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INDIGENOUS SELF-DETERMINATION AND THE REDUCTION OF GREENHOUSE GAS EMISSIONS: A NEW APPROACH FOR INTERNATIONAL CLIMATE LAW?

Submitted in support of the LLB(Hons) Degree
LAWS523: International Climate Change Law and Policy

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2022

Abstract

Indigenous peoples face disproportionate burdens caused by climate change. Making up less than 5 per cent of our population, they care for 80 per cent of its biodiversity. As their environment degrades, so too does the indigenous way of life, and indigenous identity, to which it is so closely connected. So, what legal mechanisms are there to guarantee the survival of indigenous populations and their ways of life? This paper focuses on the indigenous right to self-determination as outlined in the United Nations Declaration on the Rights of Indigenous Peoples. It seeks to ask whether an argument can be made placing a duty on states to reduce their greenhouse gas emissions in order to observe and uphold this right. This paper argues that, as the climate degrades, so too does the ability for indigenous groups to freely determine their economic, social and cultural goals as enshrined in their right to self-determination. This is due to the loss of choice that results from climate degradation, which, in turn, affects the cultural identity that is so integral to indigenous populations and their survival. Beginning by examining the origins of the right to self-determination, this paper then moves on to examining its 'internal' and 'external' elements. It is determined that both are guaranteed by UNDRIP and also supported by the position of the right in customary international law as an ergo omnes obligation. Finally, this paper analyses the efficacy of this argument, asking whether it is correct to say that states must reduce their greenhouse gas emissions in order to uphold the indigenous right to self-determination. Ultimately, although it is concluded that such an argument can be made, it is noted that the argument is not without issue and requires more development before becoming completely watertight.

Keywords: indigenous peoples, self-determination, customary international law, ergo omnes, UNDRIP

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I Introduction

Indigenous peoples are defined by their legal and spiritual connection to the environment.[1] Where indigenous groups derive their unique identity from the environment around them, they are joined by one main commonality; a disproportionate burden faced by the impacts of climate change.[2] Indigenous Peoples (IPs) often live in vulnerable localities more susceptible to climate degradation.[3] For instance, at a mean elevation of two metres, the indigenous inhabitants of Kiribati are directly threatened by rising sea levels.[4] By inhabiting these ecologically sensitive areas, indigenous people cover 22 percent of the earth's land surface, maintain 80 percent of its biodiversity but only comprise 4-5 percent of its total population.[5]

Scientific evidence regarding the degradation of our planet often pits greenhouse gases (GHGs) as the villain, and not without good reason. GHGs are important to life on Earth, trapping heat necessary to sustain life within it.[6] However, too high a concentration of GHGs creates a deleterious effect,[7] altering climactic patterns and ecosystems; sea levels rise, oceans begin to acidify and extreme weather patterns become more common.[8] Indeed, rising GHG concentration in our atmosphere is the focus of the main climate change convention assented to by 197 states across the world, the United Nations Framework Convention on Climate Change (UNFCCC).[9] Through its provisions, the objective of the

[1] Randall S. Abate and Elizabeth Ann Kronk "Commonality among unique indigenous communities: an introduction to climate change and its impacts on indigenous peoples" Randall S. Abate and Elizabeth Ann Kronk (eds) Climate Change and Indigenous Peoples: The Search for Legal Remedies (2013, Edward Elgar, Cheltenham, 2013) at 3-4.

[2] Abate and Kronk, above n 1, at 3.

[3] Abate and Kronk, above n 1, at 6.

[4] Mike Bowers "Waiting for the tide to turn: Kiribati's fight for survival" *The Guardian* (online ed, United Kingdom, 23 October 2017).

[5] Maxine Burkett "Indigenous environmental knowledge and climate change adaptation" in Randall S. Abate and Elizabeth Ann Kronk (eds) *Climate Change and Indigenous Peoples: The Search for Legal Remedies* (Edward Elgar, Cheltenham, 2013).

