complex range of factors influencing both exposure and adaptive capacity, moreover it is in keeping with the interdisciplinary nature of the research design of the present thesis. The social-constructivist approach to vulnerability should however feature far more prominently in the development of climate just law and policy making in order to guarantee more effective and targeted responses capable of addressing the barriers to climate justice encountered by communities in practice.

Vulnerability framed in these terms, taking into account the human, as well as the systemic factors, has close links with the human rights framework. In this context, Barnett has framed vulnerability as '*the degree to which people and the things that they value are susceptible to damage arising from climate change*'[248] and highlights the ways in which a lack of compliance with human rights increases the vulnerability of communities to climate impacts and, correspondingly, how increased human rights protection can contribute to reducing climate vulnerability. International human rights law already provides a basis for the recognition of the needs of many of the groups recognised as being particularly vulnerable to the impacts of

[246] See Neil Adger, 'Vulnerability' (2006) *Global Environmental Change* 16: 268-81, at 270; and Alice Venn, 'Social Justice and Climate Change' in T. M. Letcher (Ed) *Managing Global Warming: An interface between technology and human issues*, (Elsevier, 2019) 711-728, at 715.
[247] Intergovernmental Panel on Climate Change (IPCC) 'Climate Change 2014: Impacts, Adaptation and Vulnerability' (2014) Working Group II Contribution to the Fifth Assessment Report, Chapter 1, at 179.
[248] Jon Barnett, 'Human rights and vulnerability to climate change' in Stephen Humphreys (Ed.) *Human rights and Climate Change* (Cambridge University Press, 2010), at 257.

climate change, including for example the rights of women and the rights of persons with disabilities. The unique benefits offered by the adoption of a human rights-based approach to climate justice are explored in greater detail in Chapter III below.

iii. Climate change impacts & compound injustices

The recognition within environmental justice of the close link between environmental threats and social inequality, which has been used to effectively challenge such injustice, is particularly relevant to the climate change debate in light of the nature of its impacts on vulnerable states and communities. The fifth assessment report of the IPCC expressly highlighted the link between vulnerability to climate change impacts and '*multidimensional inequalities*'[249] including '*inequalities in socioeconomic status*'[250] and discrimination on various grounds, including ethnicity. The fact that climate change hits the poorest and most marginalised states and communities the hardest has been described succinctly by Shue as '*compound injustice*'[251] in the sense that an existing situation of injustice results in an increased risk of being subjected to another injustice.

In the context of climate change, many groups already experiencing marginalisation, discrimination and socio-economic hardship also experience high levels of risk exposure to adverse climate impacts and thus fall victim to such compound injustices[252]. These climate vulnerable groups notably include women[253], persons with disabilities[254], racial minorities and those living in poverty[255], with climate impacts resulting in further reductions to adaptive

[249] IPCC AR5 WGII Contribution Summary for Policymakers (2014) *supra note* 176, at 6.
[250] *Ibid.* IPCC AR5 WGII Contribution (2014), at 6.
[251] Shue (2014) *supra note* 81, at 4.
[252] Venn (2019) *supra note* 246.
[253] See for example Margaret Alston and Kerri Whittenbury (Eds.) *Research, action and policy: addressing the gendered impacts of climate change* (Springer, 2013) at 9-10; and UN Women Fiji, 'Why is Climate Change a Gender Issue?' (2014) available at http://asiapacific.unwomen.org/en/digital-library/publications/2015/1/why-is-climate-change-a-gender-issue (accessed 15/10/19).
[254] See for example Cadeyrn J. Gaskin, Davina Taylor, Susan Kinnear, Julie Mann, Wendy Hillman, and Monica Moran, 'Factors Associated with the Climate Change Vulnerability and the Adaptive Capacity of People with Disability: A Systematic Review' (2017) *Weather, Climate and Society* 9 (4): 801-814; and Julia Watts Belser, 'Disaster and Disability: Social Inequality and the Uneven Effects of Climate Change' (2015) *Tikkun, Duke University Press* 30 (2).
[255] See for example W. Malcolm Byrnes, 'Climate Justice, Hurricane Katrina, and African American Environmentalism' (2014) *Journal of African American Studies*, 18: 3, 305-314; and 'Katrina, Climate Change and the Poor' Editorial (2005) CMAJ 173: 8, available at: http://www.cmaj.ca/content/173/8/837 (accessed 15/10/19).

capacity and the endangerment of the existing progress made towards the realisation of the UN Sustainable Development Goals, including on gender equality and the eradication of poverty[256]. The IPCC for example has reaffirmed with high confidence that '*climate variability worsen[s] existing poverty and exacerbate[s] inequalities, especially for those disadvantaged by gender, age, race, class, caste, indigeneity and (dis)ability*'[257]. This injustice, in turn, serves to illuminate both the need to tackle underlying inequality and to secure an equitable distribution of climate change burdens. Consequently, the holistic approach of environmental justice in highlighting the interdependency between human welfare and environmental concerns is highly beneficial as a framework for approaching a human rights-based analysis of climate change.

Given the strong focus of the present thesis upon the threats posed to the enjoyment of fundamental rights and the needs of vulnerable communities, it is essential to employ an analytical framework which recognises the interconnectedness of the environmental and social justice impacts. Accordingly, the practical challenges faced by communities and in particular, factors including awareness, geographic remoteness, access to justice and institutional support were woven into the interview templates and further explored with participants in the interviews. The socio-economic hardship caused by climate change impacts and disasters which further undermined community resilience represents a clear theme emerging from discussions with NGOs on initial analysis and these interlinkages will therefore be further examined in the more detailed thematic analysis of the data to follow.

iv. Enabling civil society cooperation and policy impact

The degree of overlap between research and activism in the environmental justice field represents a unique advantage of this framework over others in addressing climate change. The grassroots environmental justice movement together with the extensive body of policy-based research which has grown alongside it, has had a great deal of influence on policy making. Pastor underlines that the activists engaged in campaigning for environmental justice in the United States succeeded in eliciting policy action, for example in the form of a '*clean up and*

[256] IPCC 'Global Warming of 1.5°C' (2018) *supra note* 6, Chapter 5, Sustainable Development, Poverty Eradication and Reducing Inequalities, at 452.
[257] *Ibid.* IPCC 1.5°C Report (2018) at 451.

redevelopment of polluted 'brownfields' sites'[258] by the Environmental Protection Agency. Another important example can be found in US President Clinton's 1994 Executive Order which mandated action to address '*environmental justice in minority populations and low-income populations*'[259] following the success of the environmental justice movement. This impact has not been limited to the national level as bonds have been formed internationally between communities facing similar environmental justice challenges[260]. The impact of the movement itself is further enhanced by the close collaboration with the academic literature and the notions of justice developed within it. Much of the academic literature in this field can be seen to share the movement's emancipatory agenda, seeking to develop frameworks for a more equitable distribution of environmental burdens and benefits, greater participation and the amplification of the voices of marginalised or disadvantaged communities.

The academic literature, as Schlosberg convincingly argues stands to gain a great deal from taking heed of the approaches adopted by the movement and the civil society organisations that help to drive it. On conducting an examination of the various environmental justice approaches adopted by global and southern NGOs, Schlosberg found that the organisations demonstrated a clear overlap between the three elements of 'equity, recognition and participation'[261] in practice which should be taken into account. For this reason, academic theories that call for a strict adherence to one fixed conception of justice miss out on the crucial benefits of collaboration and the lessons learned by the movement regarding what can offer most impact.

The strengthening of these important links between grassroots movements along with the civil society organisations which champion them and academia will lead to a conceptualisation of climate justice which is far more in tune with the needs and perspectives of the vulnerable states and communities who have the most to gain from it. The strength and policy influence of civil society groups in the climate civil society groups all over the world are indeed already uniting concerned citizens both to bring legal actions and to campaign for climate justice for current and future generations[262]. Carving out a clear role for these organisations will help not only to amplify vulnerable community voices at the national, regional and international levels, but also importantly, assist governments in filling the lacuna left by a lack of institutional

[258] Pastor (2012) *supra note* 104, at 355.
[259] Keuhn (2000) *supra note* 102, at 10682.
[260] Pastor (2012) *supra note* 104, at 371.
[261] Schlosberg (2007) *supra note* 121, at 96.
[262] See for example Juliana v. United States (filed 2015, judgment pending) 9th Circuit, Docket No. 18-36082; and Urgenda Foundation v The Netherlands [2018] The Hague Court of Appeal, C/09/456689/ HA ZA 13-1396.

capacity. Closer cooperation between the different bodies will further lead to more centralised coordination of programmes of work, minimising the risk of duplication and ensuring more effective policy.

v. Towards a pluralistic approach to climate justice

One of the greatest advantages of the adoption of an environmental justice-based approach to an analysis of climate change is to be found in its pluralism. Pluralism here is defined in terms of the examination and bringing together of different concepts of environmental justice. Schlosberg has defined it in the context of the plurality of definitions that environmental justice enjoys with respect to the different elements already discussed and depending on whether environmental justice is being employed in the academic literature, in policy making, or by the grassroots movement[263]. Although it remains common to find distributive notions of justice dominating the analysis of rights and duties in the context of climate change, as illustrated by a number of contributions to the climate justice literature reviewed[264], increasingly the definitions of environmental and climate justice invoked do not adhere strictly to one notion of justice as, for example, the broad based definition of Bell demonstrates[265].

Similarly, Reyes Mason and Rigg advocate for a dual approach to the framing of climate change in social justice terms, incorporating both distributive and procedural justice to promote climate action predicated upon community inclusion[266]. This flexibility, as Schlosberg convincingly argues, should be regarded as an advantage rather than a threat to academic rigour[267]. In light of the opportunity it affords for strengthened collaboration with civil society, and the increased scope for impact that a pluralistic approach offers, many aspects of this approach recommend it to addressing climate change.

A pluralist approach to climate justice is highly suited to this analysis because it leaves room for the identification and prioritisation of the aspects of justice most relevant at the state and community levels in SIDS which, in turn, can inform the framing of a grounded climate justice

[263] Schlosberg (2007), *supra note* 121, at 165.
[264] See for example Stephen M. Gardiner, Simon Caney, Dale Jamieson, Henry Shue (Eds.) *Climate Ethics: Essential Readings* (Oxford: Oxford University Press 2010); and Dietzel (2019) *supra note* 81.
[265] Bell (2014) *supra note* 119.
[266] Reyes Mason and Rigg (2019) *supra note* 65, at 4-6.
[267] Schlosberg (2007) *supra note* 121.

approach in an inductive manner. This will help to guarantee the effectiveness and impact of the climate justice framework employed in each context. It will further permit the adoption of a more inductive approach based on the findings of the South Pacific case study and fieldwork. Climate change is a multifaceted challenge and as such, although certain notions of environmental justice may well be capable of being prioritised at the state and community levels, an effective climate justice framework requires overlapping concepts of justice to be invoked in a more adapted and nuanced manner.

The use of a pluralistic climate justice framework does not threaten the fragmentation of climate justice as a field of political theory scholarship, but rather strengthens the flexibility and the real-world applicability of it as a framework to guide law and policy action, informed by thorough assessments of human vulnerability and the needs of climate-vulnerable groups given voice in decision-making processes. The distributive and procedural justice aspects of a pluralistic approach are not mutually exclusive but rather mutually constitutive when viewed through a human rights lens. The thesis therefore employs a combined climate justice approach relying upon both procedural and distributive elements of environmental justice. Notions of global distributive justice will be invoked alongside more focused procedural aspects of participation, institutional capacity and access to justice affecting climate vulnerable states and communities in practice.

IV. Methodology

The climate justice theoretical framework is closely linked to the two central research questions of the thesis:

1) What are the defining features of a climate just approach to law and policy making for South Pacific SIDS?

2) How can international human rights law provide greater recourse to justice to climate vulnerable SIDS and their peoples?

For the purposes of RQ1, the theoretical framework is invoked in order to shape the design of the empirical case study to respond to these questions, for example determining the focus of a number of the semi-structured interview questions and the thematic analysis of the data collected. For the purposes of RQ2, it is similarly important in the framing of the doctrinal legal analysis around human rights, for example in highlighting the unique benefits of a rights-

based approach in providing for the attainment of distributive and procedural justice aims, in exploring the barriers to human rights recourse and in identifying the most suitable enforcement mechanisms.

The core research questions of the present project seek to explore not only the utility of international human rights law in providing recourse to legal justice, but the broader climate justice challenges experienced by climate vulnerable states and peoples in practice. Specifically, RQ1 exploring which aspects of a climate justice approach are of greatest relevance and utility for South Pacific SIDS to guide law and policy making, requires an examination of the doctrinal and qualitative empirical data gathered over the course of the case study in order to identify the distributive and/or procedural justice priorities and challenges emerging most strongly in practice.

The theoretical approach itself is also informed inductively through the analysis of the qualitative data which is thematically coded in order to illuminate any significant climate justice themes emerging in practice, in accordance with the overarching aim of constructing a relevant and impactful framework to guide future action. It is clear from the initial findings that access to justice and institutional capacity constraints represent significant hurdles to engagement with human rights at the national level, and to the availability of legal protections more fundamentally at the grassroots level. These core themes will therefore need to be taken into account in the final conceptualisation of climate justice, which will draw upon the theoretical, legal and empirical analysis conducted.

Three core themes for data analysis were identified based upon the theoretical climate justice framework:

1) Distributive justice

2) Procedural justice, including recognition of marginalised communities; and

3) Human rights.

The regional case study offers the combined benefits of access to regional literature and policy documents, in addition to the opportunity to explore the views of key climate change and human rights stakeholders through a series of semi-structured interviews. The theoretical framework informs the choice of interview themes and questions in a deductive manner on the one hand, but is also informed inductively by the findings of the empirical research which will feed back into the identification of the core aspects of the climate justice framework for future

academic research and policy-making. To this end, the case study plays a central role both in identifying the key facets of a climate justice approach for climate vulnerable SIDS, and in grounding the international legal analysis firmly in the reality of the challenges faced in practice, leading to more relevant and impactful research outcomes.

By making the link between the application of international human rights law to climate change on the one hand, and the practical challenges limiting the protections available to some of the most climate vulnerable SIDS on the other, many of which are likely to be shared by other climate vulnerable states, the present thesis goes a step further than the existing literature. Scholars in the international law and political theory fields have already been exploring the value of human rights as guiding principles in climate action[268], the legal challenges associated with adopting a human rights-based approach[269], and the human rights implications of specific climate-related impacts[270]. The literature however does not include examples of work combining doctrinal analysis of rights-based approaches in law and political theory, with qualitative empirical data gathered in interviews with key stakeholders in SIDS.

The added value of applying a pluralist climate justice lens to the examination of rights-based recourse to justice in the climate change context, in combination with a regional case study including empirical data collection, is the formulation of a more informed and grounded law and policy framework. The unique insight offered by stakeholders working in the human rights and climate justice fields in SIDS is invaluable in illuminating the practical barriers to climate justice, how issues of climate justice are approached at the national and regional levels, and the extent to which human rights are embedded within national frameworks. The specific choice of sites in conducting the case study are explored in detail in Chapter V, along with the unique characteristics and institutional context of the South Pacific. In Chapter VI the findings emerging from the doctrinal and empirical data at the two sites in Vanuatu and Fiji are presented and subsequently feed into a number of core recommendations for the development of a rights-based framework for climate action informed by a grounded approach to climate justice.

[268] See for example Simon Caney, 'Cosmopolitan Justice, Responsibility and Global Climate Change' (2005) *Leiden Journal of International Law,* 18: 747-775; Alix Dietzel, (2017) 'The Paris Agreement – Protecting the Human Right to Health?' in Global Policy 8:3, 313-321; and McInerney-Lankford (2013) *supra note* 77.
[269] See for example Stephen Humphreys (Ed.) *Human rights and Climate Change* (Cambridge University Press, 2010); and Eric A. Posner, 'Climate Change and International Human Rights Litigation: A Critical Appraisal' (2007) *University of Pennsylvania Law Review* 155:1925.
[270] See for example Aonima and Kumar (2015); and Fa'anunu (2015) *supra note* 98.

V. Methods

i. Combination of doctrinal & empirical research methods

The methods employed to conduct the research comprise a combination of desk-based doctrinal research and empirical semi-structured interviews with key stakeholders in the climate change, justice and human rights fields. The doctrinal research entails an examination of regional and domestic climate change policy, human rights law, and an overview of the national legal structures in Vanuatu and Fiji. The doctrinal analysis was undertaken at the University of the South Pacific's School of Law in Port Vila, Vanuatu which offered the benefit of the collated legal resources of the university which is shared by twelve Pacific Island Nations[271], along with access to, and guidance from staff at the Pacific Islands Legal Information Institute (PacLII), also located on site.

The empirical research includes participants from the Vanuatu and Fijian governments, local lawyers, NGOs working with climate vulnerable communities, Pacific regional and UN organisations. On beginning the research, some further adaptation of the initial research design became necessary as it was discovered that remote requests via email or telephone to set up interviews were not appropriate given the technological difficulties and preference for face-to-face interaction in ni-Vanuatu and Fijian society. Accordingly, face-to-face introductions at the relevant offices in Port Vila were made and an additional short trip of 12 days to Suva in Fiji was included to enable face-to-face interviews with key regional stakeholders to be conducted.

ii. Justification of the choice of semi-structured interviews

Semi-structured interviews are deemed to be the most suitable method for carrying out the research in light of the need for flexibility in exploring the broad concept of climate justice from a number of different distributive and procedural angles, in both law and policy terms.

[271] See University of the South Pacific, About the University webpage, 12 member countries: Cook Islands, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Solomon Islands, Tokelau, Tonga, Tuvalu, Vanuatu and Samoa, available online at: https://www.usp.ac.fj/index.php?id=usp_introduction (accessed 11/11/19).

Existing studies carried out in the region, in particular those of Warrick[272] and Vaioleti[273] found one-on-one or small group settings to be more effective for conducting research in the Pacific. Less structured methods based upon 'talanoa' or 'storian' where individuals are given greater freedom to discuss or story their issues and experiences with the researcher are more appropriate to the cultural context than other more rigidly structured methods. Talanoa has been defined broadly in the literature, commonly cited features however include building a rapport with the participants[274], and an open, less rigidly structured dialogue[275]. Talanoa has been widely used in the South Pacific, including in Fiji[276] and Vanuatu[277].

There are many different forms of Talanoa involving differing objectives and research methods, ranging from Talanoa faka 'eke 'eke most closely resembling an interview with pre-determined questions[278], to Talanoa'i involving deep analysis of an issue and co-construction between the parties[279]. In light of the scope of the present analysis, together with the nature of the research questions exploring key climate justice challenges, legal and policy frameworks, which are better suited to the more targeted form of questioning, semi-structured interviews informed by Talanoa therefore represent the most suitable method.

In light of both the cultural preference for less structured dialogue, and the variety of stakeholders from different organisations, policy and legal fields, focus groups were deemed to be a less suited to the objectives and context of the case study. As Newing underlines, focus groups '*do not provide independent data from individuals*'[280] or for that matter a representative sample from '*naturally occurring groups*'[281] as participants are selected by the researcher. Given the varied work and status of a number of the relevant stakeholders, for example as elite

[272] Olivia Warrick, 'Ethics and methods in research for community-based adaptation: reflection from rural Vanuatu' (2009) *IIED* available online at: http://pubs.iied.org/G02815/ (accessed 11/11/19).
[273] Timote M. Vaioleti, 'Talanoa Research Methodology: A Developing Position on Pacific Research' (2006) *Waikato Journal of Education*, 12.
[274] Ingrid Johnston, 'Cross-cultural Research: Talanoa in the Pacific' in Maggie Walter (ed.) *Social Research Methods*, 3rd Edition, (Oxford University Press, 2013).
[275] Vaioleti (2006), *supra note* 273, at 23.
[276] See for example Ingrid Johnston, 'Let Them Feed Him Biscuits: Doing Fieldwork in Fiji with the Family' (2015) *Forum: Qualitative Social Research*, 16(1), Art. 17; and Timote Vaioleti, 'Talanoa: Differentiating the Talanoa research methodology from phenomenology, narrative, kaupapa mauri and feminist methodologies' (2013) *Te Reo*, 56 & 57, 191-212.
[277] Warrick (2009), *supra note* 272.
[278] David Fa'ave, Alison Jones and Linita Manu'atu, 'Talanoa 'I 'A E Talanoa – Talking about Talanoa: Some dilemmas of a novice researcher' (2016) *AlterNative: An International Journal of Indigenous Peoples* 12(2), at 141; and Vaioleti (2013), *supra note* 276, at 201-202.
[279] Vaioleti (2013), *supra note* 276, at 203.
[280] Helen Newing, with contributions from C.M. Eagle, R.K. Puri and C.W. Watson, *Conducting Research in Conversation: Social Science Methods and Practice* (Routledge, 2011) at 104.
[281] *Ibid.* Newing (2011).

members of government ministries or legal practitioners, there were also concerns that the group dynamic would undermine rather than positively contribute to the data collected. Participants' statements on the core question themes would be likely to be far more guarded than on a one-on-one basis where a relationship of trust can more easily be established. Furthermore, the discussion would be likely to be limited by a lack of common ground between the participants[282] given their very different fields of expertise.

Warrick in particular, found focus groups to be ineffective in her research with climate vulnerable communities in Vanuatu[283], while less structured approaches based on talanoa or storian yielded much better results in terms of facilitating participation, building rapport and allowing participants greater input in the research process. In the light of both the time and resource constraints of the case study, being conducted as part of the ESRC South West Doctoral Training Centre's Overseas Institutional Visit scheme, along with the nature of the questions to be answered, an ethnographic study was also deemed to be beyond the scope of this analysis.

The institutional base for conducting the case study offered a range of important advantages in terms of a safe workspace and accommodation from which to set up interviews, access to a range of resources, and the building of an initial rapport with participants who were familiar with the University. However, the maximum three-month period for ESRC OIV placements, limited budget agreed upon and additionally, the researcher's lack of specific anthropological or ethnographic training ruled out an ethnography at this juncture. It nevertheless remains a potential avenue for future research, for example examining the perspectives on climate justice of a more representative range of vulnerable communities in the region.

Semi-structured interviews conducted on the basis of templates with key questions for different stakeholders but with greater flexibility and scope for conversation to be directed by participants in accordance with more culturally appropriate methods such as talanoa, therefore represented the most suitable option. The templates included the characteristic mixture of semi-structured interviewing question techniques, including open questions, '*theory -driven hypothesis directed questions*'[284] and more '*confrontational questions*'[285] to challenge the underlying theoretical assumptions, for example questioning whether it is appropriate to view

[282] *Ibid*. Newing (2011) at 106.
[283] Warrick (2009), *supra note* 272, at 79.
[284] Uwe Flick, *An introduction to Qualitative Research* (4th Edition) (Sage Publications, 2009) at 156-157.
[285] *Ibid.* Flick (2009) at 157.

climate change as a human rights issue. The qualitative data gathered has been recorded and fully transcribed before being analysed thematically according to the key legal and environmental justice issues identified. Four core themes of distributive justice, procedural justice, practical challenges, and human rights have been identified through the qualitative empirical data collected. The coded data in turn feeds back into the conceptualisation of the climate justice framework being proposed by the present thesis to guide the development of future law and policy.

iii. Ethical issues, reflexivity, mitigation of risks & benefits for participants

An ethics application was submitted for review by the Law Research Ethics Committee, along with a detailed risk assessment in order to ensure that any potential harm arising for the participants and the researcher was minimised. There were no anticipated physical or psychological risks to the participants taking part in the research and the University of the South Pacific provided a safe working space from which to undertake the case study. The data was gathered with prior informed consent being given in the form of a signed consent form, after a discussion of the project with the participants who were given the opportunity to ask questions and a means of contacting the researcher via email or a local telephone number for any follow-up questions afterwards. All data has been anonymised in transcription, with no personal details appearing in subsequent work. It has been stored on an encrypted USB, and in password protected university files. All data gathered in hard copy, along with participants' signed consent forms is also to be kept under lock and key.

The research methods employed were, as far as possible, informed by the Pacific 'talanoa' tradition, taking into account the importance of ensuring a respectful and culturally aware approach to data gathering. The process and data gathered is however likely to have been impacted by factors such as '*age, gender, cultural rank or community standing of the researcher*'[286] which Vaioleti underlines play a significant role in research conducted with Pacific communities. The majority of the semi-structured interviews conducted would fall into the category of elite interviews, for example those conducted with the national government and UN employees. This required additional reflexivity in both conducting the interviews, being

[286] Vaioleti (2006), *supra note* 273, at 22.

cognisant of the power dynamics in play between interviewer and interviewee, and in subsequently analysing the data collected.

Boucher has underlined the need to apply a critical feminist lens in analysing elite interviews form the perspective of gender power imbalances, further acknowledging the need for intersectional reflexivity on the basis that gender is just one aspect alongside '*class, educational status, race, ethnicity, disability and cultural context*'[287] that will have the effect of shaping the power relations in the elite interviewing process. Ganter has further illuminated the significance of '*cultural otherness*'[288] in influencing the conduct and outcomes of semi-structured elite interviews, however it is acknowledged that this created not only challenges but also '*potential for increased and mutual engagement in the interaction*'[289] between interviewer and interviewee. In my own experience, I was conscious of my age, gender, and cultural otherness in making appointments and carrying out interviews. I sought to observe socio-cultural norms and to build rapport with participants, however my otherness was, in my view, more a facilitating than a limiting factor in prompting discussion as my European background and my visiting position at the University of the South Pacific sparked interest and were often good ice-breaker talking points. I was made to feel welcome and comfortable in having the discussions with participants.

Fa'ave et al. emphasise that these factors will likely be more significant in determining the outcome of interactions than '*standard ethics or rules*'[290] employed in qualitative interviews. A reflexive approach has therefore been adopted in analysing the qualitative data gathered, remaining conscious of the researcher's status as a cultural outsider and a lone female. The case study was however conducted in awareness of, and, as far as possible, in deference to cultural norms in order to build relationships of trust and respect with participants. Chung-Do et al. note the importance of building collaborative relationships in order to engage Pacific islanders in research and particularly of researchers showing humility, respect, and providing some follow-up or tangible benefit to the participants[291]. Time was therefore taken for personal

[287] Anna Boucher, 'Power in elite interviewing: Lessons from feminist studies for political science' (2017) *Women's Studies International Forum*, 62: 99-106.
[288] Sarah Anne Ganter, 'Perception and Articulation of own Cultural Otherness in Elite Interview Situations: Challenge or Repertoire?' (2017) *The Qualitative Report*, 22(4) 942-956.
[289] *Ibid.* Ganter (2017) at 952.
[290] Fa'ave et al, *supra note* 278, at 142.
[291] Jane J. Chung-Do, Mele A. Look, Tricia Mabellos, Mililani Trask-Batti, Katherine Burke and Marjorie K. L. Mala Mau, 'Engaging Pacific Islanders in Research: Community Recommendations' (2016) *Progress in Community Health Partnerships: Research, Education and Action*, 10(1) Johns Hopkins University Press, at 66-67.

introductions and general discussions about the work of participants in order to build a rapport before approaching the core research questions and this more personal approach yielded much better results.

The overall approach to the research project, namely one of empowerment of climate vulnerable states and communities, naturally lent itself to engagement in this respect and follow-up dissemination of the core findings and any academic publications resulting therefrom is an important facet of the project. A journal article offering a number of key policy recommendations on the topic of breaking institutional barriers to engagement with the international human rights system in the South Pacific has been published in an open-access format to this end which has been shared with contacts at the University of the South Pacific[292]. On completion of the PhD thesis, a policy brief will also be drafted outlining the key policy-relevant findings of the research to be shared with participants and national government networks for further use and dissemination as they see fit.

iv. Sampling strategy for selecting participants

The twenty-eight interviews have been conducted, two of which were with two participants, so thirty-one participants working in a variety of climate-related, rights-related and community support roles were interviewed over the course of the case study in total. Seven of the interviewees were employed by UN bodies, three by Pacific regional organisations, eleven were NGO employees, seven interviewees were employed by national government departments, and three were employed in private legal practice[293]. The participants have been selected in accordance with their experience in the relevant fields of climate change policy, human rights, justice, legal practice, community outreach, and disaster response.

The range of actors was necessary to respond to the questions framed by the different environmental justice elements of, for example, distribution in the availability of funding for climate adaptation and response at the national and regional levels, compared with issues such as access to justice and participation in decision-making at the community level. Engagement with human rights is also an issue that remains institutionally largely separated from climate

[292] Alice Venn, 'Universal Human Rights? Breaking the Institutional Barriers Facing Climate-Vulnerable Small-Island Developing States' (2017) *Climate Law* 7:4, 322-346.
[293] *Ibid.* Venn (2017) at 325.

change at the national level which is primarily categorised as an environmental matter, necessitating approaching specific government departments and legal practitioners. However, they by no means represented a comprehensive cross-section of views in the respective countries, or indeed from the South Pacific region, thus an awareness of the limitations of the current project is also crucial in the analysis of the data gathered, as well as with respect to the conclusions drawn.

The participants represent different genders and backgrounds, and while many NGO participants work with climate vulnerable communities at a more grassroots level, the views provided are nevertheless, in general, those of specialist stakeholders in relevant law and policy fields. Moreover, the organisations in question have their own policies and agendas which will need to be taken into account in analysing the data gathered. A more grassroots analysis, including an ethnography of the views of climate vulnerable communities themselves with respect to climate justice priorities would demand a far more time- and resource intensive study, and therefore represents a future avenue for continued research. However, in light of the international legal focus of the present project with the aim of identifying the mechanisms and principles at that level capable of providing climate vulnerable states with effective recourse to justice, as well as to identify the challenges of access to justice and institutional capacity among others that exist in practice, it is appropriate to narrow the scope of the project to the relevant regional organisations, government, NGO and legal stakeholders.

Chapter III - International human rights law & climate change: Benefits & opportunities

The present chapter explores the unique benefits offered by international human rights obligations and mechanisms in responding to climate change. These benefits will be explored in four main sections, beginning with an exploration of the ethical advantages of a human rights-based approach to climate justice and the comparative weaknesses of the principal alternative legal avenues under the UNFCCC framework and international environmental law. The value added to an approach based upon international human rights law by the *erga omnes* and *jus cogens* status of norms, and the potential application of principles of state responsibility will subsequently be examined. In the final section, the key international enforcement avenues available to climate vulnerable states and peoples are explored. An examination of how to overcome the specific legal challenges associated with the adoption of a human rights approach to climate change at the international level is provided in detail in Chapter IV.

I. Human rights and ethics: Laying the foundations of climate justice

The strong relationship between climate justice and fundamental human rights as mutually reinforcing normative standards guiding climate action forms the bedrock for the legal development of the rights-based approach in the present chapter. The pluralistic conceptualisation of climate justice developed in Chapter II, comprising both distributive and procedural justice elements, has close ties to the normative foundations of human rights as instruments designed to eliminate discrimination, thereby creating the conditions for equality of treatment, and to guarantee a minimum level of protection for the enjoyment of a decent standard of life. It is argued that the normative symbiosis between climate justice and human rights offers important benefits in terms of 'humanising' an otherwise abstract global environmental phenomenon which has often been viewed through an economic development lens[294] rather than grounded in the lived experience of climate impacts upon human lives and

[294] See for example Nicolas Stern, 'Economic development, climate and values: making policy' (2015) *Proceedings of the Royal Society B*, 282; Kirsten Halsnæs, Anil Markandya and P.Shukla, 'Introduction: Sustainable Development, Energy, and Climate Change' (2011) *World Development*, 39:6, 983-986; and Frank Ackerman, Richard Kozul-Wright and Rob Vos (Eds.) *Climate Protection and Development* (2012) Bloomsbury Open Access.

livelihoods. The inclusion of a clause on human rights for the first time in an international climate change treaty in the preamble of the Paris Agreement in 2015[295] is evidence that this approach may gradually be changing, yet the failure to embed rights firmly in the legally binding provisions of the Agreement and their framing as factors for States Parties to 'respect' and 'consider' in taking climate action suggests that they retain their ancillary status.

In the words of Article 1 of the 1948 Universal Declaration of Human Rights, the core founding instrument of the international human rights framework, '*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*'[296]. The overarching aim of providing for minimum universally agreed standards for the safeguarding of human life and dignity ties closely with the moral arguments underpinning the climate justice literature, where useful framings of rights include those of Shue and Caney in particular. Caney conceptualises rights in a fourfold manner as being founded upon respect for 'humanity', minimum moral thresholds, the universality of the protection they provide, and their priority status above other moral values[297].

The framing of rights as having attained an elevated moral status, and as guaranteeing minimum thresholds is reflected in the arguments for the high status of rights in the international legal framework as *erga omnes* and *jus cogens* norms, explored in greater detail in Section III below. A rights-based approach to addressing climate change and the corresponding focus upon human impacts it carries with it, reinforces the prioritisation of the needs of particularly climate-vulnerable communities in designing climate law and policy responses. It may also assist in shifting the focus of international climate discourse away from the large-scale economic development challenges underpinning binary CBDR-based approaches to climate negotiations which have ultimately proven unsuccessful in preventing increases in global temperatures, towards more participatory models of climate action focused on those climate vulnerable groups whose rights are most severely affected at the sub-state level.

Clear links between distributive justice frameworks and rights are similarly evident in the way in which Shue for example defines equity as including the need to guarantee an adequate

[295] Benoit Mayer, 'Human Rights in the Paris Agreement' (2016) *Climate Law*, 6: 109-117.
[296] Universal Declaration of Human Rights [1948], United Nations General Assembly, Resolution 217(III), Article 1.
[297] Simon Caney, 'Climate change, human rights and moral thresholds' in Stephen Humphreys (Ed.) *Human Rights and Climate Change* (Cambridge: Cambridge University Press 2010) 69 – 90, at 71-73.

minimum of the resources necessary for a decent life[298]. Distributive climate justice, as discussed in Chapter II, demands action be taken to redress the fundamental inequity in the manifestation of climate change impacts, whereby climate-vulnerable SIDS and Least Developed Countries are suffering the most severe consequences of temperature and sea-level rises, extreme weather events, and the corresponding loss and damage. Fundamental human rights can form concrete guidelines in this endeavour, laying down the minimum standards for a decent life that states must provide in the face of increasingly unequal environmental burdens. In light of the utility of rights as implementation tools in redressing the disproportionate climate burdens being borne at both the national and sub-national levels, many climate justice scholars have called for their integration into distributive frameworks, relying for example upon the rights to life, basic subsistence, health, and physical security[299].

The array of rights capable of forming the basis of distributive 'minimums' and protections from climate harms stem from both the civil and political, and socio-economic and cultural rights instruments[300]. The rights impacted by climate change are numerous, however, for the purposes of developing the strongest legal and moral argument it would be preferable to prioritise certain 'core rights' in pursuit of climate justice such as the right to life, which, as one of the key civil and political rights frequently embedded in national law and subject to a growing body of scientific evidence on the effects of climate change on human mortality[301], has also gives rise to environmental duties before the courts[302]. While legal challenges must be overcome in relation to the establishment of responsibility for climate change impacts upon its enjoyment which will require the progressive reform of legal doctrine, discussed in detail in Chapter IV, it is nevertheless argued that the widely-recognised right to life and the high moral status it has attained, evidenced by its recognition as a *jus cogens* norm in international law explored in S.III(i) below, render it one of the best-suited to providing recourse to climate justice.

The link between distributive climate justice and human impacts is beginning to be made in the context of loss and damage responses. Despite the lack of an established definition of climate loss and damage, it is broadly conceived as encompassing all losses that cannot be

[298] Shue (2014) *supra note* 81, at 189-194.
[299] See for example Bell (2011) *supra note* 84; and Caney (2010) *supra note* 81; and Dietzel (2017) *supra note* 268.
[300] John H Knox, 'Climate change and Human Rights Law' (2009) *Virginia Journal of International Law*, 50:1.
[301] See World Health Organization, *Quantitative risk assessment of the effects of climate change on selected causes of death, 2030s and 2050s* (2014) Geneva: WHO Library.
[302] See for example the European Court of Human Rights cases: Öneryildiz v Turkey [2004] ECHR 657 and Budayeva v Russia [2014] 59 E.H.R.R. 2.

accounted for by either mitigation or adaptation measures, otherwise described as 'irreplaceable'[303] or the 'residual impacts'[304] of climate change. The Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts can be seen to be gradually extending its scope beyond pure economic loss resulting from climate-related disasters and extreme weather events, to more human impacts, including non-economic losses[305] and displacement currently being explored by the Task Force on Displacement[306]. By bringing the focus of loss and damage responses onto non-economic human impacts, a space is being carved out for the integration of fundamental human rights into distributive responses to climate change at the international level. Progress in this sphere has however been slow and despite concerted lobbying efforts by climate-vulnerable developing states and civil society organisations to have human rights incorporated into the international framework[307], alongside calls for the development of a compensation mechanism to provide concrete redress[308], rights remain consigned to a perambulatory clause and there is an express exclusion of any liability or compensation arising from the loss and damage provisions.[309]

Procedural environmental justice is similarly reinforced by human rights obligations, most notably those on political participation and equality. Procedural considerations have been somewhat overlooked in prevalent climate justice debates and in the UNFCCC regime itself, in favour of broader distributive issues including adaptation finance and loss and damage. The examination of procedural justice in climate change responses has principally been limited to examinations of fairness defined in terms of the prima facie representation of States Parties within the negotiations and drafting[310], alongside the representation of the interests of future generations[311]. Procedural climate justice nevertheless has a strong basis in human rights and

[303] Karen Elizabeth McNamara, 'Exploring Loss and Damage at the International Climate Change Talks' (2014) *International Journal of Disaster Risk Science* 5: 242-246, at 242.
[304] Stockholm Environment Institute, *Defining loss and damage: The science and politics around one of the most contested issues within the UNFCCC* (2016) Discussion Brief, available at: https://www.sei-international.org/mediamanager/documents/Publications/Climate/SEI-DB-2016-Loss-and-damage-4-traits.pdf (accessed 06/02/2018).
[305] UN Framework Convention on Climate Change, Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts (14 November 2017) Draft decision -/CP.23, FCCC/SB/2017/L.5, Para 13(c).
[306] UN Framework Convention on Climate Change, Task Force on Displacement at a glance (November 2017) available at: http://unfccc.int/files/adaptation/groups_committees/loss_and_damage_executive_committee/application/pdf/tfd_brochure_nov_2017.pdf (accessed 07/02/2018).
[307] Mayer (2016), *supra note* 295.
[308] Adelman (2016) *supra note* 90.
[309] UNFCCC Decision 1/CP.21 *supra note* 133, at Paragraph 51.
[310] Vanderheiden (2008) *supra note* 82, at 57-60.
[311] Peter Lawrence, *Justice for Future Generations: Climate Change and International Law* (Cheltenham: Edward Elgar, 2014), at 188-190.

should be broadened to include essential access to justice factors in line with broader pluralistic conceptualisations of environmental justice[312]. The UN Special Rapporteur on Human Rights and the Environment has acknowledged the need for international cooperation and increased efforts by states to provide access to climate change information, support inclusive participation in environmental decision-making, and to provide effective remedies for human rights violations in the context of climate change[313].

The report of the UN Special Rapporteur primarily refers to the ability to challenge violations arising from the national implementation of mitigation projects and the need for cooperation and support, rather than the provision for inter-state claims or overcoming the challenges associated with establishing responsibility for violations of human rights. The provisions of the report are nevertheless evidence of the recognition of the links between fundamental rights and procedural climate justice at the international level. International human rights law provides for prohibitions on discrimination on the grounds of race, sex, national or social origin, disability and other statuses in the enjoyment of fundamental rights[314] which align closely with the underlying socio-economic causes of climate vulnerability[315] and serve to increase the barriers to effective participation in climate policy-making and access to justice within climate-vulnerable states. The capacity of international human rights law to provide concrete recourse to justice for climate vulnerable states and peoples is explored in detail in Section IV in relation to inter-state claims, complaints mechanisms, and special procedures.

It is important to highlight that the body of climate justice literature has given rise to proposals for the establishment of new climate rights in various forms to address the inherent inequity of anthropogenic climate change. Scholars including Caney, Hayward and Shue have argued in favour of the development of rights '*not to suffer from the disadvantages generated by global climate change*'[316], to '*subsistence emissions*'[317], and to '*an equitable share of the planet's*

[312] See Bell (2014) *supra note* 119; and Schlosberg (2004) *supra note* 117.
[313] Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Human Rights Council Thirty-first session (1 February 2016) A/HRC/31/52.
[314] See: International Covenant on Civil and Political Rights (ICCPR) [1966] UN Treaty Series, Vol. 999, 171, Article 2; International Covenant on Economic, Social and Cultural Rights (ICESCR) [1966] UN Treaty Series, Vol. 993, 3, Article 2; Convention on the Elimination of All Forms of Discrimination Against Women [1979] UN Treaty Series, Vol. 1249, 13; Convention on the Rights of Persons with Disabilities (CRPD) [2006] UN Treaty Series, Vol. 2515, 3.
[315] See Adger and Kelly (1999) *supra note* 65; and IPCC WGII Contribution to AR5 Summary, *supra note* 161, at 6.
[316] Caney (2010) *supra note* 81, at 136.
[317] Shue (2014) *supra note* 81.

aggregate natural resources and environmental services'[318] in response to climate justice challenges. While it is not disputed that tailored climate rights are normatively desirable, the failure of protracted efforts to establish a legally binding right to a healthy environment at the international level[319], along with the challenges civil society organisations and climate vulnerable States Parties to the UNFCCC have faced in legally embedding existing human rights in the Paris Agreement[320] serve to illustrate the difficulties facing the establishment of such rights.

Adelman has logically argued that as the enjoyment of other human rights is underpinned by environmental sustainability, a '*meta-right to a sustainable environment*'[321] could be created and given primacy over other rights, however he acknowledges that the creation of a hierarchy of rights may be problematic and that existing rights are likely to have stronger chances of being successful in responding to climate change[322]. It is argued that the capacity of existing international human rights laws, albeit with the aid of institutional and judicial reforms, to provide for the multiplicity of distributive and procedural climate justice challenges through inter-state claims, special procedures as well as for the elevated legal and moral status of human life in climate law and policy responses, renders it the best-suited approach.

II. Comparative benefits of a human rights approach

An important further justification for the use of international human rights law in securing climate justice for vulnerable states and communities is found in the legal advantages it offers when compared with alternative approaches under international law. Two principal alternative legal avenues for the protection of climate-vulnerable states and communities are considered in the present section, primarily, the obligations contained within the UNFCCC framework itself, and secondly, key principles and customary norms of international environmental law. It is important to note however that these two avenues do not represent the only alternatives to

[318] Hayward (2007) *supra note* 86, at 445.
[319] Despite increasing focus on the enjoyment of a safe, clean and healthy environment from the UN Special Rapporteur on Human Rights and the Environment and the UN Human Rights Council – See Resolution adopted by the Human Rights Council 31/8. *Human rights and the environment* (23 March 2016), UN GA (22 April 2016) A/HRC/RES/31/8.
[320] Mayer (2016), *supra note* 295.
[321] Sam Adelman, 'Rethinking human rights: the impact of climate change on the dominant discourse' in Stephen Humphreys (Ed.) *Human Rights and Climate Change* (Cambridge: Cambridge University Press, 2010) 159-179, at 172-175.
[322] *Ibid.* Adelman (2010), at 172.

human rights in legal responses to climate change. A range of arguments have been made in both the case law and academic literature exploring the possibilities of invoking domestic laws of tortious or civil liability, constitutional provisions or environmental legislation[323]. Climate change is however, by nature, a transboundary environmental phenomenon and for this reason it is contended that international law is intrinsically better adapted to addressing it, being less constrained by jurisdictional requirements and offering embedded regimes of state responsibility. At the international level, two further legal avenues, namely those of international trade and investment law[324] and the law of the sea[325] are also excluded as beyond the scope of the present analysis which has the overarching objective of developing a pluralistic climate justice framework. This framework is not only for the benefit of states but also for that of climate vulnerable peoples at the sub-national level requiring, on the one hand, a legal regime in which a role for individuals is carved out, and on the other, one capable of responding to the multiplicity of climate justice challenges.

The two most relevant alternative legal avenues were identified as the UNFCCC regime and international norms restricting transboundary harm, including the precautionary principle of international environmental law. Beginning with the former, it is argued that the current international climate change regime under the auspices of the UNFCCC lacks the requisite legal enforceability and fails to provide adequate protection to SIDS and their peoples. The Paris Agreement adopted at COP21 in December 2015 does not provide for any legally binding greenhouse gas emissions reduction targets. The voluntary Nationally Determined Contributions (NDCs) to mitigation action were acknowledged by the UNFCCC itself ahead of the Agreement's adoption at COP21 as being inadequate to keep warming to within the 2°C threshold above pre-industrial levels[326] to avoid dangerous anthropogenic interference with the climate system in accordance with the overarching objective of the UNFCCC[327]. The 2018

[323] See for example Lord, Goldberg, Rajamani and Brunnée (2012) *supra note* 67.
[324] See for example: International Bar Association, 'Achieving Justice and Human Rights in an Era of Climate Disruption', International Bar Association Climate Change Justice and Human Rights Task Force Report (July 2014) London: IBA, at 69-76; and Markus W. Gehring, Marie-Claire Cordonier Segger and Jarrod Hepburn, 'Climate change and international trade and investment law' in Rosemary Rayfuse and Shirley Scott (Eds.) *International Law in the Era of Climate Change* (2012) Cheltenham: Edward Elgar Publishing, pp.84-117.
[325] See for example: Rayfuse (2012) *supra note* 88; and Ann Powers and Christopher Stucko, 'Introducing the Law of the Sea and the Legal Implications of Rising Sea Levels' 123-140 and Clive Schofield and David Freestone, 'Options to Protect Coastlines and Secure Maritime Jurisdictional Claims in the Face of Global Sea Level Rise' 141-165 in Michael B. Gerrard and Gregory E. Wannier (Eds.), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press, 2013).
[326] See for example UNFCCC 'Updated synthesis report on the aggregate effect of INDCs' (2016) *supra note* 25, '*much greater emission reduction efforts than those associated with the INDCs will be required in the period after 2025 and 2030 to hold the temperature rise below 2 °C above pre-industrial levels*.' at 13.
[327] United Nations Framework Convention on Climate Change [1992] *supra note* 42, Article 2.

UNEP Emissions Gap Report predicts warming of approximately 3.2°C even if all of the NDC pledges are honoured[328], well above the 1.5°C ambition threshold SIDS played a key role in lobbying to have included in the Agreement[329].

Neither the Warsaw International Mechanism for Loss and Damage, nor Article 8 of the Paris Agreement grant any access to compensation or enforceable legal entitlements to climate vulnerable states. The Warsaw Mechanism's provisions largely re-iterate existing commitments to knowledge and technology transfer, capacity building and financial support[330]. The Warsaw Mechanism, and its Task Force on Displacement in particular, would however benefit from the adoption of a human rights-based approach to guide the development of international policy on loss and damage redress. This could for example include measures to safeguard the future enjoyment of socio-economic and cultural rights in the context of climate-induced displacement caused by rising sea-levels and more intense extreme weather events. The applicability of rights to guide the ongoing work of the UNFCCC however should not preclude the exploration of further avenues of recourse under international human rights law which are capable of offering additional remedies to climate vulnerable SIDS and their peoples.

The vague provision recognising the need to address loss and damage contained in the Paris Agreement, along with enhanced 'understanding, action and support'[331] is however on a purely 'cooperative and facilitative basis'[332]. It has been convincingly argued by Rajamani that, based upon the wording and context, many core provisions within the Paris Agreement constitute 'soft obligations' or 'non-obligations' and therefore represent recommendations or aspirational guiding principles rather than legally enforceable obligations[333]. Crucially, this includes the provisions on climate finance and loss and damage, those most relevant in providing for remedial measures to address the disproportionate burdens being borne by SIDS.

The decision of the States Parties adopting the Paris Agreement further included an express exclusion of any liability or compensation arising from the loss and damage provisions contained within it[334]. In accordance with the general rules of treaty interpretation under the

[328] UNEP 'Emissions Gap Report 2018' *supra note* 15, at 21.
[329] Timothee Ourbak and Alexandre K. Magnan, 'The Paris Agreement and climate change negotiations: Small Islands, big players' (2017) *Regional Environmental Change*, available at: https://doi.org/10.1007/s10113-017-1247-9 (Accessed 09/02/2018)
[330] Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts, UNFCCC Decision 2/CP.19, (31 January 2014) FCCC/CP/2013/10/Add.1.
[331] Paris Agreement [2015] *supra note* 16, Article 8.
[332] *Ibid*. Paris Agreement [2015], Article 8.
[333] Rajamani (2016) *supra note* 24, at 344-51.
[334] UNFCCC Decision 1/CP.21 *supra note* 133, at Paragraph 51.

Vienna Convention on the Law of Treaties it is provided that a treaty shall be interpreted '*in good faith in accordance with the ordinary meaning to be given to the terms […] in their context*'[335], with the context detailed as including all agreements and instruments concluded '*in connection with the conclusion of the treaty*'[336]. It would consequently be unlikely given the wording and the express exclusion of liability in the decision adopting the Agreement that an international court or tribunal would be willing to support a claim in respect of the loss and damage provisions, or indeed, the mitigation provisions of the Paris Agreement.

The absence of sanctions or dispute settlement mechanisms embedded within the UNFCCC or the Paris Agreement provides further evidence that recourse to justice in the context of the UNFCCC obligations was not intended to be provided for by the States Parties. The Kyoto Protocol did provide for a Compliance Committee with an Enforcement Branch capable of imposing sanctions including the suspension of trading privileges or a reduction in Parties' emissions allowances[337]. The Doha Amendment to the Kyoto Protocol establishing a second commitment period from 2013-2020 however has not garnered the requisite 144 ratifications of the Parties to come into force[338]. The Paris Agreement itself provides for the establishment of an implementation and compliance mechanism in Article 15, however it is restricted to an exclusively 'facilitative' and 'non-punitive' mandate[339], representing a step back in legal enforceability from Kyoto.

The provision made for dispute settlement within the overarching UNFCCC framework for the peaceful resolution of disputes arising under it through, inter alia, referral to the ICJ or to arbitration, is subject to express declarations of the Parties recognising their jurisdiction in relation to disputes as to interpretation or application of the obligations[340]. This provision is incorporated into the Paris Agreement by Article 24, however, with the limited exception of a number of contractual disputes concerning the operation of the Kyoto Protocol's Joint Implementation and Clean Development Mechanisms submitted to the Permanent Court of

[335] Vienna Convention on the Law of Treaties [1969] *supra note* 49, Article 31(1).
[336] *Ibid*. Vienna Convention [1969], Article 31(2).
[337] UN Framework Convention on Climate Change, Decision 27/CMP.1 *Procedures and mechanisms relating to compliance under the Kyoto Protocol* (2005) FCCC/KP/CMP/2005/8/Add.3, at XV.
[338] United Nations Framework Convention on Climate Change, Status of the Doha Amendment and Frequently asked questions relating to the Doha Amendment to the Kyoto Protocol, available at: http://unfccc.int/kyoto_protocol/doha_amendment/items/7362.php (accessed 03/11/19).
[339] Paris Agreement, *supra note* 16, Article 15.
[340] UNFCCC [1992], *supra note* 42, Article 14.

Arbitration[341], States Parties have been reluctant to bring claims in relation to their obligations under the UNFCCC before international courts or tribunals. Eight SIDS have already denounced the Paris framework as being incommensurate with the 1.5°C ambition threshold and reserved their existing rights under international law, with the majority making reference to state responsibility or compensation claims in respect of climate impacts[342].

The no harm and precautionary principles of international environmental law, by contrast, offer a basis for the construction of climate claims in reliance upon existing international law. These broad-based principles underpin the duties incumbent upon states to prevent transboundary harm and to enact measures to prevent serious harm regardless of a lack of full scientific certainty[343]. The precautionary principle has not as yet attained the status of a norm of customary international law in spite of some commentators arguing in favour of this, citing its appearances in international treaties and jurisprudence its customary status nevertheless remains highly contested[344].

