

# **A BREACH OF FUNDAMENTAL 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**

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## **INTRODUCTION**

The people of small communities of the Ha'apai island group in Tonga became victims of the severe tropical cyclone Ian in 2014 resulting in damage to property, threats to livelihoods and food security, and loss of life. This article looks at a range of human rights of these communities that were, it is argued, violated. This is demonstrated by linking interference with rights to States' obligations under international climate change laws and human rights frameworks that give rise to further obligations to compensate the Ha'apai people as beneficiaries of those rights. The article recognises that a claim for compensation may be futile against claims that it is difficult to establish liability whereby no single emitter of carbon dioxide can be linked to a specific result such as a tropical cyclone. The article argues that the IPCC reports coupled with Tonga's climatological records may sufficiently establish liability on the basis that climate change has at least partially contributed to tropical cyclones by means of its influence over weather and climate events resulting in severe tropical cyclones like Ian. It is also recognised that a claim by the Ha'apai communities as a people, by virtue of their right to self-determination, may be challenged. However, a claim of this kind will stand the test of time in the relevant forums.

The first part of this article highlights the reality of the impact of the cyclone on the Ha'apai affected communities as well as the causal link between man-made climate change and extreme climate events. The subsequent sections discuss and analyse the legal issues addressed in this article and the selected rights of the Ha'apai people as recognised under human rights laws as well as the conduct of States that interfere with them. Evidence is also presented to provide context for the reality of the small and vulnerable communities of Ha'apai. The article then suggests that a human rights based approach should be considered to enhance actions to and responses against climate change. This should reflect comprehensively and extensively in the new agreement to be agreed and adopted in Paris in order to achieve the object of the UNFCCC and thus safeguard fundamental human rights of vulnerable communities now and in the future.

## **WHAT HAPPENED IN HA'APAI?**

Tonga is extremely vulnerable to natural disasters. It is ranked second to Vanuatu in the world as being one of the highest risk areas for being exposed to disasters resulting from

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extreme natural events including droughts, tsunamis, earthquakes and tropical cyclones.<sup>1</sup> It is affected by tropical cyclones, on average, once annually, and increasing to two during El Nino years.<sup>2</sup> The Ha'apai islands are located just north of Tongatapu Island, the main island of the Kingdom of Tonga where the government is situated.

On the afternoon of 11 January 2014, tropical cyclone Ian (category 5), made landfall on the islands of Ha'apai and causing havoc in the northern smaller islands of the Ha'apai group: Uiha, Uoleva, Foa, Ha'ano and Mo'unga'one.<sup>3</sup> Of the 6,616 people inhabiting the islands of Ha'apai,<sup>4</sup> 950 of the households were directly affected and suffered severe damage to property and livelihoods.<sup>5</sup> Cyclone damage to Tonga's agriculture and fisheries sectors exceeded US\$20 million.<sup>6</sup> This raised many concerns for the Ha'apai group whose communities depend primarily on agriculture and fisheries for their livelihoods.<sup>7</sup> Of the 950 households affected, about 22 percent were dependent on fishing alone as their main source of income.<sup>8</sup> About 2000 people were displaced and housed in emergency shelters when their homes were either severely or completely destroyed and, fortunately, only one death was reported.<sup>9</sup> Those whose homes were destroyed were fortunate to find safe shelter in Mormon Church buildings whilst others resorted to breaking open their own cement water tanks used for drinking as the only option available to them for safe shelter. While destroying their water tanks provided shelter during the cyclone, many families were subsequently crippled due to a lack of drinking water which was collected in the tanks as many rely on rainwater for drinking on the islands.<sup>10</sup> This in turn led to the fear of disease due to contaminated drinking water and the fact people were already suffering from the prevailing drought that began in Tonga some months prior to the arrival of tropical cyclone Ian.<sup>11</sup>

The tourism sector also suffered considerable damage to infrastructure and loss of revenue due to cancelled bookings.<sup>12</sup> With only 12 hotels and motels on the island, one of them was completely flattened by raging winds in excess of a 100 knots leaving only rubble and cement

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<sup>1</sup> The Nature Conservancy, *World Risk Report 2012* (2012), 9  
<http://www.nature.org/ourinitiatives/habitats/oceanscoasts/howwework/world-risk-report-2012-pdf.pdf>  
(accessed 21 November 2015). See also, Tonga Meteorological Service, *Facts About Natural Hazards in Tonga*  
[http://www.met.gov.to/index\\_files/Disasterfacts.htm](http://www.met.gov.to/index_files/Disasterfacts.htm). Also see Ministry of Information & Communications  
*Building a more Resilient Tonga against Disaster Risk* (2015).

<sup>2</sup> Tonga Meteorological Service, above n 1. Also see Government of Tonga (GoT) Media Release, *El Nino Advisory No.7 for Tonga*, Meteorology and Coast Radio Services Division, Tongatapu (2015).

<sup>3</sup> Ministry of Infrastructure (MOI), *Severe TC Ian Report*, Meteorology and Coast Radio Services Division Tongatapu (2014). Also see Ministry of Infrastructure (MOI), *Tropical Cyclone Ian Response Plan* (2014), 6  
[http://www.humanitarianresponse.info/en/system/files/documents/files/2014-01-30\\_TC-Ian-Response-Plan.pdf](http://www.humanitarianresponse.info/en/system/files/documents/files/2014-01-30_TC-Ian-Response-Plan.pdf)  
(accessed 18 November 2015).

<sup>4</sup> SPC, *Tonga 2011 Census of Population and Housing: Key Indicators*  
[http://www.spc.int/prism/tonga/index.php?option=com\\_advlisting&view=download&fileId=46&Itemid=301](http://www.spc.int/prism/tonga/index.php?option=com_advlisting&view=download&fileId=46&Itemid=301)  
(accessed 21 November 2015).

<sup>5</sup> FAO and Tonga Ministry of Agriculture and Foods, Forests and Fisheries, *TONGA – Cyclone Ian in Ha'apai: Rapid Damage Assessment to the Agriculture and Fisheries Sectors Report* (2014)  
<http://reliefweb.int/report/tonga/cyclone-ian-ha-apai-rapid-damage-assessment-agriculture-and-fisheries-sectors-report>  
(accessed 21 November 2015).

<sup>6</sup> FAO, *Cyclone damage to Tonga's agriculture and fisheries exceeds \$20 million* (2015)  
<http://www.fao.org/asiapacific/news/detail-events/fr/c/215345/> (accessed 25 November 2015).

<sup>7</sup> FAO and Tonga Ministry of Agriculture and Foods, Forests and Fisheries, (2014), above n 5.

<sup>8</sup> Ibid.

<sup>9</sup> MOI (2014), above n 3.

<sup>10</sup> Ibid 67.

<sup>11</sup> GoT Media Release (2015), above n 2; MOI (2014), above n 3.