[6] Rachel Shuen "Addressing a Constitutional Right to a Safe Climate: Using the Court System to Secure Climate Justice" (2021) 24 The Journal of Gender, Race and Justice 377 at 381.

[7] Shuen, above n 6.

[8] Shuen, above n 6.

[9] United Nations "What is the United Nations Framework Convention on Climate Change?" United Nations Climate Change <https://unfccc.int/process-and-meetings/the-convention/what-is-the-united-nations-framework-convention-on-climate-change#:~:text=The%20197%20countries%20that%20have,ultimate%20aim%20of%20the%20UNFCCC.>

UNFCCC is to limit and stabilise GHG concentrations in our atmosphere to a level that would "prevent dangerous anthropogenic interference with the climate system".[10]

This paper focuses on the right to self-determination as guaranteed to indigenous people.[11] Where the right to self-determination is comprised of internal and external self-determination,[12] this paper argues that both need to be upheld in order for there to be meaningful protection of indigenous rights to the environment at the international level. Externally, this means allowing indigenous peoples the ability to join climate-based negotiations at the same status as other nation states. Internally, this means a focus on the ability for indigenous groups to have meaningful choices in the preservation of their way of life and honouring the fact that indigeneity requires for its survival a healthy environment.[13] Internal self-determination in the indigenous context includes within it the right to freely dispose of their wealth in natural resources.[14] External self-determination allows indigenous groups the ability to prevent the dilution of this right on the international scale.

So what is the connection between IPs and GHGs? On a principled level, the link between IPs right to self-determination and GHGs may seem simple. Indigenous practice is closely tied to the land on which indigenous people live.[15] As natural environments degrade as a result of increasing GHG concentrations, so too does the range of choice available to indigenous peoples in deciding how to dispose and use these resources. Where the current climate decision-making regime means that there is an inability for IP to participate in international climate negotiations at the same level as nation-states, this places indigenous

[10] Nigel Bankes "International Responsibility" in Harold Coward and Thomas Hurka (eds) Ethics of Climate Change: The Greenhouse Effect (1993, Wilfred Laurier University Press, Waterloo) at 119.

[11] United Nations Declaration on the Rights of Indigenous Peoples GA Res A/RES/61/295 (2007) (UNDRIP), art 3.

[12] James Summers "The internal and external aspects of self-determination reconsidered" in Duncan French (ed) Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law (2013, Cambridge University Press, Cambridge) at 232.

[13] Malagosia Fitzmaurice "The question of indigenous peoples' rights: a time for reappraisal?" in Duncan French (ed) Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law (2013, Cambridge University Press, Cambridge) at 361.

[14] Helen Quane "The UN Declaration on the Rights of Indigenous Peoples: New Directions for Self-Determination and Participatory Rights?" in Stephen Allen and Alexandra Xanthaki (eds) Reflections on the UN Declaration on the Rights of Indigenous Peoples (2011, Hart Publishing, Oxford) at 262.

[15] Erica-Irene Daes, Former Chairperson of the UN Working Group in Indigenous Populations "The Concepts of Self-Determination and Autonomy of Indigenous Peoples in the Draft United Nations Declaration on the Rights of Indigenous Peoples" (Susan J. Ferrell Keynote Address, St Thomas University, Miami, 2001).

groups at the disposal of state actions in regards to the environment. Without security and the ability to use their land freely, indigenous groups cannot enjoy to the fullest extent their cultural freedoms rooted in the land, the social structures built around these practices or pursue economic benefit connected to the natural resources.[16] This, in turn, can be seen to degrade the guarantee of choice in cultural, social and economic practice as enshrined in the right to self-determination.