The failure of the ICJ to confirm the customary status of the principle in cases in which it has been invoked[345] has meant that its most concrete implementation has resulted from its incorporation into treaties[346]. The lack of enforceability of the precautionary principle as a customary norm before international courts and tribunals in its own right does not prevent it from playing an important guiding role in the judicial analysis of climate science for the purposes of other state responsibility claims however, including those relying upon human rights obligations. The value of the principle in the development of climate change liability in terms of 'reducing legal uncertainties'[347] it is argued is equally applicable in the context of human rights-related risk and will be explored in greater detail in Chapter IV.

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[341] Judith Levine, 'Adopting and adapting Arbitration for Climate Change-Related disputes: The Experience of the Permanent Court of Arbitration' in Wendy Miles (Ed.) *Dispute resolution and Climate Change: the Paris Agreement and Beyond* (International Chamber of Commerce, 2017), 24-32.

[342] See Declarations of Cook Islands, Marshall Islands, Federated States of Micronesia, Nauru, Niue, Solomon Islands, Tuvalu and Vanuatu, United Nations Treaty Collection, Status of Treaties, Paris Agreement (as at 09 February 2018).

[343] See Rio Declaration on Environment and Development [1992] UN Doc. A/CONF.151/26 (vol. I), Principle 15.

[344] Pedersen (2014) *supra note* 45.

[345] See for example Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) [2010] ICJ Rep 14.

[346] Catherine Redgwell, 'Transboundary pollution: principles, policy and practice' in S. Jayakumar, Tommy Koh, Robert Beckman and Hao Duy Phan (Eds.) *Transboundary Pollution: Evolving Issues of International Law and Policy* (Cheltenham: Edward Elgar, 2015), 11-35, at 19-21.

[347] Mariam Haritz 'Liability *with* and liability *from* the precautionary principle in climate change cases' in Michael Faure and Marjan Peeters (Eds.) *Climate Change Liability* (Edward Elgar Publishing, 2011), 15-41, at 33.

The 'no-harm' principle of international law stems from the Trail Smelter case of 1941 concerning a complaint by the US that acid rain damage was being caused by the sulphur dioxide emissions of a Canadian smelting company in which the Tribunal stated that *'no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another*'[348] and has since developed into an established customary norm.[349] The no-harm principle is frequently explored in relation to the establishment of climate liability[350] and embodies a broad-based duty upon states to prevent significant transboundary harm from resulting from activities occurring within their territorial jurisdiction[351]. The circumstances in which this principle has been successfully invoked however have been limited to easily identifiable sources of transboundary damage between states[352].

Verheyen underlines that the International Law Commission when adopting their Draft Articles on Prevention of Transboundary Harm from Hazardous Activities codifying custom and case law chose to exclude both '*activities causing harm in the normal course of their operation*'[353] and '*harm produced over a period of time in a cumulative fashion*'[354] as beyond the scope. State responsibility claims based upon both the UNFCCC obligations and the no-harm principle of customary law have been explored with respect to climate change[355], however enforcement challenges persist for both of these legal avenues. International human rights law, by contrast, is being increasingly applied in climate litigation[356], and has been acknowledged

[348] Trail Smelter Case (United States v Canada) [1941] Reports of International Arbitral Awards, Vol 3: 1905-1982, at 1965.
[349] See for example: Legality of the Threat or Use of Nuclear Weapons (1992) International Court of Justice Advisory Opinion of 8 July 1996 ICJ Reports 1996 226, at 241-242.
[350] See for example M. Robert, L. Bacalando, J. Teulings et al, 'Transboundary Climate Challenge to Coal: One small step against dirty energy, one giant leap for climate justice' in M. B. Gerrard and G. E. Wannier, *Threatened Island Nations: Legal implications of rising seas and changing climate* (Cambridge University Press 2013), 589-626.
[351] International Law Commission, Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries [2001], Yearbook of the International Law Commission, 2001, Vol. II, Part II.
[352] See for example: Trail Smelter Arbitration [1941] *supra note* 348; and Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia) [1997] Judgment, 1. C. J. Reports 1997, p. 7.
[353] Verheyen, (2005) *supra note* 45, at 160.
[354] *Ibid.* Verheyen (2005) at 160.
[355] See *Ibid.* Verheyen (2005); and Peel (2015) *supra note* 66, 51-78; and Richard S. J. Tol and Roda Verheyen, 'State responsibility and compensation for climate change damages – a legal and economic assessment' (2004) *Energy Policy* 32:1109-1130.
[356] Michael Burger and Justin Gundlach, *The Status of Climate Change Litigation: A Global Review*, United Nations Environment Programme in cooperation with Columbia Law School Sabin Center for Climate Change Law (Nairobi: UNON Publishing, 2017), at 30-31.

as being of crucial relevance in guiding climate action within the UNFCCC framework itself with the adoption of the Paris Agreement[357].

This thesis does not seek to argue that international environmental law does not have a continuing and important role to play in tackling climate change moving forward, but rather that international human rights law can offer more immediate protections to climate vulnerable SIDS and their peoples in line with the demands of a pluralistic climate justice framework. International human rights law experiences unique operational and enforceability challenges which are explored in detail in Chapter IV. It does however offer a wider range of complaints avenues to climate vulnerable states and peoples at different scales than international environmental law which will be explored in detail in Section IV below.

It is argued that existing obligations under international human rights law, in tandem with state responsibility, should be relied upon to provide recourse to justice for those most vulnerable to climate change impacts. Principles of state responsibility will be explored with regard to breaches of international human rights obligations and associated duties, underpinned by the duty to provide reparation for damage caused recognised in the judicial precedent of the ICJ[358]. Enforcement challenges including, notably, the attribution of responsibility for harm, the limited, consent-based jurisdiction of international courts and tribunals, and causation, do nevertheless persist in respect of human rights avenues and will therefore be addressed in detail in Chapter IV below. Human rights however have been widely recognised at the national and international levels, including increasingly in the context of climate impacts[359], and importantly offer greater availability of complaints mechanisms and greater scope to provide for both affected individuals and states than the UNFCCC or international environmental law.

III. State responsibility for violations of human rights obligations

i. Exploring the legal status of human rights obligations

[357] Paris Agreement [2015] *supra note* 16, Preamble.
[358] Case Concerning the Factory At Chorzów, Germany v Poland, Judgment, Claim for Indemnity, Merits, Judgment No 13, (1928) PCIJ Series A No 17.
[359] See for example: UN HRC Resolution 18/22 (2011) *supra note* 19, Paris Agreement [2015] *supra note* 16, Preamble at 2.

The relevant obligations established under international human rights law of greatest relevance to climate justice disputes are provided for primarily by the core human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) alongside more specialised instruments of relevance to particular climate-vulnerable groups including women, children and persons with disabilities[360]. Public international law is unique in the categories of norms it creates which are owed to the international community as a whole, known as *erga omnes*, and peremptory norms which have attained a higher legal status, known as *jus cogens*. *Erga omnes* obligations were first defined in the Barcelona Traction Case before the ICJ[361]. It was held by the Court that a distinction should be drawn between obligations owed by states to other states, and *erga omnes* obligations owed to the international community as a whole, in respect of which all states have a legal interest[362].

The Institut de Droit International in a 2005 Resolution on *Erga Omnes* Obligations in International Law reaffirmed the ICJ's definition and emphasised that in light of the '*common values and…concern for compliance*'[363] within the international community, all states are entitled to take action in the event of a breach of an *erga omnes* obligation[364]. The resolution further outlined that even those states who are not themselves affected by the breach are entitled to claim not only cessation of the breach but reparation for it '*in the interest of the State, entity or individual which is specially affected by the breach*'[365]. The status of human rights obligations in international law is widely debated, particularly with respect to their scope to bind states who are not party to the treaties, however the ICJ in the Barcelona Traction Case made express reference to '*the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination*'[366] as examples of international obligations with *erga omnes* status.

If human rights are legally established not only in the core treaties themselves but in customary international law, Mégret argues that in light of their *erga omnes* status, a third state may bring

[360] See CEDAW [1979] and CRPD [2006], *supra note* 314; and Convention on the Rights of the Child [1989] United Nations Treaty Series, Vol. 1577, p. 3.
[361] Case concerning the Barcelona Traction, Light and Power Company (Belgium v Spain) Second Phase (1970) I.C.J. Reports 1970, p. 3.
[362] *Ibid*. Case concerning the Barcelona Traction [1970], at 32.
[363] Institut de Droit International, Resolution *Obligations Erga Omnes in International Law*, Fifth Commission: Obligations and rights erga omnes in international law (2005) Krakow Session, Article 1.
[364] Ibid. IDI Resolution (2005), Article 1.
[365] *Ibid*. IDI Resolution (2005), Article 2.
[366] Case concerning the Barcelona Traction [1970] *supra note* 361, at 32.

a case even in the absence of violations being suffered by its nationals[367]. This view is supported by the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter ILC Articles) which provide in Article 48 that the responsibility of a state can be triggered by states other than those directly injured by a wrongful act where the obligation breached is one '*owed to the international community as a whole*'[368] or owed to a group and has the purpose of protecting a '*collective interest*'[369]. In the context of climate change, Lefeber has argued that mitigation obligations are capable of being construed as *erga omnes* in nature and as triggering the collective interest of states in light of the diffuse nature of climate damage, both within and beyond national boundaries, affecting shared aspects of the natural environment and the common heritage of mankind including the oceans[370]. In principle, the extension of this logic to the shared interests of states in protecting the global population from climate-induced threats to their lives, health and other fundamental human rights would appear to be a logical extension of the recognition of the ICJ of the *erga omnes* nature of the '*basic rights of the human person*'[371].

Two key opposing viewpoints in relation to the scope of international human rights obligations however merit consideration here, one arguing with reference to the provisions of the UN Charter and Universal Declaration on Human Rights that human rights obligations have attained both customary and *erga omnes* status and are therefore binding upon all states in the international community, and the other, that the obligations only become legally binding following states' ratification of the relevant treaties[372]. The consecration of the Universal Declaration on Human Rights in the body of customary international law, Von Bernstorff argues, has become a 'standard argument' with respect to its legal status[373]. Furthermore, Articles 55-56 of the UN Charter provide that the UN and its Member States shall promote the

[367] Frédéric Mégret, 'Nature of Obligations' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (Eds.) International Human Rights Law (2010) Oxford: Oxford University Press, pp.124-149, at 146-147.
[368] International Law Commission, ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001) Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E, Article 48(1)(b).
[369] *Ibid*. ILC Articles (2001), Article 48(1)(a).
[370] René Lefeber, 'Climate change and state responsibility' in Rosemary Rayfuse and Shirley Scott (Eds.) *International Law in the Era of Climate Change* (Edward Elgar Publishing, 2012) 321-349, at 346.
[371] Case concerning the Barcelona Traction [1970] *supra note* 361.
[372] Louis B. Sohn, 'The New International Law: Protection of the Rights of Individuals Rather Than States' (1982) *The American University Law Review*, 32:1, 1-64.
[373] Jochen von Bernstorff, 'The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law' (2008) *The European Journal of International Law*, 19:5, 903-924, at 913.

'*universal respect for, and observance of, human rights*'[374] and have similarly been cited as the foundation of *erga omnes* human rights obligations owed to all states[375].

An in-depth analysis of the extent to which human rights obligations have indeed attained customary status is beyond the scope of the present project, however there is support in international legal scholarship for the view that human rights obligations extend beyond the typical vertical legal relationship between individual and state, to inter-state obligations. If international courts and tribunals would be willing to support such a finding, this would open up additional enforcement opportunities not only to climate-vulnerable states whose populations are facing the gravest human rights threats as a result of climate change impacts, but to other interested states to whom the obligation to protect fundamental rights is owed.

Similarly, invoking obligations which are deemed to have attained *jus cogens* status in international law offers important benefits in the establishment of state responsibility claims in respect of climate change. *Jus cogens* norms of international law are defined in Article 53 of the Vienna Convention on the Law of Treaties as '*a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted*'[376] . Such *jus cogens* norms may only be altered '*by a subsequent norm of general international law having the same character*'[377] and are capable of overriding and voiding existing treaty provisions with which they come into conflict[378]. International legal scholarship on the issue of *jus cogens* often outlines the ambiguous nature of the concept, and evidences disagreement surrounding both the formation of such norms and their scope[379]. Be this as it may, the concept of *jus cogens* itself is closely linked to ideas of moral value and human dignity which bestow certain legal rules with a higher status and aligns closely with the ideology of legally consecrated human rights.

The relationship between *jus cogens* norms and the general principle of human dignity has been explored with reference to the evolution of international jurisprudence of the ICJ[380] and provides justification for the prioritisation of fundamental rights and other protective

[374] Charter of the United Nations [1945] 1 UNTS XVI, Article 55(c).
[375] Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Oxford University Press, 1991) at 81-100.
[376] Vienna Convention on the Law of Treaties [1969], *supra note* 49, Article 53.
[377] *Ibid*. Vienna Convention [1969], Article 53.
[378] *Ibid*. Vienna Convention [1969], Article 64.
[379] See for example Andrea Bianci, 'Human rights and the magic of jus cogens' (2008) *European Journal of International Law*, 19(3): 491; and Robert Kolb, *Peremptory international law - Jus cogens: a general inventory* (Oxford: Hart Publishing, 2015), Chapters 2-3.
[380] Thomas Weatherall, *Jus Cogens: International law and the Social Contract* (Cambridge: Cambridge University Press, 2015) at 54-66.

provisions being held up as *jus cogens* norms, most notably those entailing the gravest potential harms including the prohibition of genocide and the prohibition of slavery[381]. Bianci argues that the references made to human rights jus cogens norms represent both an acceptance of a normative hierarchy in international law and a manifestation of the '*inner moral aspiration of the law*'[382] itself. Within the human rights instruments further evidence of a normative hierarchy can be found in the way in which some rights are designated as being non-derogable.

Those human rights obligations recognised as non-derogable in the International Covenant on Civil and Political Rights (ICCPR) include, inter-alia, the right to life, recognition before the law and freedom of thought, conscience and religion[383]. It has been argued by scholars including Ramcharan[384], Wewerinke and Doebbler[385] that the right to life has attained the status of a *jus cogens* norm of international law. It is important to acknowledge the problems with the establishment of a hierarchy of human rights obligations normatively as a contradiction to the universality and inalienability of those rights, and practically in terms of the determination of which rights should take precedence. Meron underlines the risks associated with '*personal, cultural and political bias*'[386] in making such determinations, however crucially, he nevertheless gives credence to the view that the right to life clearly represents one of greater importance[387]. The argument that the right to life has attained *jus congens* status is convincing in light of the normative significance of this right as a pre-requisite for the enjoyment of other fundamental rights and in light of the weight it carries for the attainment of the aims of the UN itself, including the maintenance of international peace and security[388].

The right to life represents one of the most significant bases of a state responsibility claim in light of both the additional legal duties which attach to *jus cogens* obligations and the supporting evidence of the Intergovernmental Panel on Climate Change's reported impacts of climate-related extremes upon human morbidity and mortality[389]. The impacts of climate change upon the right to life have also been acknowledged in the findings of reports by the UN human rights bodies including the Office of the High Commissioner for Human Rights

[381] Bianci (2008) *supra note* 379, at 4.
[382] *Ibid*. Bianci (2008), at 4.
[383] For a list of non-derogable articles see ICCPR [1966], *supra note* 314, Article 4(2).
[384] Bertrand G. Ramcharan, 'The Right to Life' (1983) *Netherlands International Law Review*, 30(3): 297-329.
[385] Wewerinke and Doebbler (2011) *supra note* 62, at 149.
[386] Theodor Meron, 'On a Hierarchy of International Human Rights' (1986) *The American Journal of International Law*, 80: 1,1-23, at 4.
[387] *Ibid*. Meron (1986), at 4.
[388] Charter of the United Nations (1945) *supra note* 374, Preamble.
[389] IPCC AR5 WGII Contribution Summary for Policymakers (2014) *supra note* 176, at 6.

(OHCHR)[390] and the Special Rapporteur on Human Rights and the Environment[391]. The legal consequences of invoking a *jus cogens* obligation in claims before international courts and tribunals include the exclusion of the circumstances precluding wrongfulness of the act by the state in question such as self-defence, distress and force majeure, provided for in Chapter V of the ILC Articles[392]. Moreover, in the case of serious breaches of peremptory norms, defined as being those that involve a '*gross or systematic failure by the responsible state to fulfil the obligation*'[393], there is an additional duty incumbent upon the international community for all states to '*cooperate to bring to an end*'[394] such breaches. Consequently, the status of particular human rights obligations will have important repercussions for the ability of climate-vulnerable and other interested states to bring state responsibility claims.

ii. Linking human rights obligations to a state responsibility framework

Turning to the general rules of state responsibility and their potential application to human rights obligations breached in the context of climate change, the primary codification of customary international law on this issue is found in the aforementioned ILC Articles on Responsibility of States for Internationally Wrongful Acts. The ILC Articles provide that an internationally wrongful act shall be defined as '*an action or omission*'[395] fulfilling the criteria of being '*attributable to the State under international law*'[396] and constituting '*a breach of an international obligation*'[397]. To be attributable to the state, the act needs to be the result of conduct by organs of the state, persons or entities exercising governmental authority, conduct controlled or acknowledged by the state[398]. The challenge in the context of climate change is attributing responsibility for diffuse greenhouse gases emitted by a range of different actors at

[390] Office of the UN High Commissioner for Human Rights (OHCHR), Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights (15 January 2009) Human Rights Council Tenth Session, A/HRC/10/61, at 9.
[391] Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Human Rights Council Thirty-first session (1 February 2016) A/HRC/31/52, at 7-8.
[392] ILC Articles (2001), *supra note* 368, at Article 26.
[393] *Ibid.* ILC Articles (2001), Article 40.
[394] *Ibid.* ILC Articles (2001) Article 41(1).
[395] *Ibid.* ILC Articles (2001), Article 2.
[396] *Ibid.* ILC Articles (2001) Article 2(a).
[397] *Ibid.* ILC Articles (2001) Article 2(b).
[398] *Ibid.* ILC Articles (2001) Articles 4-11.

the sub-national level, along with multinational corporations, to the states under whose jurisdiction they fall.

The no-harm norm of customary international law discussed in Section II above, has been invoked with respect to the responsibility of states for transboundary environmental harm in situations where the polluting activities have been carried out by private actors, including in the founding Trail Smelter case itself[399] and, more recently, in the Pulp Mills on the River Uruguay case[400] before the ICJ. The attribution argument in Pulp Mills focused upon the responsibility of the state for authorising the construction and operation of the offending mill[401]. In the context of climate change, attribution could similarly be based upon the licensing or authorisation by the state of the activities of key fossil fuel and high-emitting industrial corporations. In the UK energy sector for example the Oil and Gas Authority is responsible for the granting of licences for all onshore and offshore exploration and production activities in line with the provisions of the Petroleum Act[402]. This approach has also been explored in relation to the potential of environmental permitting in attributing state responsibility for climate change[403], however the alternative argument in favour of attributing responsibility to the state for its omission to effectively regulate the activities of private actors within its jurisdiction offers significant advantages[404]. The scope of the omission-based approach to responsibility is broader and offers more comprehensive coverage of the activities of all actors within the state's jurisdiction, including legal and natural persons engaged in greenhouse gas emitting activities that are not subject to any formal permitting or authorisation processes.

State responsibility for transboundary harm is similarly useful in providing the basis of obligations of due diligence on the part of the state to adopt reasonable measures to prevent such harm from occurring which will vary according to the context of the claim[405]. The duty of due diligence in the prevention of transboundary harm and the flexibility it offers as a benchmark for the engagement of responsibility offers important benefits in the context of climate change and human rights obligations. Peel for example argues that the due diligence standard creates a space for the consideration of important factors such as the capacity within

[399] Trail Smelter Case [1941] *supra note* 348.
[400] Pulp Mills on the River Uruguay [2010] *supra note* 345.
[401] *Ibid.* Pulp Mills on the River Uruguay [2010].
[402] See United Kingdom Oil and Gas Authority, Licensing regime, available online at: https://www.ogauthority.co.uk/regulatory-framework/licensing-regime/ (accessed 20/03/18) and Petroleum Act [1998] c.17.
[403] Peel (2015) *supra note* 66, at 59-60.
[404] Lefeber (2012) *supra note* 370, at 329; and Peel (2015) *supra note* 66, at 60.
[405] Redgwell (2015) *supra note* 346, at 16.

the state concerned, including technological and institutional factors which may inhibit the adoption of preventive measures[406]. This type of contextual awareness is of particular significance to Least Developed Countries and SIDS often facing technical and institutional capacity challenges in responding to climate change[407], discussed in greater detail in Chapters V and VI. The application of the due diligence standard has parallels in the existing jurisprudence of the European Court of Human Rights (ECtHR) establishing duties to take reasonable steps to mitigate foreseeable risks to life in the context of environmental hazards[408].

The existing literature exploring the application of state responsibility to climate change harms has focused primarily upon the mitigation obligations contained within the UNFCCC regime, in respect of which it is suggested the common but differentiated responsibility principle could be applied[409]. The application of the rules of state responsibility to international human rights obligations in the context of climate change can draw upon the established doctrine in the sphere of transboundary harm in order to carve out a similar space for the consideration of varying capacity between states. The state responsibility framework provides for flexibility by recognising breaches comprised of composite acts expressly including '*a series of actions or omissions*'[410] that cumulatively result in the breach of an international obligation. This is particularly useful in the climate change context in light of the fact that states' omissions to effectively regulate the actions of large emitters will be likely to involve policy decisions over long periods of time that transcend a broad range of policy sectors. Similarly, the recognition of the potential plurality of both the injured[411] and responsible[412] states, allowing responsibility to be invoked separately by each injured state and in respect of each state responsible, is crucial given the global nature of climate harm.

The value of applying the rules of state responsibility to human rights obligations has been strongly argued for by Meron, citing the need to strengthen the effectiveness of the international human rights framework[413]. In the context of climate change, the advantages offered in terms

[406] Peel (2015) *supra note* 66, at 55.
[407] United Nations Framework Convention on Climate Change, 'Least Developed Countries under the UNFCCC' (2009) available at: http://unfccc.int/resource/docs/publications/ldc_brochure2009.pdf (accessed 22/03/18); and United Nations Framework Convention on Climate Change, 'Climate Change: Small Island Developing States' (2005) UNFCCC Secretariat, Bonn, available at: http://unfccc.int/resource/docs/publications/cc_sids.pdf (accessed 22/03/18)
[408] See Öneryildiz v Turkey (2005) and Budayeva v Russia (2014) *supra note* 302.
[409] See Peel (2015) *supra note* 66, at 63-65; and Lefeber (2012), *supra note* 370, at 335.
[410] ILC Articles on the Responsibility of States (2001) *supra note* 368, Article 15(1).
[411] *Ibid.* ILC Articles on the Responsibility of States (2001), Article 46.
[412] *Ibid*. ILC Articles on the Responsibility of States (2001), Article 47.
[413] Theodor Meron, 'State Responsibility for Violations of Human Rights' (1989) Proceedings of the Annual Meeting, *American Society of International Law*, 83: 372-385.

of broadening the scope of responsibility for breaches of human rights obligations and the additional basis for inter-state claims render the rules of state responsibility essential in the pursuit of climate justice before international courts and tribunals. To this end, Werwerinke-Singh has argued extensively in favour of the application of the rules of state responsibility to human rights infringements resulting from climate change on the grounds that the actions and omissions which give rise to climate change impacts, and, specifically, the exercise or failure to exercise regulatory authority, can be attributed to the state in line with the existing international rules on attribution[414].

A successful state responsibility claim would trigger an additional obligation to *'make full reparation for the injury caused*'[415], broadly conceived as including damage that is both material and moral in nature[416]. The overarching aim of reparation in international law, articulated by the Permanent Court of International Justice (PCIJ) in the famous Chorzów Factory Case, is that '*reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in al1 probability, have existed if that act had not been committed*'[417]. Reparation has been interpreted as including three core factors, namely of restitution with the aim of restoring the state to its status before the breach, compensation for damage, and satisfaction which for example can take the form of a formal statement of apology[418]. The nature of the climate loss and damage being experienced by Pacific SIDS, including the loss of territory to sea-level rise, will mean that full restitution will not be feasible and that a combination of compensation and satisfaction will be necessary to account not only for economic loss, but the socio-cultural impacts of climate displacement. The aims of distributive climate justice could thereby be served through the establishment of such claims in the potential they have both as incentives for change and as concrete measures of redress.

IV. Exploring human rights enforcement avenues

[414] Wewerinke-Singh (2019) *supra note* 67, at 8-14.
[415] ILC Articles on the Responsibility of States (2001) *supra note* 368, Article 31(1).
[416] *Ibid*. ILC Articles on the Responsibility of States (2001), Article 31(2).
[417] Case Concerning the Factory at Chorzów [1928] *supra note* 358, at 47.
[418] ILC Articles on the Responsibility of States (2001) *supra note* 368, Articles 35-37.

i. Inter-state measures under responsibility frameworks

The general obligation under international law for states to settle disputes by peaceful means is affirmed in the UN Charter[419] and finds expression in many international treaties, including the UNFCCC[420]. Peaceful means include a variety of recognised inter-state measures ranging from diplomatic negotiations to mediation, conciliation, arbitration, and adjudication by international courts and tribunals. In this section the potential of alternatives to arbitral or judicial rulings will be considered in responding to the establishment of state responsibility for breaches of international obligations relating to climate change. The first option meriting consideration is one which has already been extensively utilised under the auspices of the UNFCCC, namely, negotiations. The promotion of ongoing negotiations is being actively facilitated as a means to increase ambition in climate action in accordance with the temperature goals contained in the Paris Agreement by way of a facilitative dialogue, the Talanoa Dialogue, inspired by the Pacific approach to storying of experiences and building mutual trust in the spirit of more effective cooperation[421].

The dialogue approach has been championed under the recent COP23 Presidency of Fiji and represents an important and much-needed facet of ongoing collective cooperation in securing greater commitment of the States Parties to the Paris framework. Nevertheless, negotiations of this nature have previously shown themselves to be capable of yielding little by way of concrete access to justice, a matter of which Pacific SIDS remain conscious, evidenced by the States Parties' exclusion of compensation for loss & damage[422] and the declarations made by many states on ratification of the Agreement reserving existing rights to explore this[423]. It should be noted that negotiations, while often the first port-of-call on emergence of a dispute are, as Shaw underlines, dependent upon political goodwill and a finding of common ground[424] which may prove challenging with respect to politically contentious issues such as loss and damage or human rights claims.

[419] UN Charter [1945], *supra note* 374, Article 33.
[420] UNFCCC [1992], *supra note* 42, Article 14.
[421] UN Framework Convention on Climate Change, 'Approach to the Talanoa Dialogue', Informal note by the Presidencies of COP 22 and COP 23 (17 November 2017) Annex II to 1/CP.23.
[422] UNFCCC Decision 1/CP.21 (2016) *supra note* 133.
[423] See Declarations of Cook Islands, Marshall Islands, Federated States of Micronesia, Nauru, Niue, Solomon Islands, Tuvalu and Vanuatu, *supra note* 50.
[424] Malcolm N. Shaw, *International Law* (Fifth Edition) (Cambridge: Cambridge University Press, 2003), at 919.

On specific disputes, states may choose to approach one another through diplomatic channels or agree to submit a matter to mediation or conciliation. Mediation represents the middle-ground between direct negotiations and adjudication. An independent third party is nominated to facilitate the negotiation of an agreement acceptable to both parties to the dispute[425]. Conciliation is similar in its underlying premises but rather more structured in nature as it involves the appointment of between three and five third party conciliators by the States party to the dispute, with one each of their own nationality and others agreed upon to form a conciliation commission[426].

Conciliation is regulated under the United Nations Model Rules for the Conciliation of Disputes which empowers the conciliation commission to conduct factual inquiries in consultation with relevant experts[427] and to draw up recommendations for the consideration of the parties[428]. The proceedings are however confidential in nature[429] which poses questions over their transparency and value in international standard-setting for climate change, while the committee's recommendations do not have legally binding force[430]. These non-binding inter-state measures may offer benefits in terms of the likelihood of states being induced to participate in the proceedings, this point of view finds support in the approach adopted to the drafting of the Paris Agreement framework which relies heavily upon voluntary pledges, soft law and guiding principles as opposed to more legally binding obligations[431].

Nevertheless, important climate justice benefits may be gained by seeking to apply greater legal pressure to large emitting states in the absence of any sanction provisions within the Paris framework. To this end, countermeasures may offer an alternative to adjudication if the states concerned have failed to recognise the jurisdiction of relevant international courts and tribunals or for example have failed to ratify the relevant human rights treaties or protocols granting recourse to the specialised bodies. The use of countermeasures is restricted to injured states under the ILC Articles on State Responsibility and to the non-performance of obligations owed to the state in breach, with important restrictions as to the obligations from which temporary derogation is permitted[432]. Importantly, states' countermeasures are not permitted to impact

[425] *Ibid*. Shaw (2003), at 921-922.
[426] Vienna Convention on the Law of Treaties [1969], *supra note* 49, Annex; and United Nations Model Rules for the Conciliation of Disputes between States [1995], United Nations General Assembly A/RES/50/50.
[427] *Ibid*. UN Model Rules for Conciliation [1995], Article 14.
[428] *Ibid*. UN Model Rules for Conciliation [1995], Article 20.
[429] *Ibid*. UN Model Rules for Conciliation [1995], Article 25.
[430] Shaw (2003), *supra note* 424, at 926.
[431] Rajamani (2016) *supra note* 24.
[432] ILC Articles (2001), *supra note* 330, Articles 49-50.

'*obligations for the protection of fundamental human rights*'[433] and therefore non-performance of human rights obligations as a retaliatory response to climate-related breaches of human rights obligations would be in contravention of the ILC guidelines and would, as Mégret convincingly argues, make little sense from the perspective of safeguarding rights if individuals within another jurisdiction would in effect pay the price[434].

The use of countermeasures is politically sensitive and opinion is split as to their utility in relation to climate change. On the one hand, the International Bar Association argues that their use is unlikely to be permissible with respect to climate change obligations[435],on the other Lefeber has argued that trade-related countermeasures could offer a proportionate response to the breach of climate mitigation obligations[436]. The question of states' ability to invoke countermeasures in relation to obligations owed to the international community as a whole remains open[437], however there is increasing recourse to sanctions within the international community generally[438]. This has prompted calls for the parameters of the use of third-party sanctions to be clearly defined, for example in instances where a general assembly or security council resolution supports their use[439]. In the absence of guidance from the International Law Commission or established state practice applying countermeasures in this context, their utility in responding to climate justice issues remains difficult to predict, however their potential in terms of providing concrete inducement for compliance as compared to other inter-state measures means that they merit serious consideration.

ii. International courts and tribunals

In the current section, the potential role of international courts and tribunals in the enforcement of human rights obligations in respect of climate change will be explored with reference to two core bodies, namely, the ICJ and the Permanent Court of Arbitration (PCA). It is again important to flag at the outset that these judicial and arbitral bodies do not represent the only

[433] *Ibid.* ILC Articles (2001), Article 50.
[434] Frédéric Mégret (2010), *supra note* 367, at 146-147.
[435] IBA Climate Change Justice and Human Rights Task Force Report (2014), *supra note* 324, at 137.
[436] Lefeber (2012) *supra note* 370, at 348.
[437] Tom Ruys, 'Sanctions, retortions and countermeasures: concepts and international legal framework' in Van den Herik (Ed.) *Research handbook on UN sanctions and international law* (Edward Elgar Publishing, 2017) 19-51, at 20 and 45-47.
[438] *Ibid.* Ruys at 47-49.
[439] *Ibid.* Ruys at 47-49.

international tribunals capable of receiving climate-related claims and others, including the International Tribunal for the Law of the Sea along with regional human rights courts, may offer greater enforceability for other types of claims. For the purposes of providing recourse to climate justice for climate vulnerable SIDS in the South Pacific however, the lack of a regional human rights mechanism or court means that recourse to inter-state redress can only be provided at the international level.

The Law of the Sea, while highly relevant to the plight of climate-vulnerable SIDS, primarily concerns disputes of a territorial nature relating to shifting baselines or those concerning impacts on marine resources such as fisheries[440]. The framework of international human rights obligations, construed in conjunction with the rules of state responsibility, is by contrast far more closely aligned with the objectives of a pluralistic climate justice framework in terms of providing for both distributive and procedural justice priorities. For this reason, the enforcement avenues explored represent those in respect of which environmental and human rights disputes have been, or are currently being explored, and thereby offer greater recourse to climate justice.

The choice of established international courts and tribunals capable of hearing state responsibility claims in respect of climate change is fundamentally limited by the consent-based, state-centric jurisdiction within the confines of which these tribunals operate. The ICJ offers two principal avenues of redress, the first through contentious inter-state proceedings and the second through an advisory opinion. In accordance with Article 34 of the Statute of the ICJ, only states may be parties in cases brought before the court[441]. States must be party to the United Nations Charter and/or the ICJ Statute, or alternatively, have deposited a declaration accepting the Court's jurisdiction in accordance with Security Council requirements[442].

States must also consent to the submission of particular disputes to the Court by means of the conclusion of a special agreement, the inclusion of a clause granting the ICJ jurisdiction in a treaty or through declarations accepting the Court's jurisdiction[443]. The requirement that contentious proceedings before the ICJ be inter-state in nature immediately excludes individuals or interest groups such as environmental NGOs from being able to bring proceedings which limits the type of rights claims that could be brought in the context of

[440] See for example Powers and Stucko (2013) *supra note* 325.
[441] Statute of the International Court of Justice (1945) 15 UNCIO 355, Article 34(1).
[442] International Court of Justice Handbook, available at: http://www.icj-cij.org/files/publications/handbook-of-the-court-en.pdf (accessed 06/02/2018), at 34.
[443] See ICJ Statute (1945) *supra note* 441, Article 36 and *ibid.* ICJ Handbook, at 34-40.

climate change, particularly as successful emerging climate cases at the national level have been brought with the support of civil society organisations[444].

By contrast, the advisory jurisdiction of the Court allows United Nations bodies and designated agencies to refer questions of international law to the Court for a non-binding advisory opinion. The broad scope of the advisory jurisdiction of the Court applies to 'any legal question'[445] requested by an authorised body, of which there are 5 authorised UN bodies and a further 16 specialised agencies with the power to make such referrals[446]. The most significant of these actors is the UN General Assembly which, alongside the Security Council, is empowered by the UN Charter to refer questions for advisory opinions to the Court[447] and has done so with great effect to obtain opinions in relation to crucial questions of international law unlikely to glean states' consent to adjudication in contentious proceedings. Advisory opinions requested by the General Assembly have included those on the legality of the threat or use of nuclear weapons[448] and the legality of the construction of a wall by Israel in the occupied Palestinian Territory[449]. The General Assembly has certainly not shied away from requesting opinions from the Court with the aim of providing legal clarity in respect of politically contentious issues. In accordance with the Rules of Procedure of the General Assembly, a simple majority of the UN Member States present and voting is required to carry a resolution requesting an advisory opinion[450] so even when presented with contentious issues in respect of which there may be many abstentions, it remains possible for a request to be carried forward, as was the case with the Wall opinion for example[451].

As temperature increases, sea-level rise and climate-related extreme weather events begin to have a greater impact upon countries around the globe, the likelihood of a successful vote to explore the legal obligations and responsibilities of big emitters correspondingly increases. Despite previous calls by Palau and the Marshall Islands for the General Assembly to request

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[444] See for example: Urgenda Foundation v The Netherlands (24 June 2015) The Hague District Court, C/09/456689 / HA ZA 13-1396; and Greenpeace Southeast Asia et al v Chevron et al., Republic of the Philippines Commission on Human Rights Petition [2015] Case No.: CHR-NI-2016-0001.
[445] ICJ Statute (1945) *supra note* 441, Article 65.
[446] International Court of Justice, Organs and agencies authorized to request advisory opinions, available at: http://www.icj-cij.org/en/organs-agencies-authorized (accessed 13/03/18).
[447] UN Charter [1945], *supra note* 374, Article 96(a).
[448] ICJ Nuclear Weapons Opinion (1992), *supra note* 311.
[449] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory [2004], Advisory Opinion of the International Court of Justice, I. C. J. Reports 2004, p. 136.
[450] Rules of Procedure of the General Assembly [2016] United Nations, embodying amendments and additions adopted by the General Assembly up to September 2016, A/520/Rev.18, Rule 85.
[451] United Nations Meetings Coverage and Press Releases, 'General Assembly Adopts Text Requesting International Court of Justice to Issue Advisory Opinion on West Bank Separation Wall' (8 December 2003) GA/10216, available at: https://www.un.org/press/en/2003/ga10216.doc.htm (accessed 13/03/18).

an advisory opinion from the Court elucidating the responsibility of states for climate change damage resulting from greenhouse gas emissions produced within their territories[452], to date no such opinion has been formally requested. International lawyer and scholar Philippe Sands previously advised Small Island States against the move for fear of obtaining an 'unhelpful'[453] opinion, however he has more recently acknowledged that his view of the ICJ's potential role has become more favourable in light of the evolution of scientific evidence, national government and judicial action on climate change[454].

The ICJ has historically adopted a preventative approach to questions of environmental harm, affirming in the Gabcikovo-Nagymaros Project Case that: '*in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage*'[455]. Similarly, prevention was affirmed as the most appropriate course of action in the Court's Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, citing the health and environmental impacts that would result from their use[456]. Most significantly, Judge Weeramanty in a Separate Opinion in the Gabcikovo-Nagymaros case affirmed that the protection of the environment is a '*vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights*'[457], citing in particular the rights to life and health within the full spectrum of rights impacted by environmental harm[458].

Similarly, the ICJ is playing an increasingly important role in adjudicating upon the scope of human rights obligations, including their extraterritorial application[459]. The Court has expanded the scope of human rights obligations to apply in tandem with rules of international humanitarian law[460] and to account for the failure of states to take adequate steps to prevent

[452] Statement by the Honorable Johnson Toribiong President of the Republic of Palau to the 66th Regular Session of the United Nations General Assembly (22 September 2011) New York, available at: https://gadebate.un.org/sites/default/files/gastatements/66/PW_en.pdf (accessed 18/09/19).
[453] Philippe Sands QC, 'Climate Change and the Rule of Law: Adjudicating the Future in International Law' (2016) *Journal of Environmental Law*, 28: 19-35.
[454] *Ibid.* Sands (2016), at 20-21.
[455] Case concerning the Gabcikovo-Nagymaros Project [1997] *supra note* 314, at 78.
[456] ICJ Nuclear Weapons Opinion (1992) *supra note* 311, at 67.
[457] Case concerning the Gabcikovo-Nagymaros Project [1997] *supra note* 314, Separate Opinion of Vice-President Weeramantry, at 91.
[458] *Ibid.* Separate Opinion of Vice-President Weeramantry, at 91-92.
[459] Rosalyn Higgins, 'Human rights in the international Court of Justice' (2007) *Leiden Journal of International Law*, 20: 745-751.
[460] ICJ Wall Advisory Opinion [2004], *supra note* 449, at 178.

human rights violations by other actors within their jurisdictions[461]. The role it has played in affirming the application of human rights obligations beyond states' territorial boundaries, albeit thus far limited to situations concerning occupations or military activities where state jurisdiction is exercised[462], has laid the foundations for the future broadening of extraterritorial responsibility called for in accounting for climate damage.

In the Diallo case, the Court further evidenced its willingness to invoke human rights obligations in inter-state cases that might otherwise have been dealt with solely under the rules of diplomatic protection and, crucially, to award compensation against offending states found to be in breach of human rights obligations[463]. The challenges surrounding the extraterritorial application of human rights will be explored in greater detail in Chapter IV, however it is important to note that the ICJ has shown itself willing to develop the scope of international obligations and offers particular benefits with respect to the Court's extensive expertise in transboundary disputes of this nature compared with the more localised human rights issues dealt with by the specialised treaty bodies[464].

In spite of the reference to the ICJ as one of the options for the resolution of disputes between States Parties relating to the interpretation and application of the UN Framework Convention on Climate Change provisions[465], and by extension, to the provisions of the Paris Agreement[466], this is subject to the deposit of a written instrument accepting the compulsory jurisdiction of the Court to adjudicate on such disputes. Only four States Parties have made declarations in accordance with Article 14 UNFCCC and of those, only one, The Netherlands, accepted both the ICJ and arbitration dispute settlement options, with the other three opting for diplomatic negotiations or arbitration to settle disputes[467]. No climate change disputes have as yet been brought before the ICJ, either within or beyond the remit of the UNFCCC regime so the outcome of any such proceedings remains difficult to predict.

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[461] Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) [2005] Judgment of the International Court of Justice, I.C.J. Reports 2005, p. 168, at 231.
[462] See ICJ Wall Advisory Opinion [2004], *supra note* 449, at 179; and Ralph Wilde, 'Human Rights Beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties' (2013) *Chinese Journal of International Law*, 12: 639-677.
[463] Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) [2010] International Court of Justice Judgment, I.C.J. Reports 2010, p. 639; and Eirik Bjorge, 'Ahmadou Sadio Diallo' (2011) *The American Journal of International Law*, 105: 3: 534-540.
[464] Wilde (2013), *supra note* 461, at 675.
[465] UNFCCC [1992], *supra note* 42, Article 14.
[466] Paris Agreement, *supra note* 16, Article 24.
[467] UN Framework Convention on Climate Change, Declarations by Parties, available at: http://unfccc.int/essential_background/convention/items/5410.php (accessed 12/03/18).

The Permanent Court of Arbitration (PCA) differs from the ICJ in both procedural and substantive terms. As an arbitral body, it is composed of expert arbitrators appointed on an ad-hoc basis and subject to the proposals of the parties to the dispute. Unlike the ICJ, the PCA is competent to deal with mixed disputes between states, state-controlled entities, intergovernmental organisations and private actors[468], and is characterised by its openness to the discretion of the parties. Parties to a dispute may opt, either through contractual provisions or ad-hoc agreement, to submit it to confidential, closed proceedings or may consent to either limited or complete public disclosure of any award made[469]. The PCA operates in accordance with both its own Arbitration Rules[470], and the United Nations Commission on International Trade Law (UNCITRAL) Rules which have the core mandate of facilitating the harmonisation of international trade law[471].

Traditionally, the role of the PCA has been viewed as principally as a specialist of commercial and investment dispute settlement[472], however the Court has a growing focus upon the resolution of environmental disputes and has developed a body of Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment[473] for this purpose. In the field of climate change, the PCA has invoked the Optional Rules in contractual disputes involving the operation of the Joint Implementation and Clean Development Mechanisms under the Kyoto Protocol[474]. There is evidence to suggest that reform with the aim of providing for the integration of human rights into the procedural competence of the PCA may occur moving forward with the establishment of a Working Group on International Arbitration of Business and Human Rights conducting consultations and developing proposals on the necessary provisions for human rights disputes[475].

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[468] Permanent Court of Arbitration, Arbitration Rules (2012), available at: https://pca-cpa.org/wp-content/uploads/sites/175/2015/11/PCA-Arbitration-Rules-2012.pdf (accessed 08/02/2018), Article 1.
[469] Permanent Court of Arbitration, Arbitration Rules (2012), Article 34; and Permanent Court of Arbitration, Frequently Asked Questions, available at: https://pca-cpa.org/en/faq/ (accessed 25/03/2018)
[470] Permanent Court of Arbitration Rules (2012) *supra note* 429.
[471] United Nations Commission on International Trade Law, FAQ - Origin, Mandate and Composition of UNCITRAL, available at: http://www.uncitral.org/uncitral/en/about/origin_faq.html (accessed 06/02/2018).
[472] Manuel Indlekofer, *International Arbitration and the Permanent Court of Arbitration* (Kluwer Law International Online, 2013) at 10-11.
[473] Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment [2001] available at: https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/Optional-Rules-for-Arbitration-of-Disputes-Relating-to-the-Environment-and_or-Natural-Resources.pdf (accessed 25/03/18).
[474] Levine (2017) *supra note* 303, at 26.
[475] Claes Cronstedt, Jan Eijsbouts, Adrienne Margolis, Steven Ratner, Martijn Scheltema and Robert C. Thompson, The Working Group on International Arbitration of Business and Human Rights, *International Arbitration of Business and Human Rights Disputes: Questions and Answers* (17 August 2017) available at: http://www.l4bb.org/news/Q&A.pdf (accessed 08/02/2018)

The procedural benefits of pursuing climate claims before the PCA include the flexibility to consider disputes submitted by international organisations and individuals as well as states, and the expeditiousness of the process compared to those of other Courts[476]. These benefits are however outweighed by the disadvantages including the continuing lack of transparency in international arbitration, despite recommendations for reform[477], which is in fundamental conflict with the core procedural justice objectives of making available essential information relating to climate change and the legal framework surrounding it, including the rulings of international courts and tribunals.

There are additional substantive advantages offered by the ICJ as the established international court with experience of both human rights and environmental disputes, and its capacity, through public proceedings, to make significant advancements in international legal doctrine. The adjudication of climate change will necessarily require the adaptation of existing legal doctrine, thus the capacity of the ICJ to affirm the status of international norms and principles, and to apply, according to Article 38 of its Statute, not only primary sources of international law such as treaties or custom, but secondary sources, including general principles, judicial decisions and '*the teachings of the most highly qualified publicists of the various nations*'[478] in its reasoning is key in providing the scope for such development.

The normative benefits of the judicial adjudication of climate change merit consideration at this juncture as, if the procedural and legal challenges can be overcome and a favourable judgment or advisory opinion handed down, the effect of such an authoritative statement by the ICJ would likely serve to focus the attention of governments upon climate change and its human rights impacts as priority issues. Preston argues convincingly that the adjudication of climate change is conceptually desirable in light of the capacity of the courts, as publicly trusted and respected institutions, to highlight the true significance of the issue and to prompt the consideration of further action by the other branches of government[479]. To this end, the influential power of international courts with wide-ranging general jurisdiction such as the ICJ is greater than that of the more specialised tribunals or that of private arbitral proceedings.

[476] IBA Climate Change Justice and Human Rights Task Force Report (2014), *supra note* 324, at 141.
[477] *Ibid.* IBA Report (2014), at 145.
[478] ICJ Statute, *supra note* 441, Article 38(1).
[479] Brian J. Preston, 'The Contribution of the Courts in Tackling Climate Change' (2016) *Journal of Environmental Law*, 28: 11-17, at 13-14.

iii. Recourse to UN human rights mechanisms and special procedures

The final enforcement avenues that merit consideration are the specialised procedures available through human rights bodies. Each of the nine core international human rights treaties has a committee responsible for monitoring implementation and promoting compliance with the obligations contained in each of the instruments. There are three principal types of compliance procedure provided for under the auspices of the treaty bodies, namely, inter-state complaints, individual complaints and inquiries. The International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) as the two most comprehensive instruments have committees which are competent to receive individual complaints, subject to the ratification of their optional protocols[480]. The Committee on Economic, Social and Cultural Rights is also competent to consider inter-state complaints, once again subject to ratification of the Optional Protocol[481].

The Human Rights Committee of the ICCPR contains a provision for inter-state complaints leading to the appointment of an ad-hoc conciliation commission to resolve disputes subject to the consent of the States Parties concerned[482]. These treaty body mechanisms are complemented by those complaints mechanisms provided within the more specialised treaties including the Convention on the Elimination of All Forms of Discrimination (CEDAW)[483] and Convention on the Rights of Persons with Disabilities (CRPD)[484] subject once again to ratifications of the relevant optional protocols, which are of particular relevance to the protection of climate vulnerable groups and individuals.

The UN treaty body processes are accompanied by the special procedures of the UN Charter bodies. The bodies established by the UN Charter with mandates including human rights comprise the International Court of Justice, the Economic and Social Council, the Security Council, and the General Assembly[485]. The UN Office of the High Commissioner for Human Rights with the core mandate to promote and protect the enjoyment of all human rights[486],

[480] Optional Protocol to the International Covenant on Civil and Political Rights [1966] A/RES/2200; and Optional Protocol to the International Covenant on Economic, Social and Cultural Rights [2008] A/RES/63/117.
[481] *Ibid*. Optional Protocol to ICESCR, Article 10.
[482] ICCPR [1966] *supra note* 314, Articles 41-42.
[483] CEDAW [1979], *supra note* 314.
[484] CRPD [2006], *supra note* 314.
[485] Donald K. Anton and Dinah L. Shelton, *Environmental Protection and Human Rights* (Cambridge University Press, 2011) at 283.
[486] UN General Assembly Resolution 48/141 High Commissioner for the promotion and protection of all human rights (7 January 1994) A/RES/48/141.

along with the UN Human Rights Council (formerly the Commission) with the mandate to provide a forum for dialogue, make recommendations, and to undertake a universal periodic review of the extent of states' fulfilment of their human rights obligations[487]. The UN Human Rights Council special procedures are more wide-reaching in nature than those of the specialised Treaty Bodies and cover all human rights within the international regime. These procedures are conducted by independent human rights experts and take the form of country visits, consultations, thematic reports, special rapporteurs on particular human rights issues, working groups, and communications.

The UN Human Rights Council currently lists forty-four thematic mandates for special rapporteurs and independent experts in broad range of thematic areas, including, crucially, a Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, a Special Rapporteur in the field of cultural rights, a Special Rapporteur on the human rights to safe drinking water and sanitation, and a Special Rapporteur on the rights of internally displaced persons[488]. All of the above mandates share significant points of overlap with both current and projected climate impacts faced by SIDS and their peoples, including for example the effects of climate-induced displacement on custom practices, the impacts of sea-level rise on the availability of fresh water supplies, and the impacts of increasing environmental risks upon the continued enjoyment of the right to life, the right to an adequate standard of living, and the right to health[489]. The purpose of these procedures is broadly to promote awareness of important human rights issues and to facilitate compliance with the legal frameworks by States Parties.

The independence and impartiality of Special Rapporteurs are key requirements in the selection of mandate-holders entrenched by the Manual of Operations of the Special Procedures of the Human Rights Council[490]. This independence and accountability, together with their expertise and the freedom they benefit from in the conduct of their work has been observed by Piccone

[487] UN General Assembly Resolution 60/251 Human Rights Council (15 March 2006) A/RES/60/251.
[488] United Nations Office of the High Commissioner on Human Rights (OHCHR), Human Rights Bodies, Special Procedures, available at: https://www.ohchr.org/en/hrbodies/sp/pages/welcomepage.aspx (accessed 25/03/2020)
[489] UN-OHRLLS 2017 Report, *supra note* 4; and United Nations Office of the High Commissioner for Human Rights (OHCHR), 'Five UN human rights treaty bodies issue a joint statement on human rights and climate change: Joint Statement on "Human Rights and Climate Change"' (16 September 2019) available at: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E (accessed 18/09/2019).
[490] UN Manual of Operations of the Special Procedures of the Human Rights Council (August 2008) available at: https://www.ohchr.org/EN/HRBodies/SP/CoordinationCommittee/Pages/Manualofspecialprocedures.aspx (accessed 26/03/2020) at 7.

to '*contribut[e] substantially to both their success and credibility*'[491]. The role of the former UN Special Rapporteur on Human Rights and the Environment, John Knox, has been of particular relevance to the development of international human rights approaches to climate change, for example through the issuing of detailed reports outlining the relationship between climate change, procedural and substantive rights, including the right to an effective remedy in the face of climate-induced violations of human rights[492]. The reports of Special Rapporteurs can therefore play an important role in developing human rights doctrine and determining the scope of application of human rights obligations in the climate change context. They can also help to secure compliance by States Parties with their obligations in this context though their fact-finding missions, direct meetings and communications with governments.

The consultations, communications and reports provided for by the Council special procedures can play an important role in informing the recommendations of the human rights committees, including providing key country- or theme-specific findings and interpretations of human rights doctrine in relation to specific inter-state or individual complaints submitted. They can also play an important role in inducing compliance by governments in their own right by influencing the development of law and policy responses to rights situations arising in the context of climate impacts. Human rights scholars outline ongoing critiques of the Council itself, including for example controversy surrounding its composition[493], however its special procedures have nevertheless been observed to '*have significantly influenced the elaboration, interpretation, and implementation of international human rights law*'[494]. The potential for these procedures to be used to contribute to the elaboration of human rights duties in the relatively unexplored context of climate impacts is therefore significant.