<sup>12</sup> MOI, (2014), above n 3.

foundations behind. The loss and damage to the tourism sector not only impacted the households but also the community whose source of income derived from visiting tourists through the purchase of handicrafts and agricultural produce sold at the market resulting in diminished wages for those employed at tourist facilities.<sup>13</sup> The lack of water, loss of electricity and telephone lines and damage to tourist facilities meant that businesses would take a long time to recover. In fact, the Tongan economy over-all was generally affected because the expenditures to rebuild Ha'apai meant that other State priorities had to be put on hold.<sup>14</sup>

## WHO IS RESPONSIBLE?

### Causal link with Climate Change

This section attempts to show the causal link between climate change and extreme climate events, including tropical cyclones. It is based on the IPCC reports that acknowledge the effects of climate change resulting from the accumulated greenhouse gases (GHGs) in the atmosphere. The reports also note that ocean basins have been warmed the most, and the warming of the ocean is critical to the formation of tropical cyclones. It is argued here that climate change influences tropical cyclones like Ian and indeed contributed to the damages which the Ha'apai people have suffered. What is clear is that the developed countries, based on historical emissions, are largely responsible for the impacts of climate change that are being experienced today<sup>15</sup> and thus the influence of climate change on tropical cyclones may be sufficiently supported to establish liability against developed countries under international law. However, it is usually argued that no single nation and its emissions could contribute to a particular cyclone, hence causation would be too remote.<sup>16</sup> It is important to note that the number of severe cyclones based on their average maximum wind speeds that have affected Tonga have occurred in the last two decades and thus in the time frame since the adverse effects of man-made climate change began to materialise.<sup>17</sup>

The IPCC confirmed in its Assessment Reports<sup>18</sup> that there are changes in the Earth's energy budget owing to both natural and anthropogenic substances and processes resulting in climate change.<sup>19</sup> It also confirmed that the largest contribution to this change is by the increase of atmospheric concentration of carbon-dioxide (CO<sub>2</sub>) caused by human activities<sup>20</sup> since 1750.<sup>21</sup> It also highlights specifically that '[the observed changes] in climate extremes reflect the influence of anthropogenic climate change in addition to natural climate variability...'<sup>22</sup>

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<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Intergovernmental Panel on Climate Change (IPCC), *AR4* (2007); IPCC, *AR5* (2013).

<sup>16</sup> Christina Voigt, 'State Responsibility for Climate Change Damages' (2008) 77 *Nordic Journal of International Law*, 15.

<sup>17</sup> IPCC, *Summary for Policymakers* (2013), 13.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid 16. Also see IPCC, *Summary for Policymakers: Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation* (2012), 7.

<sup>20</sup> IPCC, (2013), above n 17, 15.

<sup>21</sup> IPCC, (2013), above n 17, 17.

<sup>22</sup> IPCC, (2012), above n 19, 17.

IPCC further linked the changing climate as influencing weather and climate events to disasters<sup>23</sup> that adversely impact<sup>24</sup> on the exposure<sup>25</sup> and vulnerability<sup>26</sup> of human society and natural ecosystems.<sup>27</sup> Weather and extreme events include more intense tropical cyclones with higher average maximum wind speeds and more frequent<sup>28</sup> droughts. Sea level rise and increasing sea surface temperatures are critical concerns for tropical Small Island States (SIDS) including Tonga.<sup>29</sup> To quote the IPCC Special Report on Managing Risks of *Extreme Events and Disasters to Advance Climate Change Adaptation*:

A changing climate leads to changes in frequency, intensity, spatial extent, duration and timing of extreme weather and climate events, and can result in unprecedented extreme weather and climate events.<sup>30</sup>

These findings add to the existing understanding about this relationship. That is, the changing climate influences sea surface temperatures as a critical ingredient for cyclone formation.<sup>31</sup> The IPCC Third Assessment Report noted that peak wind and precipitation intensity of tropical cyclones would increase in some areas.<sup>32</sup> But it could not confirm if all regions would be affected the same way due to limited data at the time.<sup>33</sup> This in fact was consistent with a statement by the World Meteorological Organizations (WMO) in 2006 resulting from its Sixth International Workshop on Tropical Cyclones in San Jose, Costa Rica.<sup>34</sup> It stated that: (1) it was well established observationally that over the past several decades the sea surface temperature over most tropical ocean basins had increased in magnitude by between 0.25 – 0.5 degrees celcius; (2) most researchers in the field of climate science accepted that the most likely primary cause of the observed increase of global mean surface temperature was due to a long term increase in greenhouse gas concentrations and thus the likelihood of most tropical ocean basins warm significantly due to the same cause; and (3) sea surface temperatures will increase by an even greater amount in the 21<sup>st</sup> century than during the 20<sup>th</sup> century as described by the IPCC (2001).<sup>35</sup>

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<sup>23</sup> Disaster is defined as ‘Severe alterations in the normal functioning of a community or a society due to hazardous physical events interacting with vulnerable social conditions, leading to widespread adverse human, material, economic, or environmental effects that require immediate emergency response to satisfy critical human needs and that may require external support for recovery’, IPCC, (2012), above n 19, 3.

<sup>24</sup> Adverse impacts are considered disasters when they produce widespread damage and cause severe alterations in the normal functioning of communities and societies, IPCC, (2012), above n 19, 2.

<sup>25</sup> Exposure is defined as “The presence of people; livelihoods; environmental services and resources; infrastructure; or economic, social, or cultural assets in places that could be adversely affected”, IPCC, (2012), above n 19, 3.

<sup>26</sup> Vulnerability is defined as “the propensity or predisposition to be adversely affected”, IPCC, (2012), above n 19, 3.

<sup>27</sup> IPCC, (2012), above n 19, 7.

<sup>28</sup> There is prediction for a likely increase in tropical cyclone maximum wind speed, IPCC, (2012), above n 19, 13.

<sup>29</sup> *Draft outcome document of the third International Conference on Small Island Developing States: Small Island Developing States Accelerated Modalities of Action (Samoa Pathway)*, GA Res (2014), <http://www.sids2014.org/index.php?menu=1537> (accessed 20 November 2015). Also see IPCC, (2012), above n 19, 3.

<sup>30</sup> IPCC, (2012), above n 19, 7.

<sup>31</sup> See World Meteorological Organization (WMO), *Statement on Tropical Cyclones and Climate Change* (2006) [https://www.wmo.int/pages/prog/arep/tmrp/documents/iwtc\\_statement.pdf](https://www.wmo.int/pages/prog/arep/tmrp/documents/iwtc_statement.pdf) (accessed 21 November 2015).

<sup>32</sup> IPCC, *Climate Change 2001: Synthesis Report – Summary for Policymakers*, (2001), 14 <https://www.ipcc.ch/ipccreports/tar/vol4/english/pdf/spm.pdf> (accessed 20 November 2015).

<sup>33</sup> IPCC, (2001), above n 32.

<sup>34</sup> WMO, (2006), above n 31.

<sup>35</sup> IPCC, (2001), above n 32.