The UN Human Rights Council also has its own complaints procedure which has a broad geographical and substantive remit, however is restricted to '*consistent patterns of gross and reliably attested violations of all human rights*'[495] with examples of previous situations referred including those concerning the oppression of religious minorities, systematic torture, detention,

[491] Ted Piccone, 'Human Rights Special Procedures: Determinants of Influence' (2014) *Proceedings of the Annual Meeting (American Society of International Law)* 108: 288-291, at 289.
[492] Report of the UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (2016) *supra note* 391.
[493] Philip Alston, 'Reconceiving the U.N. Human Rights Regime: Challenges confronting the new U.N. Human Rights Council' (2006) *Melbourne Journal of International Law* 7(185): 186-88, 191-93.
[494] Surya P. Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs' (2011) *Human Rights Quarterly* 33(1): 201-228, at 204.
[495] United Nations Human Rights Council Resolution 5/1 'Institution-building of the United Nations Human Rights Council' (18 June 2007), at para.85.

sexual violence, executions, and other serious violations[496]. Climate change impacts upon the enjoyment of human rights are undoubtedly serious in character and, as outlined in Section III(i) above, also affect *jus cogens* norms including the right to life which have attained a higher legal status. Nevertheless, demonstrating 'reliably attested violations' of human rights in the context of climate change for the purposes of the HRC complaints mechanism is likely to be difficult to demonstrate in the absence of advancements in international legal doctrine to overcome some of the oft-cited barriers to the establishment of violations, explored in Chapter IV of the present thesis.

The situations in respect of which the Council complaints procedure has been used concern those where there are allegations of systematic human rights violations, most notably the persecution of minority groups[497]. The applicability of this procedure in the context of climate change impacts would therefore represent a significant expansion of its scope. The embedded confidentiality of the procedure with discussions with State Parties taking place in closed meetings[498] presents a further challenge in terms of the accessibility of any Council findings and the contingent ability to advance the international legal doctrine on rights-based responses to climate change for the purposes of informing future claims.

The key challenges related to the exercise of human rights obligations, including the availability of complaints procedures in the South Pacific and enforceability hurdles will be explored in detail in Chapter IV. The advantages offered by human rights complaints mechanisms and special procedures should however be noted and although they lack the ability of the courts to hand down legally binding judgments, their decisions, communications, and reports nevertheless carry political weight. As Oette argues, they entail duties of compliance in the sense that they '*are declaratory of a state party's obligation*'[499] in accordance with the relevant treaty obligations. The flexibility and variety of mechanisms available offers further important advantages in responding to climate change as a multi-faceted challenge which touches upon the full spectrum of civil and political, social, cultural and economic rights. In

[496] List of Situations Referred to the Human Rights Council under the Complaint Procedure Since 2006 (October 2014) available at: http://www.ohchr.org/Documents/HRBodies/ComplaintProcedure/SituationsConsideredUnderComplaintProcedures.pdf (accessed 26/03/18).
[497] United Nations Human Rights Council, 'LIST OF SITUATIONS REFERRED TO THE HUMAN RIGHTS COUNCIL UNDER THE COMPLAINT PROCEDURE SINCE 2006' available at: https://www.ohchr.org/en/hrbodies/hrc/complaintprocedure/pages/hrccomplaintprocedureindex.aspx (accessed 27/03/2020).
[498] UNHRC Resolution 5/1, *supra note* 447, para. 86.
[499] Lutz Oette, 'Bridging the Enforcement Gap: Compliance of States Parties with Decisions of Human Rights Treaty Bodies' (2010) *INTERIGHTS* 16(2): 51-54.

responding to complex climate justice challenges at multiple scales, the utility of the recognition of the competence of different actors to bring complaints, from states, to organisations, to individuals provides greater access to justice than comparative international environmental law or UNFCCC-based claims before the ICJ which is limited solely to states.

iv. Remedies

International human rights law offers further key benefits in framing the way in which increasingly severe climate losses and damages are remediated, both at the inter-state and individual levels. The growing body of human rights jurisprudence from international and regional human rights bodies has given rise to the development of significant norms for remediating pecuniary and non-pecuniary losses. The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation affirm that the obligation to respect and implement international human rights law includes the duty to provide effective remedies and reparation to victims of violations[500]. Klein defines reparation broadly in the context of international human rights violations as '*comprising all measures which have to be taken by a violating state in order to remedy the consequences of a breach*'[501] and distinguishes this from the cessation of wrongful conduct in light of the fact that this is what is already required by the obligations contained within the relevant treaties[502].

Reparation in human rights law takes many forms and varies according to both the forum, and the particular contextual circumstances under which the claim is brought, however it is possible to identify three main types of remedy which may be referred to by regional and international human rights bodies, namely, awards of pecuniary damages, awards of non-pecuniary damages[503], and orders requiring either the cessation of acts or additional positive action on the part of States Parties such as the amendment of laws or policies[504]. Pecuniary losses in this context have been defined by Shelton as including '*the value of the very thing to which the*

[500] UN General Assembly Resolution 60/147 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (16 December 2005) available at: https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx (accessed 30/03/2020).
[501] Eckart Klein, 'Individual Reparation Claims under the International Covenant on Civil and Political Rights: The practice of the Human Rights Committee' in Albrecht Randelzhofer and Christian Tomuschat (Eds.) State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights (Kluwer Law International, 1999) pp.27-41, at 29.
[502] *Ibid.* Klein (1999) at 29.
[503] Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 1999).
[504] Klein (1999) *supra note* 501, at 29

plaintiff was entitled and any special/consequential harms or losses'[505] and this has notably included aspects such as a loss of earnings, the maintenance of dependents, medical expenses, the value of property, and any additional costs or expenses incurred[506]. In situations involving losses of life rather than for example property damage, the quantification of pecuniary losses has presented greater challenges. Shelton outlines the conceptualisation of these damages before the Inter-American Court in circumstances involving losses of life in the Velasquez Rodriguez and Godinez Cruz cases as including maintenance for the spouse and children of the deceased, education costs and lost earnings[507].

Non-pecuniary damages are defined as encompassing the broader physical and mental impacts upon the victim which Shelton frames as '*physical pain and suffering*'[508] along with '*mental anguish*'[509] including for example '*humiliation [and] loss of enjoyment of life*'[510]. These types of non-pecuniary loss are less tangible and therefore more difficult for human rights courts and bodies to quantify, however they are of particular significance in the context of non-economic climate loss and damage. This non-pecuniary loss has also been extended to the impacts upon family or community life of human rights violations, including for example losses of companionship[511]. It is useful to look to the jurisprudence of regional human rights courts and bodies that have developed further innovative concepts in remediating less tangible harms in responding to climate change. The concept of '*proyecto de vida*' developed by the Inter-American Court of Human Rights in the Loayza Tamayo v Peru case[512] is particularly relevant in informing the response to the climate impacts being experienced by SIDS communities as it encompasses '*lost opportunities and enjoyment of life*'[513] in the abstract. This has been held to include circumstances in which the applicant has been prevented from fulfilling their personal and professional goals as a result of the human rights violations in question[514]. In circumstances in which SIDS populations are being permanently displaced from their homelands, experiencing significant disruption to their livelihoods, community structures, and cultural practices, with many individuals likely to be forced to start a fresh somewhere new as sea-

[505] Shelton (1999) *supra note* 503 at 223.
[506] *Ibid.* Shelton (1999) at 224.
[507] *Ibid.* Shelton (1999) at 225.
[508] *Ibid.* Shelton (1999) at 226.
[509] *Ibid.* Shelton (1999) at 226.
[510] *Ibid.* Shelton (1999) at 227.
[511] *Ibid*. Shelton (1999) at 227.
[512] Loayza Tamayo v Peru (Reparations) (1998) 43 Inter-American Court of Human Rights (ser.C).
[513] *Ibid*. Shelton (1999) at 229.
[514] *Ibid*. Shelton (1999) at 230.

levels continue to rise, this concept of lost opportunities and enjoyment of life is highly applicable.

Even innovatively conceptualised forms of pecuniary and non-pecuniary damages however will not always be appropriate remedies where the impacts of climate related violations of human rights are not economically quantifiable or the suffering of the victims or their family members cannot be alleviated simply by a monetary remedy, for example where homelands are permanently lost. In such circumstances, it is necessary to explore alternative remedies such as rehabilitation measures, official apologies, memorials, commemorations, and law and policy reforms[515]. The Inter-American Court of Human Rights has previously ordered rehabilitation measures comprising detailed medical and psychological support for the families of victims who had lost their lives[516]. Antkowiak argues that this approach, placing the burden to provide rehabilitative treatment upon state facilities directly, has been widely adopted in subsequent cases by the Court[517]. Similarly, with respect to satisfaction remedies, the Court has ordered public apologies, ceremonies, and acknowledgements of responsibility by the state authorities to be directed to the affected groups[518]. Rehabilitation and satisfaction remedies are particularly important to ensure that climate vulnerable communities who experience irreparable non-economic climate loss and damage are treated with dignity by the relevant state authorities.

The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation alongside compensation notably recognise the need for restitution which is defined as including the '*restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property*'[519]. While full restitution is unlikely to be possible for all victims of climate change impacts, particularly those involving permanent losses of habitable territory, other forms of restitution are relevant including for example making appropriate provision on relocation for the replacement of lost property and for the continued enjoyment of cultural and family rights. The Guidelines also recognise rehabilitation remedies including the provision of medical and social support, and

[515] Tom Antkowiak, 'Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond'(2008) *Columbia Journal of Transnational Law* 46: 351.
[516] Nineteen Tradesmen v Colombia (2004) Inter-American Court of Human Rights (ser. C) No. 109.
[517] Antkowiak (2008) *supra note* 515, at 376.
[518] Moiwana Community v Suriname (2005) Inter-American Court of Human Rights (ser. C) No. 124.
[519] UN Basic Principles and Guidelines on the Right to a Remedy and Reparation (2005) *supra note* 500, at para.19.

satisfaction including formal apologies and the commemoration of the victims[520]. All of these types of remedies will need to be invoked to adequately respond to the multifaceted and often intangible nature of climate loss and damage faced by SIDS and their peoples.

The recommendations on remedies of the UN Human Rights Treaty Bodies in response to individual complaints are often broadly framed and therefore present their own challenges in providing for the effective reparation of climate loss and damage. Klein argues that the Human Rights Committee of the ICCPR for example often '*lacks clarity about what the appropriate action is, with the result that the recommendation is confined to a request for an effective remedy*'[521] which, in turn, leaves States Parties with a great deal of discretion in the action they choose to take in response to the Committee recommendations[522]. The development of a more detailed and innovative approach to remedies for climate claims before international human rights bodies including the ICJ and UN Treaty bodies is called for, informed by the jurisprudence of regional human rights courts and bodies, in particular that of the Inter-American Court of Human Rights.

V. Conclusion

The strong relationship between human rights and climate justice provides a firm foundation for the development of both inter-state and individual avenues of legal recourse in the face of worsening climate change impacts. Human rights are already embedded within the political theory literature on climate justice by many authors as core aspects of a distributive justice framework, ensuring that individuals and groups who are disproportionately bearing the burdens of global climate change in developing states are guaranteed a minimum level of protection[523]. The international human rights framework already provides for the broad-based protection of civil and political, socio-economic and cultural rights through the IPCCR and the ICESCR, along with specialist treaties and monitoring bodies in respect of a number of climate vulnerable groups including CEDAW on the rights of women, CRC on the rights of children, and the CRPD on the rights of persons with disabilities. Similarly, strong linkages between

[520] *Ibid.* UN Basic Principles and Guidelines on the Right to a Remedy and Reparation (2005), at para.21-22.
[521] Klein (1999) *supra note* 501, at 37.
[522] *Ibid.* Klein (1999) 501, at 37.
[523] See for example Shue (2010); Dietzel (2019) *supra note* 81; and Bell (2011) *supra note* 85.

human rights and procedural climate justice exist in the affirmation of rights of political participation, anti-discrimination and the right to an effective remedy illustrate most clearly. Rights-based frameworks are more capable of 'humanising' climate impacts and calling for the recognition of marginalised climate vulnerable groups in law and policy making agendas on legal as well as moral grounds.

The existing status of human rights in the international legal order, exemplified in particular by the right to life as a *jus cogens* norm capable of overriding conflicting treaty provisions and giving rise to additional duties within the international community as a whole, is significant in both reinforcing the existence of shared duties to act to minimise risks to life, and in establishing linkages with the general rules of state responsibility. Establishing these linkages is crucial in order to offer SIDS viable recourse to remedies for climate loss and damage suffered as a result of the breaches by large GHG emitters of their international obligations. The rules of state responsibility not only recognise collective, transboundary models of responsibility based upon the attribution of harm to multiple states, but they can serve to strengthen the potential of human rights obligations to provide for stronger remedies for harm, including through the obligation to make full reparation for any injury caused[524].

Four core enforcement avenues have been identified in the present Chapter as capable of providing recourse to justice in response to climate change, namely, diplomatic inter-state measures, claims before the Permanent Court of Arbitration or ICJ, and invoking the UN Human Rights Council special procedures or complaints mechanisms before the individual UN Human Rights Treaty Bodies. Each of these avenues varies greatly in terms of the capacity to provide for effective access to remedies for climate loss and damage, in their capacity to influence the behaviour of States Parties, and in the extent to which they fulfil the interests and aims of a climate justice framework. In order to identify the enforcement avenue capable of offering the greatest benefits to the advancement of a climate justice framework, three key questions have been developed, namely:

1) The availability of remedies for loss and damage;
2) Public access to the resulting decision and statement of legal principle; and
3) The ability to meaningfully advance international legal doctrine.

[524] ILC Articles on the Responsibility of States (2001) *supra note* 368, Article 31(1).

Based upon the foregoing analysis it is possible to identify several flaws in the enforcement avenues provided for by diplomatic measures and the UN treaty bodies in terms of their ability to provide remedies for climate loss and damage in the absence of the power to hand down legally binding judgments. Negotiated settlements reached through good offices or conciliation for example will carry political weight, however in light of the approach taken by states to the issue of climate loss and damage in the UNFCCC negotiations which have included express exclusions of compensation, the likelihood of agreeing upon sufficient remedies through these channels seems slim. The UN treaty body processes have potential in terms of their ability to advance international legal doctrine and to provide an authoritative statement on the scope of human rights obligations in the context of climate change from a specialist perspective, for example on the scope of women's rights or the rights of persons with disabilities in the face of climate impacts.

There are however also transparency concerns surrounding the need for state consent to make decisions of the UN bodies publicly available which may limit the impact of such decisions and serve to undermine the second of the criteria outlined. Adjudication by international courts and tribunals by contrast offers greater opportunities to secure remedies for breaches of international obligations, particularly if the rules of state responsibility are invoked alongside human rights obligations. The Permanent Court of Arbitration, similar to the ICJ can hand down decisions that are legally binding upon the parties to the dispute and both have the ability to advance international legal doctrine. The previous case law and expertise of the PCA has however been principally focused on trade law and arbitral awards are not made public without the prior consent of the parties. The ICJ can therefore be identified as the enforcement avenue offering the greatest potential on the basis of all three of the criteria.

Chapter IV - Overcoming human rights challenges

The present chapter is devoted to addressing the unique challenges encountered in the adoption of a human rights-based approach to climate change under international law. It builds upon the arguments presented in Chapter III on the benefits offered by a human rights-based approach to climate justice by tackling the core questions surrounding the suitability for purpose of the international human rights regime and by outlining steps to be taken in the requisite advancement of the legal doctrine. At the outset it is important to comment on the limitations of the present Chapter. The challenges addressed represent those of greatest significance in responding to the principal research questions of the thesis, namely, of how international human rights law can provide recourse to legal justice for climate vulnerable states & communities and how a climate justice approach for South Pacific Small Island States can be developed in light of the specific distributive and procedural justice challenges encountered. This Chapter will not focus upon the normative challenges to a human rights-based approach to climate change generally which have already been the subject of extensive analysis in the body of political theory literature on climate justice[525].

Consequently, the challenges addressed here encompass both the legal and operational barriers encountered in providing recourse to justice, including a critical examination of the availability of remedies for breach. Beginning with an examination of the applicable obligations under international law, the question of the exclusivity of human rights and climate law in accordance with legal principle merits consideration. Secondly, the accessibility of human rights mechanisms will be considered, along with the operational challenges facing the UN treaty framework that serve to limit its capacity to provide effective recourse to climate vulnerable SIDS and their peoples. Finally, the legal questions surrounding the attribution of responsibility to the state, and the extraterritorial scope of human rights will be examined with the aim of demonstrating how these oft-cited barriers to establishing accountability for climate change impacts can be overcome.

[525] See for example: Bell (2011) *supra note* 84; Caney, (2005) *supra note* 253; and Gardiner, Caney, Jamieson, and Shue (2010) *supra note* 249.

I. Exclusivity of human rights & climate law

The application of the general rules of state responsibility to international human rights law and to the regulation of climate change which falls within the remit of the UNFCCC is potentially subject to exclusivity challenges in international law. These challenges are founded upon the principle of '*lex specialis*' providing for the exclusive application of rules in a specialised field, most often associated with the rules of international humanitarian law applying in situations of armed conflict[526]. This includes a general rule giving precedence to specialised treaty law over the body of general rules of international law, such as customary norms, it is taken to have derogated from, expressed in the following terms: '*lex specialis derogat legi generali*'[527]. The consequences of the designation of *lex specialis* status are significant with respect to the application of the rules of state responsibility. The codification of these rules in the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles) provides in Article 55 that they shall not apply '*where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law*'[528].

Both Article 55 itself and the operation of *lex specialis* more broadly remain contested in international legal scholarship, Simma and Pulkowski for example describing it as one of the '*most debatable provisions of the ILC's Articles*'[529]. The application of this exclusion has been called into question on normative grounds in terms of the presumption of uniformity underpinning the perceived intention of the states concerned, and, more pragmatically, how specific a regime needs to be in order to fall within the realm of *lex specialis*[530]. In making such determinations, Crawford argues that regard should be had to the extent to which the consequences of breaches of the treaty obligations have been elaborated, and that the intention

[526] See for example literature on lex specialis and the relationship between international humanitarian law and international human rights law: Ilias Bantekas and Lutz Oette, *International Human Rights: Law and Practice* (Second Edition) (Cambridge University Press, 2016) Chapter 15.4.
[527] Shaw (2003) *supra note* 424, at 116.
[528] ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001) *supra note* 368, Article 55.
[529] Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) *European Journal of International Law* 17(3): 483-529, at 486.
[530] *Ibid.* Simma and Pulkowski (2006).

to exclude the rules of state responsibility is a question of contextual interpretation in line with the overarching object and purpose of the special regime[531].

In the case of state responsibility for climate change impacts, the argument could be made that in light of the specialised climate treaty regime under the UN Framework Convention on Climate Change and Paris Agreement regulating climate action at the global level, this represents a *lex specialis* regime to the exclusion of the general rules of international law. A number of authors have indeed argued that the UNFCCC, its associated legal obligations and mechanisms, fall under the umbrella of *lex specialis* to a greater or lesser degree[532]. If this fundamental premise is accepted, it may have the effect of excluding the application of key rules and norms on state responsibility, reparation for loss and damage caused, and the obligations flowing from international human rights law in respect of climate change.

The position on *lex specialis* in the climate change literature is often more nuanced, for example with *jus cogens* norms overriding the exclusionary capacity of *lex specialis*[533], and with other commentators arguing that *lex specialis* applies only in respect of certain core principles such as that of common but differentiated responsibility[534]. The recognition of the *lex specialis* status of certain of the core principles, or indeed of the UNFCCC treaty, would thus not necessarily lead to the exclusion of the rules of general international law in their entirety. *Lex specialis* in the field of climate law may nevertheless serve to limit the recourse to justice available to climate vulnerable states and peoples. The arguments against its strict application therefore merit further exploration.

The normative objectives behind the development of *lex specialis* have been described by Simma and Pulkowski as two-fold, to preserve the sovereignty of states in their freedom to choose to be bound by more specialised rules on the one hand, and more pragmatically on the other, to ensure the effective operation of rules that are less likely to be subject to exceptions[535]. These objectives can be called into question if the designation of *lex specialis* serves to restrict or prevent the attainment of the overarching aims of the specific treaty in question, namely, in

[531] James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013), at 104-105.
[532] See for example Teresa Thorp, 'Climate Justice: A Constitutional Approach to Unify the Lex Specialis Principles of International Climate Law' (2012) *Utrecht Law Review*, 8:3, 7-37; and Wewerinke and Doebbler (2011) *supra note* 62, at 142.
[533] Teresa M. Thorp, *Climate Justice: A Voice for the Future* (Palgrave Macmillan, 2014) at 274.
[534] Wewerinke and Doebbler, (2011) *supra note* 62, at 145.
[535] Simma and Pulkowski (2006), *supra note* 529, at 486-7.

the case of the UNFCCC, the '*stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system*'[536].

This aim is complimented by the regime's guiding principles laid down in Article 3, including notably, the precautionary principle, intra-generational equity, sustainable development, and common but differentiated responsibility (CBDR)[537]. The extent to which the provisions of Article 3 constitute *lex specialis* principles of international climate law has been explored in detail by Thorp, who argues that they are both intrinsically linked to general principles of international law and give rise to the broader *lex specialis* principles of equity, solidarity and good neighbourliness in climate change law[538]. The advantages offered by a broadened approach to *lex specialis* in the field of climate change include the increased capacity of the more general principles of equity and precaution to address the uncertainty and multifaceted nature of climate challenges.

The relationship between the UNFCCC and customary international law has been explored by Verheyen in the context of state responsibility for climate damage[539]. Verheyen underlines that although *lex specialis* would generally demand that in situations of conflict a more precise treaty provision would take precedence, each instance of conflict should be considered in accordance with the general rules of treaty interpretation[540] under the Vienna Convention on the Law of Treaties[541]. As a result, any potential conflict between the UNFCCC and the rules of state responsibility or international human rights obligations would demand an examination of the precise provisions at issue and the factors to be taken into account in interpretation. These factors include, namely, the object and purpose of the provision, together with the context, including the preamble and any agreements or instruments concluded in in connection with the treaty[542]. In the case of the UNFCCC, a perambulatory clause refers to both the UN Charter and the no-harm principle of customary international law[543], suggesting that the States Parties did not intend for the application of general rules of international law to be excluded. The reference in the Convention's overarching principles to the '*needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse*

[536] United Nations Framework Convention on Climate Change [1992] *supra note* 42, Article 2.
[537] *Ibid.* UNFCCC [1992], Article 3.
[538] Thorp (2012) *supra note* 532, at 36-37.
[539] Verheyen (2005) *supra note* 45, at 144-145.
[540] *Ibid.* Verheyen (2005) at 144-145.
[541] Vienna Convention on the Law of Treaties [1969], *supra note* 49, Article 31.
[542] *Ibid.* Vienna Convention [1969], Article 31.
[543] UNFCCC [1992] *supra note* 42, Preamble.

effects of climate change'[544] further supports the view that the treaty was not intended to prevent climate vulnerable states from fulfilling those needs by invoking alternative bodies of rules under international law.

The limitations of the UNFCCC framework and Paris Agreement in terms of the enforceability of the key mitigation and loss and damage provisions have been explored in detail in Chapter III, Section II above. It is clear that issues surrounding compliance procedures for climate obligations in the Paris Agreement have sparked disagreement among the States Parties particularly with respect to the scope of Article 15, its triggering and the measures available at COP23[545]. The shared intention of the Parties to exhaustively establish the consequences of breaches of climate obligations therefore remains far from established. Many of the obligations themselves similarly lack specificity or precision with regards to the requirements for States Parties[546]. It is further significant that five Pacific SIDS made express declarations upon ratification of the UNFCCC, and an additional six upon ratification of the Paris Agreement, affirming that as States Parties they did not renounce any of their existing rights under general international law, including specifically, the '*law concerning State responsibility for the adverse effects of climate change*'[547]. Based on the foregoing, the intention of the States Parties to create an exhaustive *lex specialis* regime for climate change, capable of excluding the application of general international law, cannot in my view be reasonably established.

The debate on *lex specialis* is similarly ongoing with respect to the application of the rules of state responsibility to human rights obligations that are subject to specific treaty mechanisms. Meron has argued convincingly against this on the basis that it would 'intensify the fragility and ineffectiveness of human rights law'[548] if recourse to general rules and principles were excluded. With respect to state responsibility for rights violations, the entitlement of third states to invoke the responsibility of others in breach of *jus cogens* and *erga omnes* obligations owed to the international community as a whole, discussed in Chapter III. Section. III(i) above, has been cited by Bird as a convincing challenge to the notion that human rights treaties

[544] *Ibid.* UNFCCC [1992] Article 3(2).
[545] European Parliament Directorate General for Internal Policies, 'Implementing the Paris Agreement – New Challenges in View of the COP 23 Climate Change Conference' (October 2017) IP/A/ENVI/2017-04, at 47.
[546] Rajamani (2016) *supra note* 24.
[547] See specifically the declarations of Fiji, Kiribati, Nauru, Papua New Guinea, and Tuvalu in respect of the UNFCCC [1992] and those of Cook Islands, The Federated States of Micronesia, Nauru, Niue, Solomon Islands, and Tuvalu in respect of the Paris Agreement [2015], UN Treaty Collection, available online at: https://treaties.un.org/Pages/Treaties.aspx?id=27&subid=A&clang=_en (accessed 09/05/18)
[548] Meron (1989) *supra note* 413, at 374.

represent self-contained regimes[549]. The ICCPR notably contains a provision citing the intention not to restrict the States Parties from '*having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them*'[550]. The CRC and CEDAW similarly contain provisions stating that they shall not '*affect any provisions which are more conducive to the realization of the rights of the child'*[551] or to the *'achievement of equality between men and women'*[552] including any international law or conventions in force in the state in question[553].

Such provisions of international law or other treaties may conceivably include rules of state responsibility or alternative remedies. In relation to human rights and climate change specifically, the preambulatory clause in the Paris Agreement referring to the need for States Parties to '*respect, promote and consider*'[554] human rights in taking climate action is reflective of the growing recognition in international discourse of the overlap between the climate change regime and human rights protections. Normatively, the continuing availability of general rules of international law, including those providing for remedies, is highly desirable in light of the significant challenges facing the complaints mechanisms under the human rights treaties[555], explored in greater detail in Section. II and Section. III below.

II. Operational challenges facing the UN human rights treaty mechanisms

The operational challenges facing the UN human rights treaty mechanisms are defined broadly here as encompassing on the one hand, the factors restricting the accessibility of the mechanisms themselves, and on the other, the functional challenges faced by the UN human rights system more generally. Although human rights offer a greater variety of enforcement avenues as compared with alternative avenues under the UNFCCC and international environmental law as discussed in detail in Chapter III Section II above, the availability of the complaints mechanisms under the UN human rights treaty regime is limited to those states who have ratified the relevant conventions and protocols. In the South Pacific region, levels of

[549] Annie Bird, 'Third State Responsibility for Human Rights Violations' (2010) *The European Journal of International Law*, 21(4): 883-900.
[550] ICCPR [1966] *supra note* 314, Article 44.
[551] CRC [1989] *supra note* 360, Article 41.
[552] CEDAW [1979] *supra note* 314, Article 23(b).
[553] *Ibid.* CRC Article 41 and CEDAW, Article 23.
[554] Paris Agreement [2015] *supra note* 16, Preamble.
[555] Bird (2010), *supra note* 549, at 900.

engagement with the international human rights treaties and protocols are comparatively low, however the regional and national human rights contexts will be examined in greater depth in the case study Chapters V and VI below.

It is important at this juncture to explore those challenges affecting the functioning of the treaty body regime at the international level which serve to illuminate both the broader context surrounding national government decision-making and the backdrop to repeated calls for reform. This will be followed by a detailed examination of the legal challenges associated with the use of the mechanisms as and when they become available to states and individuals.

The international human rights treaty bodies face a series of functional challenges as a result of the structure of the regime itself. The nine human rights treaty bodies each have their own periodic reporting obligations and monitoring procedures which operate in concert, creating bureaucratic challenges for both the nation states responding to those overlapping reporting obligations, and for the bodies themselves in allocating sufficient resources to address them. The UN General Assembly has acknowledged the persistent resource challenges facing the treaty body system, stating in the 2014 reform proposal that '*the current allocation of resources has not allowed the human rights treaty body system to work in a sustainable and effective manner*'[556] and citing the need for adequate funding to be provided from the UN budget[557]. The multiplicity of human rights procedures at the international level has given rise to concerns regarding duplication and the coherence of the regime[558]. These fundamental structural questions, coupled with the increased workload and funding pressures being faced by the bodies, represent the core challenges to the effective functioning of the UN human rights system.

The human rights committees themselves are comprised of independent experts who are unpaid and engaged in their duties on only a part time basis[559] meaning that they must find time to dedicate to reviewing reports, compiling questions, observations and recommendations alongside their other responsibilities. The fixed location of the committee sessions in Geneva,

[556] United Nations General Assembly Resolution 68/268 'Strengthening and enhancing the effective functioning of the human rights treaty body system' [2014] A/RES/68/268.
[557] *Ibid.* UNGA Res 68/268.
[558] The Geneva Academy of International Humanitarian Law and Human Rights, 'Optimizing the UN Treaty Body System: Academic platform report on the 2020 review' (May 2018) available online at: https://www.geneva-academy.ch/joomlatools-files/docman-files/Optimizing%20UN%20Treaty%20Bodies.pdf (accessed 07/11/19) at 11.
[559] *Ibid.* Geneva Academy Report (2018) at 11.

predominantly at Palais Wilson, and to a lesser extent Palais des Nations[560], presents further practical challenges both in terms of the physical capacity of the venues to house Committee sessions simultaneously, and their geographic location in Switzerland. If a 'constructive dialogue'[561] with national delegations, including relevant government representatives who can respond to questions[562], is to take place, this necessarily requires that states make significant human and financial resource commitments in order to attend.

The election process for committee members has also been the subject of critique for a lack of transparency[563] and, together, these issues raise procedural justice concerns if the equitability of the participation processes cannot be ascertained. Indeed, the General Assembly has acknowledged the need for States Parties to consider the geographical representation of human rights committee members, along with the representation of different genders and persons with disabilities[564]. If the moral standing of the committees themselves as the guardians of the treaties protecting the rights of women and persons with disabilities is called into question, this is likely to undermine the authority vested in their statements and recommendations, in turn increasing the likelihood of non-compliance.

There is a clear need for structural change which has led to successive proposals for reform by the Office of the High Commissioner for Human Rights to streamline and consolidate the treaty body processes, ranging from the adoption and alignment of simplified reporting procedures by the Committees[565], to the replacement of the multiplicity of the current structures with a single, unified standing treaty body[566], the latter of which failed to be adopted. The UN General Assembly has similarly initiated a process of review of the functioning of the treaty body system, notably calling for '*greater efficiency, transparency, effectiveness and harmonisation*'[567] in human rights treaty body processes. The 2014 General Assembly

[560] United Nations Office of the High Commissioner for Human Rights, 'Information Note on Accreditation to attend session of Treaty Bodies', available online at: http://www.ohchr.org/EN/HRBodies/CCPR/Pages/Accreditation.aspx (accessed 01/06/18), at S.II Venue.
[561] Office of the High Commissioner for Human Rights, Civil and Political Rights: The Human Rights Committee Fact Sheet No. 15 (Rev.1) available at: http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf (accessed 04/06/18), at 18.
[562] See for example United Nations International Covenant on Civil and Political Rights, Rules of Procedure of the Human Rights Committee [2012] CCPR/C/3/Rev.10, Rule 68.
[563] Geneva Academy Report (2018) *supra note* 558, at 11.
[564] UNGA Res 68/268 (2014) *supra note* 556, at 5.
[565] Navanethem Pillay, 'Strengthening the United Nations human rights treaty body system: A report by the United Nations High Commissioner for Human Rights' (June 2012) available online at: http://www2.ohchr.org/english/bodies/HRTD/docs/HCReportTBStrengthening.pdf (accessed 07/06/18), at 50.
[566] Louise Arbour, Concept paper on the High Commissioner's Proposal for a Unified Standing Treaty Body (22 March 2006) HRI/MC/2006/2.
[567] UNGA Res 68/268 (2014) *supra note* 556, at 4.

Resolution imposed word limits on the documents submitted to and issued by the treaty bodies and encouraged greater support by the States Parties for the UN Voluntary Fund for Technical Cooperation in the Field of Human Rights[568] providing funding for implementation through institutional capacity-building and other means[569]. The existing changes made with the aim of rendering the system more effective have been modest and have included for example the adoption of simplified reporting procedures by many of the treaty bodies, in line with General Assembly recommendations to eliminate the backlog of state reports[570].

It is however clear that the UN human rights regime continues to face significant challenges and that reform attempts thus far have yet to resolve fundamental underlying issues such as the high rates of non-compliance with reporting obligations by States Parties globally. A review of human rights treaty compliance for 2017 found that some 83% of States Parties were overdue in submitting their reports, with a handful of states having as many as nine reports outstanding[571]. The need for fundamental restructuring to facilitate universal compliance by the States Parties has been recognised by the Geneva Academy study which makes recommendations for the consolidation of reporting obligations, including having a single report to be reviewed jointly by all of the treaty bodies or, alternatively, a '*semi-consolidated state report combined with a clustered state review*'[572] whereby the states are reviewed twice by two different groups of committees at more regular intervals[573]. Whether these proposals will be adopted remains to be seen, however the momentum for reform in the run up to the UN General Assembly mandated review of the human rights system in 2020 is building.

III. Legal challenges faced by the Treaty body mechanisms

The enforceability of the international human rights treaty obligations is notoriously limited. The monitoring of compliance with the relevant treaty obligations falls within the remit of the respective committees and those committees may only issue non-binding recommendations in

[568] *Ibid.* UNGA Res 68/268, at 5.
[569] UN Commission on Human Rights Resolution 1991/49, Voluntary Fund for Technical Co-operation in the Field of Human Rights (5 March 1991) E/CN.4/RES/1991/49.
[570] UNGA Res 68/268 (2014) *supra note* 556, at 8.
[571] United Nations International Human Rights Instruments, *Compliance by States parties with their reporting obligations to international human rights treaty bodies: Note by the Secretariat* (23 March 2018) HRI/MC/2018/2*, at 5.
[572] Geneva Academy Report (2018) *supra note* 558, at 7.
[573] *Ibid.* Geneva Academy Report (2018), at 7.

response to States Parties' reports or communications received under the complaints procedures. The inquiry procedure is limited in scope, its initiation by the relevant Committees requires reliable evidence of '*grave or systematic violations*'[574] by the State Party in question and, once again, may only result in a dialogue and non-binding recommendations. The emphasis placed upon confidentiality in inquiry procedures[575], together with the limited grounds for initiation, raise procedural justice concerns with respect to a lack of transparency and access to justice. The inter-state and individual complaints mechanisms offer comparatively greater levels of transparency and scope for impact in terms of the advancement of legal doctrine as the jurisprudence of the Committees and their recommendations are publicly accessible[576].

The follow-up procedures available to the Committees in respect of their recommendations however are themselves limited. Six of the treaty bodies including the Human Rights Committee, the Committee on the Rights of Persons with Disabilities and the Committee on the Elimination of Discrimination Against Women are among those that have follow-up procedures in place[577]. These procedures allow the Committees to make a limited number of recommendations in respect of which additional reporting on States Parties' progress towards implementation is required. The States Parties are then obligated to report back on follow up within one to two years and a rapporteur may be tasked with producing a follow-up report on behalf of the committee in question[578]. State Party cooperation is nevertheless a pre-requisite for both progress monitoring and the effective implementation of recommendations. The Committees notably do not have the capacity to impose sanctions for non-compliance.

The weakness of the Treaty Bodies' follow-up procedures has been highlighted in the recent reform proposals[579], however in the absence of substantial legal change to the role and mandates of the Committees, these procedures will continue to play a more political role in 'naming and shaming' non-compliant States to induce law or policy change through collective international pressure. In light of the international status and increasingly broad geographic

[574] See Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women [1999] UN Treaty Series, vol. 2131, p. 83, Article 8(1); and Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure [2011] A/RES/66/138, Article 13(1).
[575] *Ibid.* CEDAW Optional Protocol, Article 8(5); and CRC Optional Protocol, Article 13(3).
[576] See United Nations Office of the High Commissioner for Human Rights, Jurisprudence database, available at: http://juris.ohchr.org/ (accessed 25/06/18).
[577] United Nations Office of the High Commissioner for Human Rights, Human Rights Bodies, Follow-up Procedure, available online at: https://www.ohchr.org/EN/HRBodies/Pages/FollowUpProcedure.aspx (accessed 18/06/18).
[578] *Ibid.* UNOHCHR Follow-up Procedure webpage.
[579] Geneva Academy Report (2018) *supra note* 558, at 12.

scope of the UN human rights bodies as states ratify the core instruments in steadily greater numbers[580], non-binding follow-up has the potential to be persuasive if other members of the international community are willing to lend their weight to calls for compliance.

The predominantly 'soft law' approach to enforcement is mirrored in the treaty body complaints mechanisms where individual or inter-state communications are received, only non-binding recommendations can be issued. The treaty bodies are empowered to make recommendations as to the appropriate remedies that ought to be conferred on victims of human rights violations and, indeed, the Human Rights Committee in upholding the ICCPR rights has recommended a range of remedial measures including investigations, prosecutions, compensation, and satisfaction in respect of the same individual communications[581]. The responses of States Parties to the recommendations of the committees are however often delayed, which Oette argues should be viewed as a common form of 'partial non-compliance'[582] that appears to be more pronounced with respect to the decisions of the UN treaty bodies. In order to promote increased compliance with the decisions of the treaty bodies, and to tackle the issue of limited political will[583], state responsibility may prove a useful framework within which non-compliance could be challenged by other states at the international level.

An associated challenge to the view that states may hold each other accountable for a failure to comply with the decisions of international human rights bodies is their historic reluctance to invoke the inter-state complaints mechanisms provided by the treaties and optional protocols. Up until very recently the inter-state complaints procedures had never been utilised, with international law scholars citing the political contentiousness of lodging such complaints as a barrier to states' effective engagement with these processes[584]. In April 2018 however, it was reported that Palestine has for the first time made use of a UN treaty body inter-state procedure

[580] United Nations Office of the High Commissioner for Human Rights, OHCHR Report (2016), Human Rights Treaties Division, available at: http://www2.ohchr.org/english/OHCHRreport2016/allegati/17_Human_Rights_Treaties_Division_2016.pdf (accessed 18/06/18) at 291.
[581] See for example UN Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2283/2013* (1 December 2017) CCPR/C/121/D/2283/2013, at 11.
[582] Oette (2010) *supra note* 499, at 51.
[583] *Ibid.* Oette (2010), at 51.
[584] Scott Leckie, 'The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?' (1988) *Human Rights Quarterly* 10(2): 249-303.

to lodge a complaint before the Committee on the Elimination of Racial Discrimination against Israel.[585]

The history of conflict between Palestine and Israel and, importantly, the advisory opinion of the ICJ ruling on the illegality of the construction of a barrier wall in the Palestinian territory which reaffirmed the right to self-determination of its peoples[586], are significant contextual factors to be taken into account. They render the circumstances of this first inter-state claim extraordinary, however if the response of the CERD proves valuable to the parties to the dispute, or indeed to third states, this may pave the way for increased engagement with inter-state mechanisms moving forward. The increasing severity of climate change impacts for SIDS, in particular the potential for complete inundation from sea-level rise and population displacement is, moreover, likely to dramatically shift the diplomatic priorities of these nations as they seek to protect their populations in the face of unprecedented losses of territory. It is further important to note that inter-state human rights claims have been brought regionally under the auspices of the European Convention on Human Rights[587], indicating that when states consider a matter to be of great national interest, these mechanisms may indeed be invoked.

Finally, the procedural challenges posed by the requirement for an individual victim and the exhaustion of domestic remedies with respect to the individual complaints procedures merit consideration. In the context of climate change as a global environmental phenomenon, one which by its very nature impacts upon humanity collectively, the requirement that an individual demonstrate that they have been '*personally and directly affected*'[588] by the measure, act or omission of the State Party to the treaty in question presents significant challenges. This requirement would prima facie require a victim to demonstrate that the failure of the state authorities' to adequately curb the greenhouse gases emitted within their jurisdiction has had the effect of exposing them to an imminent threat of harm or that such harm has already materialised with respect to specific rights.

[585] David Keane, 'ICERD and Palestine's Inter-State Complaint' (30 April 2018) EJIL: Talk! Blog, available at: https://www.ejiltalk.org/icerd-and-palestines-inter-state-complaint/ (accessed 19/06/18).
[586] ICJ Wall Opinion [2004] *supra note* 449.
[587] European Court of Human Rights, Inter-States Applications (as of 9 May 2018), available at: https://www.echr.coe.int/Documents/InterStates_applications_ENG.pdf (accessed 22/06/2018).
[588] UN Office of the High Commissioner for Human Rights, *Fact Sheet No.7/Rev.1, Complaints Procedure*, available at: https://www.ohchr.org/Documents/Publications/FactSheet7Rev.1en.pdf (accessed 19/06/18).

The question of attribution to the state will be addressed in detail in S.IV below, however it has been established that the harm to an individual may be '*imminent*'[589] rather than having necessarily already materialised. Knox has argued that climate impacts do present such imminent threats to rights because once set in motion they will be '*difficult or impossible to forestall*'[590]. The admissibility of individual complaints further depends upon the prior exhaustion of domestic remedies[591]. A qualified approach to the admissibility requirements can be found in the wording of the provisions of the more specialised treaties which hold that '*this shall not be the rule where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief*'[592], however the notable exception of the Optional Protocol to the ICCPR and the more limited provision in the ICESCR Protocol[593] are cause for concern. Meron argues that the requirement for the exhaustion of domestic remedies must be tempered by the need to provide effective protection for human dignity[594]. With respect to climate change, the international bodies are better placed than the domestic courts to provide effective relief by interpreting and making the necessary advancements in international law doctrine.

The narrow scope of the individual complaints mechanisms and the very broad nature of global climate impacts together indicate that models based upon more collective notions of responsibility, for example under the rules of state responsibility, or indeed, the inter-state complaints procedures before the treaty bodies, will, as they stand, be better suited to addressing climate-related rights impacts. Nevertheless, the effective exclusion of individuals from making claims based upon the obligations of states with respect to climate change is normatively undesirable and at odds with the overarching aims of the UN Charter and international human rights law, notably including the '*obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms*'[595]. In light of the disproportionate impacts that climate change will have upon

[589] OHCHR, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights (2009) *supra note* 352, at 23.
[590] John H. Knox, 'Linking Human Rights and Climate Change at the United Nations' (2009) *Harvard Environmental Law Review* 33: 477-498.
[591] See ICCPR Optional Protocol [1966] Article 2; ICESCR Optional Protocol [2008], Article 3 *supra note* 480; CEDAW Optional Protocol [1999] *supra note* 574, Article 4; Optional Protocol to the Convention on the Rights of Persons with Disabilities [2006] United Nations Treaty Series vol. 2518, p. 283, Article 2(d); and CRC Optional Protocol on a communications procedure [2011] A/RES/66/138, Article 7(5).
[592] See *Ibid.* CRPD Optional Protocol [2006], Article 2(d); CEDAW Optional Protocol [1999], Article 4(1); CRC Optional Protocol on a communications procedure [2011], Article 7(5).
[593] ICESCR Optional Protocol [2008] *supra note* 480, Article 3(1) provides '*This shall not be the rule where the application of such remedies is unreasonably prolonged*'.
[594] Meron (1989) *supra note* 413, at 377.
[595] ICCPR [1966] *supra note* 314, Preamble.

marginalised groups and those residing in geographically vulnerable regions where sea-level rise threatens the widespread displacement of populations, the assurance of fundamental human rights protections and access to justice is essential.

To this end, the right to an effective remedy[596] for human rights violations merits affirmation. This right has been interpreted broadly by the Human Rights Committee in respect of the ICCPR as including not only a duty to compensate victims, but the positive obligations to conduct investigations and to bring prosecutions[597]. Such positive duties find reinforcement in the provisions of CEDAW[598] and CRC[599] on the rights of women and the rights of children, which cite the need to provide for, inter alia, effective judicial protections. A purposive interpretation of these provisions can be adopted to infer a duty on the part of states to provide effective remedies for climate-related infringements of human rights, including access to judicial redress. Such a duty adds weight to the call for a broader interpretation of the admissibility requirements in order to enable basic protections to be provided to climate-vulnerable individuals and groups at the sub-national level. This view has found support in the reports of the UN Special Rapporteur on Human Rights and the Environment who has called on states to guarantee that '*effective remedies for all human rights violations, including those arising from climate-related actions*'[600] are provided for and underlined the need for international support for this purpose.

IV. Attributing responsibility to the state

Turning from the specific operational and legal challenges associated with the UN human rights treaty body mechanisms to the challenges associated with establishing state responsibility for climate impacts more broadly, it is necessary to consider how causation, foreseeability, and uncertainty can be effectively addressed. The difficulties associated with establishing a chain of causation between the act or omission of a state on the one hand, and the infringement of a right suffered by a specific victim or group represents one of the most commonly cited critiques

[596] *Ibid.* ICCPR [1966], Article 2(3).
[597] Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 1999) at 16.
[598] CEDAW [1979] *supra note* 314, Article 2(c).
[599] CRC [1989] *supra note* 360, Article 19.
[600] Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (2016) *supra note* 391, at 15-16.

of the human rights based-approach to climate responsibility[601]. The establishment of legal causation is rendered particularly challenging by the diffuse nature of greenhouse gas pollution, the indirect nature of many of the human impacts of climate change such as food insecurity, which themselves often have multiple contributory causes, and, crucially, the scientific uncertainty associated with definitively linking any singular meteorological event to climate change. In problematising a human rights-based approach, Humphreys has called into question the predictability of climate change impacts and the inherent uncertainty in scientific projections as limiting the ability to identify which individuals have been affected[602].

In responding to these causal challenges, it is important to acknowledge that climate science is a highly dynamic field and that the ability to pinpoint both emissions responsibility and projected impacts is constantly evolving. A 2014 study of carbon dioxide and methane emissions for example found that nearly two thirds of global historic emissions of these two greenhouse gases could be attributed to just 90 fossil fuel and cement entities[603]. States Parties to the UNFCCC and Paris Agreement are obliged to regularly update national GHG inventories[604] to permit the monitoring of compliance with the 1.5°C and 2°C temperature goals. The Intergovernmental Panel on Climate Change in turn, collates expert climate data at the global level to present authoritative reports on both emissions levels and the likelihood of a range of impacts, with an increasing focus upon human vulnerabilities[605]. These findings are already being cited by the parties to climate litigation, and, crucially, by the judiciary to support the engagement of state duties for insufficiently ambitious climate policy at the national level[606].

The quantification of human vulnerabilities is increasingly becoming the focus of climate scientists, including for example the impacts on human health and mortality. A 2018 study in Nature Climate Change quantified the risk of heat-related deaths in London and Paris associated with the stabilisation of temperatures in accordance with the 1.5°C versus the 2°C targets as between 15-22%[607]. The proportional attribution of responsibility between states at

[601] See Ole W. Pedersen, 'Climate change and Human Rights: amicable or arrested development?' (2010) *Journal of Human Rights and the Environment* 1(2): 236; and OHCHR Report (2009) *supra note* 390, at 23.
[602] Humphreys (2012) *supra note* 76, at 33.
[603] Heede (2014) *supra note* 64.
[604] See UNFCCC [1992] *supra note* 42, Article 12; and Paris Agreement [2015] *supra note* 16, Article 13(7).
[605] IPCC WGII Contribution to AR5 (2014), Summary for Policymakers, *supra note* 176.
[606] Urgenda Foundation v The Netherlands (2015) *supra note* 444.
[607] Daniel Mitchell, Clare Heaviside, Nathalie Schaller, Myles Allen, Kristie L. Ebi, Erich M. Fischer, Antonio Gasparrini, Luke Harrington, Viatcheslav Kharin, Hideo Shiogama, Jana Sillmann, Sebastian Sippel and Sotiris Vardoulakis, 'Extreme heat-related mortality avoided under Paris Agreement goals' (2018) *Nature Climate Change* 5: 546–553.

the global level is already possible in accordance with published GHG inventories. The wording of the reports however is cautious in line with academic practice in the natural sciences, and the disciplinary divide between the fora in which the evidence is being presented and those in which it is being adjudicated upon must be bridged by evolving judicial knowledge and legal doctrine to accompany the ever-evolving climate science.

The precautionary principle represents a key tool of judicial interpretation that has evolved with the express purpose of accounting for scientific uncertainty in the face of serious or irreversible environmental harm[608]. As discussed in Chapter III, the status of the principle as a norm of customary international law and thus as a freestanding obligation in its own right remains contested[609]. The precautionary principle nevertheless plays an important role in shaping the judicial interpretation of scientific evidence and the way in which treaty provisions are applied[610]. In the context of climate change, Haritz argues that the precautionary principle has the effect of increasing the requisite standard of care by imposing positive duties to respond to future risk, thereby aiding in the establishment of climate liability[611]. The precautionary principle has been embedded in state responses to climate change by the UNFCCC itself which provides in Article 3 that precautionary measures 'to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects'[612] should be taken in spite of the lack of full scientific certainty.

The application of the precautionary principle as an interpretive tool in climate change litigation to determine whether mitigation obligations under the international framework had been effectively complied would be expected as a result of this. I argue that its application should, in turn, be extended to climate-related human rights claims. This proposition is, as yet, untested before the international courts and tribunals, however at the regional level, the Inter-American Court of Human Rights in a 2017 Advisory Opinion held that states are under a duty to act in accordance with the precautionary principle to protect the rights to life and physical integrity in instances of transboundary environmental damage[613]. The jurisprudence of the European Court of Human Rights and the Court of Justice of the European Union contains examples of a precautionary approach being adopted to assess risks to human rights and health,

[608] Rio Declaration on Environment and Development [1992], *supra note* 343, Principle 15.
[609] See for example Pedersen (2014) *supra note* 45.
[610] See for example Case concerning Pulp Mills on the River Uruguay [2010] *supra note* 345.
[611] Haritz (2011) *supra note* 347.
[612] UNFCCC [1992] *supra note* 42, Article 3(3).
[613] Advisory Opinion OC-23/17 of November 15 2017 requested by the Republic of Colombia, Inter-American Court of Human Rights (2017) Official Summary Issued by the Inter-American Court [English translation].

although not explicitly referring to the precautionary principle itself[614]. The international courts should therefore look to the regional human rights courts and indeed, to the domestic courts[615], for leadership in the development of precautionary approaches to state duties, including crucially, in relation to the right to life.

Finally, for conduct to be attributed to the state for the purposes of engaging international responsibility, an element of state control is required. The International Law Commission has defined this as including conduct directed, controlled or adopted by the state, along with actions assuming de facto state authority such as those of insurrectional movements[616]. The doctrine of state control has evolved in the jurisprudence of the international courts and tribunals, most notably in the Nicaragua[617] and Tadić[618] cases. It was held by the ICJ in the former case that state responsibility shall be established where it can be proven that the state had effective control over the activities or conduct resulting in the violations[619].

The doctrine of attribution in state responsibility has since been broadened by the International Criminal Tribunal for the former Yugoslavia (ICTY) to encompass instances in which the state has 'overall control' of the group committing the violations in question, in the absence of any specific direction or enforcement by the state as required under the effective control test[620]. In the ICJ's subsequent case law, recourse to the narrower effective control test was however maintained. The Court distinguished Tadić on the grounds that the role of the ICTY was not to rule upon questions of state responsibility, but rather on the application of international criminal law to responsible individuals[621]. The Court described the broadening of state responsibility as a 'major drawback'[622] of the overall control test and took a very conservative approach to attribution beyond the organs of the state.

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[614] Hannes Veinla, 'Precautionary Environmental Protection and Human Rights' (2007) *Juridica International* XII/2007: 91-99.
[615] See for example Urgenda Foundation v Netherlands [2015] *supra note* 444.
[616] ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001) *supra note* 368, Articles 4-11.
[617] Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) [1986] ICJ Reports 1986, p. 14.
[618] Prosecutor v Tadić [1999] Judgment of the International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-a-A. 38 ILM 1518.
[619] Nicaragua v United States [1986] *supra note* 617, at 55.
[620] Prosecutor v Tadić [1999] *supra note* 618, at 40-51.
[621] Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) [2007] International Court of Justice Judgment of 26 February 2007, I.C.J. Reports 2007, p.43, at 170.
[622] *Ibid.* Bosnia and Herzegovina v Serbia and Montenegro [2007], at 171.

The question of the appropriate forum for any state responsibility claim in respect of climate impacts will require careful consideration in light of the reticence of the ICJ judges exhibited in the Genocide case to permit the extension of the existing doctrine. Nevertheless, the 13 of the 15 judges serving at the Court in 2007 when the judgment was handed down have moved on in the intervening period[623]. With both new members of the bench and new facts come new possibilities for the development of international legal doctrine. In attributing the responsibility for climate-related violations to the state, two principal arguments could be made. The first, more tentative argument, would be that the actions of the largest GHG emitting corporations fall under the overall control of the state in light of their operation within the jurisdiction, or, more simply, that those whom have been granted government permits to operate do so under the control of the state. This would require more proactive development of the existing legal framework which has thus far been limited to the actions of armed groups within territorial boundaries. The second, more straightforward argument, is based upon holding the relevant policy-making branches of the state itself responsible for their omission to effectively regulate or to implement the precautionary measures that could have mitigated or averted the risks to rights.

International courts and tribunals have affirmed the responsibility of states for transboundary environmental damage resulting from activities carried out within their territorial jurisdiction, including industrial activities and infrastructure projects, in accordance with the no harm principle of customary law[624]. As underlined in Chapter III, the ILC state responsibility framework is capable of accommodating a plurality of responsible states[625], along with a cumulative series of acts or omissions leading to the breach of the international obligation in question[626]. The established causal tests for the purposes of obtaining reparation from the state for damage incurred as a result of breaches of international obligations are based upon 'but for' logic or the damage being a normal or foreseeable consequence of the breach[627]. The ICJ's broad approach to foreseeability stemming from the 1949 Corfu Channel case requires only that the state knew or ought to have known that the injurious consequences would result[628].

[623] International Court of Justice, All Members of the Court, available at: http://www.icj-cij.org/en/all-members (accessed 17/07/2018).
[624] Trail Smelter [1941] *supra note* 348; and Case concerning Pulp Mills on the River Uruguay [2010] *supra note* 345.
[625] ILC Articles on the Responsibility of States (2001) *supra note* 368, Article 46.
[626] *Ibid.* ILC Articles (2001), Article 15(1).
[627] Lefeber (2012) *supra note* 370, at 341-342.
[628] Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v Albania) [1949] International Court of Justice Judgment of 9 April 1949, I.C.J. Reports 1949, P. 4.

Based upon the emissions reporting mandated by the UNFCCC and the evolving body of climate science regularly presented to policy-makers by the IPCC, the requisite knowledge of climate harms is well supported.

Verheyen underlines that the sine qua non causation model whereby the injury would not have occurred but for the breach by the state would require amending to take into account the numerous contributing acts and the cumulative nature of climate change damage, for example by simply requiring a legally relevant contribution to the problem[629]. The proportional attribution of responsibility based upon states' published GHG emissions inventories could be relied upon, although in light of the recognition by the international courts that a state's breach need not be the only cause of the damage sustained[630], this level of attribution may not be necessary. The unique nature of climate risks to rights will necessitate the development of existing doctrinal approaches to the question of attribution. By marrying together the broader precautionary approaches to state responsibility for transboundary harm, and judicial approaches to the determination of imminent threats to rights, a strong middle ground could inform the development of new climate precedents by international courts and tribunals.

V. Extraterritoriality

The final challenge associated with the application of human rights obligations in the context of transboundary climate change impacts is that of the extraterritorial scope of the treaties. Human rights obligations are by nature, state-centric and usually involve individuals bringing a case against the state authorities within whose jurisdiction they reside to challenge measures or omissions internally. The diffuse nature of greenhouse gas pollution is further complicated by the disproportionate global distribution of both responsibility for those emissions, and human rights vulnerabilities to them. In order to respond to distributive climate justice needs, the extraterritorial responsibility of large emitters must be established in respect of the rights impacts felt by vulnerable groups and individuals beyond state borders. The extraterritorial application of international human rights law however remains contested in both legal scholarship and the case law before international courts and tribunals[631]. Questions surrounding

[629] Verheyen (2005) *supra note* 45, at 253-257.
[630] See for example Trail Smelter [1941] *supra note* 348.
[631] Wilde (2013), *supra note* 461, at 642.

the scope of extraterritorial human rights obligations for duty bearers have come before the ICJ and the European Court of Human Rights which have paved the way for future judicial development in this field, although it is important to note at this juncture that the cases have thus far been predominantly limited to situations involving armed conflict or occupations[632]. In the absence of a regional human rights regime in the South Pacific, the position of the international courts and tribunals is of greatest significance and will therefore be the principal subject of analysis here.

Among the core international human rights treaties there is considerable variation of the jurisdictional provisions. In the context of climate change, taking the ICCPR, ICESCR, CRPD, CRC and CEDAW as the instruments capable of providing broad-based protection for particularly climate vulnerable groups and individuals, the differences are pronounced. The ICCPR as the most jurisdictionally restricted among them, provides in Article 2(1) that States Parties undertake to '*respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant*'[633], definitively indicating that the application of the Covenant is limited to rights violations occurring within territorial boundaries. By contrast, the ICESCR is framed more openly as obliging States Parties to take steps both individually and '*through international assistance and co-operation, especially economic and technical, to the maximum of its available resources*'[634] to realise the rights provided for. The CRC provides that states should respect and ensure the Convention rights '*within their jurisdiction*'[635], while the CEDAW and CRPD do not contain any express provisions on jurisdictional scope.

The jurisprudence of the ICJ provides crucial insight into the application of those jurisdictional restrictions provided for, as well as the approach adopted to determining the scope of human rights treaties in the absence of such provisions. With respect to the latter, the Court provided some clarity in a 2008 order on provisional measures in the Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination involving Russian activities in Georgia. The ICJ held in relation to the scope of application of the CERD that where no territorial restrictions are provided for, either in the general provisions

[632] See for example Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation) [2008] Request for the Indication of Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008, p. 353; Bosnia and Herzegovina v Serbia and Montenegro [2007] *supra note* 549; and ICJ Wall Advisory Opinion [2004] *supra note* 449.
[633] ICCPR [1966] *supra note* 314, Article 2(1).
[634] ICESCR [1966] *supra note* 314, Article 2(1).
[635] CRC [1989] *supra note* 360, Article 2(1).

of the treaty, or with respect to the specific rights invoked, the provisions of the treaty will generally apply to the extraterritorial actions of the States Parties[636]. This gives rise to a presumption of applicability in the absence of specific restrictions which, Wilde argues, reverses the starting position from one of positively proving the extraterritorial application of the treaty in question to negatively establishing that his has not been excluded[637]. This alleviation of the burden of proof in respect of extraterritoriality is highly significant with respect to the feasibility of climate change claims relying upon obligations contained in the CEDAW or CRPD.

In respect of those treaties which do contain provisions limiting their scope, the extraterritorial application of obligations is not entirely excluded. Indeed, even the territorial restriction provided for in the ICCPR has been interpreted broadly by the Human Rights Committee as entailing an obligation to ensure the rights '*to anyone within the power or effective control of that State Party, even if not situated within the territory*'[638]. The extraterritorial scope of the ICCPR, along with that of the ICESCR and CRC, was further affirmed by the ICJ in the Wall Opinion wherein it outlined that state jurisdiction may be exercised outside of the territory and in light of the object and purpose of the Covenant '*it would seem natural*'[639] that rights would apply under such circumstances. The obligations contained in the ICCPR, ICESCR and CRC were held to apply to Israeli activities in the Occupied Palestinian Territories[640].

This recognition of the continuing application of human rights to actions subject to state jurisdiction beyond territorial boundaries was further reaffirmed by the Court in the DRC v Uganda case, finding that Uganda was internationally responsible, inter alia, for violations of ICCPR and CRC rights committed by armed groups in the territory of the DRC[641]. On the one hand, the express recognition of the extraterritorial scope of many of the core human rights treaties by the ICJ, in spite of the narrowly framed provisions in the text of the ICCPR, is in itself encouraging. On the other, the circumstances in which extraterritoriality has been affirmed have thus far been limited to situations involving occupations or the activities of armed groups which represent more easily identifiable and actionable causes of rights

[636] Georgia v Russian Federation [2008] *supra note* 632, at 37.
[637] Ralph Wilde, 'The extraterritorial application of international human rights law on civil and political rights' in Scott Sheeran and Nigel Rodley (Eds.) Routledge Handbook of International Human Rights Law (Routledge, 2013) 635-661.
[638] Human Rights Committee, General Comment 31 'Nature of the General Legal Obligation on States Parties to the Covenant' (29 March 2004) available at: http://www.unhcr.org/4963237716.pdf (accessed 18/07/2018).
[639] ICJ Wall Advisory Opinion [2004] *supra note* 449, at 47.
[640] *Ibid.* ICJ Wall Advisory Opinion [2004].
[641] Case concerning Armed Activities on the Territory of Congo [2005] *supra note* 461, at 79-81.

violations. Consequently, there is a need for further development of judicial approaches to the doctrine of extraterritoriality to accommodate climate-related rights impacts.

In the case of economic, social and cultural rights, the treaty obligation for States Parties to take steps towards the progressive realisation of those rights not only unilaterally but '*through international assistance and cooperation*'[642] leaves the door open to the development of extraterritorial duties at the global level. The emphasis upon cooperation in this context, reaffirmed by the socio-economic provisions of the CRPD[643] and CRC[644], is significant in light of the shared responsibility for climate impacts and the need for concerted efforts to provide redress. By relying upon existing global duties to respect and promote the realisation of human rights, a more convincing argument can be made for extending the application of these treaties to transboundary environmental harms in line with their overarching object and purpose. One way in which this could be achieved is through proposals such as those contained in the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights[645]. The Maastricht Principles suggest an alternative basis of extraterritorial duties to adopt protective measures in circumstances where '*the harm or threat of harm originates or occurs on its territory*'[646] and further affirm the need to provide for effective accountability in respect of extraterritorial rights obligations[647].

Milanovic emphasises the need to strike a balance between the universality and effectiveness of human rights obligations by drawing a distinction between negative obligations which should not be limited in application to the state territory in question, and positive obligations to ensure rights which would be so restricted[648]. Giving the example of transboundary environmental harm affecting the enjoyment of rights in the case of Aerial Herbicide Spraying[649], Milanovic argues that the obligation to respect the rights of those affected beyond territorial boundaries would apply but the positive duty to ensure for example their right to health would not[650]. This compromise position offers important benefits in creating state duties

[642] ICESCR [1966] *supra note* 314, Article 2(1).
[643] CRPD [2006], *supra note* 314, Article 4(2).
[644] CRC [1989], *supra note* 360, Article 4.
[645] ETO Consortium, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, ETOs for human rights beyond borders (January 2013) Heidelberg: ETO Consortium Secretariat.
[646] *Ibid.* Maastricht Principles (2013) Principle 25.
[647] *Ibid.* Maastricht Principles (2013) Principle 36.
[648] Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press, 2011) at 228.
[649] Case concerning Aerial Herbicide Spraying (Ecuador v Colombia) [2013] Order of 13 September 2013, I.C.J. Reports 2013, p. 278.
[650] Milanovic (2011) *supra note* 648, at 228.

to take appropriate measures to prevent the infringement of the rights of climate vulnerable people beyond state borders as a result of activities within their territorial control, without overstretching the existing doctrine to include positive extraterritorial duties requiring significantly greater distributive redress.

VI. Conclusion

Even within the academic commentary critiquing the rapprochement of climate change and human rights, there are acknowledgements of the increasing overlap between these two fields, and the as yet underdeveloped nature of the linkages between them[651]. It is submitted that many of the seemingly embedded legal challenges can be overcome with recourse to existing norms and principles of general public international law, along with forward-thinking judicial development of the legal doctrine. The significance of overcoming these challenges is both practical and normative. By providing recourse to rights-based protections for climate-vulnerable individuals and groups, the international human rights framework and UN itself shall move closer to attaining its overarching objective of providing for the enjoyment of universal human rights without discrimination on any grounds, including race and sex[652]. The relationship between the indicators for climate vulnerability and pre-existing social injustice, including not only disproportionate geographic susceptibility, but socio-economic status, age, gender, and marginalisation, mean that securing basic rights protections in the face of climate impacts is all the more crucial.

Existing proposals within the Maastricht Principles to expand and clarify the extraterritorial human rights duties of states including, most significantly, reforming the territorial model to focus upon the origin of the harm itself and not merely the locality in which the harm to individuals occurs, offer blueprints for climate redress. Such reforms are in keeping with international cooperation duties embedded in many of the core treaties and supported by a purposive reading of the provisions contained within them. The new approach will need to accommodate the plurality of responsible States, either through proportional attribution of responsibility or simply by recognising the right of injured parties to bring cases against any

[651] Humphreys (2012) *supra note* 76, at 55-56.
[652] Charter of the United Nations [1945] *supra note* 374, Article 1.

and all of the responsible states in line with the ILC Articles on the responsibility of states for internationally wrongful acts[653].

To this end, it has been demonstrated that inter-state human rights claims and the application of the general rules of state responsibility cannot be excluded in responding to climate justice challenges. It would not be in keeping with the object and purpose of the human rights treaties or the Paris Agreement itself to exclude the application of the rules of state responsibility on *lex specialis* grounds, and indeed the declarations made by a number of SIDS upon ratification of the Paris Agreement make explicit the intention to retain recourse to state responsibility or compensation claims[654]. The evolution of the legal doctrines on state responsibility and extraterritoriality will however need to be accompanied by operational reforms of the international human rights infrastructure of the nature proposed by the Geneva Academy in order to render the full spectrum of human rights obligations more available as bases of claims to climate vulnerable states and peoples.

These reform proposals, alongside those drawn from my empirical findings on climate justice emerging from the South Pacific case study will be discussed in greater detail in Chapter VII below. The need to reform and evolve the international legal doctrine in order to overcome the challenges identified is further reinforced by the procedural climate justice framework which demands that access to justice not be restricted for climate vulnerable groups. Similarly, the attainment of core distributive climate justice aims, including the enjoyment of fundamental rights on an equal basis globally will be undermined if the international human rights framework is not adapted to meet the challenges of climate change. This Chapter has set out the first steps for achieving the required evolution of international law.

[653] ILC Articles on the Responsibility of States (2001), *supra note* 368, Article 46.
[654] See the declarations of Fiji, Kiribati, Nauru, Papua New Guinea, and Tuvalu in respect of the UNFCCC [1992] and those of Cook Islands, The Federated States of Micronesia, Nauru, Niue, Solomon Islands, and Tuvalu in respect of the Paris Agreement [2015] available at: https://treaties.un.org/pages/Treaties.aspx?id=27&subid=A&clang=_en (accessed 08/11/19).

Chapter V - Exploring Climate Justice in Practice: Regional priorities & challenges in the South Pacific

I. Framing the case study

i. Choice of South Pacific region

In order to construct a grounded climate justice framework, a case study within a region particularly vulnerable to the impacts of climate change was necessary. Vulnerability, as explored in greater depth in Chapter II, is defined in both environmental and socio-economic terms, taking into account factors which restrict the ability to adapt[655] of communities such as the availability of resources[656], poverty or the level of reliance upon subsistence agriculture. Based upon these factors, a number of climate vulnerable states and regions were considered as potential sites for the case study including, notably, from South America, East Africa and Southeast Asia based upon countries' developing status and multifaceted vulnerability to climate change impacts. Their participation in the Climate Vulnerable Forum served as a further guiding factor in identifying potential states in this respect and notably included Fiji, Kiribati, the Marshall Islands, Tuvalu, Palau, Papua New Guinea and Vanuatu[657].

The South Pacific was identified as representing a unique research opportunity not only in terms of the urgency and severity of the climate change impacts many SIDS in the region are facing as a result of sea-level rise[658] and increasingly intense tropical cyclones[659], but also due to the socio-economic factors contributing to their vulnerability such as a heavy reliance upon marine ecosystems for food security[660]. The highly collaborative and ambitious approach to climate policy adopted through Pacific regional and international bodies bringing together climate vulnerable Pacific SIDS was of further interest with respect to the potential for

[655] IPCC, 'The Regional Impacts of Climate Change: An Assessment of Vulnerability' Summary [1997] *supra note* 48.
[656] Adger and Kelly (1999) *supra note* 65.
[657] Climate Vulnerable Forum, CVF Participating Countries, available online at: http://www.thecvf.org/web/climate-vulnerable-forum/cvf-participating-countries/ (accessed 08/11/19).
[658] Elizabeth Ferris, Michael M. Cernea, and Daniel Petz, 'On the Front Line of Climate Change and Displacement: Learning with and from Pacific Island Countries'(2011) *The Brookings Institution: London School of Economics Project on Internal Displacement*, at 18.
[659] IPCC WGII Contribution to AR5 (2014), Summary for Policymakers, *supra note* 176, at 6.
[660] Secretariat of the Pacific Regional Environment Programme, Strategic Plan 2017-2026 [2017] SPREP: Apia, Samoa.

collective action at the state level. The opportunity to be hosted as a visiting researcher by the University of the South Pacific's School of Law in Port Vila, Vanuatu, with the University shared by twelve Pacific Island nations[661] presented an additional opportunity to conduct desk-based doctrinal research into the collated regional law and policy materials via the library and the Pacific Islands Legal Information Institute, based on the Emalus campus in Port Vila. The case study employed a combination of desk-based doctrinal analysis and primary qualitative interviews with key climate, human rights and justice stakeholders. More detail concerning the choice of research methods is provided in Section II below.

ii. Culture, geography & practical challenges

The fourteen South Pacific states covered by the present case study, namely those of the Cook Islands, Fiji, Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, Niue, Papua New Guinea, Palau, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu, span thousands of miles and are home to a rich variety of cultures, customs and languages. The South Pacific comprises the sub-regions of Micronesia, Melanesia and Polynesia, with hundreds of languages[662], dialects and diverse social structures. The physical geography of states in the region, embodied by a series of archipelagos and the associated remoteness challenges facing many SIDS communities are illustrated by the map below, as well as by the empirical evidence gathered over the course of the case study.

[661] USP is notably owned by: Cook Islands, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu and Vanuatu – Available at: https://www.usp.ac.fj/index.php?id=usp_introduction (accessed 08/11/19).
[662] Campbell and Barnett, (2010) *supra note* 86, at 7.

Figure 1. Map of the South Pacific Region

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The cultural diversity of the region, together with the importance of custom norms and practices has great significance in the production of traditional knowledge. The protection and preservation of traditional knowledge is recognised as a key objective by Pacific regional organisations including the Pacific Islands Forum[664] and Pacific Community[665]. In the context of climate change, such traditional knowledge plays a crucial role in both disaster preparedness and community resilience to climate change impacts. One civil society interviewee working with climate impacted communities gave a striking example with respect to tropical cyclones:

'*They do have like their own indicators, these are natural indicators there's a cyclone, a kind of warning. […] So these are hornets' nests, they tend to uh move their beehive a little closer to the ground…that's an indication to them that there's a cyclone approaching […] Because uh normally the bees would have their hives at the very top but once they go into the forest and they see that it's closer to the ground and as they weed near the forest floor, they*

663 United Nations International Labour Organisation, ILO in the Pacific, Countries Covered, available at: https://www.ilo.org/suva/countries-covered/lang--en/index.htm (accessed 09/03/2020).
664 See for example Pacific Islands Forum Countries 'Traditional Knowledge Implementation Action Plan' (2009) available at: http://www.sprep.org/attachments/VirLib/Global/traditional-knowledge-action-plan.pdf (accessed 08/11/2017)
665 Secretariat of the Pacific Community, 'Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture' (2002) available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=184651 (accessed 08/11/2017).

get stung more, that's an indication okay the bees are preparing for windy or cyclone event. […] So those are some of the indicators, natural indicators that they equip themselves with.'[666]

The diversity of cultural perspectives, together with the inherent value of traditional knowledge and customary practices in both climate change responses, and environmental preservation more broadly, underpin the need for a climate justice framework which recognises the importance of procedural justice and the participation of climate vulnerable communities in policy making.

The geography and climates of SIDS in the region present unique practical challenges for both governments and communities themselves. Pacific SIDS are comprised of archipelagos with large numbers of individual islands, in Fiji's case for example over 300 islands[667], which are spread over thousands of miles of ocean. The geographic remoteness of many Pacific island nations in the region, in combination with their developing[668] or least developed country status[669] serves to exacerbate the challenges faced by governments and civil society actors in responding to climate-related disasters and the needs of communities. As one civil society organisation interviewee noted:

'*We've started with remote islands three years ago and we see that the need is there, you know there's genuine need out there in the islands in terms of getting them, building their resilience…uh supporting their livelihoods. So we've seen the need to focus there more because there are other NGOs that are working in the more accessible places and for us it has been a challenge trying to at least go across to these islands. Transportation is an issue*.'[670]

With regard to the challenges posed by remoteness in terms of governmental burdens, it was underlined that some local government officials, specifically '*officers from the provincial office… have never been to some of the villages that fall under their focus…that come under their office*' the reason for this being that '*they do not have the manpower and also the finances*

[666] Interview with Civil Society Organisation Employee (2016).
[667] United States of America Central Intelligence Agency World Factbook, Fiji, Geography, available at: https://www.cia.gov/library/publications/the-world-factbook/geos/fj.html (accessed 10/10/2017).
[668] International Monetary Fund, World Economic Outlook (April 2017) Country Composition of WEO Groups, available at: https://www.imf.org/external/pubs/ft/weo/2017/01/weodata/groups.htm (accessed 10/10/2017).
[669] United Nations Committee for Development Policy, Development Policy and Analysis Division Department of Economic and Social Affairs, 'List of Least Developed Countries' (as of December 2018) notably includes Kiribati, the Solomon Islands, Tuvalu and Vanuatu - available at: https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc_list.pdf (accessed 08/11/19).
[670] Interview with Civil Society Organisation Employee (2016).

and even the…you know, the transport issues to take them down to these remote communities'[671].

The high dependency upon subsistence farming and fishing of many remote island communities in the region further compounds their vulnerability to climate change impacts ranging from sea-level rise to temperature rises and increasingly intense tropical cyclones[672]. These overarching geographic and socio-economic factors form the backdrop to the analysis of specific climate justice challenges including loss & damage, access to justice and participation in decision-making. The present case study does not seek to examine the local-level challenges in depth, but rather focuses primarily upon national and regional frameworks and the relevant challenges affecting them. This, in turn, will reveal the steps required at the international level to provide climate justice to SIDS in the region.

Doctrinal and empirical data was gathered in two national sites, in the capitals of Port Vila, Vanuatu, and Suva, Fiji. In light of the limitations of the present study however, it is important to flag that homogeneity of the islands cannot be assumed and to remain conscious of the inherently wide variation of cultures and approaches to climate change and human rights norms, which exist both within and between the South Pacific SIDS considered. Nevertheless, government, NGO, and Pacific regional organisation stakeholders collaborating with, and operating across states in the region can shed light on some of the shared priorities and challenges, drawing upon their own experience. The empirical data gathered and the insights gleaned from these stakeholders inform the overall construction of climate justice in the present analysis.

iii. Overview of the key regional organisations

Figure 2.

Pacific regional organisation	**Members**	**Founding Instrument**	**Mandate**

[671] *Ibid*. CSO interview (2016).
[672] Johann Bell, Mary Taylor, Moses Amos and Neil Andrew, 'Climate Change and Pacific Island Food Systems: The future of food, farming and fishing in the Pacific Islands under a changing climate' (2016) CCAFS and CTA. Copenhagen, Denmark and Wageningen, the Netherlands.

Pacific Islands Forum (PIF)	Australia, Cook Islands, Federated States of Micronesia, Fiji, French Polynesia, Kiribati, Nauru, New Caledonia, New Zealand, Niue, Palau, Papua New Guinea, Republic of the Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu[673].	Agreement Establishing the Pacific Islands Forum [2005][674]	. Encourage closer regional cooperation through Framework for Pacific Regionalism[675]. . Strengthen governance & security. . Promote economic growth & sustainable development.[676] . Foster collaboration with civil society organisations through Council of Regional Organisations in the Pacific (CROP).[677]
Secretariat for the Pacific Community (SPC) (Formerly South Pacific Commission)	Originally colonial powers: Australia, France, New Zealand, the Netherlands, UK and US. Currently: American Samoa, Australia, Cook Islands, Federated States of Micronesia, Fiji, France, French Polynesia, Guam, Kiribati, Marshall	Canberra Agreement [1947][679]	. Promotion of the welfare & well-being of Pacific peoples[680]. . Technical and scientific capacity building. . Providing sources of advice & technical support for governments in the region. . Supporting sustainable economic development[681].

[673] Pacific Islands Forum Secretariat About us, available at: http://www.forumsec.org/pages.cfm/about-us/ (accessed 25/10/2017).
[674] Agreement Establishing the Pacific Islands Forum [2005] available at: http://www.forumsec.org/wp-content/uploads/2018/02/Agreement-Establishing-the-Pacific-Islands-Forum-Secretariat-2005-1.pdf (accessed 08/11/19).
[675] Pacific Islands Forum Secretariat, 'The Framework for Pacific Regionalism' (July 2014), available online at http://www.forumsec.org/resources/uploads/attachments/documents/Framework%20for%20Pacific%20Regionalism_booklet1.pdf, access 26/10/17.
[676] Agreement Establishing the Pacific Islands Forum [2005], *supra note* 674, Article 2.
[677] Pacific Islands Forum Secretariat, Council of Regional Organisations in the Pacific, available at: http://www.forumsec.org/pages.cfm/about-us/our-partners/crop/?printerfriendly=true , (accessed 26/10/17).
[679] Canberra Agreement [1947] - Agreement Establishing the South Pacific Commission (Canberra, 6th February 1947) Treaty Series No. 21 (1952)
[680] *Ibid.* Canberra Agreement [1947] Article IV and Secretariat of the Pacific Community (SPC) 'Pacific Community Strategic Plan 2016-2020: Sustainable Pacific Development through science, knowledge and innovation' (2015), available at: http://www.spc.int/wp-content/uploads/2016/11/Strategic-Plan-2016-2020.pdf , (accessed 31/10/17), at 2.
[681] *Ibid.* Pacific Community Strategic Plan (2015), at 4.

	Islands, Nauru, New Caledonia, New Zealand, Niue, Northern Mariana Islands, Palau, Papua New Guinea, Pitcairn Islands, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu, US, Vanuatu, Wallis and Futuna[678].		. Promoting climate resilience & human rights[682].
SPC Regional Rights Resource Team (RRRT)	Members of the SPC.	Established by UK Department for International Development in 1995 and subsequently taken over by UNDP in 2002. In 2008 the RRRT became a programme under SPC's Social Development Division.[683]	Guided by SPC strategic plan goals and five core objectives: .Tackle violence against women & children. . Strengthen capacity of anti-discrimination institutions. . Encourage observance of human rights by governments. . Increase capacity of relevant civil society organisations. . Establishing National Human Rights Institutions.[684]

[678] Pacific Community (SPC), Our members, available at: http://www.spc.int/our-members/ (accessed 25/10/17)
[682] Pacific Community Strategic Plan (2015) *supra note* 680, at 4.
[683] SPC Regional Rights Resource Team (RRRT), About, History, available at: http://rrrt.spc.int/about/history (accessed 25/10/2017)
[684] SPC Regional Rights Resource Team, About, RRRT's vision and mission, available at: http://rrrt.spc.int/about/mission (accessed 01/11/17).

Secretariat of the Pacific Regional Environment Programme (SPREP)	American Samoa, Australia, Commonwealth of the Northern Mariana Islands, Cook Islands, Federated States of Micronesia, Fiji, France, French Polynesia, Guam, Kiribati, Marshall Islands, Nauru, New Caledonia, New Zealand, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu, United Kingdom, United States of America, Vanuatu and Wallis and Futuna[685].	Agreement Establishing the South Pacific Regional Environment Programme (SPREP) [1993][686]	. Monitoring & environmental assessment.[687] . Programme development to provide protection of natural resources & ecosystems.[688] . Pollution prevention . Institutional capacity-building & promotion of sustainable development[689] . Climate change the 'principal concern'.[690]
Pacific Islands Development Forum (PIDF)	Fiji, Kiribati, Republic of Marshall Islands, Federated States of Micronesia, Nauru, Solomon Islands, Tonga, Vanuatu, Tuvalu, Tokelau, Timor Leste, Pacific Islands Association of Non-Governmental & Private	Charter of the Pacific Islands Development Forum [2015][692]	. Promote sustainable & inclusive development.[693] . Climate advocacy & policy development.[694] . Integration of economic, social & environmental pillars of sustainable development.[695]

[685] Secretariat of the Pacific Regional Environment Programme (SPREP), About us, Members, available at: http://www.sprep.org/about-us (accessed 25/10/17).
[686] Agreement Establishing the South Pacific Regional Environment Programme (SPREP) [1993] PITSE 2 (16 June 1993).
[687] *Ibid.* Agreement Establishing SPREP, Article 2.
[688] *Ibid.* Agreement Establishing SPREP, Article 2.
[689] SPREP Strategic Plan [2017] *supra note* 660, at 2.
[690] *Ibid.* SPREP Strategic Plan [2017], at 2.
[692] Charter of the Pacific Islands Development Forum [2015] available at: http://pacificidf.org/wp-content/uploads/2013/06/PIDF-CHARTER.pdf (accessed 08/11/19).
[693] *Ibid.* PIDF Charter, Article 4.
[694] *Ibid.* PIDF Charter, Article 4.
[695] Pacific Island Development Forum, Strategic Profile, available at: http://pacificidf.org/strategic-profile/ (accessed 01/11/17)

	Sector Organisations (PIANGO) (PIPSO)[691].		
Council of Regional Organisations of the Pacific (CROP)	Pacific Islands Forum Secretariat, Forum Fisheries Agency (FFA), Pacific Islands Development Programme (PIDP), SPC, SPREP, South Pacific Tourism Organisation (SPTO), University of the South Pacific (USP), Pacific Power Association (PPA), Pacific Aviation Safety Office (PASO).[696]	CROP Charter [2012][697]	. Created by leaders of the Pacific Islands Forum in 1988 with the aim of facilitating coordination of regional programmes & policies.[698] . Aims to promote sustainable development & poverty alleviation.[699]

All of the Pacific regional organisations listed in the above table have some role in the development of regional climate change policy, albeit within their own differing spheres of competence. The Pacific Islands Forum (PIF) for example has a particular focus on shared governance strategies and the promotion of regional cooperation, while the Pacific Community (SPC) and Secretariat of the Pacific Regional Environment Programme (SPREP) provide more technical advice and capacity-building support to national governments. While SPREP's mandate is focused exclusively upon environmental protection, the SPC has the Regional

[691] Nitish Narayan, 'Timor Leste is PIDF's Newest Member', Pacific Islands Development Forum (18th August 2016) available at: http://pacificidf.org/timor-leste-is-pidfs-newest-member/ (accessed 25/10/17).
[696] Pacific Islands Forum Secretariat, Council of Regional Organisations in the Pacific (CROP) webpage, available at: http://www.forumsec.org/pages.cfm/about-us/our-partners/crop/ (accessed 23/11/17)
[697] Council of Regional Organisations of the Pacific Charter [2012] available at: http://www.forumsec.org/resources/uploads/attachments/documents/Council_of_Regional_Organisations_of_the_Pacific.pdf (accessed 23/11/17).
[698] *Ibid.* CROP Charter [2012], at 1-3.
[699] *Ibid*. CROP Charter [2012], at 2.

Rights Resource Team (RRRT) with an exclusive focus upon human rights, and the Pacific Islands Development Forum (PIDF) focuses its activities specifically around the promotion of sustainable development.

In order to foster coordination between the many Pacific regional organisations, the Council of Regional Organisations of the Pacific (CROP) was created, yet it is important to note that not all regional organisations are members of CROP and that duplication and inefficiency is therefore a real risk. Barnett and Campbell argue that the cooperation between the Pacific regional organisations principally engaged in climate change, namely, SPREP, the University of the South Pacific (USP), SPC and the South Pacific Applied Geoscience Commission, has been inefficient and has even led to '*rivalry [and] redundancy*'[700] in their programmes of work. The core Pacific regional organisations are further complemented by a range of UN bodies with in-country offices, including notably, UNICEF, UN Women and UNDP in their climate-related disaster response, community resilience, and human rights capacity-building work, again each within their own specialised remits.

The Pacific Islands Forum also has a strong focus on fostering closer collaboration with civil society organisations working in the region, inviting them along with other non-state actors to participate in policy discussions. They currently have an EU funded programme aimed at strengthening non-state actor engagement with policy making in the region[701] and the Secretariat emphasise the constructive input which can be offered by civil society organisations working with communities at the local level. In conducting the case study, civil society organisation interviewees were invited to participate. The value of their input in both procedural justice terms, providing often remote climate vulnerable communities with an additional avenue through which to communicate their needs and concerns, as well as in providing support to governments to engage more effectively with human rights frameworks, will therefore be explored in more detail in the analysis to follow.

iv. Analytical themes emerging from the data

The case study and the collection of the doctrinal and empirical data was, at the outset, guided deductively by the climate justice framework derived from theory which enabled the

[700] Barnett and Campbell (2010) *supra note* 87, at 121.
[701] Pacific Islands Forum Secretariat, Strengthening Non-State Actors Engagement in Regional Policy Development and Implementation Programme (September 2014 – March 2019) available online at: http://grants.forumsec.org/index.php/about-us (accessed 11/11/19).

identification of the three core themes outlined in the methodology Section in Chapter II, namely, of distributive climate justice, procedural climate justice, and human rights. These themes were deduced from a pluralistic approach to the conceptualisation of climate justice and helped to direct the desk-based analysis of regional materials at the University of the South Pacific library and Pacific Islands Legal Information Institute and to shape the formulation of a number of key questions in the semi-structured interviews conducted with key stakeholders.

The qualitative interview data has been fully transcribed and thematically coded, revealing a fourth core theme of practical challenges and a number of sub-themes. For distributive justice, the two sub-themes of climate vulnerability, containing data relating to hazard-risk and socially constructed vulnerabilities has been identified, along with the theme of climate loss and damage, covering challenges and responses to increasingly severe loss and damage as a result of climate impacts and encompassing both economic and non-economic aspects such as the impacts on displaced communities and cultures.

Within the theme of procedural justice, the sub-themes of access to justice, participation in decision-making and access to information were identified, largely in line with procedural justice frames in the environmental law literature such as for example that deriving from analyses of the Aarhus Convention. The human rights theme revealed three core sub-themes of engagement with the international human rights framework, the linkages between human rights and climate change, and the enforceability of human rights more broadly, encompassing issues relating to the domestic, regional and international levels. The new fourth theme of practical challenges was coded into the two sub-themes of institutional capacity and funding challenges, encompassing aspects such as access to climate finance and human rights capacity-building support.

Figure 3.

Distributive Justice	Procedural Justice	Practical Challenges	Human Rights
Climate vulnerability	Access to justice	Institutional capacity	Engagement with the international human rights framework
Loss & damage	Access to information	Funding	Human rights linkages with climate change
	Participation in decision-making		Enforceability of human rights

II. Climate priorities & challenges

i. Policy collaborations and regional priorities

Pacific island nations are demonstrating a high level of engagement with climate change at the regional and international levels. The UNFCCC has been widely ratified and engaged with, all 14 South Pacific states falling within the remit of the present analysis have ratified the Paris Agreement, the total number of States Parties for which currently stands at 169[702]. South Pacific SIDS have adopted a shared approach to the development of climate responses, under the auspices of both international and Pacific regional bodies. SPREP for example identifies climate change as their 'principal concern', playing a key role in the coordination of advocacy and policy in this field through, inter alia, the Pacific Climate Change Centre (PCCC)[703]. SPREP as the regional implementing entity for the UNFCCC financial mechanism, the Green Climate Fund, also provides states in the region with technical support in accessing climate

[702] United Nations Treaty Collection, Depository, Status of Treaties, Environment, Paris Agreement as of 11/11/19, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en (accessed 11/11/19).
[703] SPREP Strategic Plan 2017-2026, *supra note* 660, at 5-6.

finance[704]. A variety of regional climate change programmes focusing primarily upon adaptation, building climate resilience and responding to loss & damage have been developed. Similarly, the SPC has as a core goal the improvement of 'multi-sectoral responses to climate change and disasters'[705], providing technical and capacity support through a range of mechanisms to this end.

The membership of numerous Pacific SIDS in larger international fora including, notably, the Alliance of Small Island States (AOSIS) and Climate Vulnerable Forum, provides additional opportunities for the pooling of resources, knowledge sharing and developing shared negotiating positions on issues of common concern. AOSIS, as an intergovernmental body representing 44 Small Island and low-lying coastal states from around the world[706], has provided the Pacific SIDS with a global platform for negotiations with a principal focus on prompting ambitious action on climate change for the most vulnerable to its impacts. These shared negotiating platforms at the international level, together with regional organisations including the PIF, and the PIDF, have offered fora for climate strategies to be collaboratively developed and have enabled South Pacific nations to effectively lobby for the inclusion of priority issues such as loss & damage in the UNFCCC framework.

Encouraging closer collaboration with civil society organisations represents a further clear priority in regional climate policy with the Framework highlighting the need to strengthen partnerships between government, civil society and private sector actors by the end of the commitment period. This is a common theme among regional climate policy documents which emphasise the importance of working with civil society organisations going forward[707]. Coordinating networks such as the Pacific Islands Climate Action Network (PICAN) have a key role to play. PICAN brings together NGOs engaging in climate related activities operating throughout the Pacific and acts as the regional platform linking sub-networks operating at the national level such as the Vanuatu Climate Action Network (VCAN) with the international Climate Action Network (CAN).

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[704] *Ibid.* SPREP Strategic Plan.
[705] SPC Strategic Plan 2016-2020, *supra note* 680, at 6.
[706] Alliance of Small Island States (AOSIS), About webpage, available at: http://aosis.org/about/ (accessed 11/11/19).
[707] See for example Pacific Islands Forum Secretariat 'Pacific Climate Change Finance Assessment Framework' (May 2013) available at: https://www.pacificclimatechange.net/document/pacific-climate-change-finance-assessment-framework-pccfaf-final-report-may-2013 (accessed 11/11/19) at 3, Pacific Island Development Forum 'Suva Declaration on Climate Change' Issued at the Third PIDF Leaders Summit 2-4 September 2015, Suva, Fiji at 3, clause 17.

These networks are bridges between the levels of governance and policy making and represent important channels through which grassroots lessons learned and community needs can be communicated up the policy tree. Furthermore, as there are a great many NGOs operating at both the national and regional levels engaging in climate or disaster related activities, coordination is essential in order to avoid wasting resources or duplicating activities. In light of the limited institutional capacity of many developing country governments in the region, the need to streamline and make civil society support as effective and efficient as possible is all the greater.

The Pacific Island Forum Leaders Declaration on Climate Action [708]adopted ahead of COP21 in Paris last year reflected a common ambition to lobby for the inclusion of key provisions of high priority for the region. These priorities notably included a recognition in the agreement of the particular vulnerability of SIDS, the need for ambitious commitment to emissions reductions to stay within a 1.5°C threshold, the increased provision and accessibility of financial support and the inclusion of loss and damage.[709] The PIDF for whom climate change is similarly a key focus has mirrored many of these priorities in their Suva Declaration on Climate Change last year which underlined the members concerns regarding the lack of a 'clear roadmap for developed countries to provide USD 100 billion climate finance per year by 2020'[710] and inadequate mitigation efforts in light of the 1.5°C threshold advocated for. Loss and damage and access to climate finance remain key concerns at the regional level.

ii. Key distributive challenges

Examining the regional climate policy frameworks and empirical data gathered in the interviews conducted with Pacific regional organisations and UN bodies operating at the regional level through a climate justice lens, revealed a number of core regional challenges. Two interlinked distributive climate justice themes were identified, notably, vulnerability to climate impacts and responding to the loss and damage which will continue to be sustained.

[708] Pacific Islands Forum Leaders Declaration on Climate Change Action (10 September 2015) Pacific Islands Forum Secretariat, Twenty Fourth Smaller Island States Leaders Meeting, available at: http://www.forumsec.org/wp-content/uploads/2017/11/2015-Pacific-Island-Forum-Leaders-Declaration-on-Climate-Change-Action.pdf (accessed 19/08/16).
[709] *Ibid.* Pacific Islands Forum Leaders Declaration on Climate Change Action (2015), Article 11.
[710] Suva Declaration on Climate Change (2015) *supra note* 730, at 2, clause 8.

On the topic of loss and damage, the empirical data was gathered against the backdrop of the substantial losses and damages caused by two category five cyclones, Pam in Vanuatu in March 2015 and Winston in Fiji in February 2016, which shaped the focus of the work of many of the Pacific regional, UN, government and civil society stakeholders interviewed.

The overlap between resources and development on the one hand, and climate-related disasters on the other, was further emphasised in this respect by a UN body employee who remarked that in the Pacific '*it's very hard to differentiate emergency response and development because you find that as a result of disasters, you know, the GDP is taken back 20-30%*'[711]. Losses of this nature were particularly poignantly illustrated by Cyclone Pam which resulted in losses amounting to in excess of 60% of Vanuatu's GDP according to government estimates.[712]

The economic loss sustained by countries in the region as a result of climate change impacts cannot be viewed in isolation, the status of South Pacific SIDS as developing or Least Developed Countries[713] with limited institutional and financial resources serves to restrict their ability to adapt and build resilience to climate change impacts. These impacts in turn result in further economic losses, indeed, a comprehensive study of the Asian Development Bank (ADB) examining the projected economic impacts of climate change in the Pacific region found that '*Even under a low emissions scenario […] the economic loss would still reach 4.6% of the region's annual GDP equivalent by 2100*'[714].

These worsening economic impacts will serve to reverse the progress made in development policy by governments in the region[715]. Redirecting of development budgets for climate adaptation and rebuilding purposes will become increasingly necessary in the absence of significantly increased financial support being offered by climate finance bodies, must be viewed in conjunction with their particular vulnerability to climate-related disasters[716]. Both climate-related disasters and more gradual climate impacts such as sea-level and temperature

[711] Interview with UN body employee (2016)
[712] Government of Vanuatu, 'Vanuatu Post-Disaster Needs Assessment: Tropical Cyclone Pam, March 2015' (2015) available at: https://cop23.com.fj/wp-content/uploads/2017/06/vanuatu_pdna_cyclone_pam_2015.pdf (accessed 11/11/19), at ix.
[713] See UNCDP List of Least Developed Countries (2018) *supra note* 669.
[714] Asian Development Bank (ADB), 'The Economics of Climate Change in the Pacific' (2013) ADB: Manila, Philippines, at xii.
[715] *Ibid*. ADB Report (2013) at xii.
[716] United Nations University Institute for Environment and Human Security, World Risk Report (2015) available at: https://collections.unu.edu/eserv/UNU:3303/WRR_2015_engl_online.pdf (accessed 11/11/19), at 46.

rises have been overserved to have significant impacts upon food security including on crop yields and fish stocks[717], threatening the wellbeing and livelihoods of Pacific communities.

The loss and damage affecting South Pacific SIDS is however broader than pure economic loss, the loss of land, along with the social and cultural impacts of climate change, although more difficult to quantify, are of great significance. In so far as these kinds of loss and damage are far more complex and difficult to redress through traditional means such as financial aid, they merit more careful consideration. Loss and damage should be defined to include the impacts of climate-related displacement of people, both internally and externally of states, entailing factors such as a loss of legal protections and negative impacts upon cultural traditions[718]. At the international level, the establishment at COP21 in Paris of a Task Force on Displacement under the auspices of the Warsaw International Mechanism for Loss and Damage[719] indicates that a broader definition to loss & damage inclusive of displacement factors is gradually being developed.

At the regional level, the definition of loss & damage being adopted already appears to be far broader, the Suva Declaration for example refers to '*irreversible loss and damage caused*'[720], in particular referring to the '*forced displacement of island populations and the loss of land and territorial integrity*'[721] as leading to '*breaches of social and economic rights*'[722]. It was also indicated by one national government interviewee that Pacific regional organisations SPREP and SPC have been involved in providing support for broad-based loss & damage assessments in the region including in Vanuatu looking at factors including '*not only the physical, tangible loss and damage but also the intangible and this is about losing identity, […] important cultural sites, really basic human rights*'[723]. The need to address loss & damage by providing for scaled-up, more accessible climate finance, either through existing climate funds including the UNFCCC financial mechanism, the Green Climate Fund, or Global

[717] ADB Report (2013), *supra note* 737, at xi.
[718] See Margaretha Wewerinke (2013) 'A Right to Enjoy Culture in Face of Climate Change: Implications for "Climate Migrants"' *CGHR Working Paper* 6 | 4CMR Working Paper 7, University of Cambridge Centre of Governance and Human Rights.
[719] UNFCCC, 'Task Force on Displacement at a Glance' brochure (August 2017) available at: http://unfccc.int/files/adaptation/groups_committees/loss_and_damage_executive_committee/application/pdf/tfd_brochure_nov_2017.pdf (accessed 11/11/19).
[720] Suva Declaration (2015), *supra note* 730.
[721] *Ibid.* Suva Declaration.
[722] *Ibid.* Suva Declaration.
[723] Interview with National Government Employee (2016).

Environment Facility, or alternatively, through specially designed compensation mechanisms, represents a clear distributive justice priority for the South Pacific region.

iii. Limited integration of human rights

Human rights and climate change are addressed by many of the Pacific regional organisations, however this is principally done independently in separate work programmes. The Pacific Community (SPC) strategy for example refers to the need to respond to climate change and promote human rights within one of its overarching goals that 'Pacific communities are empowered and resilient'[724]. The SPC however has notably separated its climate change and disaster resilience work from its social development and human rights work which has included initiatives on youth, domestic violence and gender, the development of national human rights institutions and culture[725]. By contrast the SPC's climate change programme of work has focused primarily upon adaptation, ecosystems, and disaster preparedness[726]. The SPC's Regional Rights Resource Team has the stated aim in its work to raise awareness of the human rights aspects of climate change[727].

As climate change remains at the top of the Pacific policy agenda and its impacts become more severe, this human rights dimension will be of increasing importance so programmes such as those of the RRRT are likely to have a growing role to play in highlighting the relevant human rights impacts and protections in this respect. Nevertheless, it appears that the RRRT's primary focus is upon gender issues and human rights training more broadly, while climate change remains more of an ancillary consideration. One Pacific regional organisation interviewee remarked upon the challenging nature of bridging the human rights/climate change divide: '*it's been like a real challenge as a human rights programme trying to intervene into something that's or programme that's been viewed purely scientifically*'[728].

Shared climate change declarations expressly citing the human rights implications of climate change for their people have also been adopted. The Suva Declaration adopted by the Pacific

[724] SPC Strategic Plan 2016–2020, *supra note* 680, at 8.
[725] Secretariat of the Pacific Community, 'Pacific Community Results Report 2016' (2017) Noumea, New Caledonia: Pacific Community, Chapter 6.
[726] *Ibid.* SPC Results Report (2017), Chapter 5.
[727] Pacific Community Regional Rights Resource Team (RRRT) Human Rights Programme, Climate change and human rights, available at: http://rrrt.spc.int/projects/climate-change (accessed 22/11/17).
[728] Interview with Regional Organisation Employee (2016).

Islands Development Forum for example refers to the 'existential threats to our very survival and other violations of human rights'[729] their people are facing as a result of climate change. The People's Declaration for Climate Justice adopted in June 2015[730] by Pacific community leaders from Fiji, Tuvalu and Kiribati among others at a human rights and climate change workshop hosted by Greenpeace Australia Pacific provided evidence of interest in exploring legal avenues to establish the responsibility of big emitters and, indeed, expressly cited the human rights implications of climate change. Follow-up legal action however remains to be brought and the declaration reflects the views of the community leaders who were in attendance rather than the official position of national governments. The human rights implications of climate change although widely acknowledged, have not yet led to the firm integration of human rights into climate policy or to the active pursuance of a legal claim to this effect.

The treatment of human rights and climate change remains largely separate in regional policy, mirroring the traditional divide that has until recently existed at the international level. Only with the adoption of the Paris Agreement in 2015 have human rights been expressly integrated into the international climate change framework and their inclusion remains limited to a perambulatory clause rather than provisions within the legally binding body of the treaty[731]. A number of Pacific SIDS chose to adopt reservations to the Paris Agreement citing existing rights and obligations under international law which serves to illustrate that many leaders in the region are not excluding the possibility of pursuing legal claims outside of the UNFCCC framework, however human rights were not expressly cited, rather it was 'rights' under international law and state responsibility claims more generally that found expression in these SIDS reservations[732].

[729] Suva Declaration (2015), *supra note* 730.
[730] People's Declaration for Climate Justice (8 June 2015) Port Vila Vanuatu, Greenpeace Human Rights and Climate Change Workshop, available online at: http://www.greenpeace.org/international/en/press/releases/2015/People-from-Philippines-Pacific-Island-nations-sign-a-Climate-Justice-declaration-to-hold-big-polluters-accountable/ (accessed 11/11/19).
[731] Paris Agreement [2015] *supra note* 16, Preamble.
[732] UN Treaty Collection, Status of Treaties, Chapter XXVII, Environment, Paris Agreement, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en (accessed 22/11/17).

III. Human rights priorities & challenges

i. Key stakeholders & engagement

Many of the core regional organisations have a strong focus on the promotion of human rights and social wellbeing, including the Pacific Islands Forum (PIF) which has a Political Governance and Security Programme with the aim of encouraging states to consider the benefits of national human rights mechanisms and ratification of the core human rights treaties[733]. This aim of encouraging increased engagement by national governments with the international human rights framework is shared by many actors operating at the regional scale, including UN bodies such as the UN Development Programme (UNDP) which has a Pacific regional office based in Fiji and has produced detailed information for governments on the process and benefits of ratifying human rights treaties[734]. The UN Office for the High Commissioner for Human Rights (OHCHR) similarly has a Pacific regional office which has committed to providing human rights capacity building support and encouragement to national governments to engage with the core international treaties, protocols and reporting processes[735].

The SPC Regional Rights Resource Team (RRRT) based in Fiji, is an important body in this respect, founded with the overarching goal 'to strengthen the capacity of the Pacific region to promote principles of human rights and good governance in order to achieve democracy based on social justice'[736]. The RRRT provides training sessions and awareness workshops for civil servants and lawyers in the region, as well as technical advice to governments on UN Universal Periodic Review reporting. It also has a number of specific projects focused on regional priorities, for example to tackle violence against women and to advocate for the rights of people with disabilities. In the past the RRRT has also helped to facilitate discussion around the development of a regional human rights mechanism for the Pacific, producing a comprehensive

[733] Pacific Islands Forum Secretariat, Political Governance & Security Programme webpage, available at: http://www.forumsec.org/pages.cfm/political-governance-security/ (accessed 29/08/16).
[734] United Nations Development Programme Pacific Centre, 'Pacific Handbook on Human Rights Treaty Implementation' (2012) Suva, Fiji: UNDP Pacific Centre.
[735] UN Office of the High Commissioner for Human Rights (OHCHR) Pacific Region website, available at: http://pacific.ohchr.org/ (accessed 11/11/19).
[736] P. I. Jalal and J. Madraiwiwi (Eds.) *Pacific Human Rights Law Digest* (2005) Volume I PHRLD Suva: Pacific Regional Rights Resource Team (RRRT), at vi.