The IPCC's 5<sup>th</sup> Assessment Report has validated these earlier findings and thus confirms that there is very high confidence that the impacts of climate-related extremes, including tropical cyclones, reveal significant vulnerability and expose some ecosystems and many human systems to current climate variability.<sup>36</sup> Records also show that Ian is among the eight most severe tropical cyclones to hit Tonga between 1960 and 2014.<sup>37</sup> The five most destructive tropical cyclones recorded to have affected the South Pacific happened in the last two decades including cyclone Zoe in 2002 (890 hPa), Pam 2014 (896 hPa), Percy 2004 (900 hPa), Ron (900 hPa), and Susan (900 hPa).<sup>38</sup>

This combined evidence may be sufficient to establish a causal link between climate change and tropical cyclones as an extreme climate event influenced by the changing climate which adversely affect human systems directly and indirectly.

### **The Law of State Responsibility**

To establish State responsibility, a State must commit an internationally wrongful act as against another State<sup>39</sup> which consists of an act or omission.<sup>40</sup> The conduct to qualify as an internationally wrongful act must first be attributable to the State, and secondly that act attributable to the State constitutes a breach of an international obligation existing of that State.<sup>41</sup> It is important to realise that the legal responsibility that arises is not limited to bilateral relations but can extend to other States, who are members of the international community and have 'legal interests in the protection of certain basic rights and the fulfilment of certain essential obligations'.<sup>42</sup> This view of the International Law Commission (ILC) links to the international law norm of avoiding harm to others even outside one's State borders.<sup>43</sup>

The United Nations Framework on Climate Change Convention (UNFCCC) is the starting point in an attempt to establish State responsibility. The UNFCCC is binding upon State Parties and they have special legal obligations under it. These obligations could be viewed as individual and joint obligations<sup>44</sup> that aim to achieve the ultimate purpose of the UNFCCC. However, any liability arising under the UNFCCC can only arise against another State. In the case of Ha'apai, Tonga could make a claim on behalf of the affected communities under the UNFCCC and against all industrialised countries labelled as Annex 1 parties with

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<sup>36</sup> IPCC, *Climate Change 2014: Impacts, Adaptation, and Vulnerability – Summary for Policymaker*, (2014), 6. Risks to human systems and ecosystems include infrastructure damage, supply chain, ecosystems, and social system disruption; public health impacts; and water quality impairment, due to sea level rise, extreme precipitation, and cyclones.

<sup>37</sup> Tonga Meteorological Service, *List of Tropical Cyclones that has affected at least a part of Tonga from 1960 to present*, [http://www.met.gov.to/index\\_files/tc\\_history.pdf](http://www.met.gov.to/index_files/tc_history.pdf) (accessed 21 November).

<sup>38</sup> International Pacific Research Center, *Asia-Pacific Data-Research Center Archives*, (2008) [http://apdrc.soest.hawaii.edu/projects/speartc/download\\_speartc.php?email=fitilagi.faanunu@gmail.com](http://apdrc.soest.hawaii.edu/projects/speartc/download_speartc.php?email=fitilagi.faanunu@gmail.com) (accessed 21 November).

<sup>39</sup> See International Law Commission (ILC), *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), Art 2.

<sup>40</sup> ILC, (2001), above n 39.

<sup>41</sup> Ibid, at [5] and [7], above n 39. Also see *Factory at Chorzow's case, (Germany v Poland)*, (*Judgment of the Permanent Court of International Justice*) (1927) 9.

<sup>42</sup> ILC, (2001), above n 39, art 1.

<sup>43</sup> See *Smelter Trail Case (United States, Canada)*, (*Decision of the Trail Smelter Arbitration*) (1935) 62.

<sup>44</sup> Individual obligations in accordance with principles articulated in Article 3 and commitments in Article 4. Joint obligation can be referred to the collective obligations to achieve the objective in Article 2 as the result of their individual efforts or otherwise the combined effect of their individual efforts.

damages to be apportioned amongst them. The following discussion however suggests that as a people Ha'apai communities could also make a claim by themselves through Human Rights mechanisms and procedures.

## Causation

The distinction between general and specific causation in this context is necessary. General causation requires the activity in question to be causally linked to the general outcome of a resulting damage<sup>45</sup> such in the case of anthropogenic activities as the dominant cause of climate change.<sup>46</sup> Specific causation concerns the causal link between a specific type of activity such as a particular State's emissions, with a specific type of result such as tropical cyclones.<sup>47</sup> I focus my argument on specific causation to establish a possible claim for the Ha'apai communities resulting from the damage done by tropical cyclone Ian.

I argue that the IPCC findings point out that tropical cyclones are influenced by climate change. Despite claims that damage 'due to multiple sources and where no single emitter can be identified' is difficult to establish unless there is 'convincing evidence'.<sup>48</sup> I persist in arguing that the Tonga records appear to be consistent with the IPCC findings in regards the intensity and not the regularity of cyclones. They present sufficient and convincing evidence to establish that the damage suffered from tropical cyclone Ian were at least partially attributable to climate change.<sup>49</sup> In the *Trail Smelter* case, it was sufficient that the damage caused was 'at least partially caused by the polluting activity of the smelter in Trail hence Canada was sufficient'.<sup>50</sup> Such a finding is relevant to this argument that developed countries' historical contributions causing climate change have attributed to tropical cyclones in regards their intensity and the damage caused is attributed to that causal link. The amount and who contributed what, is only relevant to the apportionment of costs.<sup>51</sup>

The counter argument is that Tonga has experienced tropical cyclones in the past with similar intensity and perhaps severe damage like cyclones Isaac and Ron.<sup>52</sup> Cyclone Ian is a unique case as it emerged in a time when there is strong evidence that strongly supports climate change as affecting weather and climate events including tropical cyclones.

## Violation of International Obligations

International legal norms require all signatories to not frustrate the purpose of the UNFCCC.<sup>53</sup> Likewise, the non-parties are also open to liability should they frustrate the UNFCCC's objectives.<sup>54</sup> Article 2 holds all parties accountable and liability arises where the Annex 1 countries have failed to act consistently with the object of the UNFCCC. For instance, where the Annex 1 countries have failed to implement domestic policies and

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<sup>45</sup> Voigt, (2008), above n 16, 15.

<sup>46</sup> IPCC, (2013), above n 17. Also see Richard S.J. Tol and Roda Verheyen, *State responsibility and compensation for climate change damages – a legal and economic assessment*, (2004).

<sup>47</sup> Voigt, (2008), above n 16, 16.

<sup>48</sup> Ibid.

<sup>49</sup> See *Smelter Trail Case (United States, Canada)*, (1935), above n 43, 62.

<sup>50</sup> Voigt, (2008), above n 16, 16.

<sup>51</sup> Ibid.

<sup>52</sup> Tonga Meteorological Service, above n 37.

<sup>53</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, (entered into force 27 January 1980) art 18.

<sup>54</sup> Ibid.

measures to deal with climate change that are cost effective to ensure global benefits at the lowest possible cost as required by Article 3.<sup>55</sup> Any failure to do so is a failure of parties to fulfil their obligations to achieve the object of the UNFCCC. In turn, such failures give rise to further breaches of the States obligations under Article 3 to take precautionary measures to prevent and minimize causes of climate change which means a failure to prevent dangerous anthropogenic interference with the climate system.