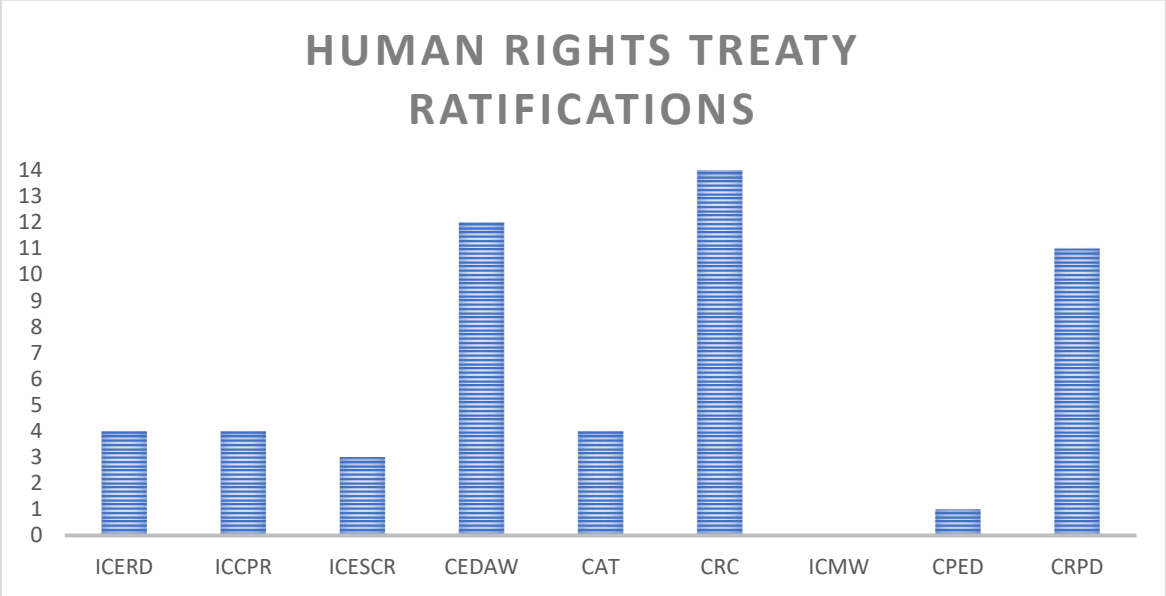
report in 2012[737] exploring existing regional human rights models, along with the potential options, costs and benefits for the Pacific. The report recommends the creation of a Pacific Charter of human rights, along with a commission with some powers to provide advice and support to national institutions, make recommendations, and potentially intervene in cases involving human rights disputes[738]. The debate around the creation of such a mechanism however has stalled and although human rights currently feature prominently in many regional strategies and programmes, there appears to be little political will or impetus at present to establish a Pacific human rights body or charter in the near future.

ii. Barriers to international human rights engagement

The South Pacific is one of the regions of the world with the lowest levels of engagement with the nine core international human rights treaties with the number of ratifications of the treaties and associated optional protocols generally low, particularly of the two core covenants, the ICCPR and ICESCR. For the purposes of demonstrating the initial accessibility of the complaints mechanisms, three illustrative figures are provided below compiled from UN Treaty Collection data[739].

[737] Pacific Regional Rights Resource Team (RRRT) 'Regional Human Rights Mechanisms: Pathways for the Pacific' (2012) Secretariat of the Pacific Community, Suva, Fiji.
[738] *Ibid.* RRRT Regional Mechanisms Report (2012), at 30-31.
[739] United Nations Treaty Collection Depository, Status of Treaties, Chapter IV: Human Rights, available at https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&clang=_en (accessed 16-17 May 2018).

Figure 4.



[740]

The data here represents the nine core UN human rights treaties and the numbers of ratifications by 14 South Pacific SIDS, namely, Cook Islands, Fiji, Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, Niue, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu. The number of ratifications of the core treaties is steadily increasing in the region, in March 2018 alone the Marshall Islands ratified the ICCPR[741], the ICESCR[742] and the CAT[743] for example[744]. The treaties themselves however rarely provide access to the individual communications, inter-state communications and inquiry procedures providing recourse to the committees responsible for monitoring compliance. In light of the projected climate change impacts on the enjoyment of rights[745], five core human rights treaties can be identified as the most significant in terms of providing broad-based protection to climate

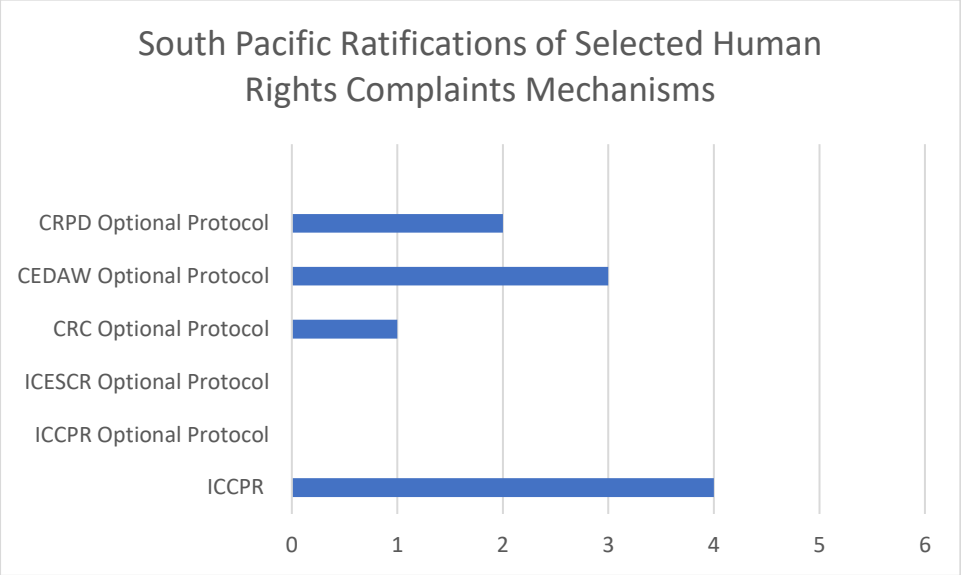
[740] An older version of this graph appears in Venn (2017) *supra note* 292, at 330.
[741] ICCPR [1966], *supra note* 314.
[742] International Covenant on Economic, Social and Cultural Rights [1966] United Nations Treaty Series, Vol. 993, p. 3.
[743] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [1984] United Nations Treaty Series, Vol. 1465, p. 85.
[744] UN Treaty Collection Depository, Chapter IV: Human Rights, *supra note* 762.
[745] See for example OHCHR, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights (2009) *supra note* 352; and Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (2016) *supra note* 391.

vulnerable individuals and groups, namely, the ICCPR, ICESCR, CEDAW[746], CRPD[747] and CRC[748].

With the exception of the ICCPR which itself provides for an inter-state procedure, states will need to have ratified the relevant optional protocols in addition to the core treaty for individual, inter-state or inquiry procedures to be available. The Human Rights Committee (CCPR), Committee on Economic, Social and Cultural Rights (CESCR), Committee on the Elimination of Discrimination Against Women (CEDAW), Committee on the Rights of Persons with Disabilities (CRPD), and the Committee on the Rights of the Child (CRC) are all competent to receive individual communications.[749] Three of the committees are competent to receive inter-state complaints[750] and four to launch inquiries where evidence of grave or systemic violations is presented[751]. The following tables provide a breakdown of the treaty ratification data for the 14 South Pacific SIDS detailed above according to the instruments containing the relevant procedures:

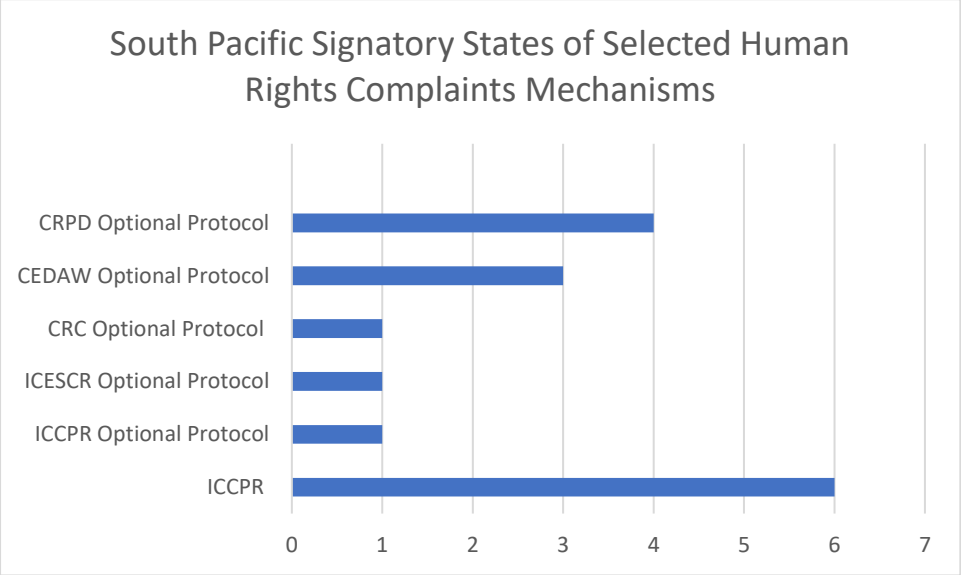
[746] Convention on the Elimination of All Forms of Discrimination Against Women [1979], *supra note* 314.
[747] CRPD [2006] *supra note* 314.
[748] CRC [1989], *supra note* 322.
[749] See ICCPR Optional Protocol [1966], Article 1; ICESCR Optional Protocol [2008] *supra note* 480, Article 2; CEDAW Optional Protocol [1999] *supra note* 574, Article 2; CRPD Optional Protocol [2006] *supra note* 591, Article 1; and CRC Optional Protocol on a communications procedure [2011] *supra note* 574, Article 5.
[750] ICCPR [1966] *supra note* 314, Article 41; OP to ICESCR, ibid, Article 10; and OP to CRC, *ibid*, Article 12.
[751] ICESCR Optional Protocol, Article 11; CRC Optional Protocol, Article 13; CEDAW Optional Protocol, *supra note* 574, Article 8; CRPD Optional Protocol *supra note* 591, Article 6.

Figure 5. (Showing ratifications of the relevant instruments conferring legally binding force):



[752]

Figure 6. (Including states who have signed but not ratified the relevant instruments):



[753]

The number of signatory states is slightly higher indicating prima facie engagement, however in order for the provisions to have legally binding force and access to the procedures before the committees to be provided, full ratification is required. Of the fourteen South Pacific SIDS analysed, the ICCPR and Optional Protocol to CEDAW had garnered the largest number of ratifications with four and three ratifications respectively. The accessibility of the complaints mechanisms is therefore initially limited by the low numbers of ratifications of the relevant

[752] Data sourced from the UN Treaty Collection Depository, supra note 33 (accessed 16-17 May 2018).
[753] *Ibid.* UN Treaty Collection Depository (accessed 16-17 May 2018).

treaties and protocols in the region. Common challenges encountered by SIDS' national governments in engaging with the international human rights framework, including technical capacity and funding constraints[754], will therefore be explored with reference to the qualitative data collected from the case study. The ICCPR and ICESCR have just three[755] and two[756] states party respectively out of the fourteen Pacific SIDS examined, while none have ratified the Optional Protocols thereto which provide for the corresponding complaints mechanisms[757].

The enforceability of the human rights provisions which have been signed up to is correspondingly limited by the lack of access to individual or inter-state complaints procedures contained in the optional protocols or requiring an additional declaration recognising the competence of the relevant committee. Discussions surrounding the establishment of a Pacific regional human rights framework, although a variety of options were presented by the SPC RRRT[758], have failed to yield any concrete results. The South Pacific is consequently a region in which people have access to comparatively few human rights protections beyond those provided for by the domestic legal frameworks. The exception to this is found in the Convention on the Rights of the Child (CRC) which all fourteen Pacific SIDS examined have ratified and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which has garnered the ratifications of all but two, namely Tonga and Palau[759]. The reasons for this stark disparity in the number of ratifications attained are explored in more detail in Section iii below.

The legal commitment to international human rights standards also varies considerably between states in the region, in terms of both formal ratification and compliance with the

[754] United Nations Development Programme, *Pacific Handbook on Human Rights Treaty Implementation* (2012) Suva: UNDP Pacific Centre, at 2.
[755] UN Treaty Series, Status of Treaties, Chapter IV Human Rights, International Covenant on Civil and Political Rights [1966] available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (accessed 23/11/17).
[756] UN Treaty Series, Status of Treaties, Chapter IV Human Rights, International Covenant on Economic, Social and Cultural Rights [1966] available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en (accessed 23/11/17)
[757] UN Treaty Series, Status of Treaties, Chapter IV Human Rights, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights [2008] and Optional Protocol to the International Covenant on Civil and Political Rights [1966] (accessed 23/11/17).
[758] Pacific Regional Rights Resource Team (RRRT) 'Regional Human Rights Mechanisms: Pathways for the Pacific' (2012) Secretariat of the Pacific Community, Suva, Fiji.
[759] UN Treaty Series, Status of Treaties, Chapter IV Human Rights, Convention on the Elimination of All Forms of Discrimination Against Women [1979] available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en (accessed 23/11/17).

contingent obligations. Papua New Guinea, Fiji, Samoa and Vanuatu boast the greatest number of ratifications in the region. The commitment shown by these four states is however unique as they are the only ones to have ratified in excess of four of the nine core human rights conventions, while the majority have ratified just two or three[760]. Indeed, some states in the region have become party to the conventions not through independent ratification but rather through succession or legal dependence upon an administrative power. Doubt has been cast upon the status of the Cook Islands and Niue as parties of conventions ratified by New Zealand for example in light of an apparent lack of subsequent reporting or implementation[761].

The potential reasons for the low number of ratifications of the core treaties, in particular the ICCPR and ICESCR, may include the provision of similar rights in national constitutions, along with more practical concerns over the institutional capacity challenges associated with their implementation and the fulfilment of additional international reporting requirements. As one regional organisation interviewee observed '*one major challenge is reporting, many governments are not actually against the treaties, they just don't want to take on additional reporting responsibilities*'[762]. Responding to the reporting requirements of all nine UN human rights bodies and to Universal Periodic Reporting requirements is a heavy bureaucratic burden for national governments to bear and one which has been recognised as requiring reform at the international level[763]. The onerousness of reporting is likely to be a contributing factor to non-compliance with reporting requirements, as another interviewee observed '*we've had a lot of reports sitting dormant for quite some time like Nauru was one of the leading ones with 22 years behind in their CRC report*'[764].

Other challenges associated with the implementation of international human rights law in the region may include the diversity of Pacific Nations' legal systems, ongoing political and economic instability[765], technical capacity, awareness, and funding limitations. To this end, one regional organisation interviewee remarked that in their view the principal reasons for the wide discrepancy in the number of ratifications of the CRC and CEDAW compared to the other treaties were that '*it's because the awareness is not there. […] A lot of the awareness has been around CRC, CEDAW and disabilities*'[766] and secondly, '*it's just the TA [technical assistance].*

[760] See data gathered from UN Treaty Collection, Status of Treaties as of 28/06/16.
[761] Farran, (2009) *supra note* 97, at 61.
[762] Interview with Regional Organisation Employee (2016); and Venn (2017) *supra note* 292, at 332.
[763] See for example Geneva Academy Report (2018) *supra note* 558.
[764] Interview with Regional Organisation Employee (2016).
[765] Farran (2009) *supra note* 97, at 2.
[766] Interview with Regional Organisation Employee (2016)

I mean there hasn't been much support […] focus has not been around ICCPR and ICESCR. I mean, they have focused a lot more on CEDAW, CRC and uh as part of the project […] we were saying to move a bit more into the other conventions'[767].

Authors including Farran[768] and Thaman[769] have questioned the extent to which human rights can be effectively applied in the Pacific region in light of their Western socio-political origins and their failure to take Pacific community values, norms and customs into consideration. It has even been suggested that the lack of ratifications in the region can be viewed as a form of passive resistance to Western domination[770], particularly in light of the history of colonial rule in the region. The nature of the rights and duties themselves have also been critiqued in light of the individualistic nature of the human rights framework in contrast to Pacific custom which centres upon the best interests of the group and places more emphasis on collective shared duties[771]. Custom plays an important role in the region, not only in light of its cultural and social significance, but also in terms of providing for dispute resolution at the local level where ready access to judicial and enforcement institutions may be limited, particularly for remote island communities.

Access to justice in this respect will be explored in more detail in Chapter VI. Nevertheless, crucial similarities between Pacific customary values and those underpinning the international human rights regime have also been illuminated in the literature. The concept of human dignity for example plays a central role in Pacific values as well as in the foundation of numerous human rights provisions[772]. Similarly, the sharing of benefits and the recognition of the importance of participation in decision-making by Pacific communities have found parallels in the international regime's principle of equal rights and freedom of speech.[773] The commonality of these foundational values provides a basis upon which to build a stronger relationship between Pacific customary norms and human rights.

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[767] *Ibid.* Interview with Regional Organisation Employee (2016)
[768] Farran (2009) *supra note* 97, at 2.
[769] K. H. Thaman 'A Pacific Island Perspective of Collective Human Rights' in N. Tomas and T. T. Haruru (Eds.) *Collective Human Rights of Pacific Peoples*, (International Research Unit for Maori and Indigenous Education, University of Auckland, 2000), at 3.
[770] Natalie Baird 'To Ratify or Not to Ratify? An assessment of the case for ratification of international human rights treaties in the Pacific' (Paper presented at the 10th Pacific Islands Political Studies Association (PIPSA) Conference, Port Vila, Vanuatu, 7-8 December 2007) at 4.
[771] New Zealand Law Commission, 'Converging Currents: Custom and Human Rights in the Pacific' Study Paper 17 (September 2006) Wellington, New Zealand, at 20-21.
[772] *Ibid.* NZ Law Commission Report (2006), at 75.
[773] *Ibid.* NZ Law Commission Report (2006), at 76.

The view that the traditional approach to rights and that taken by the international human rights framework can work in harmony[774] is a convincing one and is evidenced in the region by the notably wide ratification of CEDAW and the corresponding national level initiatives to reconcile custom and women's rights, explored in more detail in Section iii below. National social and cultural norms will naturally play a crucial part in shaping governments' agenda setting, however it is argued, based upon the doctrinal and empirical evidence gathered, that the factors of a lack of institutional capacity, funding and material support to enable the necessary national processes to be carried out, acquire the requisite technical expertise, and comply with the burdensome international reporting requirements, are likely to carry more weight in the decisions of governments to refrain from ratifying further human rights treaties[775].

iii. Prioritisation of the rights of women, children and persons with disabilities.

The comparatively high level of engagement with the CEDAW[776] and CRC[777] conventions in the South Pacific, with corresponding examples of national legislation and reforms specifically aimed at enhancing the protection of these groups at the national level[778], can be explained by two main factors. Firstly, it can be explained by the fact that many Pacific island nations continue to face serious challenges with gender based and domestic violence affecting women and children, which has given rise to political pressure and rendered these rights a priority for policy makers[779]. Secondly, the political attention and civil society-driven and awareness raising on these issues can be seen to have given rise to an increase in the availability of donor

[774] Farran (2009) *supra note* 97, at 2.
[775] See Venn (2017) *supra note* 292.
[776] 12 South Pacific Nations have ratified CEDAW (as of 23/11/17): Cook Islands, Fiji, Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, Papua New Guinea, Solomon Islands, Tuvalu and Vanuatu. Source: United Nations Treaty Collection, Status of Treaties, Human Rights, available online at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (accessed 23/11/17).
[777] All 14 South Pacific SIDS examined have ratified the CRC (as of 23/11/17): Cook Islands, Fiji, Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu. United National Treaty Collection, Status of Treaties, Human Rights, available online at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (accessed 23/11/17).
[778] See for example Vanuatu Family Protection Act, No. 28 of 2008 and the Fiji Domestic Violence Decree [2009] 1.
[779] See for example Pacific Women who estimate that approximately 60% of women have experienced domestic violence in the Pacific region - Pacific Women, Focus Areas, Ending Violence Against Women, available at: http://www.pacificwomen.org/focus-areas/ending-violence-against-women/ (accessed 11/11/19).

funding and capacity building support available to facilitate increased engagement with these specific human rights frameworks.

The lack of representation of women in policy making[780] as well as in traditional customary decision-making and reconciliation processes has been criticised from a human rights perspective for example for failing to give adequate voice or protection to victims of violence, particularly women and children[781]. Yet in spite of the apparent tensions with patriarchal custom practices, attempts are nevertheless being made by governments to reconcile the need for gender equality with traditional community structures and customs. The introduction of national policies aimed at addressing gender concerns in cooperation with community and religious leaders at the local level is demonstrated for example by Vanuatu's Family Protection Act[782] which holds that the payment or other 'valuable consideration' in respect of a custom marriage shall not be accepted as a defence in relation to domestic violence offences[783] and provides for the designation of 'authorised persons', including community and religious leaders empowered to issue 'temporary protection orders'[784] for victims. Courts have also shown themselves willing to give precedence to the rights of women when they come into direct conflict with custom[785].

Similarly, the rights of persons with disabilities, provided for by the Convention on the Rights of Persons with Disabilities (CRPD) which has received 11 ratifications[786] from the 14 Pacific SIDS examined making it the third-highest ratified human rights treaty, are likely to have been prioritised in light of the identification of the '*entrenched cultural and physical barriers*'[787] faced by these groups in the region. The political attention these challenges have received can, in turn, be seen to have given rise to increased financial and technical support for governments in the implementation of these rights. As one regional organisation employee observed in an interview '*we work with women, children, and persons with disability because this is one of the more highly ratified conventions within the Pacific so trying to work with our governments*

[780] UN Women Asia Pacific, Fiji Multi-Country Office, available online at: http://asiapacific.unwomen.org/en/countries/fiji (accessed 11/11/19).
[781] NZ Law Commission Report (2006), *supra note* 794, at 21-22.
[782] Vanuatu Family Protection Act [2008] *supra note* 801.
[783] Family Protection Act [2008] Section 10(2).
[784] Family Protection Act [2008] Section 17.
[785] See for example the Vanuatu Supreme Court cases of Noel v Toto [1995] VUSC 3 and Public Prosecutor v Kota [1993] 2 Van LR 661.
[786] UN Treaty Series, Status of Treaties, Chapter IV Human Rights, Convention on the Rights of Persons with Disabilities [2006] (accessed 23/11/2017).
[787] See Pacific Disability Forum, Disability in the Pacific, available online at: http://www.pacificdisability.org/About-Us/Disability-in-the-Pacific.aspx (accessed 11/11/19).

towards being able to live up to the obligations they've been a party to'[788] and that, in their opinion, some government officials in the region had harboured reservations with respect to the ratification of the CRPD in light of '*the challenges of finances, of having to put in place infrastructure*'[789]. These insights underline the pragmatic need for broader-based capacity-building and funding support for human rights in order to facilitate engagement with and implementation of the international treaties.

UNICEF for example, has provided support to governments in their reporting and implementation of the Convention on the Rights of the Child (CRC)[790]. Similarly, UN Women has provided targeted support to encourage full compliance with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) obligations[791]. Within the so far limited regional exploration of human rights in the context of climate change, the SPC RRRT, which has an express focus on providing human rights capacity building support and awareness raising, has accordingly chosen to focus its attention primarily on '*climate change in relation to violence against women and the impacts*'[792] as opposed to other human rights impacts such as health, property or cultural rights. It is argued in light of the doctrinal and empirical evidence collected at the regional level, that the disparity in engagement with the core international human rights treaties in the region corresponds to the availability of effective financial and institutional capacity assistance rather than to an idealistic preference, however further in-depth study would be necessary to confirm this.

IV. Conclusion

The choice of the South Pacific region as the focus of the case study was justified based upon both key aspects of the climate justice framework, together with an analysis of the vulnerability of the region to some of the most severe climate impacts including inundation from rising sea levels and increasingly intense tropical cyclones, giving rise, in turn, to increasing loss and damage in both economic and non-economic terms. The unique opportunities and challenges

[788] Interview with Regional Organisation Employee (2016).
[789] *Ibid.* Interview with Regional Organisation Employee (2016).
[790] UNICEF Pacific Island Countries, The Convention on the Rights of the Child, available at: https://www.unicef.org/pacificislands/overview_22695.html (accessed 09/11/2017).
[791] UN Women, Advancing Gender Justice in the Pacific Programme, available at: http://asiapacific.unwomen.org/en/countries/fiji/advance-gender-justice (accessed 09/11/2017).
[792] Interview with Regional Organisation Employee (2016).

presented by research conducted in the South Pacific, including the geographic remoteness of many of the archipelagos, the cultural diversity, shared institutional capacity constraints, and the multiplicity of stakeholders involved in climate law and policy making at the regional and national levels, were all key considerations in the design and conduct of the research.

In designing the empirical research, semi-structured interviews were chosen as the most appropriate method both to reveal information most pertinent to responding to the two core research questions of the present thesis and to take into account the cultural preferences for less formally structured storying of experiences through 'talanoa'. The researcher has remained conscious of the power dynamics of the elite interviews conducted and of the need to reflexively analyse the data collected on the basis of factors such as gender and cultural otherness.

The combined doctrinal and empirical data collected revealed a strong response to climate change in the development of increasingly ambitious regional policies and in the enhancement of multi-stakeholder collaborations, for example with civil society organisations through the Council of Regional Organisations of the Pacific and the Pacific Islands Climate Action Network. The analysis of the engagement with human rights regionally however flagged several key challenges including notably, the absence of a Pacific regional human rights instrument or enforcement mechanism, the uneven and often limited nature of the engagement with international human rights treaties and their complaints mechanisms, and the prioritisation of certain treaties including most notably CEDAW on the rights of women and CRC on the rights of children.

This prioritisation is in line with the institutional capacity and funding support being made available in line with external funding agendas, for example the focus of UN bodies on developing the rights of women in the South Pacific region. The present Chapter provides an overview of the framing of the case study and of the regional structures, priorities and challenges that will serve to underpin the development of rights-based responses to climate change at the regional scale. Chapter VI examines in greater depth the climate justice priorities and challenges emerging from the data collected at the national level in Vanuatu and Fiji.

Chapter VI - Exploring Climate Justice at the National Level: Priorities & challenges in Vanuatu and Fiji

I. Introduction

While Chapter V explored the methodology employed in undertaking the South Pacific case study, along with the priorities and challenges in the climate justice and human rights at the regional level, the present Chapter shifts the focus of the analysis to the national level. Beginning with an overview of the unique benefits offered by the two national sites and an introduction to their geographic and cultural backgrounds, the Chapter then moves on to present the climate justice priorities and challenges that have emerged from the empirical data. The findings have been split into two key themes, with human rights and access to justice as the first to be addressed, followed by climate justice priorities and challenges more broadly as the second. This distinction mirrored the broad separation between the climate change and human rights frameworks at the national level, where human rights tied in with justice policy and access to legal justice was therefore often addressed in tandem. Although human rights were acknowledged to be of significance in shaping climate responses by many of the research participants, climate adaptation was predominantly framed as an environmental issue which was dealt with by separate government departments or staff in the NGO offices.

II. Overview of the national sites: Vanuatu & Fiji

i. Benefits offered by the two sites

The two sites for the case study were chosen among the fourteen independent South Pacific SIDS examined[793] in the course of the present thesis on the basis of the availability of both doctrinal and empirical data. In light of the University of the South Pacific (USP) being shared

[793] The following Pacific SIDS are examined in the present analysis: Cook Islands, Fiji, Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, Niue, Papua New Guinea, Palau, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.

by twelve Pacific Island nations[794], the academic resources in relevant fields are collated with individual faculties and schools located throughout the campuses in each of the countries. As mentioned in the previous chapter, the School of Law is located at Emalus Campus in Port Vila, Vanuatu so this site offered the benefits of access to legal materials through a shared university library as well as to the Pacific Islands Legal Information Institute (PacLII) database of case law and statutes from around the region also located on site. The desk-based doctrinal research was therefore conducted at the School of Law and comprised an analysis of regional academic literature, human rights and climate change frameworks. Policy documents, legislation and jurisprudence were examined to build a picture of the existing challenges and legal structures in the relevant fields at both the regional and national levels.

The primary location of Emalus campus in Port Vila offered the further benefit, as the capital city of Vanuatu, of being located within convenient distance of the principal government and legal institutions. Many NGOs and UN in-country offices engaged in disaster-risk resilience, climate change adaptation, human rights capacity-building and community resilience work are also located in and around Port Vila, offering an important source of qualitative data. The NGOs and UN bodies stationed in Vanuatu coordinate their in-country programmes from this hub and many have staff in the field working with climate vulnerable communities offering training and resources at the grassroots level.

The secondary location of Suva, Fiji was chosen primarily as the seat of many key Pacific regional and UN organisations, offering the added benefit of enabling a more grounded exploration of the international response to the relevant climate justice challenges experienced in the South Pacific.

ii. Vanuatu and Fiji: geography, culture & governance

Vanuatu was formerly jointly administered by the English and French colonial powers as a condominium known as the New Hebrides. The country gained independence in 1980 and is an archipelago comprised of more than 80 islands, spanning a huge surface area of over 12,000

[794] USP is notably owned by: Cook Islands, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu and Vanuatu, *supra note* 589.

square kilometres[795]. As a least developed country[796] and the world's most at exposed and at-risk country to natural disasters according to the UN University's 2015 World Risk Index[797], Vanuatu is particularly vulnerable to both climate change impacts and other natural hazards, including volcanic eruptions, tsunamis and earthquakes. The country has a population of 272,459[798] and is culturally and linguistically diverse, with an estimated 138 indigenous languages[799] alongside the three official languages, Bislama, English, and French, established during the colonisation period[800].

Fiji became a British colony in 1874 and remained under British rule until it gained independence in 1970 and adopted a national constitution[801]. Fiji remained within the Commonwealth and initially accepted the Queen as the head of state, supplemented by national House of Representatives and Governor General[802]. Fiji's parliament was restructured with the introduction of a new constitution in 2013 to form a single chamber consisting of 50 elected members[803] in which legislative authority is vested[804]. The country has a larger population of an estimated 837,271[805] and is similarly culturally and linguistically diverse, with the main language, Fijian, having an estimated 300 dialects[806], along with Hindi and the colonially established language, English, which also remain in wide use[807]. Fiji has previously experienced significant political instability with a series of coups in 1987, 2000 and 2006, underpinned by ethnic tensions between the indigenous Fijian and Indo-Fijian communities[808]. Geographically, Fiji is made up of 332 islands spread over more than 18,000 square

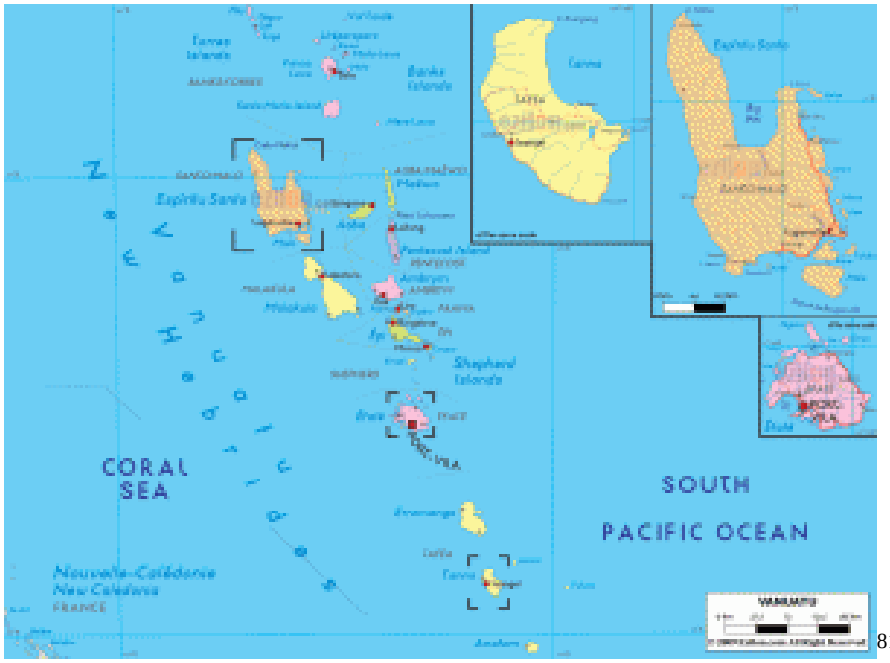
[795] United States of America Central Intelligence Agency World Factbook, Vanuatu, available at: https://www.cia.gov/library/publications/the-world-factbook/geos/nh.html (accessed 05/10/17).
[796] See UNCDP List of Least Developed Countries (2018) *supra note* 669.
[797] UNU-EHS, World Risk Report (2015), *supra note* 739, at 46.
[798] Vanuatu National Statistics Office, Ministry of Finance and Economic Management 'Vanuatu 2016 Post TC Pam Mini Census Report' Volume 1 (2017) Port Vila, Vanuatu: Vanuatu National Statistics Office, at 1.
[799] Alexandre François, Sébastien Lacrampe, Michael Franjieh and Stefan Schnell (Eds.) *The Languages of Vanuatu: Unity and Diversity* (Asia-Pacific Linguistics, 2015), at 1.
[800] *Ibid.* François et al (2015), at 2.
[801] Paterson and Zorn in M.A. Ntumy (Ed.) *South Pacific Islands Legal Systems* (University of Hawaii Press, 1993), at 27.
[802] *Ibid.* Paterson and Zorn in Ntumy (1993) at 27.
[803] Constitution of the Republic of Fiji [2013], Promulgation Decree No. 24 of 2013, Article 54.
[804] *Ibid*. Fiji Constitution, Article 46.
[805] Fiji Bureau of Statistics, Population and Demography (based on 2007 Population Census) available at: http://www.statsfiji.gov.fj/statistics/social-statistics/population-and-demographic-indicators (accessed 29/11/17)
[806] The Commonwealth, Member Countries, Fiji: Society, available at: http://thecommonwealth.org/our-member-countries/fiji/society (accessed 29/11/2017)
[807] Francis Mangubhai and France Mugler, 'The Language Situation in Fiji' (2003) *Current Issues in Language Planning* 4(3-4): 367-459.
[808] Stewart Firth, 'The Fiji election of 2014: Rights, Representation and Legitimacy in Fiji Politics' (2015) *The Round Table*, 104 (2): 101-112.

kilometres[809]. It is categorised as a developing economy[810] and therefore has greater economic resources at its disposal than Vanuatu and other South Pacific neighbours with LDC status.

It is important to note at the outset that geographic remoteness, together with limited infrastructural development, particularly in the most remote islands, are factors that play a significant role, not only in exacerbating vulnerability to climate impacts, but in constraining government capacity to universally provide institutional support to communities who may be located hundreds of miles from urban centres and be without affordable transport links. Geographic remoteness is therefore an important contextual factor to take into account in the analysis of climate justice challenges at the national level, particularly procedural justice themes such as access to justice and participation in decision-making. As one NGO interviewee remarked in relation to providing support to communities '*it's a very high percentage of communities that you can only access by foot still. There's no runway, there's no road, nothing […] you have to access it by foot or by boat. […] it increases the huge money costs in transport. So we never make that judgment call but it wouldn't surprise me if […] actors coming in said well it's too expensive to get to, let's go somewhere else*'[811]. These geographic remoteness challenges are further illustrated by the two maps of the archipelagos of Vanuatu and Fiji in Figures 7 and 8 below.

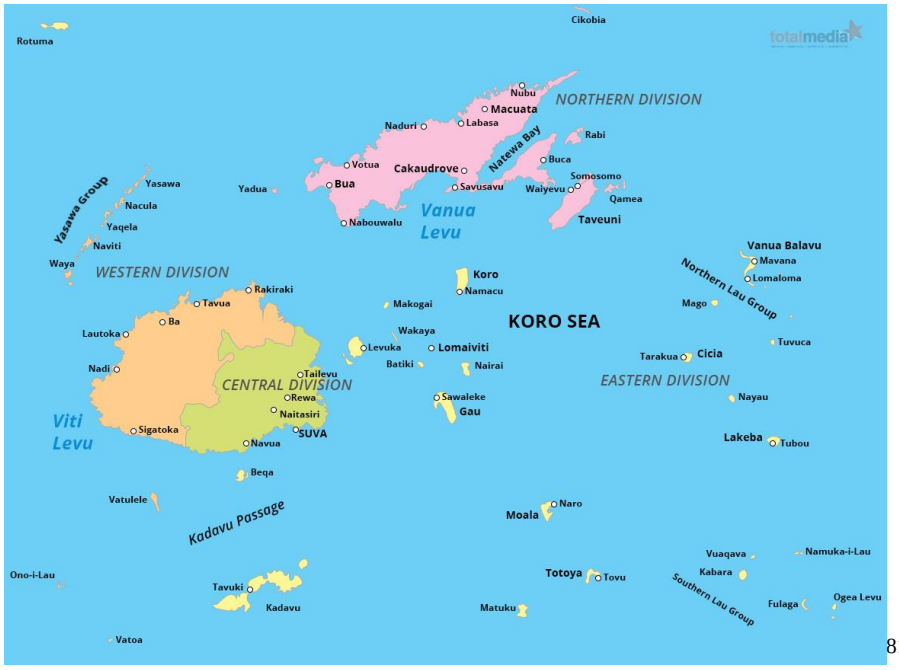
Figure 7. Map of the Republic of Vanuatu

[809] United States of America Central Intelligence Agency World Factbook, Fiji, Geography, available at: https://www.cia.gov/library/publications/the-world-factbook/geos/fj.html (accessed 10/10/2017).
[810] International Monetary Fund, World Economic Outlook (April 2017) Country Composition of WEO Groups, available at: https://www.imf.org/external/pubs/ft/weo/2017/01/weodata/groups.htm (accessed 10/10/2017).
[811] Interview with NGO Employee (2016)



[812]

Figure 8. Map of the Republic of Fiji



[813]

[812] Vanuatu Financial Services Commission VFSC, History of Vanuatu, available at: https://www.vfsc.vu/about-us/history-of-vanuatu/ (accessed 09/03/2020).
[813] Fiji Ministry of Health & Medical Services, Interactive Map, available at: http://www.health.gov.fj/interactive-map/ (accessed 09/03/2020)

III. Climate justice in Vanuatu: legal hurdles & climate justice findings

i. Legal pluralism, human rights & access to justice

Vanuatu gained independence in 1980 and enacted a national constitution which according to Article 2 constitutes the supreme source of law[814], however both the English common law and, to a lesser extent, French civil law traditions continue to play a role in Vanuatu's legal system. Under Anglo-French administration, Vanuatu was subject to 'a complex and chaotic mixture of law and courts'[815] with English, French and ni-Vanuatu peoples all being subject to different sets of laws and procedures. French law applied to French nationals and English law to English nationals as well as to 'nationals of other countries who opted to be subject to such laws' in accordance with the Anglo-French Protocol of 1914.[816] Principles of English common law and equity were also provided for and continue to find application in Vanuatu[817]. In accordance with Article 95(2) of the Constitution:

'*British and French laws in force or applied in Vanuatu immediately before the Day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu*'

Article 95(2) however also provides that 'due account' should be taken of custom in respect of the application of such laws, the scope of which is open to interpretation[818]. Consequently, there are numerous sources of law in Vanuatu, from the Constitution and national legislation enacted by the Parliament, to English and French law still in force, as well as customary law that has emerged from the traditional practices of communities. In terms of the legal hierarchy, the Constitution takes precedence and then national legislation which is provided for by the Constitution can be seen to take precedence over existing customary laws[819]. The same is true for French and English legislation remaining in force after independence.[820]

[814] M. A. Ntumy (Ed.) *South Pacific Islands Legal Systems* (University of Hawaii Press,1993) at 367.
[815] Hamlison Bulu 'The Judiciary and the Court System in Vanuatu' in G. Powles and M. Pulea (Eds.) *Pacific Courts and Legal Systems* (Institute of Pacific Studies of the University of the South Pacific, 1988) 229-237, at 229.
[816] Ntumy (1993) *supra note* 837, at 368.
[817] See High Court of the New Hebrides Regulation 1976 in M. A. Ntumy (Ed.) (1993) *supra note* 762, at 369.
[818] J. Corrin and D. Paterson, *Introduction to South Pacific Law* (Second Edition) (Routledge, 2007) at 56.
[819] *Ibid.* Corrin & Paterson (2007) at 55.
[820] *Ibid.* Corrin & Paterson (2007) at 56.

Farran however underlines that French civil law has 'largely fallen into disuse'[821] since Vanuatu gained independence and this claim was supported by the interview participants working in the legal field who considered English law to remain far more widely relied upon than French law. It should be underlined that these numerous sources of law have the potential to create conflicts in terms of both the practical resolution of disputes and the manner in which the judiciary approach new legal questions. Climate change as a judicial unknown would therefore present challenges in terms of where potential cases should be heard and which provisions are relied upon. While the Constitutional provisions for rights and duties would appear to offer the most relevant domestic source of law, it is likely for example that customary land rights will also be severely impacted as a result of climate impacts and access to justice for communities may be better guaranteed through recourse to traditional dispute resolution techniques.

In terms of the applicability of international law, a distinction has been drawn between the application of general principles and customary international law in Vanuatu in respect of which a monist system applies rendering them directly effective at the domestic level[822], and treaties on the other, which generally require domestic implementation in accordance with the dualist tradition. The Constitution in Article 26 provides that treaties require ratification by the Parliament when they concern 'international organisations, peace or trade', 'commit the expenditure of public funds', 'affect the status of people', 'require amendment of the laws of the Republic of Vanuatu' or 'provide for the transfer, exchange or annexing of territory'[823]. In light of the reporting and implementation obligations imposed by the core international human rights treaties, they would therefore appear to fulfil many of the constitutional criteria for ratification, including the amendment or enactment of laws and the expenditure of public funds to institutionally provide for compliance and implementation.

The court structure is composed of Magistrates Courts, whose jurisdiction is limited according to the amount claimed or the prospective penalty in civil and criminal proceedings but can also hear appeals from Island Courts. Above the Magistrates Courts presides the Supreme Court which is empowered to make determinations on cases where compliance with constitutional provisions is called into question[824] and has 'unlimited jurisdiction' in civil and criminal

[821] Farran (2009) *supra note* 97, at 46.
[822] Dejo Olowu, *International Law: A Textbook for the South Pacific* (CDPublishing.org, 2010), at 115.
[823] Constitution of the Republic of Vanuatu [1980] Laws of the Republic of Vanuatu Consolidated Edition 2006, Article 26.
[824] Bulu (1988) *supra note* 838, at 230.

cases.[825] The Supreme Court is composed of a 'Chief Justice and three other judges' who are appointed by the President in consultation with other senior political figures.[826] Other judges are similarly appointed in consultation with the Judicial Service Commission and their appointments are for life in the absence of the commission of a criminal offence, 'gross misconduct, incapacity or professional incompetence'.[827] The highest level of judicial recourse is to the Court of Appeal in respect of which decisions of the Supreme Court can be appealed and it is formed by judges of the Supreme Court as needed[828].

Custom plays a very important role both socially and legally, with customary law expressly recognised by the Constitution which holds in Article 95 that '*customary law shall continue to have effect as a part of the law of the Republic*'[829]. Article 47 also provides that determinations made by the courts, in the absence of an applicable rule of law, should be '*wherever possible in conformity with custom*'[830]. Custom however is not legally defined[831] and customary rules are often uncodified, passed on verbally and principally presided over by community chiefs who invoke it as a basis for the 'social control of members of their communities'[832]. The customs of each of the islands and communities themselves vary greatly[833], therefore any attempt to uniformly codify customary law would be extremely difficult. Institutionally, custom is principally provided for through the Island Courts which deal specifically with cases involving parties residing within their territorial jurisdiction[834] and which are presided over by 'at least one…custom chief residing within the jurisdiction'[835], a legal and institutional space is therefore carved out for the resolution of disputes based on the customary rules of the local communities concerned.

In spite of the multi-layered court structure and the provision of island courts mandated to settle customary disputes, access to justice for communities in Vanuatu remains a challenge. For many remote and rural communities, traditional forms of reconciliation facilitated by chiefs and village councils remain their principal form of dispute settlement. The factor primarily

[825] Corrin & Paterson (2007) *supra note* 841 at 392 – 393.
[826] Bulu (1988) *supra note* 763, at 230.
[827] *Ibid.* Bulu (1988) at 229.
[828] Bulu (1988) *supra note* 838, at 230.
[829] Constitution of the Republic of Vanuatu [1980] *supra note* 846, Article 95(3).
[830] *Ibid*. Constitution of Vanuatu, Article 47(1).
[831] Corrin and Paterson (2007) *supra note* 841, at 46.
[832] *Ibid.* Corrin and Paterson (2007), at 48.
[833] *Ibid.* Corrin and Paterson (2007) at 45-46.
[834] *Ibid.* Corrin and Paterson (2007) at 394.
[835] *Ibid.* Corrin & Paterson (2007) at 391.

restricting access to justice include geographic remoteness as Vanuatu's eighty plus islands span a huge surface area of over 12,000 square kilometres[836] . Thus, for many island communities travel to urban centres where judicial and enforcement bodies are located is prohibitively expensive and/or logistically challenging. Magistrates courts are present in five of the six provinces and cater for multiple islands, while the Supreme Court is based in the capital Port Vila with judges travelling on circuit to provincial centres when cases demand it[837]. Resources are limited and for the most remote communities without good road or air access, even travel to the island courts within the provinces presents significant challenges.

Alongside the geographic challenges which include the location of the majority of legal offices, government institutions and civil society organisations in the capital Port Vila on the island of Efate, the costs of obtaining private legal representation is another severely restrictive factor. The legal fees charged were observed to be prohibitive for much of the population by one legal practitioner interviewed: '*the average lawyer here charges 35,000 vatu per hour, the average ni-Vanuatu earning is 100 vatu per hour*'[838]. Although some law firms may be willing to take pro bono cases on an individual basis, the only source of institutional support in the form of legal aid is provided by the Public Solicitor's Office. The Public Solicitor's Office has offices in the capital, Port Vila, as well as on the islands of Espiritu Santo, Malekula and Tanna[839]. It offers advice and legal representation to 'needy persons' who could not otherwise afford to hire a private lawyer and focuses on cases involving serious offences[840].

It was observed by one legal practitioner interviewed that the Public Solicitor is '*the office of government for people who cannot afford uh private lawyers […] or cannot afford to pay money. So the Public Solicitor and his lawyers and staff do go out to the islands and run awareness programmes*'[841] in an attempt to bridge some of the geographic divides restricting access to justice in Vanuatu. The Public Solicitor's Office have however been found to face challenges in terms of a lack of available resources and institutional capacity[842] to effectively

[836] United States of America Central Intelligence Agency World Factbook - Vanuatu – Geography, available online at: https://www.cia.gov/library/publications/the-world-factbook/geos/nh.html (accessed 26/07/16).
[837] Interview with National Government Employee (2016).
[838] Interview with Legal Practitioner (2016)
[839] Interview with National Government Employee (2016).
[840] Government of Vanuatu Ministry of Justice & Community Services - Justice Sector – Public Solicitor's Office, information online at: http://www.mjcs.gov.vu/index.php/justice-sector/public-solicitors-office (accessed 26/07/16).
[841] Interview with Legal Practitioner (2016)
[842] See for example Australian Aid Vanuatu Legal Sector Strengthening Program (VLSSP) (concluded in 2011) details available online at: http://www.justice.nsw.gov.au/legal-services-coordination/Pages/projects/vanuatu-program.aspx (accessed 26/07/16).

respond to the need for legal services, as one interviewee remarked '*they provide this service uh to the whole of Vanuatu, but I think again it goes back to the capacity problems. We have a lot of people who need the service. The government only have a few officers in the office to provide the service*'[843]. Material challenges including institutional capacity, funding and geographic remoteness can therefore be seen to compound access to justice challenges in Vanuatu.

The Constitution of the Republic of Vanuatu provides in Chapter 2 for a number of fundamental rights of a civil and political nature, including notably the rights to life, liberty, freedom of expression and association, freedom from inhuman treatment and forced labour, along with provisions for legal protection and the protection of property[844]. Article 5 importantly also provides for freedom from discrimination on the grounds of 'race, place of origin, religious or traditional beliefs, political opinions, language or sex'[845] in the enjoyment of the rights guaranteed. The provision in Article 5(1)(d) for the protection of the law is particularly interesting in relation to the access to justice considerations embodied in this analysis. The right to legal protection is further elaborated upon in subsection 2 to the effect that individuals shall have the right to a fair trial within a reasonable time frame and crucially, also be entitled to legal representation if the case involves a serious offence[846]. The right to protection of the law is extensively drafted and includes safeguards relating to language barriers and the defendant's ability to understand the charges and court proceedings.

In addition to the rights listed, Article 7 of the Constitution provides for a number of fundamental duties incumbent upon individuals which can be seen to reflect the customary emphasis placed on the collective duties of members of communities in Vanuatu, for example in the duty requiring 'active participation in the development of the national community'[847]. These duties crucially include express reference to the duty to protect and 'safeguard the national wealth, resources and environment'[848] in accordance with the principle of inter-generational equity which features prominently in international climate change and sustainable development discourse. Article 7 further includes a duty to 'respect the rights and freedoms of

[843] Interview with National Government Employee (2016)
[844] Constitution of the Republic of Vanuatu [1980] *supra note* 846, Chapter 2 – Fundamental Rights and Duties.
[845] *Ibid.* Constitution of Vanuatu [1980] Article 5(1).
[846] *Ibid.* Constitution of Vanuatu [1980] Article 5(2)(a)
[847] *Ibid.* Constitution of Vanuatu [1980] Article 7(b).
[848] *Ibid.* Constitution of Vanuatu [1980] Article 7(d).

others'[849] although this is framed in a more collective manner in accordance with custom traditions with reference to 'interdependence' and 'solidarity'[850] as guiding principles.

As the supreme law of the land, the constitution takes precedence over other sources of law which in the context of fundamental rights is particularly significant. The Supreme Court is the principal judicial body responsible for the enforcement of these constitutionally recognised rights[851]. Points of contention have emerged between customary laws and the fundamental rights consecrated by the constitution upon which the Supreme Court of Vanuatu has ruled. In the cases of Noel v Toto[852] and Public Prosecutor v Kota[853] for example it was held that the enjoyment of fundamental rights free from discrimination on the grounds of sex in particular took precedence over existing customary laws granting men a superior status with regards to the sale of land and freedom of movement respectively[854].

Vanuatu does have a Human Rights Committee which is in the early stages of development with oversight responsibilities in respect of compliance with human rights treaty reporting. However, it was underlined that as yet, the '*only downside or challenge that we have in this Committee is we don't have a budget*'[855] and although the Committee is not responsible for investigating human rights violations, it does have responsibility for ensuring the timely completion of international human rights reporting. Vanuatu does not yet have a recognised and accredited National Human Rights Institution by the Asia Pacific Forum of National Human Rights Institutions[856] or the Global Alliance of National Human Rights Institutions (GANHRI)[857].

In spite of the comparatively high level of engagement with international human rights treaties and mechanisms demonstrated by Vanuatu, with five ratifications of the core human rights treaties, access to complaints mechanisms nevertheless remains very limited. The failure to ratify ICESCR and its Optional Protocol, or the Optional Protocol to the ICCPR, individual

[849] *Ibid.* Constitution of Vanuatu [1980] Article 7(f).
[850] *Ibid.* Constitution of Vanuatu [1980] Article 7(f).
[851] Bulu (1988) *supra note* 838, at 230.
[852] Noel v Toto [1995] *supra note* 735.
[853] Public Prosecutor v Kota [1993] *supra note* 808.
[854] Corrin & Paterson (2007) *supra note* 841, at 55.
[855] Interview with National Government Employee (2016).
[856] Asia Pacific Forum of National Human Rights Institutions, Members, available at: http://www.asiapacificforum.net/ (accessed 05/10/17).
[857] Global Alliance of National Human Rights Institutions, 'Chart of the Status of National Institutions' (5 August 2016), available at: http://www.ohchr.org/Documents/Countries/NHRI/ChartStatusNHRIs.pdf (accessed 05/10/17).

complaints under the two general covenants remain unavailable. Furthermore, although Vanuatu ratified the ICCPR in 2008[858], in the absence of a declaration accepting the competence of the Human Rights Committee to receive inter-state complaints in accordance with Article 41, that mechanism will also remain unavailable. The limitations on access to human rights protection can be seen to be exacerbated by practical challenges including geographic remoteness, institutional capacity, and funding limitations[859]. A national government interviewee when discussing the process of conducting the requisite national consultations prior to ratification of the human rights treaties remarked that '*we just have Vila and Santo…everything is concentrated here but we think because of the cultural diversity we would still need more awareness […] especially to those remote places. […] for ICESCR we really need at least two or three consultations because of our cultural diversity and how the islands are very remotely separated from each other*'[860]. Challenges therefore exist both in the process of accessing and implementing the international human rights framework on the one hand, and in relation to access to justice at the national level for individuals and communities on the other.

ii. Climate justice priorities & challenges

Vanuatu's vulnerability to climate change impacts is well recognised in government strategies and the development of policy both at the national and international levels. In 2013 the Vanuatu Ministry of Climate Change was established, which brought together the Departments of Environment, Energy, and Climate Change Adaptation, as well as the Department of Meteorological and Geohazards and the National Disaster Management Office, in order to foster closer institutional collaboration and encourage policy integration. A National Advisory Board on Climate Change and Disaster Risk Reduction (NAB) was further established as a platform for policy development and discussion which invites participation from NGO stakeholders. Both the Ministry and the comprehensive national strategy on climate change are

[858] United Nations Treaty Collection, Depository, Status of Treaties, Chapter IV Human Rights, International Covenant on Civil and Political Rights, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (accessed 05/10/17).
[859] For a more detailed analysis of the institutional barriers to human rights engagement see Venn (2017) *supra note* 292.
[860] Interview with National Government Employee (2016).

therefore relatively new, and, as one of the interview participants underlined, the government recognised the need to adopt a more holistic approach to the development of strategies around responding to climate change leading to the establishment of the Ministry, prior to this there was '*a national advisory committee on climate change and they would meet once in a while to look at projects*'[861] and the climate strategy was the responsibility of the Ministry of Infrastructure[862].