Article 4 spells out certain commitments for the Annex 1 countries. Such language denotes clear obligations for the Annex 1 countries and any failure to act accordingly will give rise to liability.

### **Standard of Proof**

Perhaps the most critical issue for establishing climate change liability against the Annex 1 countries is the standard of proof which the claiming State(s) must meet. The standard of proof must be appropriate and that it allows to remedy any uncertainties and with the view that it must be consistent with the principles as interpreted in the context of the Convention to achieve its purpose. It is submitted that the standard of proof should be “on the balance of probabilities” as in any civil lawsuit. There is merit for this view. The principle of precautionary as interpreted in the context of the UNFCCC encompasses an element of foreseeability. The failure of Annex 1 countries to take the necessary precautionary measures or actions that ‘anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects’, and harm which results from that failure, will lead to a logical conclusion that harm was foreseeable. This is also relevant to achieve the purpose of the Convention and that actions taken by Annex 1 countries need to be assessed on the basis of probability whether they are more likely to cause harm than not, and whether that would frustrate the objective of the Convention.

## **HUMAN RIGHTS OBLIGATIONS UNDER INTERNATIONAL LAW**

### **International Climate Change Framework**

#### *The UNFCCC*

The UNFCCC acknowledges that climate change and its adverse effects is a common concern of humankind and is attributed to human activities. It resulted from Rio in 1992 where it was first acknowledged that there was human-induced climate change but there was scientific uncertainty to substantiate the claims. States at Rio proceeded to adopt the UNFCCC on the premise that there was a need to address climate change even in the face of scientific uncertainty based on the precautionary principle.<sup>56</sup> The IPCC Assessment Report 4 published in 2007 (AR4, 2007) confirmed that there was man-made climate change and was reaffirmed by the IPCC AR5, 2013.<sup>57</sup> The UNFCCC also acknowledges climate change as a common concern for all humankind<sup>58</sup> and highlights further that the increasing atmospheric concentrations of greenhouse gases by human activities will enhance the greenhouse effect

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<sup>55</sup> *United Nations Framework on Climate Change Convention (UNFCCC)*, opened for signature from 4 to 14 June 1992, (entered into force 21 March 1994) art 3.

<sup>56</sup> *United Nations Framework Convention on Climate Change, Handbook* (2006), 15.

<sup>57</sup> IPCC, (2013), above n 17.

<sup>58</sup> *UNFCCC*, above n 55, Preamble.

which may adversely affect natural ecosystems and humankind.<sup>59</sup> Article 2, states its object and calls for an international response to ‘stabilize greenhouse gas emissions in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system’.<sup>60</sup> It further reiterates the views already propounded by the General Assembly and other relevant bodies to ‘protect the global climate for present and future generations of mankind’. This is reinforced by the guiding principles for implementation of the Convention in Article 3.<sup>61</sup>

The UNFCCC does not make explicit references to human rights but it is argued that human rights references are implicit, firstly in the preamble highlighting the intention of the Parties in bringing the Convention to life, and secondly in the guiding principles under Article 3.<sup>62</sup> The obligations to achieve its ultimate objective appear to be owed by State Parties to ensure to each other rather than individuals and people outside their jurisdictions. Nonetheless, it can be argued that the obligation is also owed to individuals and people who make up the State. The essential feature of the UNFCCC is the special obligations on Annex I countries to lead in the implementation of the UNFCCC.<sup>63</sup>

These references mirror the concerns of State Parties that climate change affects humans and thus their basic human rights as discussed here. It is submitted that State Parties have an obligation to regulate actors within their jurisdiction to protect the rights of people everywhere from any violation now and in the future, and such an interpretation is consistent with the object and principles of the UNFCCC.<sup>64</sup> It is also submitted that an obligation arises on the basis that these rights are accepted as general principles of international law which binds all States to observe.<sup>65</sup> And irrespective of the source of the obligation, a violation of these rights gives rise to a separate right to a remedy. This also means that this obligation extends to those who are not parties under the Convention as the right to food and water, health, life and an adequate standard of living as well as the right to self-determination which, as already submitted, is an universal and inherent right, essential to the ideal of free human rights as embraced by the Universal Declaration on Human Rights (UDHR).<sup>66</sup> One needs not read too much into these references to recognise that human rights are addressed throughout the UNFCCC. Hereby the IPCC reports presenting the best scientific evidence form a strong evidential basis for the argument that the industrialised countries with the greatest emissions contributing to this changing climate have an obligation to individuals and peoples whose basic human rights have been violated as the result of industrialised countries’ wrongful acts. It should also be noted that the UNFCCC addresses climate change as a means to raise standards of living of all peoples of the world, and explicitly mentions the right to sustainable development. This means that there is overlap between the objective of the UNFCCC and the

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<sup>59</sup> Ibid.

<sup>60</sup> UNFCCC, above n 55, art 2.

<sup>61</sup> Guiding principles include the precautionary principle, sustainable development, common but differentiated responsibility, and respective capabilities, and equity.

<sup>62</sup> Article 3, paragraph 1 may be interpreted as clearly referring to the rights of the next generation and this provision is in conformity with the Rights of Children to life and to develop (Article 6), adequate living standards (Article 27) and under Article 23 for proper conditions for mentally and physically disabled children could be compromised by the threats of climate change and its adverse effects as predicted. Also see *Convention on the Rights of the Child (CRC)*, (entered into force 02 September 1990).

<sup>63</sup> UNFCCC, above n 55, art 3 at [1].

<sup>64</sup> Ibid, art 2 and art 3, at [1].

<sup>65</sup> *Statute of the International Court of Justice* art 38 at [1].

<sup>66</sup> ILC, (2001), above n 39, art 1.

aims of the United Nations as laid down in the UN Charter.<sup>67</sup> States have repeatedly uttered this mission through various international frameworks including the human rights<sup>68</sup> and climate change laws discussed here, and we must not lose sight of this mission for the good of the international community.

### *The Kyoto Protocol*

The Kyoto Protocol can be viewed as the strategic implementation plan of the Convention to achieve the Convention's purpose more effectively by creating legally binding emission reduction targets. The ultimate goal is to safeguard the climate system from any dangerous interference by human activities that could mean even worse disasters than what we are experiencing and have been experiencing thus far. The Protocol focuses on the Parties who have committed themselves to be legally bound to reduce emissions to an average of 5 percent against 1990 levels within the first commitment period commencing in 2008 and ending in 2012.<sup>69</sup> Further implementation plans include the Clean Development Mechanism (CDM), International Emissions Trading and the Joint Implementation Mechanism as a means to allow flexibility to Parties to achieve their targets in a cost effective way. This is in fact consistent with Article 2, paragraph 1(b) which encourages Parties to work through both individual and combined efforts to be more effective by means of exchange of information and experiences on policies and measures.

The Kyoto Protocol aims to fulfil the object of the Convention and therefore it is submitted that it addresses human rights issues as well as those that are implicitly referenced throughout the Convention. Climate Change as a global crisis affecting humanity and thus people's basic and fundamental human rights. The same obligation arising under the Convention owing to those within the jurisdiction and those outside of the jurisdiction, it is submitted, also arises under the Kyoto Protocol.<sup>70</sup>

### **Human Rights Protection under Environmental Protection Frameworks**

The Rio Declaration was adopted to recognise the importance of the environment and development. Although the declaration itself is not legally binding, its principles are reinforced in the UNFCCC as another resulting document of the Rio Summit. The Declaration was built upon the principles of the Stockholm Declaration of 1972,<sup>71</sup> which espouses basic human rights to life, equality and adequate conditions of life supported by an environment that allows for a life of dignity and wellbeing, and the protection of the environment for the present and future generations.<sup>72</sup> These principles are restated in the Rio Declaration.<sup>73</sup> In fact, at the time the two instruments were adopted, these principles were 'either understood to already reflect customary international law or expected to shape future

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<sup>67</sup> *Charter of the United Nations* (1945) Preamble.

<sup>68</sup> *Human Rights Council*, GA Res 60/251.

<sup>69</sup> *Kyoto Protocol* (1998).

<sup>70</sup> ILC, (2001), above n 39, art 1.

<sup>71</sup> The Stockholm Declaration consists of a preamble featuring seven introductory proclamations and 26 principles centred on the human environment. Thus the environmental policy goals and objectives are quite broad which resulted in the adoption of the Rio Declaration to recognise the emerging issues to 'synthesise economic and development considerations in environmental decision-making' to name a few.

<sup>72</sup> *Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)*, (16 June 1972), Principle 1 <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503> (accessed 20 November 2015).

<sup>73</sup> *Rio Declaration on Environment and Development*, (14 June 1992), Principle 1 and 3.

normative expectations'.<sup>74</sup> The same principles are restated in the UNFCCC<sup>75</sup> and are critical to the implementation of the Convention to achieve its objective. It is thus suggested that on the basis of these principles they lend support to the interpretation of human rights obligations arising under the UNFCCC, hence State responsibility in the context of climate change as addressed by the UNFCCC.<sup>76</sup>

The Declaration recognises the special needs of developing countries and their environmentally vulnerable situations and calls for international efforts to address their interests and needs.<sup>77</sup> These are also highlighted in the UNFCCC expressly<sup>78</sup> and implicitly.<sup>79</sup> However, in light of the IPCC findings, current practices appear inadequate and are too slow to repair the damage already done and are inconsistent with obligations to 'prevent dangerous anthropogenic interferences with the climate system'.<sup>80</sup> States should thus be mindful of important general principles of international law and also customary international law to avoid harm done to others even outside their own jurisdiction and which all States must respect and abide by and thus no derogation is permitted.<sup>81</sup> With that in mind, the achievement of a legally binding agreement in Paris in December 2015 is thus critical and should reflect the countries' real commitments in the absence of political interests to achieve the object of the UNFCCC which the survival of many vulnerable communities like Ha'apai, Tonga depend on.

## Human Rights Frameworks

For the purpose of this article, the international human rights frameworks discussed here are limited to the International Bill of Human Rights (IBHR) with the exceptions of the Optional Protocols.<sup>82</sup>

### *Universal Declaration of Human Rights (UDHR)*

Following the horrific experiences of the Second World War, States got together to formulate the UDHR and laid down the general human rights standards and freedoms and provided a guide for subsequent human rights frameworks which developed human rights to a level as we see it today. The UDHR is conceived as:

...a common standard of achievement for all peoples and nations...[and the] most important and far-reaching of all United Nations declarations...a

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<sup>74</sup> Audiovisual Library of International Law, *Declaration of the United Nations Conference on the Human Environment Stockholm* (16 June 1972), *Rio Declaration on Environment and Development*, (14 June 1992), (2013) <http://legal.un.org/avl/ha/dunche/dunche.html> (accessed 21 November 2015).

<sup>75</sup> UNFCCC, above n 55, art 3.

<sup>76</sup> Margaretha Wewerinke and Curtis F.J. Doebbler, 'Exploring the Legal Basis of a Human Rights Approach to Climate Change' (2011) 10(1) *Chinese Journal of International Law* 141, 144.

<sup>77</sup> *Rio Declaration*, above n 73.

<sup>78</sup> UNFCCC, above n 55, art 3 at [2], art 4 at [8].

<sup>79</sup> *Ibid* art 3 at [1], on the basis of common but differentiated responsibilities.

<sup>80</sup> *Ibid* art 2.

<sup>81</sup> See *VCLT*, opened for signature 23 May 1969, above n 53, art 53.

<sup>82</sup> See United Nations, *Fact Sheet No.2 (Rev.1), The International Bill of Human Rights* (1996) <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf> (accessed 18 November 2015).

fundamental source of inspiration for national and international efforts to promote and protect human rights and fundamental freedoms.<sup>83</sup>

The core principles of human rights espoused in the UDHR are recognised as universal, interdependent and indivisible. The same principles were also adopted in the Vienna Declaration and Programme of Action on Human Rights on 25 June 1993 and reaffirmed those principles.<sup>84</sup> Human rights entail both rights and obligations from duty bearers and right holders. Article 29(3) of the UDHR specifically stipulates that rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.<sup>85</sup>

The preamble is not binding but the intention of States is seen through various articles that stipulate human rights obligations and thus binding on all States. Moreover, the general principles and standards established by the UDHR are recognised and accepted as general principles of international law and form part of customary international law and thus binds all States. By assuming responsibility under the UDHR, States must respect, protect and fulfil human rights requirements accordingly.<sup>86</sup> To respect means that ‘they must refrain from interfering with or curtailing the enjoyment of human rights’.<sup>87</sup> To protect requires that ‘States protect individual rights and groups against human rights abuses’.<sup>88</sup> The obligation to fulfil means that ‘States must take positive actions to facilitate the enjoyment of basic human rights’.<sup>89</sup>

#### *International Covenant on Economic, Social and Cultural Rights (ICESCR)*

The ICESCR was adopted to provide measures for the implementation of economic, social and cultural human rights as specific rights addressed by this instrument. As part of the IBHR, it mirrors similar rights<sup>90</sup> enshrined in the UDHR with the addition of the right to self-determination.<sup>91</sup> The right to self-determination is recognised as universal, based on the principles of the UDHR that the ideal free human being means possessing the right to enjoy the freedom to determine his economic, social and cultural rights amongst other human rights.<sup>92</sup> Thus on that basis, Article 1 enunciates expressly that all people can ‘freely pursue their economic, social and cultural development’<sup>93</sup> and ‘in no case may a people be deprived of its own means of subsistence’.<sup>94</sup>

The State Parties have a primary responsibility to protect, respect and to guarantee these rights to individuals and people alike within their own territorial boundaries. Paragraph 3 is

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<sup>83</sup> The International Bill of Human Rights consists of the Universal Declaration of Human Rights (adopted in 1948), the International Covenant on Civil and Political Rights (1966) with its two Optional Protocols and the International Covenant on Economic, Social and Cultural Rights (1966).