The most recent core policy priorities of Vanuatu in responding to climate change have been detailed in the Climate Change and Disaster Risk Reduction Policy from 2016-2020 as '*governance, finance [and] knowledge*'[863] together with '*climate change adaptation and disaster risk reduction, low carbon development, and response and recovery*'[864]. The priorities can therefore be seen to reflect the particular vulnerability to impacts, focusing primarily upon increasing adaptive capacity and the available resources with which to respond to impacts going forward. Vanuatu has also developed a National Policy on Climate Change and Disaster-induced Displacement[865] to guide responses to climate-induced displacement and relocation with an emphasis on planning with '*a strong focus on rights, gender and protection*'[866], and including human rights, respect for custom and traditional knowledge as core guiding principles.

Support in these endeavours has been provided from a variety of sources, not only through the UNFCCC funding sources, but also by development banks, bilateral aid, civil society and the private sector[867]. Assistance and input from the German Gesellschaft für Internationale Zusammenarbeit (GIZ), together with civil society organisations based in the country invited to participate in NAB meetings is further provided. Civil society organisations conducting climate-related projects are further invited to collaborate and feedback their observations through the Vanuatu Climate Action Network (VCAN), the national branch of the Pacific Islands Climate Action Network (PICAN). The Vanuatu Environmental Lawyers Association

[861] Interview National Government Employee (2016).
[862] *Ibid.* Interview with National Government Employee (2016).
[863] Government of the Republic of Vanuatu, 'Vanuatu Climate Change and Disaster Risk Reduction Policy 2016-2030' (2015) Secretariat of the Pacific Community, Suva, Fiji, at 1.
[864] *Ibid.* Vanuatu Climate Change and Disaster Risk Reduction Policy (2015) at 1.
[865] Vanuatu National Policy on Climate Change and Disaster-induced Displacement (2018) available at: https://www.iom.int/sites/default/files/press_release/file/iom-vanuatu-policy-climate-change-disaster-induced-displacement-2018.pdf (accessed 15/10/19).
[866] *Ibid*. Vanuatu National Policy on Climate and Disaster-induced Displacement (2018) at 15.
[867] Government of Vanuatu National Advisory Board on Climate Change and Disaster Risk Reduction, 'Vanuatu Climate Finance Forum Outcomes Document' (30 November – 1 December 2016), available at: http://www.nab.vu/sites/default/files/news_attachments/OUTCOMES%20Vanuatu%20Climate%20Finance%20Forum%201%20Dec%202016.pdf (accessed 05/10/17) at 1.

(VELA) established in collaboration with the International Union for the Conservation of Nature (IUCN) in 2014[868] may also play a role in climate-related litigation going forward.

The collaboration between organisations and the government in the climate change field can therefore be observed to be strong, with priority climate action at the national level focused primarily upon distributive justice themes including vulnerability assessment, adaptation, and responding to loss & damage needs through garnering access to scaled-up climate finance up to and beyond the $100 billion a year threshold[869]. As one national government interviewee remarked '*what we're working on right now is making sure that programmes and projects are based on real vulnerability assessments […] that's gonna be critical for helping [the government] do its job and also for making sure that climate change finance gets channelled to the most vulnerable*'[870].

Vanuatu has ratified the Paris Agreement subject to a declaration to the effect that its ratification 'shall in no way constitute a renunciation of any rights under any other laws, including international law'[871] and expressing concern at the inadequacy of existing emissions reduction efforts, including those within the Agreement itself, to keep global temperature rises to within the 1.5°C ambition threshold. The possibility of future legal claims in reliance upon international law rights or obligations beyond the UNFCCC regime is therefore being kept open by the government. In relation to the Paris Agreement and loss & damage, a national government employee observed that '*I think loss and damage being included was a win for Vanuatu […] but the fact that it specifically denies any potential claims for compensation or financial…that is, I mean it's unacceptable*'[872]. Over the course of the case study and subsequently however, no evidence as to specific legal claims that are being pursued has been obtained.

Turning to procedural climate justice, the empirical data gathered suggests that significant challenges persist with respect to access to information on climate change and participation in

[868] International Union for the Conservation of Nature (IUCN) 'Protecting and Safeguarding the Environment through Law' (9 July 2015), available at: https://www.iucn.org/fr/node/18202 (accessed 05/10/17).
[869] See for example Vanuatu Statement delivered by the Minister of Climate Change, Adaptation, Geo-Hazard, Environment and Energy, the Honourable Ham Lini Vanuaroroa at the High-level Segment of the 22nd Conference of the Parties of the UN Framework Convention on Climate Change (25 November 2016) Marrakech, Morocco available at: https://unfccc.int/sites/default/files/vanuatu_cop22cmp12cma1_hls.pdf (accessed 13/11/19).
[870] Interview with National Government Employee (2016).
[871] United Nations Treaty collection, Depository Status of Treaties, Chapter XXVII Environment, Paris Agreement, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en (accessed 10/10/17).
[872] Interview with National Government Employee (2016)

decision-making. It was observed by an NGO interviewee engaged in community work on the issue of access to information for example that '*some [of the communities] they still don't have means of communication and they have to walk far up, and even roads are restricted access, they don't have good wharfs and roads. So they still lack this means of accessing information on weather and climate*'[873]. Accessing information to build an effective human rights-based approach to climate justice is important not only in environmental terms, but in legal terms. Awareness of rights and access to legal information is of equal value in this respect and this was flagged by another interviewee in the following terms '*when you are out in the islands it's, it's not that easy to have access to information. I know the Community Legal Centre used to be able to do some outreach. […] That was very well received by the community […] just giving advice on issues […]so I think there's definitely a need for that*'[874]. Facilitating improved access to a wide range of climate change and human rights information for communities is a key factor in building an effective climate justice approach going forward. Without access to relevant environmental and legal information, communities cannot fully engage in or challenge decision-making, even where ample opportunity is provided for them to do so.

With respect to participation, the traditional decision-making structures in the form of village and district councils and chiefs, provide important fora for knowledge sharing and the discussion of community needs. The customary governance system, in turn, is linked to the Malvatumauri Council of Chiefs who have a strong voice in decision-making at the national level and are complemented by the Island Councils of Chiefs and Urban Councils of Chiefs[875]. The Malvatumauri Council of Chiefs is provided for in Chapter 5 of the Constitution and has 'general competence to discuss all matters relating to custom'[876]. The importance of custom and traditional knowledge in environmental management and climate resilience is also clear. It was for example observed by an interviewee specialising in custom that '*there's a custom to dealing with disasters. And people know what needs to be done when there's a disaster. […] Even the traditional knowledge of how they can tell by nature whether there will be a cyclone or even a hurricane […] and that is very effective in our customs, in our traditions*'[877]. This is reinforced by the findings of adaptive capacity analyses in the islands. A 2011 analysis of the adaptive capacity of communities in the Torres Islands for example found that the '*traditional*

[873] Interview with NGO Employee (2016)
[874] Interview with UN Body Employee (2016)
[875] Vanuatu National Council of Chiefs Act No. 23 of 2006, Part 3.
[876] Constitution of the Republic of Vanuatu [1980] *supra note* 846, Chapter 5.
[877] Interview with Organisation Employee (2016)

knowledge and belief systems enable robust food-production systems, buffered against environmental contingencies'[878]

Similarly, the churches and NGOs operating in the islands provide a network and governance structures which can be used to channel any needs or concerns up from the communities to the national level. A number of NGOs and UN bodies operating in Vanuatu appear to be focusing on facilitating the participation of women in decision-making. One NGO interviewee remarked in relation to women in the communities they work with that '*They can now speak out […] but before we can't […] we just sit there and wait because of the culture. […] So we just wait…but because of the help, the assistance that comes from other NGOs and yes, especially [us], yes women have the knowledge of their right […] so they feel more empowered to approach government officials*'[879] in the context of community support work.

The national climate and disaster risk policy does make reference to the importance of ensuring that '*the rights, priorities and needs of individuals (particularly vulnerable and marginalised groups, including the elderly, women, youth, children, disabled, illiterate, landless, minority and impoverished)*'[880] are incorporated into adaptation and disaster risk management action, and to ensuring that '*community stakeholders and vulnerable groups*'[881] are able to participate in climate and disaster decision-making at multiple scales of government. The procedural climate justice objectives of participation are therefore embedded in the government climate policy, along with an acknowledgement of the need to respect the rights of climate vulnerable and marginalised groups in climate action.

IV. Climate justice in Fiji: priorities & challenges

i. Human rights & access to justice

The issue of human rights protection in Fiji is situated in the wider context of the ethnic tensions and political instability the country has faced in previous years, demonstrated most poignantly

[878] Olivia Warrick 'The adaptive capacity of the Tegua island community, Torres Islands, Vanuatu' (May 2011) available at: https://www.nab.vu/sites/default/files/documents/usp-adaptive-capacity-vanuatu.pdf (accessed 13/11/19) at iii.
[879] Interview with NGO Employee (2016)
[880] Vanuatu Climate Change and Disaster Risk Reduction Policy 2016-2030 *supra note* 886, at 18-19.
[881] *Ibid.* Vanuatu Climate Change and Disaster Risk Reduction Policy 2016-2030, at 18-19.

by the aforementioned military coups which have taken place[882]. Firth argues that in human rights terms, the coups were justified on the basis of the collective rights of indigenous Fijians which can be contrasted with the British colonial and Indo-Fijian notions of individual rights and freedoms[883]. Prime Minister Bainimarama, leader of the 2006 military coup who took office in 2007, subsequently won an absolute majority of 59% with the FijiFirst party in the democratic elections held in 2014[884], restoring relative political stability. The democratic legitimacy of the 2014 elections was recognised at the international level with Fiji's reinstatement as a full member of the Commonwealth in September 2014[885]. These political and cultural challenges nevertheless form an important part of the historical context in the wake of which government decision-making is taking place and, accordingly, part of the backdrop to the analysis of human rights protection in Fiji more broadly.

Domestic law in Fiji is based upon the English law tradition as a former British colony. Custom also plays an important role in Fijian law with the Native Lands Act providing in s.3 that 'native lands shall be held by native Fijians according to native custom as evidenced by usage and tradition'[886], however this is more specifically focused on rights to land in contrast to the broad remit carved out for custom by Vanuatu's constitution[887]. Traditional methods of customary dispute settlement employed at the village level by chiefs are recognised and may be used 'subject to the intervention of government agencies and the courts'[888], although their use will vary according to the location and traditional practices. The court structure is comprised of Magistrates Courts, the High Court, Court of Appeal and the Supreme Court[889].

The Supreme Court acts as the final appellate court with an appointed chief justice, supreme court judges and appellate judges and the Court of Appeal receives appeals from the High Court, consisting of a president and justices of appeal. The High Court has a very broad 'unlimited original jurisdiction'[890] to hear constitutional, criminal and civil cases, while the

[882] Firth (2015), *supra note* 831.
[883] *Ibid*. Firth (2015), at 102.
[884] Fijian Elections Office, 2014 General Election Results, available at: http://www.feo.org.fj/media-centre/publications-2/past-elections-reports/2014-general-elections/2014-general-elections-results/ (accessed 29/11/2017).
[885] The Commonwealth, Press Releases 'Fiji rejoins Commonwealth as a full member' (26 September 2014) available at: http://thecommonwealth.org/media/press-release/fiji-rejoins-commonwealth-full-member (accessed 29/11/2017).
[886] Laws of Fiji, Native Lands Act [Chapter 133] [1978], S.3.
[887] Corrin & Paterson (2007) *supra note* 841, at 46-47.
[888] G. Powles and M. Pulea (Eds.) *Pacific Courts and Legal Systems* (Institute of Pacific Studies of the University of the South Pacific, 1988), at 307.
[889] Constitution of the Republic of Fiji [2013], *supra note* 826, Chapter 5.
[890] *Ibid.* Constitution of the Republic of Fiji [2013], Article 100.

Magistrates Courts, consisting of a chief magistrate and others appointed by the Judicial Services Commission, have a more limited territorial remit within the division in which they are located[891]. The formal justice system in Fiji, as in Vanuatu, runs in parallel to pre-existing traditional dispute resolution at the local level, which have a greater focus upon community interests, mutual discussion, compromise and restorative justice[892]. The recognition of these traditional methods for the peaceful resolution of disputes within communities, that for structural or geographic reasons may have limited access to the formal justice system, is crucial if the overarching aims of an inclusive procedural climate justice framework are to be attained.

Fiji has a strong legal aid framework provided for by the Legal Aid Act [1996][893] and a Legal Aid Commission established in 1998, headquartered in the capital of Suva. The provision of legal aid by the state is a duty embedded in the Fijian constitution in Article 15(10) which is broadly drafted as requiring that aid be provided to '*those who cannot afford to pursue justice on the strength of their own resources, if injustice would otherwise result*'[894]. The Fijian government has expanded the number of legal aid offices considerably in recent years to include seventeen branches located throughout the districts, with plans already in motion to open some five further branches[895]. Access to legal advice and the courts for communities in more geographically remote locations however, as in Vanuatu, remains limited.

One Fijian NGO interviewee observed in this regard that '*having access to institutional arrangements, legal wise, that is something that NGOs and communities lack*'[896], further underlining the importance of having access to legal and factual information to inform decision-making in that communities '*need to be clearly given the whole picture about the pros and cons about whatever they are agreeing to*'[897]. The priority accorded to the further development of access to justice in Fiji[898] by the government is encouraging as the opening of

[891] Laws of Fiji, Magistrates Courts Act [Chapter 14] [1988], Part II Constitution of the Courts, S.4.
[892] Ratu Filimone Ralogaivau, 'Blending Traditional Approaches To Dispute Resolution In Fiji With Rule Of Law – The Best Of Both Worlds', Paper presented at the 3rd Asia-Pacific Mediation Forum Conference, University of the South Pacific, Suva, Fiji (26-30 June 2006), available at: http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/BlendingTradDisputeReswithRoL.pdf (accessed 29/08/18).
[893] Laws of Fiji, Legal Aid Act [Chapter 15] [1996]
[894] Constitution of the Republic of Fiji [2013], *supra note* 826, Article 15(10).
[895] Jyoti Pratibha, 'Understanding Our Legal Aid Commission' (26 May 2018) FijiSun online, available at: http://fijisun.com.fj/2018/05/26/understanding-our-legal-aid-commission/ (accessed 28/08/18)
[896] Interview with NGO Employee (2016).
[897] *Ibid.* Interview with NGO Employee (2016).
[898] See for example The Fijian Government Media Centre, 'PM Bainimarama – Speech at Opening of Legal Aid Office Nadi' (19 November 2012) available at: http://www.fiji.gov.fj/Media-Center/Speeches/PM-BAINIMARAMA---SPEECH-AT-OPENING-OF-LEGAL-AID-OF.aspx (accessed 28/08/18).

more geographically widespread legal aid offices and advice services will make it increasingly possible for remote communities to access the formal legal system. It is however, essential for the development of an effective procedural climate justice framework that this geographic expansion of legal aid is accompanied by open information sharing with communities regarding their human rights entitlements, including specifically in relation to climate change impacts and displacement. This, in turn, can facilitate effective engagement on the part of climate-vulnerable groups with the legal services available.

In terms of the applicability of international law in Fiji, the dualist system generally applies in line with the British legal system[899] therefore domestic implementation of international law, including treaties, is generally required. In practice however, the Courts have been to some extent flexible in their approach and have shown themselves willing to sidestep the requirement for domestic implementation in certain human rights cases, for example in directly applying provisions of the Convention on the Rights of the Child[900]. Fiji has been more proactive in ratifying the international human rights conventions compared to many other South Pacific SIDS and leads the way, together with Vanuatu and Samoa, having ratified five of the nine core treaties[901]. At the national level, it has a Bill of Rights embedded in the Constitution which notably provides for civil and political rights, including the right to life, access to the courts, as well as socio-economic rights, including the right to adequate food and water, right to health and the right to housing and sanitation. Interestingly, the Bill of Rights includes in Article 40 the right to '*a clean and healthy environment, which includes the right to have the natural world protected for the benefit of present and future generations*'[902]. The enforceability of these rights is provided through petitions to the High Court[903].

Fiji also has a Human Rights and Anti-Discrimination Commission responsible for promotion, education, monitoring and investigation of human rights compliance with the mandate to make recommendations to the government[904]. The Commission, previously recognised by the Global Alliance of National Human Rights Institutions, experienced a suspension and subsequently resigned from GANHRI in 2007[905]. The adoption of the Human Rights Commission Decree in

[899] Pacific Islands Treaty Series, How treaties become law, Categorisation of Pacific countries, available at: http://www.paclii.org/pits/en/domestication.shtml#dualist (accessed 05/10/17).
[900] Olowu (2010), *supra note* 845, at 115.
[901] Data collected from the UN Treaty Collection Status of Treaties (18 September 2017).
[902] Constitution of the Republic of Fiji [2013], *supra note* 826, Article 40.
[903] *Ibid.* Constitution of Fiji [2013], Article 44.
[904] *Ibid.* Constitution of Fiji [2013], Article 45.
[905] See Global Alliance of National Human Rights Institutions (GANHRI), 'Chart of the Status of National Institutions' Accreditation Status as of 21 February 2018, available at:

2009 nevertheless reaffirmed the role of the Commission, inter alia, in raising public awareness of human rights, making recommendations to government on legislative and other measures, investigating allegations of rights infringements and promoting compliance with international human rights instruments[906]. Crucially, the Commission also has a broad mandate to receive complaints submitted by '*any person*'[907] or '*a representative complaint on behalf of other persons with a similar cause of complaint*'[908] alleging either a breach of human rights or unfair discrimination[909].

Moreover, the move towards increased engagement with and implementation of the international human rights treaties in Fiji is very positive, with the constitutional Bill of Rights providing a firm legal basis on which individuals can base claims at the domestic level. Facilitating increased access to justice for more remote communities through institutional outreach and capacity-building at the local level, together with ratifying the optional protocols containing additional individual and inter-state complaints mechanisms at the international level or, where appropriate, making declarations accepting the jurisdiction of UN human rights committees, would serve to further strengthen access to climate justice in this regard.

ii. Climate change responses & challenges

Fiji has a dedicated Climate Change Unit within the Ministry of Finance, however it has previously been located in both the Ministry of Local Government, Urban Development, Housing and Environment and, subsequently, the Ministry of Foreign Affairs and International Cooperation. Previous justifications offered for moving the unit include garnering strategic national support[910] There is also a National Climate Change Coordinating Committee (NCCCC) which provides coordination and oversight notably with the objectives of

https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/Status%20Accreditation%20Chart.pdf (accessed 03/09/18); and Sonia Cardenas, *Chains of Justice: The Global Rise of State Institutions for Human Rights*, (University of Pennsylvania Press, 2014), at 208-209.

[906] Republic of Fiji Islands Human Rights Commission Decree [2009] Government of Fiji Decree No. 11, S.12(1).

[907] *Ibid.* Fiji Human Rights Commission Decree [2009], S.27(1).

[908] *Ibid.* Fiji Human Rights Commission Decree [2009], S.27(1).

[909] *Ibid.* Fiji Human Rights Commission Decree [2009], S.27(1) and S.28(1).

[910] Republic of Fiji National Climate Change Policy (2012) Suva, Fiji: Secretariat of the Pacific Community, at 14.

mainstreaming climate change policy considerations and securing climate finance[911]. A national climate change policy was introduced in 2012, building upon an existing policy framework agreed upon in 2007[912] and includes a particular focus on securing climate finance, regional collaboration, and '*strengthening institutional and legal frameworks*'[913]. The 2012 policy did not include provisions on human rights or on tackling climate displacement or relocation, however the government had been engaged for some time in conducting vulnerability assessments and developing national relocation guidelines to tackle the growing issue of climate displacement[914]. In 2018 the government introduced a new National Climate Change Policy for 2018 - 2030[915], along with a set of Planned Relocation Guidelines[916]. The Guidelines define relocation in the following terms:

'*Relocation is the voluntary, planned and coordinated movement of climate-displaced persons within States to suitable locations, away from risk-prone areas, where they can enjoy the full spectrum of rights including housing, land and property rights and all other livelihood and related rights'*[917]

Prime Minister Bainimarama has further publicly offered refuge to particularly low-lying Pacific SIDS, Kiribati and Tuvalu, most at risk of climate displacement due to rising sea levels and called for a pragmatic acknowledgement of the severity of the climate change impacts that many Pacific islands are already facing, together with an urgent injection of adaptation finance.[918] Both distributive climate justice themes, including the need to assess and respond to unavoidable climate losses and damages, and procedural justice considerations such as the participation of communities in decision-making on relocation, feature prominently in Fiji's national climate policy priorities. The government has also taken a very active role in advocating for increased climate mitigation efforts at the global level, becoming the first SIDS

[911] Government of Fiji and United Nations Development Programme, Project Document: Green Climate Fund (GCF) Readiness Programme in Fiji (2015) available at: https://info.undp.org/docs/pdc/Documents/FJI/Fiji_GCF%20readiness_prodoc%20FINAL_6March2015_Signed.pdf (accessed 11/10/17), at 10.
[912] Fiji National Climate Change Policy (2012) *supra note* 933, Foreword at V.
[913] *Ibid.* Fiji National Climate Change Policy (2012), at 18.
[914] Karen McNamara and Helene Jacot Des Combes, 'Planning for Community Relocations Due to Climate Change in Fiji' (2015) *International Journal of Disaster Risk Science* 6, 315-319, at 318.
[915] Republic of Fiji National Climate Change Policy 2018-2030 (2019) Ministry of Economy, Republic of Fiji.
[916] Republic of Fiji 'Planned Relocation Guidelines: A framework to undertake climate change related relocation' (2018) Ministry of Economy and GIZ.
[917] *Ibid.* Fiji Relocation Guidelines (2018) at 6.
[918] Address by Prime Minister Frank Bainimarama at Pacific Partnership Event, 'Pacific Islands Need to Lead Global Climate Action Agenda' (3 July 2017) UNFCCC Newsroom, available at: http://newsroom.unfccc.int/cop-23-bonn/pm-bainimarama-opening-address-at-the-climate-action-pacific-partnership-event/ (accessed 01/12/2017).

to hold the Presidency of the UNFCCC negotiations at COP23 in Bonn in 2017, and utilising the platform to raise awareness of climate impacts upon SIDS, as well as to develop the Talanoa Dialogue[919] to increase levels of ambition in line with the 1.5°C temperature threshold ahead of the commencement of the Paris Agreement NDC global stocktake in 2023[920]. The Dialogue was founded upon the shared Pacific tradition of 'talanoa' and had two key aims to '*build trust and empathy through meaningful, blame free engagement*'[921] and to share stories of both challenges and successes in tackling climate change in order to '*learn from each other's climate journeys*'[922] and thereby prompt greater ambition among both states and non-state actors.

Fiji ratified the Paris Agreement in April 2016[923] and, in contrast to some of the country's South Pacific neighbours, notably the eight who chose to make declarations upon ratification, Fiji did not reserve any existing international law rights in respect of climate change or express concern regarding the 1.5 °C threshold. In relation to the Paris Agreement, one government interviewee observed that '*the text somehow does recognise some of the key issues that we wanted in terms of outcomes. […] The number one would be the recognition of loss & damage […] of course increasing of financing support, and third would be the commitment of the government to a carbon low transition economy*'[924]. This is likely to be indicative of a desire to show strong support for the Paris framework as opposed to a decision to definitively rule out any exploration of claims based on existing international law obligations in the future.

The absence of a declaration may however render such claims, particularly any invoking obligations contained within the UNFCCC or Paris Agreement frameworks more difficult in light of the express exclusion of liability and compensation in respect of loss & damage[925]. Nevertheless, human rights-based claims relying upon the core treaties and rules of state responsibility may have a stronger footing, particularly in light of Fiji's role as a regional leader in engagement with the international human rights framework, as illustrated by *Figure 3* in Chapter V above.

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[919] Republic of Fiji, Talanoa Dialogue Report 'Talanoa Dialogue: From Ambition to Action' (2019) available at: https://cop23.com.fj/wp-content/uploads/2019/03/Talanoa-Dialogue_Report_F_February-19-20193.pdf (accessed 15/10/19).
[920] Paris Agreement [2015] *supra note* 16, Article 14.
[921] Fiji Talanoa Dialogue Report (2019) *supra note* 867, at 6.
[922] *Ibid.* Fiji Talanoa Dialogue Report (2019), at 6.
[923] United Nations Treaty collection, Depository Status of Treaties, Chapter XXVII Environment, Paris Agreement, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=en (accessed 10/10/17).
[924] Interview with National Government Employee (2016)
[925] UNFCCC Decision 1/CP.21 *supra note* 133, at 8, Paragraph. 51.

The 2018 Fijian climate policy has a strong focus upon human rights as one of the core pillars guiding policy action together with gender-responsiveness and the stated aim to be guided by the principle of inclusivity[926]. The core commitments of the government include a net zero emissions pledge by 2050, securing access to adequate climate finance, and adaptive capacity building[927]. The policy also makes reference to the commitment to enhancing institutional capacity for climate governance and to increasing multi-stakeholder collaboration[928] which will have potentially significant impacts upon the attainment of procedural climate justice aims such as more representative participation in climate decision-making processes. Further support for this endeavour can be found in the stated objectives of the policy to take into account the '*differentiated impacts of climate change across societies and vulnerable groups*'[929] and that '*climate change will exacerbate existing inequalities disproportionately affecting low-income and otherwise disadvantaged groups*'[930] as underscoring the need for an inclusive and rights-based approach to climate action.

Further institutional support and civil society engagement for climate action in Fiji stems from the capital, Suva, which is a key hub for Pacific regional, UN and civil society organisations operating in the climate change, disaster response, governance and other related fields. The Pacific Island Development Forum, Pacific Island Forum Secretariat, UNDP and others are notably operating alongside many civil society organisations and coordinating clusters. The Pacific Island Climate Action Network (PICAN) also based in Suva, brings together a range of civil society organisations throughout the region engaged in climate-related work to coordinate climate justice advocacy and provide communication channels for information from Climate Action Network International to the national branches. Civil society and Pacific regional organisation collaboration in climate change policy development and response features prominently and is of particular importance in helping to overcome some of the procedural and material barriers to climate justice, including for example supporting capacity building, knowledge sharing and making available key environmental information.

[926] Fiji National Climate Change Policy 2018-2030, *supra note* 938.
[927] *Ibid.* Fiji National Climate Change Policy 2018-2030, at 27.
[928] *Ibid.* Fiji National Climate Change Policy 2018-2030, at 27.
[929] *Ibid.* Fiji National Climate Change Policy 2018-2030, at 23.
[930] *Ibid.* Fiji National Climate Change Policy 2018-2030, at 23.

V. Conclusion

The findings revealed by the desk-based doctrinal and interviews with key stakeholders in Vanuatu and Fiji, stemming from an analysis of climate justice and rights-based responses at the national level, reveals that addressing climate change remains a central priority in the formulation of national policy. Both national governments' approaches focus upon enacting climate mitigation and adaptation measures, securing access to climate finance, and responding to climate loss and damage. Climate loss and damage is interpreted broadly as encompassing both economic losses associated with climate-related disasters and slow onset impacts such as sea level rise leading to losses of land, infrastructure and property along with the displacement of communities.

Increasingly, both Vanuatu and Fiji can be seen to be integrating substantive and procedural rights into their climate policy responses, embedding the substantive rights of vulnerable groups as core guiding principles within climate displacement strategies and to be emphasising the importance of ensuring that members of those groups have the opportunity to participate in decision-making processes around climate change, including through multi-stakeholder collaboration with groups beyond national government.

Although some core challenges persist with respect to access to justice, and to human rights mechanisms, exacerbated by geographic remoteness and institutional capacity constraints, as well as the absence of a Pacific regional human rights system, both states nevertheless have embedded fundamental human rights protections within their national constitutions. National law and policy frameworks further provide for access to information entitlements and to legal aid services. The number of ratifications of and level of engagement with international human rights treaties generally is among the highest in the South Pacific region in Vanuatu and Fiji, however access to complaints mechanisms via optional protocols remains limited.

Capacity building support for further engagement with international complaints processes would assist in providing recourse to inter-state claims capable of addressing the transboundary distributive questions of climate justice, for example surrounding remedies for loss and damage. Individuals and groups however may assert their human rights at the domestic level in reliance upon the constitutional bills of rights, where access to justice barriers can be overcome. The role of civil society actors in facilitating access to justice and the exercise of

rights in the climate change context will be highly significant, as it has already proven to be with respect to the development of new inclusive, rights-based climate policy.

Chapter VII - Securing a Human Rights-Based Approach to Climate Justice: Future Steps

I. Introduction

The present chapter brings together and builds upon the doctrinal and empirical findings of the thesis to draw a series of conclusions as to the requisite next steps in the pursuit of climate justice. These conclusions shall lead to the development of key law and policy strategies for the attainment of the distributive and procedural justice priorities identified in Chapters V and VI, including notably, providing effective recourse for climate loss and damage, strengthening the enforceability of human rights obligations, and increasing support to fill persistent procedural climate justice lacuna. Section II will begin by mapping out a potential legal strategy for inter-state claims based upon the responsibility of large emitters on human rights grounds. This will be followed by an examination of the ways in which improved engagement with international human rights law can be facilitated and loss and damage better provided for by the international community.

Section III will subsequently develop a series of law and policy recommendations to lay the foundations for the attainment of the core distributive and procedural climate justice aims at the national level. A number of proposals for strengthening and improving access to human rights mechanisms at the national level for climate-vulnerable groups and communities will be explored, along with the role of civil society in facilitating the legal empowerment necessary for human rights to be relied upon in this way. Actions by the international community will initially be explored, including the need for increased financial and capacity-building support in the field of human rights, the integration of human rights into climate policy responses, and the facilitation of greater involvement in decision-making processes for climate-vulnerable groups.

II. Mapping the path to climate justice at the international level

i. Inter-state claims

The overarching aim of the present section is to identify the international legal avenues with the greatest chances of securing distributive and procedural climate justice for SIDS in the South Pacific region. It will however not seek to advocate for a one-size-fits-all strategy as to do so would ignore the national interest considerations which will need to be carefully weighed by each government in consultation with the relevant national stakeholders. Such considerations are likely to vary considerably according to factors including the sources of aid funding available to the state, bilateral and multilateral relationships that could result in support being offered, or in negative repercussions resulting, and the availability of the requisite technical and financial resources for a protracted claim. Socio-cultural and political factors at the sub-national level are similarly likely to be of great significance in government decision-making on inter-state claims, including factors such as political stability and the representation of views from different cultural groups.

The procedural climate justice goals examined in Chapter II, including the recognition of climate-vulnerable and marginalised groups, are of continuing relevance in informing the decision-making processes surrounding the pursuit of inter-state claims, particularly claims seeking to invoke breaches of socio-economic and cultural rights obligations. The empirical and doctrinal analysis nevertheless permits a number of key conclusions to be drawn regarding, firstly, the forum best suited to delivering climate justice, and secondly, the legal content of potential inter-state claims between South Pacific SIDS and large emitters. Thirdly and finally, some strategic considerations will be presented with the aim of aiding the identification of potential respondent states.

The argument in favour of bringing inter-state claims before international courts or UN human rights committees, as opposed to invoking alternative dispute resolution avenues such as negotiation, or diplomatic countermeasures, as discussed in Section IV of Chapter III, is founded upon the need to advance international legal doctrine in a concrete and transparent manner. In order to respond to the global nature of the distributive injustice facing South Pacific SIDS that bear deeply disproportionate climate burdens, dispute settlement avenues which offer a clear means of driving legal change in order to strengthen future claims and provide

redress for climate loss and damage should be prioritised. The strong focus regionally and nationally in the South Pacific on addressing increasingly severe climate loss and damage, both economic and non-economic, has emerged clearly from the empirical data and policy documents examined in Chapters V and VI.

This has been expressly linked to South Pacific SIDS' reservations of existing rights under international law and calls for compensation in connection with the acknowledged inadequacies of the Paris Agreement in securing action commensurate with the 1.5°C warming threshold[931]. The Solomon Islands declaration on ratification of the Agreement contains the following clause detailing that '*no provision in this Paris Agreement can be interpreted as derogating from principles of general international law or any claims or rights concerning compensation due to impacts of climate change*'[932] and similar references to compensation can be found in those of Cook Islands, Federated States of Micronesia, Nauru, Niue, and Tuvalu. Similar concerns were evident in the empirical data, one government interviewee for example observed that '*We are concerned that the question of compensation and liability is not really fleshed out well […] But we make it very clear that after we sign it, we have concerns on that and we make it very clear that we are not forfeiting any future rights*'[933].

The potential of inter-state claims invoking the rules of state responsibility alongside human rights obligations is significant in light of the provisions made in the ILC rules on state responsibility[934] and in international jurisprudence[935] for the obligation to make full reparation for an injury caused as a result of the breach of an international obligation. These principles on reparation include not only compensation but, as far as possible, the restoration of the circumstances of the state to those that existed prior to the breach, along with satisfaction which provide the flexibility to accommodate reparations for the non-economic losses being sustained in the region that are far more difficult to quantify.

The most suitable forum in which to bring inter-state claims has been deduced based upon an assessment of three key climate justice and legal criteria emerging from the empirical and legal analysis in the preceding chapters, namely;

[931] United Nations Treaty Collection, Status of Treaties, Chapter XXVII Environment, 7.d Paris Agreement (as at 18 September 2018)
[932] *Ibid.* UNTC, Status of Treaties, Paris Agreement (as at 18 September 2018) Declaration of Solomon Islands.
[933] Interview with National Government Employee (2016).
[934] ILC Articles on the Responsibility of States for Internationally Wrongful Acts (2001) *supra note* 368, Articles 31-37.
[935] Case Concerning the Factory at Chorzów [1928] *supra note* 358, at 47.

1) The availability of remedies for loss and damage;
2) Public access to the resulting decision and statement of legal principle; and
3) The ability to meaningfully advance international legal doctrine.

The ICJ, Permanent Court of Arbitration (PCA) and UN human rights committees represent the three principal inter-state claims avenues with the capacity to fulfil these criteria to a greater or lesser extent. The PCA partially fulfils the first two criteria in that it has the competence to hand down awards of damages and is playing an increasingly important role in the resolution of environmental disputes[936]. The relevance and availability of these remedies is however limited by the PCA's primary competency in international trade law, reflected by the PCA Arbitration Rules and UNCITRAL rules pursuant to which it functions[937]. As a consequence, the PCA's ability to provide recourse to justice in respect of substantive questions of climate justice, for example related to states' rights-based duties to mitigate risk, will be significantly restricted. Reform proposals with a view to integrating human rights into the PCA's remit[938] have not yet materialised and this leaves an unsatisfactory lacuna in respect of human rights-related losses, particularly in light of the significant non-economic loss and damage facing the communities being displaced by climate change impacts.

In respect of the two latter criteria of public access to the resulting decision, and the ability to meaningfully advance legal doctrine, arbitration represents a process of dispute settlement which is by default conducted in private proceedings with the award of the tribunal remaining confidential unless both parties expressly consent to public disclosure or are otherwise legally obliged to disclose it.[939] The inherent lack of transparency surrounding PCA proceedings risks impairing public access to information in the form of important precedents, legal arguments and principles that could bolster future climate justice claims. This lack of transparency, together with the lack of competence in the field of human rights renders arbitration before the PCA is both procedurally and substantively ill-suited to delivering the objectives of climate justice. Even where expert arbitrators may make important statements of principle on the way in which international law should be interpreted and applied in respect of climate change, the

[936] Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment [2001] *supra note* 434.
[937] Permanent Court of Arbitration, Arbitration Rules (2012) *supra note* 429; and United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules (2013) available at: http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf (accessed 25/09/2018).
[938] Cronstedt, Eijsbouts et al (2017) *supra note* 475.
[939] Permanent Court of Arbitration, Arbitration Rules (2012) *supra note* 429, Article 34(5).

potential for them to have a meaningful impact upon the development of international law, will necessarily be limited by the accessibility of these statements to the public, international law scholars, and other courts and tribunals.

Turning to the inter-state mechanisms of UN treaty bodies, only three of the five international human rights treaties identified in Chapter IV as offering the most broad-based protection to climate-vulnerable groups, namely, the ICCPR, ICESCR, CEDAW, CRPD and CRC, provide for inter-state communications procedures[940]. As with the PCA, the three criteria of availability of remedies for loss & damage, public accessibility of any statements of law, and the ability to meaningfully advance international legal doctrine are, to an extent, mutually dependent. Access to the inter-state complaints mechanisms is at first instance limited by the low number of ratifications of the relevant instruments and protocols containing them. A detailed breakdown of the numbers of ratifications of the international human rights instruments and protocols providing for complaints mechanisms in Section II of Chapter IV, revealed that none of the instruments had respectively received more than four ratifications of the fourteen South Pacific SIDS examined.

The ICCPR, which boasts the greatest levels of engagement with four ratifications, includes the further requirement that the States Parties make a declaration expressly accepting the competence of the Committee to receive and consider inter-state communications[941]. None of the South Pacific SIDS examined have yet made declarations recognising the competence of the Human Rights Committee under Article 41 to this end.[942] Turning to the other two instruments providing for inter-state complaints procedures in climate-relevant treaties, namely, the ICESCR Optional Protocol and CRC Optional Protocol on a Communications Procedure, both require similar declarations of acceptance[943]. The only ratification either received however, was that of Samoa to the CRC Optional Protocol and a declaration accepting

[940] ICCPR [1966] *supra note* 314, Article 41; ICESCR Optional Protocol [2008] *supra note* 441, Article 10; and CRC Optional Protocol on a communications procedure [2011] *supra note* 519, Article 12.
[941] ICCPR [1966] *supra note* 314, Article 41(1).
[942] United Nations Treaty Collection Depository, Status of Treaties, Chapter IV: Human Rights, 4. International Covenant on Civil and Political Rights, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (accessed 01/10/18).
[943] ICESCR Optional Protocol [2008] *supra note* 480, Article 10; and CRC Optional Protocol on a Communications Procedure [2001] *supra note* 574, Article 12.

the competence of the Committee on the Rights of the Child to receive communications has yet to be made by any SIDS[944].

The previous failure of states to invoke the inter-state mechanisms has left open the question of the capacity of the mechanisms to lead to recommendations providing for remedial measures or to take a view on the likelihood of compliance by the states parties with such recommendations. Their utility in terms of providing remedies for climate loss & damage is therefore also in question. The first inter-state communication was submitted in April 2018 by Palestine alleging violations of the International Convention on the Elimination of all forms of Racial Discrimination (ICERD) by Israel, however the potential scope and impact of any recommendations handed down by the Committee as yet remains to be seen[945]. The communications of the human rights committees are non-binding and therefore any recommendations for remedies will be dependent upon the cooperative goodwill of the states parties to the dispute.

The inter-state procedures primarily rely upon the good offices of the committee concerned with the aim of prompting a 'friendly solution' to the inter-state dispute[946]. Good offices are characterised by the facilitation of an independently negotiated settlement between the parties, without any firm settlement terms being provided[947]. The ICCPR provides further recourse to an ad hoc conciliation commission if a satisfactory resolution is not reached through good offices, however conciliation is itself both non-binding in nature and rarely resorted to by states in practice[948]. This facilitative approach to dispute settlement is largely dependent upon the goodwill of the parties and challenges are likely to arise in light of the political sensitivity of climate-related claims, as reflected in the exclusion of liability and compensation for loss in the decision adopting the Paris Agreement[949].

On the question of public access to the decisions and recommendations of the treaty bodies however, their use may present procedural justice challenges. The ICCPR procedure under the

[944] United Nations Treaty Collection Depository, Status of Treaties, Chapter IV: Human Rights, 11. d Optional Protocol to the Convention on the Rights of the Child on a communications procedure, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&clang=_en (accessed 01/10/18).
[945] Keane (2018) *supra note* 585.
[946] See for example ICCPR [1966] *supra note* 314, Article 41(1), ICESCR Optional Protocol [2008] *supra note* 480, Article 10(1), and CRC Optional Protocol [2011] *supra note* 574, Article 12(5).
[947] Malcolm Shaw, *International Law* (Sixth Edition) (Cambridge University Press, 2008) at 1018.
[948] John Merrills, 'The Means of Dispute Settlement' pp.559-585, in Malcolm D. Evans (Ed.) International Law (Third Edition) (Oxford University Press, 2010) at 568.
[949] UNFCCC Decision 1/CP.21 *supra note* 133, at Paragraph. 51.

auspices of the Human Rights Committee is, according to the rules of procedure, to consider inter-state communications in closed meetings and only to issue communiqués detailing its activities following a consultation with the States Parties involved[950]. This closed meeting approach to the consideration of inter-state communications is mirrored in the rules of procedure of both the ICESCR Optional Protocol[951] and the CRC Optional Protocol[952]. The communications of the UN human rights treaty bodies on individual complaints have been made available on public jurisprudence databases[953], however the individual procedures are far more utilised and less politically contentious so the question remains whether states parties to inter-state disputes would be willing to consent to the public disclosure of committee communications or how detailed and therefore useful for the development of international legal doctrine any information released would be.

In light of the above challenges associated with bringing inter-state claims before the PCA or the UN human rights treaty bodies, clear advantages exist in favour of bringing claims before the ICJ on the basis of all three of the criteria outlined. The public accessibility of any resulting statement of legal principle, and the ability to meaningfully advance international legal doctrine are of particular significance in the attainment of procedural climate justice goals. The hearings of the ICJ are public by default and the opinions are read in public sittings before being published[954]. The duties of the ICJ Registrar expressly include ensuring that '*information concerning the Court and its activities is made accessible to governments, the highest national courts of justice, professional and learned societies, legal faculties and schools of law, and public information media*'[955]. The public ethos of the Court, together with the scope afforded within its mandate to apply not just primary but secondary sources of international law including general principles and '*the teachings of the most highly qualified publicists of the various nations*'[956], which could crucially include the precautionary principle and the teachings

[950] International Covenant on Civil and Political Rights, Human Rights Committee, *Rules of procedure of the Human Rights Committee* [2012] CCPR/C/3/Rev.10, Rule 77.
[951] United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, *Provisional rules of procedure under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, adopted by the Committee at its forty-ninth session (12-30 November 2012) E/C.12/49/3.
[952] United Nations Convention on the Rights of the Child, Committee on the Rights of the Child, *Rules of procedure under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure** (2013) CRC/C/62/3, Rule 46.
[953] United Nations Office of the High Commissioner for Human Rights (OHCHR) Jurisprudence, available at: http://juris.ohchr.org/ (accessed 26/09/18).
[954] International Court of Justice, Rules of the Court [1978], available at: https://www.icj-cij.org/en/rules (accessed 21/11/18) Articles 59, 93, and 107.
[955] *Ibid.* ICJ Rules of Court [1978], Article 26(1)(m).
[956] Statute of the International Court of Justice (1945) *supra note* 441, Article 38(1).

of climate justice scholars as lenses for the assessment of climate-induced risks to rights, provides for a broader range of interpretive tools for the development of international legal doctrine.

The third criteria of the availability of remedies for loss and damage will be dependent upon whether either the contentious or advisory jurisdiction of the ICJ is being employed as the advisory opinions are non-binding. Nevertheless, the court, as discussed in Chapter III, has shown itself to be willing to award compensation in respect of breaches of human rights obligations. It is well placed to expand upon and clarify the scope of both human rights and environmental obligations in international law, as evidenced by its previous jurisprudence. The Court has upheld the three facets of reparation codified by the rules on state responsibility, namely of restitution, compensation and satisfaction[957].

Turning to the composition of any inter-state claims, the findings of the legal analysis conducted in Chapters III and IV are presented through the lens of the empirically-informed climate justice framework. The close links between the climate justice framework and human rights are well established in the body of political theory literature on climate justice and have been discussed in detail in Chapters II and III. Of great importance here is the need to guarantee an adequate minimum of resources and protections for fundamental subsistence rights, the rights to life and health[958]. Similarly, the relationship between procedural climate justice and the recognition of marginalised and particularly climate-vulnerable groups in the international human rights treaties, particularly with respect to the rights of women, children and persons with disabilities, underpins the suitability of a rights-based approach to legal claims for climate justice.

To strengthen potential inter-state claims before international courts and tribunals, the existing obligations within the international human rights framework should be invoked alongside the rules of state responsibility. The normative status of human rights obligations as *erga omnes* obligations owed to the international community at large, supported by the findings of the ICJ in the Barcelona Traction case[959], broadens the potential scope of inter-state claims to include not only those who have experienced harm within their jurisdictional boundaries, but concerned third party states. The argument that a number of 'core' human rights have further attained the

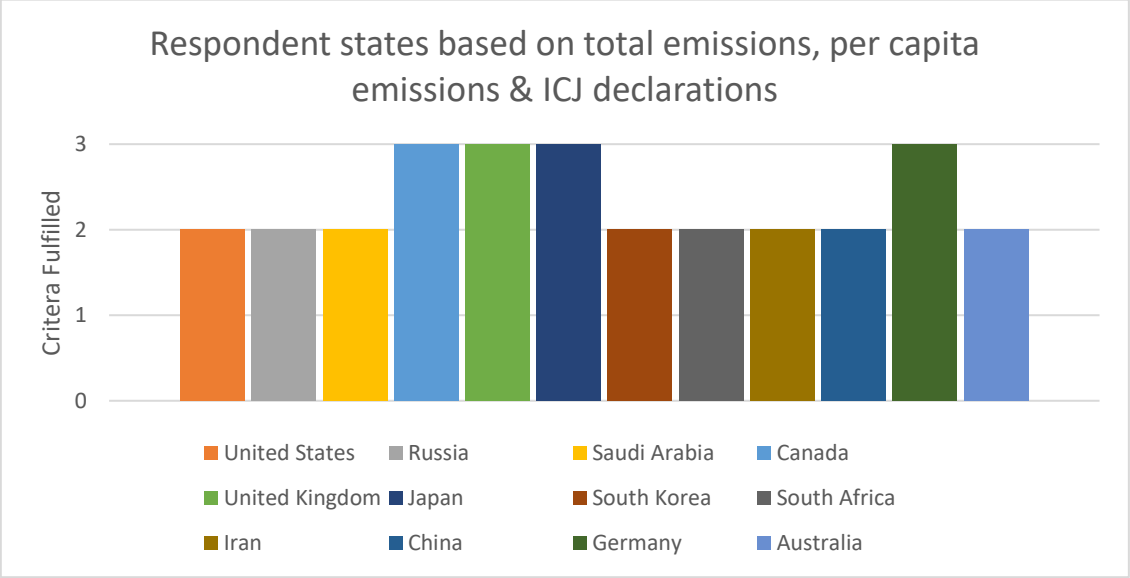
[957] Case Concerning the Factory at Chorzów [1928] *supra note* 358; and ILC Articles on the Responsibility of States (2001) *supra note* 368, Articles 35-37.
[958] Bell (2011) *supra note* 85; Caney (2010) *supra note* 81; and Dietzel (2017) *supra note* 268.
[959] Case concerning the Barcelona Traction [1970] *supra note* 361.

status of *jus cogens* norms of international law, including the right to life[960], and as such, are both non-derogable and subject to broader duties of compliance, brings with it additional opportunities for enforcement in line with the rules of state responsibility. Wewerinke-Singh argues that in light of the growing recognition of the applicability of the rules of state responsibility by human rights bodies, and the right to a remedy being embodied in both treaties and customary international law, the rules of state responsibility can and should be applied to support climate change claims[961].

In order to ascertain which respondent states claims could be brought against, numerous contextual factors will need to be taken into account and the aim, as outlined above, is not to provide a prescriptive outline in this thesis, as this would fail to take into account important national interest considerations. Nevertheless, a rubric based on three initial criteria can present a good starting point, namely identifying those states who boast a world-leading share of both the total and per-capita greenhouse gas emissions, as such an approach is more able to cater for common but differentiated responsibility considerations in respect of states, such as India, that feature among the top five total emitters globally but have very low per capita output. The third criteria is that of declarations made to the ICJ accepting the Court's compulsory jurisdiction as a significant factor in opening up recourse to justice. It should however be noted that this will not be required if an advisory opinion on climate responsibility is sought, as this would instead be subject to a request from an authorised UN body such as the General Assembly, or if jurisdiction is provided by other means such as an ad hoc agreement or a provision in a treaty.[962] A simple analysis of the three initial criteria is presented in *Figure 6* below.

[960] Ramcharan (1983) *supra note* 384; and Wewerinke and Doebbler (2011) *supra note* 62, at 149.
[961] Margaretha Wewerinke-Singh, 'State responsibility for human rights violations associated with climate change' in Sebastien Duyck, Sebastien Jodoin and Alyssa Johl (Eds.) *Routledge Handbook of Human Rights and Climate Governance* (Routledge, 2018) 75-89.
[962] Statute of the International Court of Justice (1945) *supra note* 441, Article 36.

Figure 6.



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At the first instance, there were just four states that fulfilled all three of the criteria of being among the top 15 total and per capita greenhouse gas emitters, and who have made declarations accepting the compulsory jurisdiction of the ICJ, namely, Canada, Germany, Japan and the United Kingdom. It is worth noting that Australia also came in close, ranking 16th for total emissions, 2nd for per capita emissions, and having also made a declaration accepting the Court's jurisdiction in 2002[964]. Additional factors to consider in identifying potential respondent states could further include their ratifications of relevant human rights treaties, however as there are strong arguments in favour of human rights having been embedded in customary international law[965], particularly those with *jus cogens* status, this is not an essential prerequisite. An assessment of the ambition and comprehensiveness of the relevant respondent state's law and policy on climate change mitigation could also be made in order to determine the extent to which the state is responsible for an omission to regulate greenhouse gas emissions. Domestic courts have already employed a similar approach in establishing responsibility for insufficiently ambitious climate policy at the national level[966].

[963] Data drawn from the Union of Concerned Scientists and the International Energy Agency, 'Each country's share of CO2 emissions' available online at: https://www.ucsusa.org/global-warming/science-and-impacts/science/each-countrys-share-of-co2.html#.W_P9B-j7SUm (accessed 21/11/18); and International Court of Justice, Declarations recognizing the jurisdiction of the Court as compulsory, available at: https://www.icj-cij.org/en/declarations (accessed 21/11/18).
[964] *Ibid*. ICJ Declarations (accessed 21/11/18).
[965] Von Bernstorff (2008) *supra note* 373; and Meron (1991) *supra note* 375, at 81-100.
[966] See for example Urgenda v The Netherlands [2018] *supra note* 262.

ii. Enabling a human rights-based approach

In order to facilitate increased engagement with the international human rights framework by climate-vulnerable SIDS and to lay the foundations for climate change claims to be brought, reform at the international level is urgently called for. The UN General Assembly itself has acknowledged the need for a reform of the international human rights framework and a review is currently scheduled for 2020[967]. Chapter IV outlined a number of the key challenges undermining the effective functioning of the international human rights system, alongside the corresponding reform proposals put forward by the Geneva Academy. In order to tackle the significant global reporting deficit which saw just 17% of the States Parties to the human rights treaties comply fully with their reporting obligations as of 2018 estimates[968], proposals to streamline the multiplicity of burdensome reporting requirements have been made. The Geneva Academy have notably proposed the introduction of consolidated reporting and either a single or clustered state review process[969] over and above previous modest reform efforts by the human rights treaty bodies that included for example simplified reporting procedures but that failed to address the underlying compliance issues.