<sup>84</sup> *Vienna Declaration and Programme of Action* (25 June 1993).

<sup>85</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR Art 29(3).

<sup>86</sup> The Universal Declaration of Human Rights, *The Foundation of International Human Rights Law* [http://www.un.org/en/documents/udhr/hr\\_law.shtml](http://www.un.org/en/documents/udhr/hr_law.shtml) (accessed 21 November 2015).

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> UDHR, above n 85, art 22-27, which introduces the rights to which everyone is entitled “as a member of society”. Also see UN, *Fact Sheet No.2 (Rev.1)*, above n 82.

<sup>91</sup> See *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, GA Res 2200A (XXI), (entered into force 3 January 1976), art 1.

<sup>92</sup> *Ibid* art 1.

<sup>93</sup> *ICESCR*, above n 91, art 1 at [1].

<sup>94</sup> *Ibid* art 1 at [2].

suggested to impose an obligation on State Parties to promote this right beyond their territorial boundaries<sup>95</sup> ‘in conformity with the provisions of the Charter of the United Nations’.<sup>96</sup> Article 11 makes specific reference to everyone being entitled to ‘an adequate standard of living for himself and his family, including adequate food..., and to the continuous improvement of living conditions’.<sup>97</sup> It also recognises the right of everyone to enjoy the highest attainable standard of physical and mental health<sup>98</sup> and calls for States to fully realise this right<sup>99</sup> by means of improving all aspects of environmental and industrial hygiene<sup>100</sup> amongst other things. Moreover, it provides that everyone has the right to take part in a cultural life.<sup>101</sup>

These specific rights are limited to the measures and restrictions set out in the ICESCR. At the same time, the right to self-determination is a universal and inherent right which finds its origin in the UN Charter and is thus protected beyond the scope of this Covenant as it is considered a general principle of international law binding on all States. This is apparent from its Article 25:

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.<sup>102</sup>

It should be emphasised that in accordance with the law of State responsibility, States must provide an adequate and effective remedy to victims of a violation of these rights.

#### *International Covenant on Civil and Political Rights (ICCPR)*

The ICCPR consists of similar rights including the right to self-determination.<sup>103</sup> Like the ICESCR, it was built upon the general principles of UDHR and conforms to the ultimate mission articulated by States through the UN Charter.<sup>104</sup> It restates that these rights ‘derive from the inherent dignity of the human person’.<sup>105</sup> The ICCPR articulates specific measures and limits for implementing civil and political rights. State Parties are to respect, protect and fulfil their human rights obligations in respect of the civil and political rights of their own people within their territorial boundaries.<sup>106</sup> The ICCPR also imposes obligations on States Parties to conform to the spirit and intention of States as enshrined in the preambles of the Covenants and the UDHR in regards to respecting the rights of individuals and people outside their own jurisdictions.<sup>107</sup> It calls for States to realise these rights without discrimination of any kind<sup>108</sup> and to ensure that any violation of individual rights and freedoms committed

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<sup>95</sup> See *International Covenant on Civil and Political Rights*, General Comment No.12: Article 1 (Right to Self-determination), (1984).

<sup>96</sup> *UN Charter*, above n 67, art 55, 56, 59.

<sup>97</sup> *ICESCR*, above n 91, art 11 at [1].

<sup>98</sup> *Ibid* art 12 at [1].

<sup>99</sup> *Ibid* art 12 at [2].

<sup>100</sup> *Ibid* art 12 at [2][b].

<sup>101</sup> *Ibid* art 15 at [1][a].

<sup>102</sup> *Ibid* art 25.

<sup>103</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, (entered into force 23 March 1976) art 1.

<sup>104</sup> *UN Charter*, above n 67, Preamble.

<sup>105</sup> *ICCPR*, above n 103, Preamble.

<sup>106</sup> *UN Charter*, above n 67. Also see UDHR, above n 85.

<sup>107</sup> *ICCPR, General Comment* (1984), above n 95.

<sup>108</sup> *ICCPR*, above n 103, art 2.

even ‘by persons acting in an official capacity shall have an effective remedy...’<sup>109</sup> Article 5 prevents any State Party from performing any act aimed at the destruction of any of the rights and freedoms recognised by the ICCPR<sup>110</sup> and it recognises fundamental human rights existing in State Parties to the ICCPR by virtue of their domestic laws, despite the absence of those rights from the Covenant.<sup>111</sup>

Notably the obligations arising under this Covenant give rise to State responsibility as signatories to the Covenant. Likewise, the non-Parties have a responsibility to observe these rights by virtue of these rights being fundamental human rights deriving from the inherent dignity of the human person – a general principle of international law.<sup>112</sup>

## **EVIDENCE OF THE EFFECTS OF CLIMATE CHANGE CAUSING INTERFERENCE WITH A RANGE OF HUMAN RIGHTS OF THE HA’APAI PEOPLE**

### **Right to Life (inclusive of liberty and security of person)**

While the right to life is articulated in Article 3 of the UDHR, it does not however expound what the right entails.<sup>113</sup> One may understand it as the right to live or exist in one’s own place or more generally a right to live as an inhabitant of the Earth. One may also add that no one has the right to end another person’s life or to take his or her own life. In fact, these views are apparent in Article 6 of the ICCPR.<sup>114</sup>

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

At the village community level as in the case of Ha’apai, the right to life can mean many things including the right of access to health care; access to adequate food and water to live sustainably and enjoy a better standard of living. In fact the Government of Tonga has for some years recognised as its mission to achieve a better standard of living for the people of Tonga.<sup>115</sup> Clearly, the right to life overlaps with other human rights but it is a right that is inherent and inalienable which every human is entitled to, irrespective of age, race, nationality, colour, religion or level of education.<sup>116</sup>

The enjoyment of this right also depends on one’s source(s) of food supplies on a sustainable basis. In the context of Ha’apai being comprised of small communities, the natural environment is the source of their livelihood. When they are destroyed or interfered with to the extent that people cannot have adequate food to eat or water to drink, it is thus to be said that people cannot fully enjoy their right to life, and a violation of this right by acts or

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<sup>109</sup> Ibid art 2 at [3][b].

<sup>110</sup> Ibid art 5 at [1].

<sup>111</sup> UDHR, above n 85, art 5.

<sup>112</sup> ILC, (2001), above n 39, art 1 at [4][4] and [5].

<sup>113</sup> UDHR, above n 85.

<sup>114</sup> ICCPR, above n 103.

<sup>115</sup> Tonga Strategic Development Framework (TSDF), (2011-2014),

<http://www.adb.org/sites/default/files/linked-documents/cobp-ton-2014-2016-oth-02.pdf> (accessed 11 November 2015); Strategic Development Plan Eight, (2006-2009),

<https://www.sprep.org/att/IRC/eCOPIES/Countries/Tonga/13.pdf> (accessed 11 November 2015).