More radical reform is urgently called for not only to facilitate compliance by the States Parties with the monitoring and reporting requirements mandated by the human rights treaties, but to enable climate-vulnerable states that have not yet ratified the core treaties to do so without concern for the heavy bureaucratic burdens that this may place upon their governmental resources. These streamlining efforts in the international human rights apparatus will need to be accompanied by substantial increases in the funding being made available to the UN human rights bodies. The UN OHCHR has estimated that the allocation for human rights as a core component of the UN mandate accounted for a mere 3.7% of the total regular UN budget in 2018-2019, which in real terms amounted to a cut in allocations across a number of human rights budget lines[970].

In turn, this has meant that UN human rights bodies, including the OHCHR which bears responsibility for many of the human rights capacity building programmes in the South Pacific

[967] UNGA Resolution 68/268 [2014] *supra note* 556.
[968] United Nations Report of the Secretary General, *Status of the human rights treaty body system*, (6 August 2018) UN General Assembly Seventy-third session, A73/309, at 5.
[969] Geneva Academy Report (2018) *supra note* 558, at 7.
[970] United Nations Office of the High Commissioner for Human Rights, *United Nations Human Rights Appeal 2019* [December 2018] HRC/NONE/2018/163, at 24.

region, coordinated by their regional office in Fiji, are increasingly reliant upon voluntary donations to sustain many of their programmes. Given the uncertainty inherent in this type of funding, long-term institutional capacity building projects are likely to suffer with knock-on effects for the availability of human rights mechanisms to climate-vulnerable communities in the future. Indeed, the OHCHR Regional Office for the Pacific has an increasing focus on the human rights impacts of climate change in their work, evidenced by the appointment of two dedicated climate change consultants[971].

Furthermore, to ensure that adequate funding is being allocated to human rights capacity building activities and is tailored to the specific needs of climate-vulnerable groups, two further steps are required. First, climate-vulnerability assessments should be integrated into funding allocation processes[972]. Second, human rights capacity-building activities should receive additional resources and, where appropriate, be directly integrated into climate finance initiatives at the international level, including those of the Green Climate Fund (GCF) which would necessitate closer institutional cooperation and operational harmonisation between the UN human rights and climate finance bodies[973]. The GCF has an environmental and social policy to guide the carrying out of projects and programmes which sets out a commitment to '*promote, protect and fulfil universal respect for, and observance of, human rights for all*'[974] within the guiding principles.

The focus on human rights as guiding principles and safeguards in climate action, rather than as legally binding obligations mirrors the articulation of rights in the Paris Agreement preamble whereby States Parties should '*respect promote and consider*'[975] rights in taking steps to address climate change. The framing of rights in this way is problematic both legally because the enforceability of human rights is undermined, and in procedural justice terms because access to justice is an important and neglected component of international climate law and policy. The integration of human rights capacity building activities into climate finance programmes would enable these activities to be effectively channelled into existing climate change adaptation projects in the South Pacific region and should be done in cooperation with

[971] United Nations Development Programme Jobs, 'Human Rights and Climate Change consultant - OHCHR Regional Office of the Pacific climate strategy for the Pacific' available at: https://jobs.undp.org/cj_view_job.cfm?cur_job_id=83880 (accessed 12/04/19).
[972] Venn (2017) *supra note* 292, at 340.
[973] *Ibid.* Venn (2017), at 337-338.
[974] Green Climate Fund, *Environmental and Social Policy* (2018) GCF/B.19/43 Decisions of the Board – nineteenth meeting of the Board, 26 February – 1 March 2018, at 7.
[975] Paris Agreement [2015] *supra note* 16, Preamble.

UN and regional human rights bodies, including the OHCHR and the Pacific Community Regional Rights Resource Team.

iii. Responding to climate loss & damage

The climate justice priorities identified at the regional and national levels, in particular the need to address increasing climate loss and damage and the barriers to state engagement with international claims mechanisms, call for a concerted response at the international level. Existing climate policy discourse, notably including the COP24 decision on long-term climate finance adopted in 2018[976], evidences a continuing focus on building commitment to increase financial support for developing countries in their adaptation and mitigation efforts. The participation of private sector actors is similarly a key focus of international efforts to reach climate finance targets[977]. The voluntary funding pledges however continue to fall far short of the USD 100 billion a year by 2020 pledge made by States Parties at COP16 in Copenhagen[978], with Green Climate Fund estimates of the total pledges announced amounting to only $10.3 billion[979].

Moreover, climate finance under the Green Climate Fund is channelled into pre-determined mitigation and adaptation projects, often via intermediary organisations and UN bodies, rather than allocated directly to the relevant government departments. As one national government interviewee highlighted, where a national implementing entity for climate finance has not yet been established or accredited, obtaining the funds entails '*having to pass through a number of implementing agencies […] and those implementing agencies they have their own rules, they have their own policies […] so the funds get cut every time you pass through different agencies*'[980]. In light of the significant and persistent shortfall in voluntary climate finance pledges, coupled with the bureaucratic hurdles associated with accessing those funds, existing climate finance processes are inadequate for the purpose of addressing climate loss and damage

[976] UN Framework Convention on Climate Change, COP24 Decision -/CP.24 'Long-term climate finance' (15 December 2018) (Advance unedited version), Para. 9(b).
[977] *Ibid.* Decision -/CP.24, Para. 11.
[978] UN Framework Convention on Climate Change, *The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Longterm Cooperative Action under the Convention* (2010) Decision 1/CP.16 (FCCC/CP/2010/7/Add.1), at Para.98.
[979] Green Climate Fund, Resource mobilization, available at: https://www.greenclimate.fund/how-we-work/resource-mobilization (accessed 24/01/2019).
[980] Interview with National Government Employee (2016).

effectively. The rising economic and non-economic losses and damages caused by climate change impacts in SIDS outlined in the introduction gives rise to an increasingly urgent need to put in place effective legal mechanisms to provide recourse to justice and directly accessible compensation.

The establishment of a compensation fund to address the climate loss and damage being suffered by SIDS under the auspices of the UNFCCC has been called for by Adelman[981] and others[982]. These proposals would see a compensation mechanism for climate loss and damage established on corrective justice grounds which could be funded either by levies on the largest GHG emitters, through carbon taxes or through the proceeds of carbon trading schemes[983]. The exclusion of both liability and compensation for loss and damage by the States Parties in the decision adopting the Paris Agreement[984] however is evidence of the continuing political resistance to the inclusion of any entitlement to compensation in the UNFCCC regime, even if not based upon a liability model.

The role of the Warsaw International Mechanism for Loss and Damage of the UNFCCC similarly remains focused upon guidance, information gathering and facilitative support[985], as opposed to on compensation or recourse to justice. As a consequence, the establishment of a UNFCCC compensation mechanism for climate loss and damage remains, in my view, unlikely in the immediate future and, in light of the increasing economic and non-economic loss and damage being suffered by SIDS, the focus of the international community is better placed on enabling rights-based responses.

Increasing the funding available for human rights capacity building enables further engagement with the human rights treaties and should include a particular focus upon the accessibility of international complaints mechanisms, particularly the UN treaty body mechanism and the ICJ. In Chapter III the benefits of invoking state responsibility claims for breaches of human rights obligations at the international level, including the contingent duty to make reparation for any

[981] Adelman (2016) *supra note* 90.
[982] See for example Rosemary Lyster, 'A fossil Fuel-Funded Climate Disaster Response Fund under the Warsaw International Mechanism for Loss and Damage Associated with Climate Impacts' (2015) *Transnational Environmental Law* 4(1): 125-151.
[983] Adelman (2016) *supra note* 90.
[984] UNFCCC Decision 1/CP.21, *supra note* 133, Paragraph 51.
[985] UN Framework Convention on Climate Change, Decision 3/CP.18 *Approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change to enhance adaptive capacity* (8 December 2012) FCCC/CP/2012/8/Add.1.

damage caused[986], were outlined. By focusing on rights-based responses to climate loss and damage dual benefits are offered by, on the one hand, providing recourse to compensation and other appropriate reparations in respect of state responsibility claims, and on the other, providing additional avenues of legal recourse to individuals and groups. Rights-based approaches offer the additional advantage of a human lens through which to analyse loss and damage and to respond in particular to non-economic loss and damage, an area that has been flagged as requiring further work by the UNFCCC[987] and that proves difficult to quantify in simple monetary terms. A clear focus on those groups facing the severest threats from climate displacement and other climate change impacts, whose vulnerability to those impacts immediately jeopardises their continued enjoyment of fundamental rights is needed to guide the development of loss and damage responses at the international level.

iv. Strengthening procedural recognition of climate vulnerable SIDS

The recognition of SIDS and their unique needs and climate vulnerabilities in international law and policy making on climate change is an important part of the response and is called for in line with the procedural climate justice aims of securing the equal participation of all affected parties in decision-making[988]. The banding together of SIDS both regionally in the South Pacific through organisations including the Pacific Community and Secretariat of the Pacific Regional Environment Programme (SPREP) and internationally through organisations such as the Alliance of Small Island States (AOSIS), as explored in Chapter V, has already played an important part in raising awareness and increasing the political consideration of the unique needs of climate vulnerable SIDS. It is further encouraging to note the attention to these issues garnered by the Fijian Presidency of COP23 in Bonn and the subsequent launch of both the Talanoa Dialogue and the Talanoa Call for Action with their focus upon increasing ambition for compliance with the 1.5°C threshold[989].

[986] See ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001) *supra note* 368, Article 31.
[987] UNFCCC Decision 3/CP.18, *supra note* 1008, at Para 7.
[988] See discussions of procedural justice and recognition in Chapter II.
[989] COP23 Fiji, *Statement by the Prime Minister of Fiji and President of COP23 on the Outcome of COP24* (19 March 2019) available online at: https://cop23.com.fj/statement-by-the-prime-minister-of-fiji-and-president-of-cop23-on-the-outcome-of-cop24/ (accessed 25/04/19).

The procedural recognition of the needs of climate vulnerable SIDS and the unique contributions to the development of climate responses offered by their communities however requires additional attention. The Paris Agreement contains a limited recognition of, notably, the role that '*traditional knowledge, knowledge of indigenous peoples and local knowledge systems*'[990] should play in informing the development of country-driven approaches to climate adaptation. The single reference to traditional knowledge in the Agreement is insufficient and there is a need to base the procedural recognition of climate vulnerable groups firmly upon rights. In order to provide for greater recognition and procedural climate justice, the integration of cultural rights, the right to self-determination and indigenous rights into the legally binding provisions of the climate treaties is called for, alongside procedural climate rights such as the right to participate in decision-making processes. The climate treaties' emphasis upon public access to information[991] provides a starting point, however, in the absence of any legally binding procedural provisions on participation and access to justice, or indeed, binding substantive human rights obligations, recognition in legal terms remains inadequate.

Separately strengthening international support for human rights capacity building with a specific focus on socio-economic and procedural rights would begin to address these lacunae within the climate change regime. The comparative lack of engagement with socio-economic and cultural rights instruments and their complaints mechanisms at the global level[992] including in the South Pacific region, explored in Chapter IV, limits the extent to which these rights can be relied upon by climate vulnerable states and individuals. Building capacity for engagement with those human rights instruments giving rise to relevant procedural duties, including, for example, the right to an effective remedy[993], would similarly provide a more solid legal foundation for the exercise of procedural rights reinforcing the recognition of climate vulnerable SIDS and their peoples.

[990] Paris Agreement [2015], *supra note* 16, Article 7(5).
[991] See for example The United Nations Framework Convention on Climate Change [1992] *supra note* 42, Article 6(a)(ii); and Paris Agreement [2015] *supra note* 16, Article 12.
[992] According to the UN Treaty Depositary as of April 2019 the Optional Protocol to the ICCPR has 116 States Parties, while the Optional Protocol to the ICESCR has just 24 States Parties – UN Depository, Status of Treaties, Chapter IV: Human Rights, available at https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&clang=_en (accessed 30/04/19).
[993] ICCPR [1966] *supra note* 314, Article 2(3)(a).

III. Laying the foundations of climate justice at the national level

i. Development of human rights complaints procedures

At the national level, strengthening human rights frameworks and their enforceability would provide greater access to climate justice for the groups and individuals most vulnerable to climate change impacts, including climate-induced displacement. In the face of increasingly intense tropical cyclones, storm surges and sea-level rise, communities in the South Pacific region are increasingly likely to experience temporary displacement following disasters[994] and, in the lowest-lying areas, to face permanent relocation as a policy response to long-term climate threats[995]. Climate-induced displacement presents serious risks for the enjoyment of fundamental rights. The UN Special Rapporteur on the Rights of Internally Displaced Persons has underlined in previous reports that there exists a strong relationship between access to human rights and exposure to displacement risks, and in turn, that internally displaced persons themselves face greater risks to the enjoyment of their rights as a result of '*the adverse material, social and psychological consequences*'[996] associated with being displaced.

The need to plug gaps in human rights protection for climate displaced individuals and vulnerable groups is consequently all the more urgent. The lack of recognition for environmentally displaced persons in the Convention Relating to the Status of Refugees[997], is mirrored in the lack of provision for the rights of displaced persons in the Paris Agreement or UNFCCC. By providing for improved recourse to human rights complaints avenues, along with access to legal information and advice on the human rights impacts of climate change, these lacunae can begin to be filled.

The data presented in *Figures 3, 4* and *5* in Chapter V however evidences a relatively low number of ratifications of international human rights treaties and protocols by national governments in the South Pacific. It should be noted that this number is nevertheless steadily

[994] See for example UN Women Asia and the Pacific 'Climate change, disasters and gender based violence in the Pacific' (2014) available at: http://asiapacific.unwomen.org/en/digital-library/publications/2015/1/climate-change-disasters-and-gender-based-violence-in-the-pacific#view (accessed 21/11/18), at 2.
[995] See for example Fiji Ministry of Economy, 'Fiji's National Adaptation Plan Framework' (October 2017) Suva, Fiji.
[996] UN Special Rapporteur on the Rights of Internally Displaced Persons, 'Protection of and assistance to internally displaced persons' Note by Secretary-General (2011) UN General Assembly, Doc no. A/66/285, at 10
[997] Convention Relating to the Status of Refugees [1951] *supra note* 46, Article 1.

increasing and that Fiji and Vanuatu are two of the leaders in the region in terms of their engagement with the international human rights framework. Both countries have further embedded fundamental rights provisions in their national constitutions[998]. There nevertheless remain gaps with respect to the enforceability of human rights in the absence of recourse to the complaints procedures before the UN treaty bodies, or a Pacific regional human rights body.

At the national level, the Human Rights and Anti-Discrimination Commission in Fiji is an established body with the capacity to receive complaints submitted by 'any person'[999] or 'a representative complaint on behalf of other persons with a similar cause of complaint'[1000] which opens the door to human rights actions by individuals or groups of concerned citizens supported by civil society groups, as has already been proven to be a successful model for climate change claims[1001]. The opportunity to submit complaints to a specialised national human rights body represents an important yardstick for measuring access to justice in respect of rights-based claims.

The limited engagement with the inter-state mechanisms can be explained on the one hand by the technical capacity and funding constraints facing many South Pacific governments[1002] that are being further exacerbated by the need to respond to climate-related disasters[1003], and on the other, the operational challenges facing the international human rights system including duplication, overlapping obligations, and funding constraints, explored in Chapter IV Section II. With current proposals for reform of the human rights system at the international level, including the streamlining of reporting requirements[1004], and with greater capacity-building support at the national level, there is nevertheless the potential to overcome these barriers to engagement. As one regional organisation employee observed in relation to the issue of ratifications of international human rights instruments, '*we've always had the excuse of the challenge of ratifying more means more reporting*'[1005] and that '*it's mostly capacity and resources and because of that then the political will towards ratifying it kind of wears off*'[1006].

[998] See Constitution of the Republic of Vanuatu [1980], *supra note* 846, Chapter 2 – Fundamental Rights and Duties; and Constitution of the Republic of Fiji [2013], *supra note* 826, Chapter 2 – Bill of Rights.
[999] Republic of Fiji Islands Human Rights Commission Decree [2009] *supra note* 854, S.27(1).
[1000] *Ibid.* Fiji Human Rights Commission Decree [2009], S.27(1).
[1001] See for example Urgenda Foundation v The Netherlands [2018] *supra note* 262.
[1002] UNDP Pacific Handbook on Human Rights Treaty Implementation (2012) *supra note* 777, at 2.
[1003] See for example UN General Assembly, National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council Resolution 16/21 – Vanuatu, A/HRC/WG.6/18/VUT/1 (2013), Paragraph 94 referring to the need for assistance in climate adaptation and disaster risk reduction to protect the rights of climate-vulnerable groups.
[1004] Geneva Academy Report (2018) *supra note* 558.
[1005] Interview with Regional Organisation Employee (2016).
[1006] *Ibid.* Interview with Regional Organisation Employee (2016).

The articulation of the potential benefits of inter-state mechanisms as offering an additional avenue of recourse for climate change claims could also encourage further engagement with the optional protocols and, more specifically, lead to the adoption of new declarations accepting the jurisdiction of the committees to receive inter-state complaints. Even if the treaty bodies offer purely declaratory statements on the relationship between human rights obligations and climate change, this has normative value as a statement by an expert UN body which could be used to bolster both future claims before other courts, and the advancement of international legal doctrine in this relatively under-developed area.

In Vanuatu, although the government does have a Human Rights Committee responsible for coordinating the human rights reporting in line with international treaty obligations, a human rights body competent to receive individual complaints has yet to be established. This has the effect of confining human rights actions to either individual complaints before the UN treaty bodies, although only where both the relevant treaties and additional protocols have been ratified, or to constitutional claims before the national courts. Bulu underlines that hearing human rights claims represents '*one of the most important constitutional functions*'[1007] of the Vanuatu Supreme Court. Claimants may also invoke relevant provisions of international treaties that have been ratified by the government, as one interviewee observed in relation to the national courts "*they're already applying it, especially for the Convention on the Rights of the Child and also CEDAW*"[1008] as the two most widely ratified international human rights treaties in the South Pacific region, as demonstrated in *Figure 3* in Chapter V.

Extending the scope of human rights protections and recourse to complaints processes is necessary to provide effective access to climate justice, particularly in respect of the ICESCR provisions, the enjoyment of which are likely to be adversely affected by climate-induced displacement and other climate change impacts, notably, the right to the highest attainable standard of health[1009], the right to an adequate standard of living[1010], and the right to take part in cultural life[1011]. The data analysed in Chapter IV identified the ICESCR as having received the third-lowest number of ratifications in the region, while the Optional Protocol to ICESCR providing for the complaints procedures has failed to garner any ratifications from the 14

[1007] Bulu (1988) *supra note* 838, at 230.
[1008] Interview with Government Employee (2016).
[1009] ICESCR [1966] *supra note* 314, Article 12.
[1010] *Ibid.* ICESCR [1966] Article 11.
[1011] *Ibid.* ICESCR [1966] Article 15.

Pacific SIDS analysed[1012]. A contributing factor to this may be the perception that the rights need to be capable of being implemented in their entirety prior to ratification of the relevant international instruments, however the ICESCR recognises in Article 2 that each State Party should take steps in line with 'the maximum of its available resources'[1013] and that the full realisation of the rights may be achieved progressively.

Where capacity building support for human rights is made available, for example through the Office of the High Commissioner for Human Rights Pacific Office, and through the Pacific Community Regional Rights Resource Team, a stronger focus on complaints mechanisms and recourse to socio-economic rights is called for to facilitate stronger engagement with ICESCR as a neglected treaty in the region. Similarly, existing national human rights bodies could strategically focus on raising awareness of and engaging the authorities with the more neglected treaties. National human rights committees already play a key role in raising awareness of climate-related rights impacts and concerns to the international level through the processes of treaty reporting and Universal Periodic Review. The role these national reports can play in raising awareness of the rights impacts upon particularly climate-vulnerable communities however is only part of the picture and must be accompanied by a strategic focus, backed by budgetary allocations, on providing recourse to justice to these groups, particularly those at greatest risk of climate-induced displacement. The ICESCR has been used as an illustrative example, however the strategic priorities on recourse to rights mechanisms will necessarily need to be varied in accordance with the existing national bodies and laws in place, as well as the treaty mechanisms available in each country.

ii. Facilitation of access to information & access to justice

It should be acknowledged that many of the most climate vulnerable groups are likely also to suffer from socio-economic marginalisation[1014] and may face significant structural barriers in respect of their engagement with national human rights institutions. These structural barriers should receive recognition within the relevant legal frameworks at the national level and additional assistance should be provided for through targeted legal aid and pro-bono advice

[1012] UN Treaty Series, Status of Treaties, Chapter IV Human Rights, 3. a Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Status at 29/11/18).
[1013] ICESCR [1966] *supra note* 314, Article 2.
[1014] IPCC WGII Contribution to AR5 (2014) Summary for Policymakers, *supra note* 176, at 6.

services. Moreover, the recognition of the legal standing of trusted gatekeepers who may act as nominated representatives on behalf of these individuals and groups is called for, including, for example, provincial or village council representatives, or trusted NGO employees working with communities directly. The appointment of such representatives would itself need to be subject to regulated safeguards to ensure that procedural justice aims are complied with in practice, for example ensuring that their appointment would be subject to the full and informed consent of the individuals or groups they claim to represent and that they have invited participation from all affected parties in preparing any submissions. As with touring judges, touring human rights consultants could report back to national committees with these groups concerns, which, in turn, can be fed into international treaty reports and national policy responses.

Strengthening engagement with human rights and with the relevant treaty provisions will help to facilitate access to climate justice. Procedural climate justice aims are also served by existing legal provisions on access to justice and access to information which could be applied in the context of climate change. The Fijian constitution contains both duties on the part of the state to provide legal aid and restricts the fees that can be charged by the courts to those that are reasonable and will '*not impede access to justice*'[1015]. Furthermore, the constitution contains access to information provisions in Article 25 which provide for a right of access to '*information held by another person and required for the exercise or protection of any legal right*'[1016] as well as to information held by public offices[1017]. Relevant information in the context of climate change impacts may for example include disaster management plans, relocation strategies and any data collected with respect to the projected socio-economic risks or costs.

The Vanuatu Right to Information Act [2016] is similarly important in providing for the aims of '*empowering and educating the public to understand and act upon their rights to information*'[1018] and to '*increase public participation in governance*'[1019] . The Act also recognises the protection of the environment as a key factor to be taken into account by the Information Commissioner when determining whether the release of the information requested

[1015] Constitution of the Republic of Fiji [2013], *supra note* 826, Article 15(11).
[1016] *Ibid.* Constitution of Fiji [2013] Article 25(1)(b).
[1017] *Ibid.* Constitution of Fiji [2013] Article 25(1)(a).
[1018] Republic of Vanuatu Right to Information Act [2016], Act no. 13 of 2016, S.1.
[1019] *Ibid.* Vanuatu Right to Information Act [2016], S.1.

is in the public interest[1020]. This could be used at the national level to seek access to material including national GHG emissions data, relevant reports and information not already in the public domain on government disaster and relocation strategies to gauge the extent to which rights safeguards for particularly climate vulnerable groups have been provided for. It may also be used to gain access to relevant information on the development of human rights frameworks at the national level e.g. any information being gathered on the human rights impacts of climate change for treaty or UPR reports. In light of Vanuatu's submissions in the second cycle UPR report recognising the particular climate vulnerability of women and children due to '*their unique engagements in farming, forestry, fishing, and food/water*'[1021] and the government's undertaking to '*include these vulnerable groups in trainings and policy formulation leading up to the UNFCC COP*'[1022], it would be reasonable to assume that data is being collected regarding the particular impacts on these groups and on their participation in climate decision-making.

The utilisation of civil society organisations' networks, and existing community discussion fora such as village councils for the purpose of information sharing and coordinating legal efforts is called for. This could for example include the preparation of class action claims and identification of co-claimants with similar grievances with important implications for future climate litigation. The example of the petition under investigation by the Philippines Commission on Human Rights illustrates the significant role that civil society groups, in that case Greenpeace Southeast Asia, the Philippine Rural Reconstruction Movement, and the Philippine Alliance of Human Rights Advocates among others, can play in bringing together claimants and facilitating recourse to complaints mechanisms[1023].

The broadly drafted procedural requirements recognising the rights of '*any person*'[1024] to bring a complaint before the Fijian Human Rights and Anti-Discrimination Commission, including '*a representative complaint on behalf of other persons with a similar cause of complaint*'[1025] in respect of alleged human rights infringements or discrimination render similar claims in Fiji more foreseeable. A similarly broad provision on standing is embedded in the Fiji Environment Management Act which in S.54(1) provides that '*Any person may institute an action in a court*

[1020] *Ibid.* Vanuatu Right to Information Act [2016] S.38(3)(i).
[1021] Vanuatu UPR National Report (2013) *supra note* 1026, at 15.
[1022] *Ibid.* Vanuatu UPR Report (2013), at 15.
[1023] Greenpeace Southeast Asia (Philippines) et al. v Chevron et al., *Petition Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change*, Republic of the Philippines Commission on Human Rights, Case No.: CHR-NI-2016-0001.
[1024] Republic of Fiji Islands Human Rights Commission Decree [2009] *supra note* 929, S.27(1).
[1025] *Ibid.* Fiji Human Rights Commission Decree [2009], S.27(1).

to compel any Ministry, department or statutory authority to perform any duty imposed on it'[1026] which enables civil society actors and individuals to initiate legal proceedings in respect of non-compliance with environmental provisions.

The broadening of locus standi rules to permit cases brought before the courts by individuals and civil society groups represents a significant factor in securing access to justice in legal terms. The strengthening of existing legal aid provisions and a renewed focus upon the specific needs of the most climate-vulnerable groups is further called for. A procedural climate justice framework represents a crucial tool in tackling barriers to legal action, by providing for the recognition of the entrenched structural barriers and marginalisation that exacerbate certain groups' vulnerability to climate change impacts, as well as their ability to access legal processes. This section has proposed targeted legal aid and pro bono advice services for climate-vulnerable communities which could be delivered in tandem with existing civil society and government projects, particularly in respect of geographically remote communities.

iii. Recognition of traditional knowledge & procedural rights of affected communities

The development of solutions to many of the challenges facing the development of an effective, rights-based climate justice framework at the national level will be significantly expedited by the targeted policy responses by the international community discussed in S.III(i) above. At the national level, there nevertheless remain important corresponding steps to be taken in enhancing the availability of rights-based protections to climate vulnerable communities and in effectively addressing persistent gaps in procedural climate justice. An important facet of procedural climate justice in this respect is the continuing enhancement of the legal and institutional recognition of climate vulnerable groups and local communities in decision-making processes at the national level.

The Fiji National Adaptation Plan Framework makes reference to traditional knowledge in the guiding principles, holding that adaptation interventions should be '*pro-poor*'[1027] and seek to '*improve the agency and knowledge (including indigenous or traditional knowledge) of low-*

[1026] Fiji Environment Management Act [2005] Act No. 1 of 2005, S.54(1).
[1027] Fiji National Adaptation Plan Framework (2017) *supra note* 1018, at 9.

income and otherwise disadvantaged groups'[1028]. The value of traditional knowledge is provided for under the core policy principles of the National Climate Change Policy alongside '*scientifically and technically sound information*'[1029], as well as in the adaptation strategies as an integral facet of sustainable adaptation technologies and systems[1030]. Similarly, the Vanuatu Climate Change and Disaster Risk Reduction Policy includes commitments to collect, record and incorporate traditional knowledge in addressing climate change and disasters[1031]. The acknowledgement of the significance of traditional knowledge in responding to climate change in existing national policy strategies opens the door to a more explicit consecration of the rights of traditional knowledge holders to contribute to climate policy, in particular procedural entitlements to participate in consultations on new adaptation strategies, which should be embedded within national legal frameworks.

The role of custom and traditional dispute settlement in the peaceful resolution of disputes within communities in the face of climate impacts should similarly be recognised and integrated into climate policy responses, both at the regional and national levels. Indeed, as customary law and practices are already embedded in national law in both Fiji[1032] and Vanuatu[1033] and the important role of traditional dispute settlement processes is widely embraced by national actors, the foundations for formal recognition are already laid. Encouraging further cooperation between custom leaders, community dispute-settlement bodies and the formal legal structures of the state in the context of climate vulnerability and rights is of great significance in ensuring the procedural climate rights of communities are provided for.

The integration of customary law and traditional knowledge holder rights into climate responses to displacement is particularly important in light of the prevalence of custom ownership of land in the South Pacific region which will serve to influence the availability of land for the purposes of relocating communities affected by climate change impacts. Customary dispute settlement, including negotiations between custom rights holders and the government will be necessary to enable those temporarily displaced to be accommodated nearby and those permanently displaced to be granted the agency to choose where to relocate

[1028] *Ibid.* Fiji National Adaptation Plan Framework (2017), at 9.
[1029] Fiji National Climate Change Policy (2012) *supra note* 858, at 20.
[1030] *Ibid.* Fiji National Climate Change Policy, at 23.
[1031] Vanuatu Climate Change and Disaster Risk Reduction Policy [2015] *supra note* 811, at 4-5.
[1032] See for example Fiji Native Lands Act [1978] *supra note* 834, S.3.
[1033] See for example, Constitution of the Republic of Vanuatu [1980] *supra note* 846, Article 95(3).

to. In light of the cultural significance of land, it is important that displaced communities are free to relocate to areas where custom and cultural practices can be supported in the future.

Civil society organisations and government bodies have an important role to play in promoting the continued recognition of the needs and unique contributions of communities at both the national and regional levels of governance. By integrating human rights, particularly cultural and procedural rights, into their climate change projects and programmes, and by harmonising their activities and expertise in the human rights and climate change fields, benefits can be attained through the sharing of technical expertise along with the pooling of resources. Institutional harmonisation of this nature is already occurring with great success in the environmental field, evidenced by the Vanuatu Ministry of Climate Change, discussed in Chapter VI, Section III (ii). The Vanuatu National Advisory Board on Climate Change and NGO cluster system similarly already invite the participation of civil society groups in meetings with relevant policy makers and this is indicative of an openness to contributions from a variety of groups and a recognition of the value of those contributions. By formalising the participation rights of civil society organisations, particularly grassroots local groups and custom groups, in climate policy-making processes, the enduring and effective recognition of communities can be secured.

IV. Conclusion

The as yet unproven potential of inter-state claims before the UN treaty bodies, along with the analysis of the three criteria of availability of remedies for loss and damage, public access to the resulting decision and statement of legal principle, and the ability to meaningfully advance international legal doctrine, have revealed claims before the ICJ as those offering the greatest advantages in providing recourse to climate justice. Four potential respondent states for contentious proceedings have further been identified, namely, Canada, Germany, Japan and the UK, based on the three criteria of responsibility for global greenhouse gas emissions, per capita emissions, and their pre-existing declarations accepting the compulsory jurisdiction of the ICJ.

This metric however cannot fully incorporate all of the important contextual factors that will need to be considered by SIDS governments in deciding which inter-state claims to bring. These factors may for example include pre-existing diplomatic and donor relationships such as those forged by the Compacts of Free Association between the United States, the Federated

States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau[1034], which could be jeopardised by the initiation of inter-state claims.

Strategic planning and information sharing at the regional level is required for the purpose of exploring potential climate claim options and the utilisation of Pacific regional fora to identify which states are best placed to pursue those claims. This process would need to be informed by a technical legal assessment of the availability of dispute settlement avenues, the extent to which human rights obligations are embedded and the vulnerability of their populations to climate change impacts. The use of inter-state claims should however be complemented by a strengthening of access to human rights obligations and mechanisms for vulnerable groups and individuals at the sub-national level.

For those communities at greatest risk of displacement as a result of climate change impacts, the accessibility of human rights obligations is crucial owing to the persistent lacunae in legal protection they face. A number of steps have been proposed in the present Chapter to further the development of a human rights-based approach to climate justice, including by strengthening the procedural recognition of climate vulnerable groups in decision-making processes and increasing access to justice in the face of climate change impacts. All of these facets will make an important contribution to the attainment of climate justice for SIDS and their peoples in the future.

[1034] Philip G. Dabbagh, 'Compacts of Free Association-type Agreements: A Life Preserver for Small Island Sovereignty in an Era of Climate Change?' (2018) *Hastings Environmental Law Journal* 2(2).

Chapter VIII - Conclusion

I. Key findings

The present thesis set out to answer two core research questions, namely:
1) What are the defining features of a climate just approach to law and policy making for South Pacific SIDS?
2) How can international human rights law provide greater recourse to justice to climate vulnerable SIDS and their peoples?

The overarching aim to develop an empirically informed climate justice framework, grounded in political theory and human rights law, to shape future law and policy making decisions for the benefit of climate vulnerable SIDS and their peoples has been achieved. There were two key branches of findings for the first research question defining a climate just approach to law and policy making for South Pacific SIDS. The first of these branches identifies the core tenets of a climate justice framework for RQ1, informed both deductively by the theoretical and doctrinal analysis, and inductively by the empirical data gathered during the case study. The four core tenets of this framework are distributive climate justice, procedural climate justice, human rights, and practical challenges, including funding and institutional capacity-building. Each of these four tenets, along with the doctrinal analysis and empirical data underpinning them, are expanded upon in S.III below.

The second category of findings for RQ1 are comprised of steps to further embed this climate justice framework at the national level in climate vulnerable SIDS. To this end, the need to strengthen capacity-building for individual access to rights, to plug gaps in legal protection for climate vulnerable groups, including through recourse to both substantive and procedural rights, and the opportunity to submit complaints to a national human rights body were identified. Proposals included the strategic prioritisation of budget allocations for neglected climate-relevant treaties such as ICESCR, touring human rights consultants, targeted pro bono advice, and strengthened rights-focused legal aid services delivered in tandem with existing government and civil society programmes for geographically remote climate vulnerable communities. The national level findings also reinforced the need to embed and acknowledge the role of traditional knowledge holders, civil society and community groups in law and

policy-making processes on climate change, following existing examples of good practice from the Fiji National Adaptation Plan Framework, Vanuatu Climate Change and Disaster Risk Reduction Policy, and the Vanuatu National Advisory Board on Climate Change. Similarly, the role of traditional customary dispute settlement processes have been identified as an important component of climate just approaches at the national level, particularly with respect to climate-induced displacement and the impacts this will continue to have upon customary land tenure, community structures, and the enjoyment of cultural rights.

There were two core branches of findings for the second research question (RQ2), the first identifies the most suitable avenues of recourse in international human rights law to promote compliance by States Parties and to inform responses to climate loss and damage. The second identifies six key policy recommendations at the international level to facilitate increased human rights engagement and to enable SIDS to utilise these avenues of legal recourse. The benefits and opportunities of international human rights law have been explored in detail in Chapter III and overcoming legal and operational challenges addressed in Chapter IV and in the regional and domestic contexts in Chapters V and VI.

The most suitable avenues of legal recourse can be split into two headings, the first of which comprise the most suitable fora for inter-state claims capable of responding to distributive climate justice goals and providing remedies for climate loss and damage at the global level. These fora are explored in detail in S.IV 'Legal avenues with the greatest potential of securing climate justice' Sub-Section ii. below and are identified based on the three criteria of the availability of remedies for loss & damage, public access to the resulting decision, and the ability to meaningfully advance international legal doctrine to address climate change. The ICJ was compared with the Permanent Court of Arbitration and the UN Human Rights Treaty Bodies and was accordingly identified as fulfilling these criteria to the greatest extent and having already been identified by Palau as the appropriate forum from which to seek an opinion. Four potential respondent states were also identified based on their total global and per capita emissions, as well as the existence of relevant declarations accepting the jurisdiction of the ICJ, namely, Canada, Germany, Japan, and the UK. The thesis however does not provide a blueprint for specific inter-state claims by SIDS as this will depend upon many contextual and strategic national interest and capacity questions for governments.

The second group of suitable avenues of recourse are comprised of those best suited to encouraging compliance by States Parties with their obligations in international human rights law in the face of climate change impacts, including through the use of soft law approaches. The special procedures of the UN Human Rights Council including country visits, consultations, thematic reports, working groups, and communications under the purview of independent human rights experts represent the first of these avenues. The work of the UN Special Rapporteur on Human Rights and the Environment is particularly significant in encouraging individual state compliance with human rights obligations in the context of climate change by utilising the scope of their mandate to consult, investigate and communicate directly with governments. This use of soft law and political influence has shown itself to be successful with respect to specific mandates and country situations in the past[1035]. They will also continue to play a significant role in developing international legal doctrine, including through thematic reports such as those already referenced on climate change which embed procedural climate rights including access to effective remedies[1036] into the international policy discourse guiding state responses.

The complaints and reporting mechanisms of the UN Human Rights Treaty Bodies represent the second of the soft law rights avenues with the potential to contribute to the advancement of international legal doctrine on loss and damage responses and to encourage state compliance with rights in responding to climate change. The specialist expertise of the nine committees, including on the rights challenges already faced by groups that are particularly vulnerable to the adverse impacts of climate change, including women, children, and persons with disabilities[1037], is extremely valuable in informing the construction of just climate responses. The reporting processes taking place provide an important information-gathering exercise to enable the identification of key rights-related vulnerabilities that can then be acted upon by both national policy makers and international organisations in the development of their responses to climate loss and damage. The case law of the UN Human Rights Treaty Bodies can further serve an important role in developing human rights doctrine to plug lacunae in protection for climate vulnerable groups and individuals, for example through the existing development of positive obligations in the face of imminent threats to life in the KNLH v Peru

[1035] Piccone (2014) *supra note* 491.
[1036] Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (2016) *supra note* 391.
[1037] See UN Women (2014); and Smith et al. (2017) *supra note* 12.

case[1038]. These positive obligations have notably been developed in the face of circumstances involving epidemics, malnutrition[1039], deteriorating environmental conditions[1040], and the effects of rising sea-levels on access to clean water[1041], all of which are either directly or indirectly linked to climate change impacts.

Finally, the second branch of findings for RQ2 comprise the six key policy measures necessary to enable an international human rights law-based approach to climate change for SIDS. These proposed policy measures are informed by both the desk-based doctrinal research of international law and policy reports and by the empirical data on practical challenges and engagement with human rights gathered during the case study. Accordingly, the streamlining of human rights reporting requirements to enable greater engagement and allay institutional capacity concerns by for example introducing a single review process for climate vulnerable states has been proposed, together with substantial increases in funding for human rights capacity building activities such as those of the OHCHR Pacific regional office. The integration of climate vulnerability assessments into funding allocation processes and the operational and institutional harmonisation of the human rights capacity-building and climate finance initiatives of the Green Climate Fund have further been proposed to help break entrenched barriers to human rights engagement in the region[1042]. Finally, declarations of acceptance of the jurisdiction of the ICJ and further ratifications of the most relevant human rights treaties and protocols have been proposed for states, alongside strengthened procedural recognition for climate vulnerable groups in international decision-making processes on climate change, particularly those at greatest risk of climate-induced displacement to ensure their needs are appropriately embedded in international law and policy responses developed under the auspices of the UNFCCC and Warsaw Mechanism on Loss & Damage.

II. Originality of the methodological approach

[1038] Human Rights Committee, KNLH v Peru, Communication No 1153/2003 (24 October 2003) UN Doc CCPR/C/85/1153/2003.
[1039] Bridget Lewis, *Environmental Human Rights and Climate Change: Current Status and Future Prospects* (Springer, 2018) at 158.
[1040] Anton and Shelton (2011) *supra note* 485, at 439.
[1041] Human Rights Committee, Teitiota v New Zealand, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016 (7 January 2020) CCPR/C/127/D/2728/2016.
[1042] Venn (2017) *supra note* 292.

Conceptually, this thesis has adopted an interdisciplinary approach, drawing on political theory and law and methodologically it has adopted a mixed methods approach, drawing on doctrinal and primary qualitative research. Such interdisciplinarity and mixed methods approach have enabled a more thorough and grounded analysis of recourse to climate justice for SIDS. The theoretical marriage of an in-depth review of the core elements of the distributive and procedural climate justice frameworks, together with a legal analysis of the capacity of international human rights law to provide recourse to justice to climate vulnerable SIDS and peoples is unique. The existing legal literature examining climate change claims in public international law, human rights, and state responsibility does not apply a climate justice framework or engage with the political theory literature[1043], with the limited exception of Atapattu's work which briefly acknowledges and outlines the relevance of the environmental and climate justice frameworks in developing rights-based responses to climate change, though it does not identify the most relevant aspects or apply these to an in-depth analysis or case study[1044]. Similarly, the existing political theory literature on climate justice, although engaging with human rights at face value, does not examine the relevant legal frameworks or the operational and enforceability challenges associated with the development of rights-based approaches[1045].

As a result, the present thesis fills a gap in both bodies of literature by providing a detailed analysis of the climate justice framework focused around the two core elements of distributive and procedural climate justice, exploring the linkages between this framework and a human rights-based approach, and then proceeding to examine in depth the extent to which international human rights law can provide concrete recourse to climate vulnerable states and peoples. The use of an empirical case study is similarly unique with respect to the existing literature in the field. The South Pacific case study was framed deductively by drawing upon the climate justice framework along with mixed hazard-risk and social constructivist assessments of climate vulnerability in order to identify a region on which to focus the study.

The choice of methods comprised a mixture of desk-based doctrinal research of the relevant regional and domestic law and policy documents and qualitative semi-structured interviews with key stakeholders from UN bodies, Pacific regional organisations, civil society groups, government, and legal practice. The mixed methods approach contributed to a more grounded

[1043] See for example: Humphreys (2012) *supra note* 76; Lefeber (2012) *supra note* 370; McInerney-Lankford (2013) *supra note* 77; Werksman (2013) *supra note* 65; Wewerinke-Singh (2019) *supra note* 67.
[1044] Atapattu (2016), *supra note* 59, at 64-66.
[1045] See for example: Caney (2010) *supra note* 80; Dietzel (2019) *supra note* 81; and Shue (2014) *supra note* 81.

analysis of the existing law and policy frameworks, with stakeholders particularly shedding light upon the challenges that emerge in practice with respect to the procedural climate justice framework, particularly access to justice in light of factors such as institutional capacity, geographic remoteness and funding constraints. These insights from a variety of research participants working in different climate, justice and rights-related fields proved invaluable in inductively informing the identification of the most relevant themes within the distributive and procedural climate justice frameworks, as well as identifying the new theme of practical challenges which will require additional focus in future climate responses.

The empirical data collected also reinforced some of the initial findings and hypotheses of the desk-based doctrinal research, for example on the likely operational challenges of the international human rights framework in light of the burdensome reporting requirements and the lack of engagement with optional protocols providing for complaints mechanisms. The empirical data confirmed the identification of pervasive operational challenges with the international human rights system reporting requirements and provided additional insight into how this may have influenced government decision-making on engagement with the core treaties in the South Pacific region.

Conversely, the empirical data illuminated the way in which additional capacity-building and funding support for engagement with specialised treaties, for example the CRC on the rights of children and the CEDAW on the rights of women, has contributed to increased levels of engagement with those instruments, together with their implementation in national law and policy frameworks. These insights reinforced the core findings of the doctrinal analysis of the human rights frameworks, yet they also raised new challenges which the climate justice framework needed to be adapted to respond to effectively.

The combination of empirical and doctrinal research approaches, together with the inductive re-examination of the conceptualisation of the climate justice framework following the coding of the data enabled the identification of four key themes of distributive justice, procedural justice, rights, and practical challenges, including a further ten sub-themes outlined in Section II below. These climate justice themes are grounded in the lived experiences of stakeholders working in the relevant fields in climate vulnerable SIDS and, as such, offer a foundation for the design of a more grounded and impactful response to climate law and policy making at the international and national scales. The existing law and political theory literature on climate justice does not develop a detailed case study or empirical methods to inform the analysis so

the contribution of this thesis to the field is both unique and significant in terms of its greater potential for policy relevance and impact.

III. Constructing a climate justice framework

The climate justice framework constructed in the present thesis has been informed both deductively by the climate justice literature and inductively by the key themes that emerged through the coding and analysis of the qualitative empirical data gathered over the course of the three-months of fieldwork in Vanuatu and Fiji. In Chapter II the analysis of the political theory literature on distributive justice, procedural justice and corrective justice revealed the need for a pluralistic approach to be developed in order to be capable of informing effective law and policy responses to the multifaceted challenges presented by climate change in SIDS.

The need to go beyond the existing climate justice literature predominantly focusing upon the distributive injustices of climate change impacts was highlighted with reference to the work of Young[1046] and Schrader-Frechette[1047] in advocating for broader conceptualisations of justice and equality that are capable of taking into account the structural barriers faced by vulnerable and marginalised groups in seeking to participate in decision-making processes. The pluralistic approach advocated for by Schlosberg[1048] in the context of environmental justice is consequently applied to the analysis of climate priorities and challenges in South Pacific SIDS in order to guide the identification of the most relevant aspects of distributive and procedural climate justice.

The theme of human rights also emerged strongly as a framework for analysis in the political theory literature on climate justice, for example in the work of Caney[1049], Dietzel[1050], and Shue[1051], as well as in the legal literature, for example in the work of Atapattu[1052] and Wewerinke-Singh[1053]. Human rights have however predominantly been framed as guiding

[1046] Young (1990) *supra note* 167.
[1047] Schrader-Frechette (2002) *supra note* 160.
[1048] Schlosberg (2007) *supra note* 121.
[1049] Caney (2010) *supra note* 81.
[1050] Dietzel (2019) *supra note* 81.
[1051] Shue (2014) *supra note* 81.
[1052] Atapattu (2016) *supra note* 59.
[1053] Wewerinke-Singh (2019) *supra note* 67.

principles in climate action rather than as legally enforceable duties on the part of states, evidenced for example by their framing in the preamble of the Paris Agreement and as social safeguards in climate finance programmes and projects[1054]. This is equally true of many academic commentaries in the literature which have primarily outlined the legal and political hurdles encountered by a rights-based approach to legal recourse or dismissed rights-based obligations in favour of a reliance upon the obligations contained within the UNFCCC framework[1055].

It has been argued in Chapter IV that the legal challenges to a human rights-based approach to climate justice can be overcome by drawing upon the state responsibility framework, the precautionary principle and expanding doctrines of extraterritorial application in order to facilitate improved recourse to justice on human rights grounds. It is further argued that alongside the legal benefits and opportunities of a rights-based approach outlined in Chapter III, there are additional conceptual and normative advantages to be gained from utilising human rights to 'humanise' an otherwise abstract, long-term environmental phenomenon by refocusing attention upon the adverse impacts suffered by individuals and vulnerable groups, in turn, creating impetus for involvement from a broader range of civil society groups, broadening the opportunities for legal recourse, and prompting more ambitious law and policy making on the basis of the rights-based duties of states moving forward.

The development of a rights-based approach to climate change redress finds roots in the core theoretical concepts of distributive, procedural, and reparative climate justice by providing for a wide-ranging framework of substantive obligations in civil and political rights, socio-economic rights, cultural rights and the rights of particularly climate vulnerable groups including women and persons with disabilities, upon which legal claims for climate loss and damage can be based. The right to an effective remedy and rights to participate in the democratic process serve to reinforce the relevance of rights to procedural climate justice. The relationship between procedural climate justice and rights has been further affirmed by the UN Special Rapporteur on Human Rights and the Environment, with a report detailing an express call for inclusive decision-making and access to effective remedies for human rights violations

[1054] Venn (2017) *supra note* 292.
[1055] See for example McInerney-Lankford (2013) *supra note* 77; Aonima and Kumar (2015); and Fa'anunu (2015) *supra note* 98.

resulting from climate impacts[1056]. In providing the basis of an appropriate range of remedies for harm, including restitution, rehabilitation and satisfaction measures, explored in detail Chapter III S.IV. ss.iv, human rights also provide a firm foundation for repairing the moral and intangible climate harms. As Almassi and Burkett highlight in the context of climate loss and damage, this extends beyond compensation to '*contrition and amends*'[1057] and the improvement of '*the lives of the victims*'[1058] more broadly.

The capacity of rights-based approaches to climate justice in responding more effectively to climate loss and damage, including importantly, non-economic losses, serves to further underline the suitability of the pluralistic rights-based approach proposed. As one interviewee outlined, loss and damage comprises '*not only the physical, tangible loss and damage but also the intangible and this is about losing identity, losing important cultural sites, really basic human rights*'[1059] . The rights-based framework provides significant opportunities for the protection of socio-economic and cultural rights under the ICESCR, while Article 1 of the ICCPR affirms 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*'[1060]. These rights offer important sources of recognition and obligation with respect to the increasingly severe climate impacts being faced by SIDS and their peoples, particularly those at greatest risk of being displaced from their homelands.

In Chapter V setting out the findings of the South Pacific case study at the regional level, the two core climate justice themes of distributive and procedural justice were identified as guiding the collection and analysis of the data gathered over the course of the fieldwork. These distributive and procedural themes included sub-themes examining, on the distributive justice side, climate vulnerability and loss and damage. On the procedural justice side, the sub-themes of access to climate information, equal participation in decision-making on climate change, and access to justice in the face of adverse climate impacts were identified. Thirdly, the theme of human rights was identified through the data gathered and codified into the three key sub-

[1056] Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (2016) *supra note* 391.
[1057] Almassi (2017) *supra note* 141, at 205.
[1058] Burkett (2009) *supra note* 143, at 522.
[1059] Interview with National Government Employee (2016).
[1060] ICCPR [1966] *supra note* 314, Article 1.

themes of engagement with the international human rights framework, human rights linkages with climate change, and the enforceability of human rights more broadly.

The three core climate justice and rights themes were accompanied by a third theme of 'practical challenges' which emerged, presenting the data relating to the institutional capacity and funding challenges faced by South Pacific SIDS stakeholders from government, civil society and from communities vulnerable to climate impacts at large that are associated with responding to climate change and accessing rights-based legal recourse. The data on practical challenges has been highly significant in shaping a more critical and informed analysis of the climate justice framework, for example in highlighting the challenges which will first need to be overcome in order for proposals aimed at tackling climate loss and damage and redressing the disproportionate climate burdens borne by climate vulnerable states to be effective. Examples of this from the data include issues around the accessibility of funding, with direct access requiring national implementing entities to be set up following a strict and bureaucratically burdensome accreditation process. One interviewee from national government observed that climate finance bodies '*have their own rules, they have their own policies and the funds get cut every time you pass through different agencies* […] *there's a fee for it, 10% or something like 12% of the actual amount*'[1061] which, in turn, has the effect of creating '*some sort of red tapes and all for actually reaching the country*'[1062].

Another interviewee observed that the focus on capacity building support to this end was a priority in order to '*strengthen the current existing institutions that are actually managing funds*'[1063] in light of the fact that '*minimum international requirements, especially the fiduciary standards in the funds*'[1064] would need to be met in order to gain access to funding sources directly. These observations highlight the need for barriers to access in the field of climate finance to be broken and for alternative loss and damage remedies, for example through compensation awarded by international courts and tribunals, that can be obtained by SIDS governments where funding is not directly available or specific restrictions are applied directing how funds are to be spent which may limit the capacity of national governments to

[1061] Interview with National Government Employee (2016).
[1062] *Ibid.* Interview with National Government Employee (2016).
[1063] Interview with UN Employee (2016).
[1064] *Ibid.* Interview with UN Employee (2016).

respond to the multifaceted and socio-economic context-specific aspects of climate loss and damage at the national level.

Securing adequate responses to climate loss and damage features prominently as a priority in both the qualitative empirical data and the desk-based analysis of law and policy conducted for South Pacific SIDS, which lends weight to the continuing focus on distributive climate justice at the international level, with component aspects of corrective justice in seeking remedies for harm caused. As observed by one national government employee '*where finance can be sourced from […] the responsibility of funds and mechanisms to provide that kind of finance, those are all high on Vanuatu's agenda for loss and damage*'[1065]. It is however important to note that the distributive justice theme was far from the only or even the majority climate justice theme emerging from the case study. Procedural climate justice themes of access to justice and participation in decision-making represented equally significant considerations.