<sup>116</sup> ICCPR, above n 103. Also see UDHR, above n 85.

omissions by one or more States warrants fair compensation under international laws and in accordance with universally accepted rules and principles.

### **Right to an Adequate Standard of Living**

The right to an adequate standard of living is stipulated both in the UDHR (Article 25) and the ICESCR (Article 11). The UDHR identifies this right as universal and reaffirmed by the ICESCR which further calls on State Parties to take appropriate actions to ensure the realization of this right.<sup>117</sup> The right entails that human beings' health and wellbeing achieve a certain standard or condition that is categorized as "adequate" in regards to access to food, clothing, housing, medical care, necessary social services, right to security in employment, sickness, disability, widowhood, old age and other lack of livelihood in circumstances beyond one's control.<sup>118</sup> Again this right overlaps with other human rights such as the right to food and water. It seeks to achieve a level of adequacy to which every human being is entitled in order to fully enjoy this right.

### **Right to Food**

A natural environment that is destroyed by the impacts of climate change means the destruction of peoples' livelihoods. The scarcity of food or water as the natural consequence of climate change is inevitable. Article 11, paragraph 2 of the ICESCR makes clear provision for States to recognise this fundamental right and to take internationally cooperative measures to improve methods of production, conservation and distribution of food through the full use of technical and scientific knowledge.<sup>119</sup> In addition, that food importing and exporting countries ensure an equitable distribution of food supplies according to need.<sup>120</sup>

To translate this into the context of Ha'apai requires an understanding of Ha'apai's vulnerability to natural disasters and the physical environment in which the communities live. Food production is hampered by many factors with climate change as the biggest threat to food security. This also includes the effects of climate change on coral bleaching and sea level rise that equally impact on food production and the capacity of the environment to respond to the changing climate and are critical concerns for the Ha'apai group of low lying islands.

### **Right to Health**

The right to health includes both the physical and mental health which every human being should fully enjoy to the highest attainable standard.<sup>121</sup> Article 12 of the ICESCR provides that States should take steps to achieve the full realization of this right and further identifies other matters for States to address.<sup>122</sup> Again the right to health is an indivisible component of the right to food or the right to be free from hunger and the right to liberty in its broadest sense.

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<sup>117</sup> *ICESCR*, above n 91.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid* art 12.

<sup>122</sup> *Ibid.* States are encouraged to (1) reducing the rate of stillbirth, infant mortality and the healthy development of the child; (2) improving environmental and industrial hygiene; (3) prevention, treatment and control of epidemic, endemic, occupational and other diseases; and (4) creation of conditions which would assure to all medical service and medical attention in the event of sickness.

## Right to Self-Determination

The right to self-determination finds prominence in Articles 1 of the ICESCR and the ICCPR respectively, and it marks the importance of realising it as a fundamental human right.<sup>123</sup> Recognising this right in two international human rights frameworks were major milestones and developments since the United Nations General Assembly's (UNGA) Resolution 1514 (XV) of December 1960.<sup>124</sup> In accordance with Article 1 of the ICESCR, the right entails that 'all people' can determine their own political status and freely pursue their economic, social and cultural development.<sup>125</sup> It also includes the right for all people to freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit and international law. More importantly, paragraph 2 stresses that '[i]n no case may people be deprived of their own means of subsistence' and this is relevant to small island nations and its vulnerable communities like Ha'apai.

The typical lifestyle on small island communities is that their survival depends on what they can grow on limited land areas and acquire from the ocean. This lifestyle is what defines who they are and thus their perceptions of human rights may thus differ slightly. For example, the older generation may view the right to life and self-determination to mean the right to live on their small islands until they die. The community that they have known and grown up in is part of them and that right should not be interfered with against potential migration. It may be interpreted as the right to an identity or culture which in accordance with the right of self-determination, require States to respect and to guarantee this right to the Ha'apai people.

The low lying coral atolls with the smallest of islands having a landmass stretching to only about less than 1 hectare (less than 10000 square meters or below 3 acres),<sup>126</sup> are already exposed to the rising sea level. Storm surges during tropical cyclones pose much threat to the islands' landmasses as well as the people. The Ha'apai communities, as a people, dubbed in Tonga as wise people, which in Tongan is termed *fakapotopoto*, have the right to pursue and develop culturally. Their own traditional or cultural norms are well preserved and understood not only amongst Tongans locally but also abroad which should be safeguarded against any violation resulting from climate change and its consequences.

Other evidence of human rights violations are presented by the Mo'unga'one island situation. Mo'unga'one is another small community and one of the small islands that was severely affected by cyclone Ian. The residents are comprised of mainly the elderly and young children. Shops are absent on the island and people are dependent on fishing and agriculture for their survival. Travelling to Mo'unga'one takes about an hour and a half by small boats from the island of Lifuka which also depends on the tide. The experiences of cyclone Ian raised more awareness amongst the people of Mo'unga'one of the need to build their capacity

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<sup>123</sup> Wewerinke and Doebbler (2011), above n 76. Also see Daniel Thurer and Thomas Burri, *Self-Determination*, (2008).

<sup>124</sup> See *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV) (14 December 1960).

<sup>125</sup> *ICESCR*, above n 91, art 1.

<sup>126</sup> See Ha'apai.To <http://www.haapai.to/> (accessed 12 November 2015).

to respond and cope in times of disasters by improving communication systems.<sup>127</sup> Work has commenced but one must not concede that building the resilience of communities is sufficient because while they are resilient they must do so in order to survive and live a normal life. But more should be done at the international level to avoid further violation to human rights of these small communities as well as the rights of future generations whose rights are to be guaranteed to them at the present time and must be protected.

Thus in agreement with Margaretha Wewerinke, self-determination is thus relevant to climate change in so far as the adverse effects of climate change interfere with the full enjoyment of the right and may also deny the people of Ha'apai their right to a culture of their own and their economic development.<sup>128</sup> It is to be said as well that the exercise of this right should not be limited to a narrow definition by human rights committees as a right applicable to indigenous communities with discrete and separate languages and customs. While this proposal may give rise to complex outcomes, it is submitted, that the wellbeing and sustainability of Ha'apai communities are dependent on the global community and the collective efforts to safeguard means of subsistence living which is the paramount consideration.

## **INTERFERENCE WITH SELECTED HUMAN RIGHTS BY STATE CONDUCT**

As a result of the heavier responsibility imposed on the Annex I countries to take the lead in reducing emissions, there is clear evidence that these State Parties have not done enough to curb emissions and prevent adverse effects affecting vulnerable people such as the Ha'apai communities. Annex I countries are seemingly not complying with their obligations under the UNFCCC particularly under Articles 2, 4 and 7 and are also failing to take effective compliance measures in accordance with the precautionary principle to safeguard rights now and in the future. It should be recalled that Article 2 suggests an obligation to take measures to prevent dangerous anthropogenic interference with the climate system; and that Article 4(2)(a) requires the adoption of 'national policies and corresponding measures...' that will achieve the objective of the Convention.<sup>129</sup> This is clear from the IPCC Report 2013 which highlights that there has been a consistent warming in the last three decades and between 1983-2012 was '*likely the warmest 30 year-period of the last 1400 years (medium confidence)*'.<sup>130</sup> This suggests that there is a need for deep cuts in emissions to keep the global warming below the 1.5 degree Celsius called for by the Alliance of Small Island States (AOSIS) as the acceptable global temperature limit for the survival of SIDS and which SIDS hope to achieve in Paris in December 2015. Industrialised nations must be mindful that mitigation and adaptation mechanisms under the UNFCCC are inadequate.

The effects of climate change that are reaching the stage of SIDS exceeding their capacity to adapt warrants greater consideration for a human rights-based approach as the needed and immediate action to address climate change and its impacts. A human rights-based approach should thus be considered in discussions and negotiations in Paris in December this year which so far has not been reflected in the Paris Draft Agreement. However, there is no

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<sup>127</sup> Through the Secretariat of the Pacific Region Environmental Programme (SPREP), a joint project by the Tonga Red Cross and the Tonga Meteorological Services is in progress for the Mo'unga'one Community to install VHF radios and train locals to use and maintain the system for the long term <https://www.facebook.com/tongaredcross/posts/337917213083352> (accessed 13 November 2015).

<sup>128</sup> Wewerinke and Doebbler, (2011), above n 76.

<sup>129</sup> Ibid.

<sup>130</sup> IPCC, (2013), above n 17, 5.

agreement on human rights in the draft agreement and this is evident from its inclusion in only Option 1 of Article 2 but absent in Option 2. Once again, the effects of climate change violate human rights and those rights are intrinsic to being human whose wellbeing is threatened by climate change and its adverse effects. Vulnerable communities, like the Ha'apai people whose livelihoods have been destroyed, damaged and threatened to sustain them, should be recognised and be considered for reparation under international law.

## **ANALYSIS OF HA'APAI'S CLAIM FOR REPARATIONS FOR DAMAGES AND INJURIES**

The provisions of international climate change law (ICCL) explored in this article identify that there are States obligations in respect to human rights which are explicitly or implicitly referenced in the UNFCCC. It has been argued that it is impossible to exclude human rights issues within the context of climate change that affect human systems. A breach of an obligation to observe general principles of international and customary international law is of paramount importance which can give rise to a remedy.<sup>131</sup> That is, where an instrument is silent on recourse for a breach of an obligation, customary international law as well as general principles of international law can assist in clarifying these legal issues.<sup>132</sup>

A claim for climate change damages and injuries for Ha'apai resulting from cyclone Ian would need to meet the legal requirements to establish liability against developed States: (1) there is an existing legal obligation of those States; (2) a breach of those legal obligations is established; and (3) an internationally wrongful act including an omission is attributable to those States at the time the act was committed.<sup>133</sup> International law on State responsibility sets the rules for finding States responsible for violations of international law,<sup>134</sup> and this is equally true for establishing a violation of human rights under international law. As Wewerinke and Doebbler state:

[T]he law on State responsibility for international human rights obligations serves to ensure that there is always an actor responsible for upholding human rights standards.<sup>135</sup>

This article has also attempted to demonstrate that International Human Rights Law (IHRL) provides parallel obligations which could provide an additional basis for reparation claims.<sup>136</sup> Apart from obligations of States arising under human rights treaties, human rights mechanisms including human rights bodies and procedures exist which can be employed through which claims for violations of human rights may be lodged.<sup>137</sup> Their capacity as quasi-judicial bodies can enforce IHRL for the benefits of rights holders. This is true for a claim for the Ha'apai people which Tonga as a State can lodge on their behalf against the responsible State or States under treaty-based bodies. However, the claim may be confronted

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<sup>131</sup> Wewerinke and Doebbler, (2011), above n 76.

<sup>132</sup> ICJ, above n 65, art 38 at [1].

<sup>133</sup> ILC, (2001), above n 39, art 2. See also Wewerinke and Doebbler, (2011), above n 76.

<sup>134</sup> Wewerinke and Doebbler, (2011), above n 76.

<sup>135</sup> Ibid.

<sup>136</sup> Margaretha Wewerinke, 'Climate Change, Human Rights and the International Legal Order: The Role of the Human Rights Council', (2014) *Cambridge Centre for Climate Change Mitigation Research*, Working Paper No. 4, 12, available at [http://be.4cmr.group.cam.ac.uk/working-papers/pdf/4cmr\\_WP\\_04.pdf](http://be.4cmr.group.cam.ac.uk/working-papers/pdf/4cmr_WP_04.pdf) (accessed 25 November 2015).

<sup>137</sup> Ibid.

with some difficulties but a course that could test these mechanisms in enforcing human rights obligations that exist.

Tonga however, is not a party to either ICESCR<sup>138</sup> or ICCPR<sup>139</sup> which have treaty-based committees established under them respectively. The argument that Ha'apai people may on their own submit a claim as 'a people' against one State or States under these Covenants as the subjects of the right to self-determination is based on the wide understanding that the principle of self-determination is not limited to 'colonized peoples'.<sup>140</sup> It is also submitted that Ha'apai people develop on their own within their limited means and thus rely primarily on subsistence agriculture and fisheries to sustain them. These, it is argued, are important issues to take into account when considering whether the right of self-determination is applicable and a basis for lodging a human rights claim and are crucial in the protection of fundamental human rights from any violation by climate change effects.

## CONCLUSION

This article has shown that there is a legal basis for a human rights claim for climate change damages and injuries under international law for Ha'apai communities. Obligations to protect human beings against the adverse effects of climate change arise under both the climate change and human rights frameworks. Developed countries who are largely responsible for anthropogenic climate change have legal obligations under those international laws to avoid damaging climate change impacts and related human rights violations. The international responsibility of developed States for violations of those obligations could be established based on the clear and convincing evidence presented by the IPCC and Tonga. Indeed, this lends support to the argument that extreme weather events including tropical cyclones like Ian are attributable to man-made climate change. A preferable channel for obtaining reparations is the UNFCCC, where Tonga could seek to reach an agreement with other State Parties on the provision of reparations. An international agreement on Loss and Damage could be one way of securing reparations for violations of international law that affect communities such as the Ha'apai communities. However, it is unclear whether Loss and Damage arrangements under the UNFCCC would be sufficiently ambitious to provide remedies that are 'adequate and effective' as required under human rights law. It is therefore important that invoking State responsibility remains an option for local communities affected by climate change as well as for States that represent those communities on the international plane.

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<sup>138</sup> ICESCR, above n 91, Part IV.

<sup>139</sup> ICCPR, above n 103, art 41.

<sup>140</sup> Anna Batalla, *The Right of self-determination – ICCPR and the jurisprudence of the Human Rights Committee*, (2006) 3, available at <http://www.unpo.org/downloads/AnnaBatalla.pdf> (accessed 20 November 2015).