A number of participants for example made observations about the increasing focus upon responding to the marginalisation of communities and climate vulnerable groups including women from decision-making processes, as one interviewee observed '*women are still having that fear of speaking out*'[1066] however with additional awareness raising and civil society support '*they're coming to hold the duty bearers responsible on what is affecting their lives*'[1067]. Another interviewee focused upon the support being provided to communities through '*disaster committees and climate change committees that we train to also have their voice at the province and at the national level*'[1068] and upon enabling members of communities to '*be knowledgeable and skilful in how to write proposals and they themselves will then provide, propose for their needs*'[1069]. These interventions, together with the desk-based research conducted on law and policy responses in the region, provide evidence of a broader trend towards embedding community and civil society participation into the decision-making processes on climate change as core aspects of procedural climate justice.

The Vanuatu National Policy on Climate Change and Disaster-induced Displacement for example expressly recognises '*gender responsiveness, social inclusion, community*

[1065] Interview with National Government Employee (2016).
[1066] Interview with Civil Society Organisation Employee (2016).
[1067] *Ibid.* Interview with Civil Society Organisation Employee (2016).
[1068] Interview with Civil Society Organisation Employee (2016).
[1069] *Ibid.* Interview with Civil Society Organisation Employee (2016).

participation'[1070] as important cross-cutting issues in responding to climate displacement and goes even further in including '*access to justice and public participation*'[1071] as one of the twelve strategic priority areas for action. Similarly, the Fiji National Climate Change Policy 2018-2030 recognises '*the importance of participation, communication and partnership*'[1072] in the policy development process which notably included '*a series of multi-stakeholder consultations*'[1073] as well as '*consultations with a sample of rural communities*'[1074]. The policy further acknowledged that women act as agents of change and that steps should accordingly be taken to '*improve and enhance the incorporation of women's knowledge, skills, participation and leadership into planning processes at the local and national level'*[1075]. The themes of procedural climate justice therefore feature prominently at the national level and should form a key component of the climate justice framework informing future law and policy making for climate vulnerable SIDS.

IV. Legal avenues with the greatest potential of securing climate justice

i. The potential of human rights law

Chapter III of the present thesis outlined in detail the reasons for the finding that international human rights law is currently best suited to responding to climate change as compared with alternative avenues under the UNFCCC or international environmental law more broadly. International human rights law offers greater enforceability through a variety of mechanisms before UN treaty bodies, international courts and tribunals. It has been demonstrated that by firmly linking the obligations in international human rights law, embodied either in the nine core treaties or in customary law, with the general rules of state responsibility, significant legal advantages can be gained.

These advantages include the recognition of additional shared state duties in respect of human rights obligations with *jus cogens* status as peremptory norms of international law and as *erga omnes* obligations owed to the international community as a whole in which all states have a

[1070] Vanuatu National Policy on Climate Change and Disaster-induced Displacement (2018) *supra note* 888, at 8.
[1071] *Ibid*. Vanuatu National Policy on Climate Change and Disaster-induced Displacement, at 8.
[1072] Republic of Fiji National Climate Change Policy 2018-2030 (2019) *supra note* 938, at 14.
[1073] *Ibid.* Republic of Fiji National Climate Change Policy 2018-2030, at 14.
[1074] *Ibid.* Republic of Fiji National Climate Change Policy 2018-2030, at 14.
[1075] *Ibid.* Republic of Fiji National Climate Change Policy 2018-2030, at 34.

common interest defending. It is argued that certain fundamental rights have attained such status, most notably for example the right to life[1076], raising additional opportunities to demonstrate the existence of collective, transboundary obligations to prevent climate-related violations of human rights. Similarly, the recognition within the state responsibility framework of a plurality of injured and responsible states, as well as of cumulative acts or omissions leading to the breach of an international obligation[1077] can be of assistance in overcoming some of the challenges associated with the attribution of responsibility for climate-related violations of human rights obligations.

The specific legal and operational challenges associated with invoking international human rights law to tackle issues of climate justice have been expanded upon in Chapter IV. The issues notably of *lex specialis*, causation, and extraterritoriality have been analysed and have resulted in calls for the application of the rules of state responsibility, the application of the precautionary principle as a tool of judicial interpretation in the examination of climate evidence presented to enable the attribution of responsibility, and, finally, an extension of the doctrine of extraterritoriality. The application of human rights obligations can no longer be limited to the territory of the signatory state when violations of those obligations are resulting from transboundary greenhouse gas pollution and taking place on the largest scale, although by no means exclusively, within the territories of the most climate vulnerable developing states across the globe, nowhere more starkly than in SIDS communities.

The suitability of human rights-based litigation to provide for climate displaced persons has been critiqued by Edwards as being ill-suited to the scale of the projected movements of persons[1078]. Individual rights-based claims should not be substituted for a coordinated international response, however it is contended that they can be a catalyst for multi-scalar change at the national, regional and international levels. If states can be held to account for failing to protect the rights of climate-displaced individuals and groups, law and policy frameworks are far more likely to be drafted or amended with the needs of those individuals and groups in mind. Inter-state human rights claims before the UN Treaty Bodies or international courts and tribunals offer further opportunities for recourse at the international level and would enable the governments of low-lying SIDS for example to challenge the failures of receiving states to put in place adequate rights protections for their displaced

[1076] Ramcharan (1983) *supra note* 384; and Wewerinke and Doebbler (2011) *supra note* 62, at 149.
[1077] ILC Articles on the Responsibility of States (2001) *supra note* 368.
[1078] A. Edwards, 'Climate change and international refugee law' in R. Rayfuse and S. Scott (eds.) *International Law in the Era of Climate Change* (Edward Elgar, Cheltenham 2012) at 72.

populations, as illustrated by the Teitiota v New Zealand inter-state claim before the UN Human Rights Committee[1079].The potential of UN Human Rights Council special procedures including country visits, reporting, and communications in particular within the remit of the thematic mandates of UN Special Rapporteurs is significant in advancing the legal doctrine broadening the scope of positive duties in responding to climate impacts, and in encouraging state compliance with rights obligations. The role of soft law human rights decisions, reports and recommendations, including the communications of the UN Human Rights Treaty Bodies, has been outlined in the key findings in Section I above. It is important however also to flag the potential that these mechanisms have in informing the broader approach to climate loss and damage adopted by the Warsaw International Mechanism on Loss and Damage under the auspices of the UNFCCC.

The Task Force on Displacement under the Warsaw Mechanism is engaged in an ongoing series of information-gathering exercises, consultations and negotiations with key stakeholders such as the International Organization for Migration and UNFCCC States Parties, with the aim of developing a coordinated international policy response to climate-induced displacement[1080]. It is crucial that human rights vulnerabilities and protections be embedded within this policy framework, including attention to neglected procedural rights for climate vulnerable individuals, access to justice, and access to effective remedies for rights violations in the face of climate loss and damage. Reports such as those of the UN Special Rapporteur on Human rights and the Environment, and the findings of the UN Human Rights Committee in its case law should form the bedrock of the development of positive state duties in the Task Force's policy frameworks, in turn informing more harmonised and rights-focused law and policy-making on climate displacement at the national level for the benefit of low-lying SIDS.

In order to enable the effective application and enforcement of international human rights law and to grant further access to the associated remedies, the operational challenges facing the international human rights system itself must also be addressed. Chapter VII has set out a number of proposed steps by the international community to address these more functional challenges, including, inter alia, the streamlining of burdensome reporting obligations, and the

[1079] Teitiota v New Zealand (2020) *supra note* 1064.

[1080] International Organization for Migration (IOM) and Platform on Disaster Displacement, Task Force on Displacement Stakeholder Meeting 'Recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change' Meeting Report (14-15 May 2018) available at: https://unfccc.int/process-and-meetings/bodies/constituted-bodies/executive-committee-of-the-warsaw-international-mechanism-for-loss-and-damage-wim-excom/task-force-on-displacement/implementation-updates-task-force-on-displacement#eq-1 (accessed 06/04/2020).

allocation of increased funding to climate vulnerable states specifically for the purpose of human rights capacity building. Once these operational challenges with the human rights system have been addressed and additional funding and capacity-building support is offered, it has been outlined in Chapter VI that increased engagement with the human rights instruments can be expected, as was for example the case with CEDAW. The increased engagement, particularly with optional protocols, will open the door to further legal complaints mechanisms before the UN human rights treaty bodies. Being able to rely upon human rights treaties in argument before international courts and tribunals, notably the ICJ is similarly crucial in securing legal recourse for climate justice.

ii. Inter-state claims before international bodies

The analysis of the relative benefits and drawbacks of the three primary avenues identified for potential inter-state claims by climate vulnerable SIDS was based upon the following criteria: the availability of remedies for loss and damage; public access to the resulting decision and statement of legal principle; and the ability to meaningfully advance international legal doctrine. Based upon these three criteria, the ICJ has been identified as the forum best suited to providing recourse to climate justice for SIDS in light of the capacity of the Court to award remedies upholding international case law demanding restitution to the extent possible, the Court's existing expertise in the fields of both environmental disputes and rights in a transboundary context, the ability of the court to develop international legal doctrine, and the public availability of its judgments. The willingness of South Pacific SIDS to engage with the ICJ as a potential avenue of climate recourse has already been demonstrated by the call from Palau and the Republic of the Marshall Islands for an ICJ advisory opinion on climate change in 2012 with the aim of obtaining an authoritative statement on '*the responsibilities of states under international law to ensure that activities carried out under their jurisdiction or control that emit greenhouse gases do not damage other states*'[1081]. The focus of the call being upon transboundary harm and the climate loss and damage being suffered by the two SIDS suggests a willingness to invoke the rules of state responsibility to obtain a more just law and policy response to climate change. Invoking the rules of state responsibility alongside international human rights obligations before the ICJ would present the Court with a unique opportunity to

[1081] Statement by the Honourable Johnson Toribiong President of the Republic of Palau to the 66th UNGA Session (2011) *supra note* 452, at 4.

pave the way for the evolution of the existing international legal doctrine with respect not only to the collective and cumulative responsibility of states for climate loss and damage, but also to the extraterritorial and causal scope of existing human rights obligations.

By broadening the reach of international human rights law in concert with the rules of state responsibility, relying for example upon the precautionary principle of international environmental law, many of the challenges outlined in Chapter IV can be overcome. Care however would need to be taken in the framing of the legal questions submitted to the ICJ for an advisory opinion[1082], and, indeed, to the grounds of argument submitted in any contentious proceedings, in order to ensure the most favourable odds of obtaining a judgment clarifying and extending the scope of international obligations in relation to climate change. The President of Palau poignantly highlighted in his statement the distributive climate injustice the people of Palau are being faced with and the need for a legal response that will help ensure collective action by the international community:

> '*Forces beyond Palau's control and not of our own making are ravaging the oceans, damaging the land and reefs, and threatening our very survival. Though we do our best to act responsibly and sustainably, there is only so much my country can do on its own to protect itself. We rely on our partners, the international system and the international rule of law to provide a remedy*.'[1083]

This call for a response in international law has more recently been echoed by the Vanuatu Minister of Foreign Affairs, International Cooperation and External Trade, Hon. Ralf Regenvanu. At the Climate Vulnerable Forum Virtual Summit in 2018, the Hon. Minister Regenvanu announced that his government was now exploring all avenues of legal recourse, including under international law, to hold fossil fuel companies, and the governments who have failed to adequately regulate them, responsible for the climate loss and damage that is continuing to be suffered[1084]. In subsequently analysing the scope of this announcement and the potential legal avenues that could be explored, Wewerinke-Singh and Salili have argued that inter-state claims at the international level offer the greatest benefits in terms of their

[1082] Atapattu (2016) *supra note* 59, at 287-288.
[1083] Statement by the Honourable Johnson Toribiong President of the Republic of Palau to the 66th UNGA Session (2011) *supra note* 452, at 2.
[1084] Climate Vulnerable Forum, Video Statement from Ralph Regenvanu (Minister of Foreign Affairs, International Cooperation and External Trade, Vanuatu) at The CVF Virtual Summit, (21 November 2018) available at: https://www.youtube.com/watch?v=kst10ZfSKPc (accessed 19/09/19).

potential to influence multilateral climate negotiations, as well as in terms of their ability to produce a binding decision capable of providing a remedy for the loss and damage suffered[1085].

The follow-up procedures for ICJ rulings are additionally provided for in the UN Charter itself in Article 94 which provides that UN members undertake to comply with the ICJ's judgments and for recourse to the UN Security Council under circumstances where '*any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment*'[1086]. The UN Human Rights Treaty Bodies similarly provide for follow up on their Committee recommendations through the Special Rapporteurs on follow-up to views and concluding observations who publish reports on the extent of States Parties' progress towards compliance.

These follow up processes provide an important complimentary avenue for securing compliance with human rights obligations in the face of climate change impacts which offer both an authoritative statement on progress, and a source of political and diplomatic pressure to induce compliance. The utilisation of both the ICJ and UN Human Rights bodies mechanisms will be crucial in securing state action on those human rights obligations not being fulfilled, and, most importantly, in inducing law and policy making that is pre-emptively framed by a rights-based climate justice framework moving forward, putting in place protections and recourse for the substantive and procedural rights of climate vulnerable peoples. It is important that all options for inter-state claims be open to SIDS and other similarly climate vulnerable states in light of the inherently transboundary nature of climate change, the collective responsibility of large emitters, and the need to respond to the demands of distributive climate justice in addressing loss and damage in a meaningful way, utilising the established state responsibility framework.

iii. Embedding rights at the national level

It is similarly crucial that recourse to human rights be provided for at the national level in order to ensure that the rights of climate vulnerable and marginalised groups are respected and form

[1085] Margaretha Wewerinke-Singh and Diana Hinge Salili, 'Between negotiations and litigation: Vanuatu's perspective on loss and damage from climate change' (2019) *Climate Policy* DOI:10.1080/14693062.2019.1623166, at 8.
[1086] Charter of the United Nations [1945] *supra note* 374, Article 94(2).

a key part of the decision-making processes on the development of climate policy responses. The increasing risk of exposure of SIDS populations to climate-induced displacement and human rights impacts in the path of rising sea levels and increasingly intense tropical cyclones that leave behind a path of destruction, economic and non-economic climate loss and damage within communities, serves to illuminate the need for multi-scalar recourse to justice. One interviewee for example had borne witness to the fact that '*some villages had to move inland because the shoreline is sandy, it's a beach and the sea had come right in […] the island is low, in a number of years they are going to have to move to another island […] it looks like the sea as it rises is going to go right over it*'[1087].

This was an observation echoed among other participants in the case study, with another giving the example of the island of Ambae where it was stated that '*you could see just coconut base just on the water*'[1088] with communities there who '*used to do gardening but now they're moving inland so this could create all sorts of issues like land disputes […] strife between communities*'[1089]. The enjoyment of fundamental rights of members of those SIDS communities at greatest risk of being displaced as a result of climate change impacts is threatened, particularly the rights of those groups already experiencing socio-economic injustice and marginalisation[1090]. These rights impacts include those resulting from losses of land and livelihoods, food, water and human insecurity considerations.[1091]

In order to provide broad-based effective recourse to human rights, greater engagement with international human rights mechanisms will need to be facilitated and recourse to rights will need to be provided for climate vulnerable groups within SIDS. This dual approach to the development of rights-based recourse to climate justice is crucial, particularly in the absence of a Pacific regional human rights system. The firm foundations are laid at the national level with bills of rights contained in the constitutions of both Vanuatu and Fiji, increasing levels of engagement with the international human rights treaties and reporting processes, and with a clear focus upon capacity-building for human rights. Both the recent UN human rights universal periodic review reports of Fiji and Vanuatu include sections on climate change.

[1087] Interview with Legal Practitioner (2016).
[1088] Interview with Civil Society Organisation Employee (2016).
[1089] *Ibid,* Interview with Civil Society Organisation Employee (2016).
[1090] IPCC AR5 WGII Contribution (2015) *supra note* 161.
[1091] Michael Mason, 'Climate change and human security: the international governance architectures, policies and instruments' in MR Redclift and M. Grasso (Eds.), *Handbook on Climate Change and Human Security* (Edward Elgar, 2015) 382-401.

Vanuatu's UPR report focused upon the guiding policy principles of the National Policy on Climate Change and Disaster Risk Reduction (2016-2030) as notably including accountability, equity, and community focus to be implemented by both government and non-governmental stakeholders[1092]. Fiji's UPR report by contrast emphasised the '*inextricable links between climate change, disaster resilience and human rights, vis-à-vis the special vulnerabilities of women, children and persons with disabilities in climate and disaster induced migration*'[1093] and their commitment to developing a '*robust legislative and policy framework*'[1094] in response to guarantee the continued enjoyment of fundamental rights.

There has been a further express focus upon developing the rights of climate vulnerable groups, with the Vanuatu Minister for Justice and Community Services having launched a National Implementation Action Plan (2014-2018) for the Universal Periodic Review and stated that '*a journey of a thousand miles begins with a step; this is true of Vanuatu's UPR process. The plan is therefore a step in a long journey to protect our most vulnerable groups (women, children, persons with disabilities and elderly)*'[1095]. Human rights considerations are similarly already being embedded within national climate policies in Vanuatu and Fiji, for example as core policy pillars in the Fiji National Climate Change Policy 2018-2030[1096], and the Vanuatu National Policy on Climate Change and Disaster-induced Displacement of 2018[1097]. The embedding of human rights in climate law and policy frameworks, and, conversely, of climate change considerations within developing national human rights frameworks, is a positive indication of the commitment to rights-based recourse for climate vulnerable groups at the national level. This harmonisation may further help to allay concerns over institutional fragmentation and the duplication of programmes at the regional level explored in Chapter V.

[1092] United Nations General Assembly, National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21* Vanuatu, Human Rights Council Working Group on the Universal Periodic Review, Thirty-second session 21 January–1 February 2019, (7 November 2018) A/HRC/WG.6/32/VUT/1, at 4.
[1093] United Nations General Assembly, National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21* Fiji, Advance Version, Human Rights Council Working Group on the Universal Periodic Review Thirty-fourth session 4–15 November 2019, (7 October 2019) A/HRC/WG.6/34/FJI/1, at 2.
[1094] *Ibid.* Fiji UPR Report 2019, at 2.
[1095] Government of Vanuatu Ministry of Justice and Community Services, 'Government launches Vanuatu National Implementation Action Plan under the Universal Periodic Review' (06/11/14) available at: https://mjcs.gov.vu/index.php/47-government-launches-vanuatu-national-implementation-action-plan-under-the-universal-periodic-review (accessed 20/10/19).
[1096] Fiji National Climate Change Policy 2018-2030 (2019) *supra note* 938.
[1097] Vanuatu National Policy on Climate Change and Disaster-induced Displacement (2018) *supra note* 888.

V. Areas of potential further exploration

The present thesis has examined rights-based responses to climate change within the framework of climate justice. One of the key justifications for examining obligations and avenues of recourse within international human rights law outlined in the introduction was the absence of adequate legal protection for populations at risk of climate-induced displacement, including communities in low-lying SIDS at risk from rising sea levels. The absence of protections in international refugee law or legally binding protections for internally displaced persons at the international level underpin the need for a pragmatic shift in focus to alternative international avenues with greater enforceability potential and the ability to cater for the needs of those communities, notably international human rights law.

Law and policy responses to climate displacement are rapidly developing, as evidenced by the recent adoption of climate displacement policies in Vanuatu and Fiji, discussed in Chapter VI, that are specifically designed to include community participation and a rights-based approach to the relocation process. As such, an important focus of further exploration could be upon the law and policy frameworks on climate displacement across the Pacific region in both at-risk and potential receiving states to more broadly to assess where climate displacement strategies have been adopted and the extent to which human rights protections are embedded within these frameworks.

Similarly, the importance of recognition for marginalised groups and for traditional knowledge and custom practices to be embedded into climate law and policy frameworks represents an important consideration in rights-based and procedural climate justice-based frameworks. Examining in greater depth the relationship between indigenous rights protections, socio-cultural rights, and custom land rights, along with their implications for responding to increasing climate-induced displacement, represents an important further opportunity for research. The extent to which the ICESCR can effectively provide for the cultural impacts associated with non-economic climate loss and damage, particularly the cultural significance of land in many Pacific cultures and the difficulties associated with potential conflicts in custom land ownership rights where government policies seek to provide for relocation are important further questions beyond the scope of the present thesis.

In order to provide for greater insight into the extent to which procedural climate justice frameworks can accommodate the integration of traditional knowledge and custom practices

into the law and policy making processes on climate change at multiple scales, it would additionally be necessary to gather further data on traditional knowledge and climate change in SIDS communities. This is likely to involve a more in-depth ethnographic study interacting with community members and leaders on a much wider scale, enabling conclusions to be drawn on the extent to which traditional knowledge and custom practices already contribute to community climate resilience and whether this has been taken into account by law and policy makers at the national, regional and international levels. This type of extended study would be more suited to the identification of gaps in the procedural recognition of these groups at the sub-national level and the extent to which these considerations are channelled up through the various scales of climate governance.

VI. A final call for climate justice

This thesis has demonstrated that climate justice demands the evolution of international legal doctrine to accommodate the unique challenges posed by climate change as a complex, transboundary threat to the future enjoyment of human rights. By identifying not only the legal avenues for potential claims, but the institutional and operational barriers to justice that climate vulnerable SIDS in the South Pacific face in practice, this thesis has identified a number of key steps that national governments and the international community as a whole can take to break them. The international community has both a legal and ethical duty to respond to the deeply disproportionate distributive and procedural injustices encountered both by SIDS and their peoples, in particular climate vulnerable groups at greatest risk of climate-induced displacement.

The commitment of the international community of states to the rights and values embodied in the Universal Declaration on Human Rights, championed by Eleanor Roosevelt and signed in the aftermath of the Second World War to ensure lasting peace and minimum standards for the protection of human life, freedom and dignity, is being tested with respect to the challenge of global climate change. The preamble of the UDHR provides for the following statement of values:

'[T]he peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom'[1098]

The development of the body of treaties and custom in public international law has historically had the preservation of peace, humanitarian protection and fundamental rights at its core. Climate change represents a far-reaching and immediate threat to the enjoyment of fundamental rights across the full spectrum from civil and political to socio-economic and cultural rights, both now, and into the future. The ideals of universal, inalienable fundamental rights for all are already being strenuously tested and stand to be profoundly altered if the current international law and policy frameworks do not evolve to meet the challenges of climate injustice. In order to meet these challenges, structural reform of the international human rights system, the harmonisation of climate- and rights-focused institutions and sources of funding, and the forward-thinking development of international legal doctrines will be required.

If the fundamental values upon which the international legal system was founded are undermined by the outdated norms and institutional structures through which it operates, this will severely undermine the credibility of the United Nations system of international cooperation in the future. Climate change, by nature, requires effective international cooperation for mitigation and adaptation. It is argued that climate adaptation should extend beyond bolstering the resilience of communities impacted by climate change at the grassroots level, to securing the durability of norms and institutions of the international community itself.

The joint statement of five of the core UN human rights treaty bodies released in September 2019, including the views, inter alia, of the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Discrimination Against Women, and the Committee on the Rights of Persons with Disabilities, has recently underlined the urgency of the action required by states to protect rights, and, crucially, framed the failure to enact measures to prevent foreseeable harm from occurring or to adequately regulate activities that contribute to it as a potential violation of the relevant state's international obligations[1099]. The

[1098] Universal Declaration of Human Rights (1948) *supra note* 296, Preamble.
[1099] UN Joint Statement on Human Rights and Climate Change (2019) *supra note* 489.

Joint Statement refers to the impacts of climate change upon the enjoyment of a broad range of rights including, notably, the right to life, the right to health and the right to an adequate standard of living, emphasising that '*adverse impacts on human rights are already occurring at 1°C of warming*'[1100] and that these impacts will continue to worsen as temperatures climb towards and beyond the 1.5°C threshold.

If the UNEP emissions gap report projections for temperature rises are realised, we can expect some 3.2°C of warming by the end of the century[1101] and correspondingly far greater impacts upon the enjoyment of fundamental rights. The Joint Statement represents an important acknowledgement that climate change is both a matter to be addressed by international human rights law, and that it gives rise to concrete obligations on the part of states to take appropriate regulatory and policy measures to ensure the future enjoyment of fundamental rights. This acknowledgement is indicative of a gradual paradigm shift in international legal discourse, being led by human rights courts and bodies, which is beginning to see human rights obligations being cited as necessary components of the climate response, in contrast to the soft law framing of rights as policy guidelines in the prevailing UNFCCC and climate finance discourses[1102].

Finally, the stakeholders from law, policy and civil society interviewed over the course of the empirical case study were determined to continue to advocate for the rights of South Pacific SIDS communities impacted by climate change. This is part of a wider concerted effort led by groups such as AOSIS and the Climate Vulnerable Forum to change the narrative at the international level to one, not of compromise and sacrifice with respect to states' mitigation commitments, but of justice. The need for a human rights-based approach in responding to climate change has been acknowledged by the governments of Vanuatu and Fiji in the development of their recent national climate change and displacement policies and has been further reinforced by the research participants. In their words '*when it's to do with culture, environment, people, you know, livelihoods, those rights are non-negotiables*'[1103]. Another participant poignantly remarked that the immediacy of the threat posed demands continued advocacy in the name of fundamental rights: '*We are very vocal and say we will still make it*

[1100] *Ibid.* OHCHR Joint Statement on "Human Rights and Climate Change" (2019), at Para.5.
[1101] UNEP 'Emissions Gap Report 2018' *supra note* 15, at 21.
[1102] See Venn (2017) *supra note* 292.
[1103] Interview with Pacific Regional Organisation Employee (2016); and Venn (2017) *supra note* 292, at 346.

very clear that we are not surrendering our future rights […] *And we will continue to raise this up because if you look at some of the small island countries, they are actually drowning. Where is the justice?*'[1104].

[1104] Interview with National Government Employee (2016).

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Appendices

Consent Form

CONSENT FORM

Please Tick Box

I understand that this interview is for research about legal avenues to climate justice and the challenges faced by Pacific communities. ☐

The research has been explained to me and I had the opportunity to ask questions about it. ☐

I understand that I am free to withdraw from the study at any time during the interview or for up to 30 days afterwards. ☐

If all the information about me (like name, phone number and address) is removed from it:

I agree that what I say may be used in places like books, articles and web pages (without identifying me). ☐

I agree that what I say may be copied, stored, and reused by other people. ☐

I agree to participate in the research. ☐

…… …… ……
Name of participant **Signature** **Date**

…… …… ……
Name of researcher **Signature** **Date**

Ethics Application & Risk Assessment

(Approved by the Law Research Ethics Committee on 20/01/2016)

Research Ethics Application Form

Section 1: Applicant and Project Details (All applicants)

Name(s)	Alice Venn
Email address(s)	
Degree Course or Post(s) Held	PhD Candidate in Environment, Energy & Resilience (ESRC 1+3)
Title of Research Project	'Laying the Foundations of Climate Justice for Vulnerable States & Peoples: developing a climate change liability regime under international law'
Description of proposed empirical research, indicating: i) why that research requires prior approval by the Law School Research Ethics Committee. ii) why it is necessary to undertake the research in question. iii) Your assessment of any cost/risk to research participants	My PhD project examines the various norms, mechanisms and principles of international law capable of providing the world's most climate vulnerable states and communities with an effective remedy for the losses they will continue to incur as a result of the adverse impacts of climate change. The analysis will be undertaken through an environmental justice lens and will seek to identify the legal avenues with the most potential for enforceability, taking into account practical access to justice considerations. In order to inform the legal approach and theoretical framework, a case study looking at the South Pacific region will be conducted over the course of a three month visiting research position with the University of the South Pacific's School of Law in Port Vila, Vanuatu. I will be conducting desk-based research at USP's School of Law, making use of their library, local databases and other regional resources alongside the planned qualitative interviews. The empirical study will seek to explore the perspectives of key regional and domestic actors on the recently adopted People's Declaration on Climate Justice, which legal avenues are being considered as a response to climate change and what aspects of climate justice are most important at the community level. i) The case study requires prior ethical approval by the Research Ethics Committee as approximately 10 semi-structured interviews will be conducted, primarily with local lawyers, representatives from local and regional governance and environmental NGOs engaged in climate justice advocacy. ii) It is necessary to conduct the interviews in order to clarify how the Declaration in which community leaders vowed to hold big emitters

	to account is being pursued in practice. They will also inform the overarching analytical framework by enabling an identification of the most suitable approach to climate justice at the community level. Furthermore, they will provide crucial insight into the question of access to justice for climate vulnerable communities which plays a central role in my research. In order for my research outcomes to be relevant and impactful, it will be necessary to identify what legal avenues are most accessible and likely to be invoked by climate vulnerable communities, as well as any barriers which exist in practice. iii) It is not anticipated that the participants will face any risks and the only cost to them will be their time in participating. Participants will therefore be contacted well in advance of the planned visit, so that a time convenient to them can be arranged.

Section 2: Source of Funding (All Applicants)

Is the research funded, in whole or in part, by an organisation external to the University?	YES
Funding Organisation	Economic and Social Research Council
Funding organisation website	http://www.esrc.ac.uk/
Nature of funding awarded, e.g. studentship, project funding, etc.	PhD studentship and Overseas Institutional Visit Grant
If the funding is awarded under a particular programme or scheme, please identify.	SWDTC Environment, Energy & Resilience Pathway and their Overseas Institutional Visit (OIV) Scheme
Does the Funding Organisation require institutional ethical review?	YES
Does the Funding Organisation have particular ethical review requirements, e.g. the use of an independent reviewer?	Need for a full review by a Research Ethics Committee as the research involves 'International partners or research undertaken outside of the UK where there may be issues of local practice and political sensitivities'(ESRC Framework for Research Ethics, January 2015: 10) – No other specific requirements.

Section 3: Supervision and Training (Research Students)

Name(s) of proposed/actual supervisor(s)	Dr Margherita Pieraccini and Professor Katrina Brown (University of Exeter)
Have you discussed this application with your supervisor?	YES

Have you received research methods training either at Bristol or elsewhere?	YES
Please indicate the person/body that provided the training	University of Bristol
Please briefly indicate the subject matter of that training	I received training over the course of the MRes in Environment, Energy and Resilience of the ESRC SWDTC last year in qualitative and quantitative research methods, as well as philosophy and research design in the social sciences. Both courses in qualitative research methods and philosophy and research design included sessions on research ethics.
Please provide the date of attendance	October 2014 – July 2015
Have you attended a research ethics workshop or an equivalent session as part of your research training at Bristol or elsewhere?	NO
Please indicate the person/body that provided the training	
Please provide the date of attendance	I will attend the workshop on research ethics planned to take place in the Law School on 01/02/2016.
Date of electronic submission of this form to primary supervisor	14/12/2015

Section 4: General considerations (All Applicants)

Note: Detailed answers are **not** expected in this section. The Research Ethics Committee simply wishes to be assured that you have consulted and considered relevant guidance.

Have you reviewed and addressed the ethical implications of your proposed research in line with the Socio-Legal Studies Association Re-statement of Research Ethics (to which the School of Law subscribes)?	YES
If you are leading a research team, have you taken steps to ensure that each member of that team will have read the SLSA ethical guidance, and be fully aware of the ethical dimensions of this research?	NA
Have you reviewed and addressed the ethical requirements of conducting research at the University of Bristol?	YES
Does your project involve participants who are children or young people?	NO
Have you considered whether you need to apply for a Criminal Record Check?	NA

Does your project involve participants who lack the capacity to consent either permanently or intermittently? If so the LREC is not the appropriate body for which to apply for ethical approval (Guidance Document: Application Process, point 3)	NO
Does your project involve human health-related research? If so the LREC may not be the appropriate body for which to apply for ethical approval (Guidance Document: Application Process, point 3)	NO
Have you reviewed and addressed the University 'advice on research' in the context of data protection legislation?	YES
Does your project involve any research data that you would wish to shield from disclosure under the Freedom of Information Act 2000?	NO
Does any aspect of your research suggest the need for a risk assessment exercise prior to completion of this form?	NO
Does any aspect of your research suggest that there may be a physical or mental risk to you, or other research team members, carrying out fieldwork with human subjects? See further, the Social Research Association's Code of Practice for the Safety of Social Researchers.	NO
If you have particular questions about any of this guidance that you would like to raise with the Law School Research Ethics Committee, please note them here.	
If you have questions about issues that are not covered in this general section, please note them here.	
If you have found particularly useful materials that you think may be helpful for others in addressing general ethical issues in research projects, please note them here.	

Section 5: Specific considerations (All Applicants)

Note: Detailed answers **are** expected in this section.

Methodology

1. Please indicate your methodology and proposed data collection methods (e.g., survey questionnaire, interview, internet, focus groups, observations, secondary data). Please also indicate whether you have prior relevant research training in, or experience of, those methods.
The empirical study will comprise doctrinal research methods and a series of semi-structured interviews with key local actors in the field of climate justice. Semi-structured interviews were determined to be the most appropriate method after studies carried out in the field of community-based adaptation (in particular that of O. Warrick, 'Ethics and methods in research for community based adaptation: reflections from rural Vanuatu' 2009) revealed that focus groups and overly structured methods presented challenges in terms of Pacific cultural norms. Less formal, one-on-one or small group interview methods were found to enable the researcher to build trust with the participants and more effectively glean their perspectives. Semi-structured interviews also offer the benefit of greater flexibility which, in light of the broad nature of the concepts I will be exploring and the variety of approaches which could be taken, will undoubtedly be an advantage. The initial number of interviews is anticipated to be approximately 10, but the study very much has the potential to grow as local contacts are made and lines of inquiry. In instances where interviews are conducted via skype, I will email the written consent form to the participants and ask them to sign and return it electronically before the interview takes place. With the participants' permission, all of the interviews will be recorded and fully transcribed. I took several courses while completing the MRes in Bristol last year on research methods and design, including Introduction to Qualitative Research Methods and Philosophy & Research Design in the Social Sciences. Both of these modules also included a seminar on research ethics. As part of the assessment for Qualitative Research Methods I also produced a research design based on my own research with climate vulnerable communities which received a first class grade.

Additional materials provided for review	YES

Covert & Deceptive Research

2a. Are you using any covert or deceptive methods?	NO
2b. If so, please state what you propose to do and why these methods are justified.	

Nature of Research Participants

3a. Please describe the expected characteristics of your research participants.

The research participants will primarily be elites in the case of the representatives from local and regional governance, legal practitioners, and NGOs. All the participants will be adults, will be of both genders and are likely to come from different educational and cultural backgrounds. There is not anticipated to be a problem with language barriers as English and French are the official languages predominantly used by authorities and organisations in conducting their business. I can speak French but anticipate based on my research so far that most of the research will be conducted in English.

3b. Will your proposed research will involve contact with any of the following groups:	
Children/young people (younger than 18) / Vulnerable adults	NO
Adults or young people who lack the capacity to consent/NHS patients or service users/prisoners (in health related research)	NO

3c. If you answered YES to either of the first two categories, you will need to consider whether you should apply for a Disclosure and Barring Service check. Please consult the Guidance Document for details.

Please outline any particular risks which you think your research might raise for those groups, or for you or your research team, and whether you believe specific measures may be needed to address them. If you believe your research may impact other groups for whom special measures may be needed, please describe the group(s) and any precautionary measures to be taken.

If you answered YES to either of the last two categories, the LREC alone is unlikely to be able to provide ethical clearance for your research. Please consult the Guidance Document for details.

Undue Influence

4a. How will you gain access to the proposed research setting(s)? Are there particular factors, such as power dynamics/relationships of dependency that may place undue influence upon research participants to participate, e.g. influence of gatekeepers or other intermediaries? To what extent does your methodology address such issues?

The prospective participants from the key groups identified will primarily be contacted by the researcher directly via email or telephone where appropriate. I do already have a local academic contact at the University in Port Vila who can act as a gatekeeper to some extent but it is not anticipated that they will participate in the project directly or have any influence over the data collected.

I will seek to mitigate any risks by being reflexive and exploring the selection strategy for participants in my methodology.

4b Will payments or other inducements be offered to research participants	NO
4c. If you answered YES to 4b, please provide details, in particular the rationale for the use of a payment/inducement.	

Data Protection

5a. Please describe the nature of the empirical data you expect to collect.
The data collected in the empirical study will be qualitative in nature and will specifically include: 1) Digital interview recordings (if participants agree to being recorded) 2) Interview transcripts 3) Researcher's personal notes The data will be anonymised for the purposes of the Data Protection Act 1998 to ensure that any personal details are removed and the consent of the participants will be sought before the data is collected, shared or published.

5b. Will you be collecting 'personal data' (as per the Data Protection Act 1998)	NO
5c. If you answered YES to 5b, please indicate your assessment of whether the data collected could be used to support measures or decisions targeted at particular individuals, or might cause substantial distress or damage to a data subject.	
5d. If you answered YES to 5b, please outline whether personal data will be pseudonymised or anonymized, and if so, at what stages in the research.	
5e. Will you be collecting 'sensitive personal data' (as per the Data Protection Act 1998)	NO
5f. If you answered YES to 5e, in addition to your responses in 5c, please explain briefly why you would describe your research as being 'in the substantial public interest' (Data Protection (Processing of Sensitive Personal Data) Order 2000).	
5g. Does your research require you to share personal data of research participants with third parties outside the EEA e.g. researchers in overseas universities?	NO
5h. If you answered YES to 5g, please outline how you have ensured that any personal data transfer is in accordance with the requirements of Principle 8 of the Data Protection Act 1998	

Informed Consent

6a. What advance information will you be providing to research participants (or their proxies)? Please provide copies of material to be provided to or, as appropriate, read to, research participants. **If you are not planning to provide advance information, in written or verbal form, please provide a full explanation – see also 2a.**
I will contact the participants initially via email providing them with details of the research project and enquiring as to whether they would be willing to participate well in advance of my planned visit. After 1-2 weeks I will get back in touch via email or telephone where appropriate to arrange a convenient date to meet. Where possible a venue will also be organised, although this may be something which will need to be arranged on my arrival in Vanuatu in order to ensure that the venue is safe and appropriate. I will invite the participants to ask any questions or air any concerns they may have prior to participating and provide them all with a written consent form to be signed before the interviews are conducted. If the participants consent to being recorded, a digital recording will be taken, otherwise written notes will be relied upon.

Additional materials provided for review	YES
6b. Will you obtain written, or recorded, consent from research participants prior to collecting data from them?	YES

6c. If you answered NO to 6b, please explain why obtaining written, or recorded, consent is undesirable in the context of your research, and outline any additional measures you believe may be necessary to ensure that the rights of research participants are adequately protected.
6d. If you answered YES to 6b, please explain how you will handle withdrawal of consent by research participants. Additionally, if your project is a multi-stage or longitudinal project, please outline how you intend to ensure that research participants will remain adequately informed and whether further grants of consents will, or may be sought.
I will make it clear to the participants that they may withdraw their consent at any point during or for up to 30 days after the interview and if they choose to do so, the recording and any notes will be destroyed.
6e. Please outline any circumstances relating to your research where legal or ethical issues might require you to disclose information pertaining to a research participant without their consent. How has this influenced the guarantees you are offering your intended research participants?
The research will not involve children, families or vulnerable persons. It is not anticipated that my research will reveal any legal or ethical breaches by the participants as the research is exploratory in nature and concerns their general views on climate justice. It does not require them to relate any personal experiences or issues which may raise legal or ethical challenges. The researcher would further not be required to report to law enforcement agencies unless in receipt of a court order.

Data Security and Archiving

7a. In what format do you intend to collect and store your data? Where will it be stored and what security arrangements will be in place to ensure its safe-keeping at the various stages of the research process?
I will collect the data in the form of digital recordings. Data will be anonymised, encrypted and stored on external encrypted USB sticks or hard drives and in password protected files. Data will also be stored in the University of Bristol's Research Data Storage Facility (RDSF). The hard drives will also be kept under lock and key wherever possible.
7b. What will happen to the data at the end of the research process? If it is to be archived, how will this be done? If it is to be destroyed, when will this happen and how will this be achieved?
Data will be stored on the University of Bristol server in encrypted form and will be kept in passworded files on my return. It will also be stored on Bristol's Research Data Storage Facility (RDSF) on my return.

Freedom of Information

8. If a Freedom of Information request was made for the research data to be collected during this project, are there any exemptions that you would seek to claim under the Freedom of Information Act which would require or allow the University to withhold some or all of the data from disclosure, either during the research or if archived?
No exemptions will be sought.

Health & Safety

9. Are there any significant health and safety risks to the researchers, the research participants, or third parties associated with this research? Please comment on your perception of the degree of risk, in context; whether you think special precautions are necessary; and why your approach is proportionate to any risk.
In line with the SRA- Code of Practice for the Safety of Social Researchers, I will adopt a precautionary approach, making sure that the primary qualitative analysis takes place in safe environments and as far as possible in public spaces. I will ensure that my emergency contacts and someone from the local university is aware of my interview schedule and the arranged locations. I have further completed a full risk assessment which is attached to this application.

Other Information

10. Is there anything further that you think the Research Ethics Committee should know about in relation to your proposed research, such as particular risks not identified by this form, costs imposed on research participants, or particular benefits of the research that should be weighed against the risks and/or costs identified, which the form does not cater for?
This empirical study forms a crucial part of my PhD thesis, informing the core overarching research questions concerning access to justice, potential enforcement and the analytical lens through which community claims should be examined. The South Pacific as one of the world's most climate vulnerable regions is on the front lines of the climate justice debate and both the recent adoption of the People's Declaration for Climate Justice and COP21 taking place in Paris combine to render this a crucial time for my research. The opportunity afforded to me by the offer of the University of the South Pacific's School of Law to host me at this crucial time is something I could not have anticipated and it will allow me to conduct my empirical study while benefiting from local knowledge and advice, a safe place of work and a great deal of expertise in environmental law. This study has the potential to produce very impactful research outcomes and for follow-up in the form of reports, a journal article in USP's Journal of South Pacific Law or even potentially becoming involved in the climate change and human rights training programmes offered by the Regional Rights Resource Team of the Pacific Community.

Feedback

Feedback from participants in the ethical review process is vital to keeping it a participatory and academic (as opposed to an administrative/managerial) process. If you have any further questions about, or criticisms of, the ethics review process which the Research Ethics Committee can take into account when considering future practice, please take the time to let us know.

Checklist

All relevant questions completed	YES
Copy of risk assessment document	YES
Copy of information documents to be provided to research participants	NO
Copy of written consent sheet to be completed by research participants	YES
Other documents provided (please specify)	Initial Interview Question Template
Registration checklist completed and submitted to Research and Enterprise Development	NO

Primary Supervisor's Statement (where the application is made by a research student)

I have reviewed this application, and have discussed the research design, and any training needs, with the applicant prior to its submission. I (or the alternative supervisor also named here) will provide continuing ethical oversight for this research which will take a heightened form if the applicant has not undertaken formal ethics training.	YES
Date of electronic submission of this form by primary supervisor to Law School Ethics Committee	14 December 2015

LAW
Research in the Community and Travel outside the UK

Risk Assessment Form

University of BRISTOL

Section 1: Application Details

Name	Alice Venn
Address	
Mobile phone number	
E mail address	
Student number (if applicable)	
Supervisor (name and contact number)	
Programme title e.g. MPhil/Phd	PhD Environment, Energy & Resilience (ESRC 1+3)
Title of research project	*'Laying the Foundations of Climate Justice for Vulnerable States & Peoples: developing a climate change liability regime under international law'*
Previous experience/competency	Last year I completed an MRes which included research methods and design training.

Section 2: Interview Risk Assessment

Hazard	**Control Measures** (e.g. training, supervision, protective equipment)
Risk of physical threat or abuse	The risk that I will be subject to threats as a foreign researcher is low. I will be spending the majority of my time on campus at the University of the South

	Pacific's Law School which is home to many international students and staff. Port Vila is further visited by many tourists, particularly from Australia and New Zealand. I will be careful to travel using only reputable public transport where this is necessary, however most of my meetings will be conducted around the vicinity of the University. I have an academic contact at the University who is happy to mentor me while there and who I will inform of my plans before conducting any interviews. They will be able to advise me on safe local venues and I anticipate that it may also be possible to make use of university facilities for this which would allay many safety concerns. I will arrange to meet participants in a safe public place and in the event that this is not possible, I will ensure that a gatekeeper or appropriate individual accompanies me. I will take care not to travel anywhere alone after dark and to make sure that my husband is familiar with my interview schedule and will contact me following their conclusion as detailed in the communication plan set out below. In the event that I am out of touch for longer than the period of time agreed, he will contact my local contact and if necessary the local authorities. I will also send weekly e-mail updates to my PhD supervisor in Bristol.
Risk of psychological trauma to Researcher (as a result of actual or threatened violence or the nature of what is disclosed during the interaction)	The subject matter of the planned interviews concerns participants' general opinions on climate justice and is very much aimed at empowerment and strengthening the position of the communities concerned. In order to mitigate the risk of being subject to threats of violence, I will be careful to choose safe public spaces as the venues for interviews and to inform colleagues at the USP Law School (where I will be primarily based) where I am going and a time frame for my return before setting out to conduct them.
Risk of being in a compromising situation (in which there might be accusations of improper behaviour)	Again, I will make sure to choose appropriate public spaces to conduct my interviews and colleagues at the USP Law School will be able to offer me advice in this respect given their local knowledge. I will make sure that colleagues at the law school are aware of my whereabouts and the time they can expect me back.

Increased exposure to risks of everyday life and social interaction (such as road accidents and infectious illness)	There is a risk from water borne diseases which will be addressed by making sure that all of my vaccinations are up to date and taking precautions to only drink pre-bottled or boiled water and exercising caution while eating out or buying pre-prepared food in public places. (Mitigation of health risks addressed in greater detail in the 'Health Issues' section below)
Risk of causing psychological or physical harm to others	Not applicable, the research design and planned topics for the interviews do not present risks of psychological or physical harm to the participants. I will be careful to choose a safe and appropriate public space to conduct the interviews based on advice from colleagues at the law school.
Any other hazards	Relevant natural hazards and health risks are discussed in more detail below.

Section 3: Travel Background Information

Travel location	Port Vila, Vanuatu
Dates of travel (please give approximate if date(s) unknown)	30/04/2016 – 31/07/2016
Accommodation arrangements (add address, telephone and e mail where possible)	University of the South Pacific, Port Vila, Vanuatu
Travel and Transport (Licensed drivers, travel to and from the research project from the UK and within the country)	Travel to and from Heathrow airport will be by car. The driver and car are both fully licenced and insured. I will fly from London Heathrow to Singapore, from there on to Brisbane in Australia with Singapore Airlines and then on to Port Vila, Vanuatu. Reputable local taxi companies are the recommended means of travel from Bauerfield International Airport to the centre of Port Vila. Once I arrive at the University Campus, facilities are located close by and I will be able to obtain more information about the local amenities and public transport links from the USP Emalus Campus accommodation office.

Section 4: In country hazards

Hazard	**Control Measures** (e.g. training, supervision, protective equipment)
Physical **(extreme weather or natural hazards)**	Vanuatu is subject to the risk of volcanic eruptions, earthquakes and tropical cyclones. However, there are no volcanoes on the island of Efate where I will be staying and the active volcanoes of greatest concern are many miles away on the islands of Ambae and Tanna. The Vanuatu Tourism Office provide information on the alert scale for possible volcanic eruptions which I will keep up to date with but it is not anticipated that I will need to travel to any of the affected islands. Most seismic events are small scale and do not present a significant risk, however I will familiarise myself with the US Federal Emergency Management Agency's advice on what to do before, during and after an earthquake as recommended by the UK FCO Travel Advice. The tropical cyclone season runs before my visit from November to April so I should avoid any significant risk having taken this into account in planning my dates of travel. However I will stay up to date with the weather forecasts and any warnings of the World Meteorological Organisation and Vanuatu Meteorological Service. By way of precaution, I will also familiarise myself with FCO advice on what to do if you are caught in a storm. I will also make a note of the contact details of the British High Commission in Honiara, Solomon Islands and the New Zealand High Commission in Port Vila to contact in case of emergency.

	I have taken out comprehensive travel and medical insurance which includes evacuation.
Biological **(poisonous plants, infectious diseases, animals, soil or water micro organisms, insects)**	The only risks of this nature which need to be addressed are those of water borne diseases and malaria carried by mosquitos. Both are addressed in detail in the 'Health Issues' section below.
Man-made hazards **(electrical equipment, insecure buildings, slurry pits, power and pipelines)**	Not applicable as I will spend the vast majority of my time living and working on the University Campus which complies with health and safety standards. I will enjoy the support of the university accommodation team in the event that I encounter problems there.
Security **(**terrorism, crime, or aggression from members of the public)	There is a low threat from terrorism. The FCO travel advice advises only taking caution around large gatherings or any political demonstrations which I will take into consideration during my stay. As I will spend most of my time living and working on the University campus, any security risk I face as a lone female researcher will be minimised.
Emergency Arrangements (first-aid, distance from medical facilities, accident reporting)	Port Vila offers a hospital and medical centres which are easily accessible from my accommodation at the USP campus. I have also taken out comprehensive travel and medical insurance for the duration of my stay.

Health Issues (prevalence of disease, disabilities, health conditions requirement for immunisations and health surveillance)	Water borne diseases and malaria carried by mosquitos are the primary health risks. Steps will be taken in advance to ensure that all of my vaccinations are up to date, including Hepatitis A, Diptheria and Typhoid which are all available free on the NHS. I will also be careful to drink pre-bottled or boiled water only and take care when buying food at local restaurants or shops which may have been prepared using contaminated water. I will be staying in the capital Port Vila where the risk is much lower than in rural communities. I will ensure that I have an adequate supply of antimalarial medication for the three-month period. I will also take steps to avoid mosquito bites, including wearing appropriate clothing and using insect repellents. Medical facilities are located close by in Port Vila in the event of illness and I have taken out comprehensive health insurance.
Cultural Issues (Local laws and customs, for example dress, drugs, sex, taking photographs of the local population etc.)	In Ni-Vanuatu culture, customs play a big role and customary law is protected constitutionally. I will therefore be careful to take this into account in framing my research questions for interviews and to behave respectfully in accordance with cultural norms. I will also take precautions by dressing conservatively and not travelling to remote destinations by myself in order to minimise any cultural tensions or risks arising from my status as a lone female.

Residual Risks
None that I am aware of.

Section 5: Emergency Plan

Emergency contacts in the UK (name, address and phone numbers of UK contact)	
Emergency contacts in the country (name, address and phone numbers of in country contact)	
Medical care (location and details of closest health care facility where possible)	Port Vila Central Hospital There are also a number of medical centres and chemists located around Port Vila so medical care will be readily available in the vicinity if needed. I am covered by appropriate health insurance.
Communication plan **(How and when communication with the University will take place and actions following non communications)**	I will maintain regular contact with my husband and supervisor back in the UK. I will email my supervisor weekly and my husband will be kept up to date with my daily plans and movements. When I am off campus conducting interviews I will provide him with my interview schedule, including the locations. Each interview will be approximately one hour long but some may run slightly overtime depending on the willingness of the interviewee to continue the discussion. I will plan to contact my husband two hours after the scheduled interview time. If he has not heard from me, he will try to contact me and in the event that I have not responded to the messages within an hour, he will contact my local academic contact at the university and if she is unaware of my whereabouts, the local authorities and my supervisor back in the UK will be informed.

Section 6: Additional Information

Pre-research meeting(s)	Not applicable, I will not meet with the research participants ahead of conducting the interviews. I will only be meeting my academic contact at the Law School and colleagues I will be sharing an office with.
Participant Training	Not necessary for the planned empirical study.

Foreign & Commonwealth Office Advice	The FCO does not advise against travel to Vanuatu. https://www.gov.uk/foreign-travel-advice/vanuatu The risks associated with natural events and health and how they will be minimised has already been discussed above.
Permission to work on site	I have already received confirmation from the University of the South Pacific School of Law that they are happy to host me and provide me with a workspace in a shared office for the duration of my stay. I have also had my request for campus accommodation confirmed.
Insurance To arrange UoB student travel insurance email	I have taken out comprehensive travel insurance with my existing provider.

Section 7: Signatures

	Name	Date
Assessment received		
Supervisor		