Within the international climate and human rights frameworks established by various legal United Nations (UN) instruments and agreements, this paper seeks to see whether one can transform the aforementioned principled argument into a basis for a legal duty on high-GHG emitting states to reduce their level of emissions. In the development of this argument, this paper pays particular focus on the intentions behind the right to self-determination as enshrined in various international legal instruments. Part II of this paper introduces the context to the legal problem at hand, making sure there is a clear understanding of what it means to be indigenous and what this has to do with climate change. Part III of this paper will introduce the right to self-determination, its origin and its ambit. Part IV delves deeper into the connection between the right to self-determination and GHGs, outlining a potential argument that can be made. Finally, Part V will analyse how convincing this argument is, and whether it can be said to create a legal duty on high-emitting states to reduce their GHG emissions.

II Setting the Scene

As discussed above, this paper is guided by UN agreements in which indigenous rights and international climate decision-making is rooted.[17] The main instruments here are the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the UNFCCC respectively. The focus on UN agreements is a conscious choice, given the level of international buy-in for both UNDRIP and UNFCCC. Before we delve into this legal

[16] Daes, "The Concepts of Self-Determination and Autonomy of Indigenous Peoples in the Draft United Nations Declaration on the Rights of Indigenous Peoples", above n 15.

[17] It is worth noting that, unlike the UNFCCC, UNDRIP is not a legally binding instrument. However, this does not prevent its use in forming a cogent argument for the reduction of GHGs. As discussed in Part IV below, UNDRIP is more than just soft-law and reflects binding rules of customary international law. Indeed, UNDRIP provides an effective method to delve into "cross-cutting" controversies in international law, including at the intersection of climate and human rights law; Megan Davis "To Bind or Not to Bind: The United Nations *Declaration on the Rights of Indigenous Peoples* Five Years On" (2012) 19 Aust ILJ 17 at 18.

and political framework, however, it is useful for this paper to ensure that that its scope and context clear.

A Indigenous Survival is Linked to Environmental Security

In drafting UNDRIP, the Working Group on Indigenous Populations was guided by the following definition of 'indigenous communities', which will be referenced in this paper:[18]

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

This definition highlights a number of things relating to the status of indigenous peoples within UN frameworks.[19] The first being a historical connection to the land which they inhabit, the second is a distinct and non-dominant position in the modern nation-state imposed on that land, and thirdly, a unique identity that is integral to the survive of the peoples.[20] What is most important to recognise here is that the definition of IPs used in UNDRIP expressly connects this identity to their 'ancestral territories'. In this way, the international order has recognised (and upholds) that a key element to indigeneity is a connection with one's surrounding environment.[21] This recognition of a connection to the land will become important later on in this paper.[22]

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[18] Technical Review of the United Nations Draft Declaration on the Rights of Indigenous Peoples: Note by the Secretariat (Technical Review of the UNRIP) UN Doc No. E/CN.4/Sub.2/1994/2 (5 April 1994) at 3.

[19] Erica-Irene Daes "An Overview of the History of Indigenous Peoples: Self-determination and the United Nations" (2008) 21 Cambridge Review of International Affairs 7 at 9.

[20] James Summers *Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations* (2007, Martinus Nijhoff Publishers, Lieden) at 5.

[21] Cherie Metcalf "Indigenous Rights and the Environment: Evolving International Law" Ottawa L Rev (2003) 35 103 at 106; see also the extensive land rights guaranteed to indigenous peoples in arts 8, 10, 25-30 and 32 of UNDRIP, above n 11.

[22] See below at IV.

As discussed above, IPs are further defined by their complex cultural relationships with the ecosystems around them, which are both legal and spiritual.[23] Often, indigenous cultural practices such as myths, beliefs, proverbs and songs are closely linked to biodiversity conservation.[24] For example, the Ashanti people in Ghana have made extensive use of their cultural practices in forest management.[25] This includes practices to not enter the forests on certain days (as Gods are said to be visiting), which can help relieve anthropogenic interference and stress on the environment.[26] The belief that the forests are the physical embodiment of deities also "inspires reverential fear" and respect to its resources.[27] In Māori culture, the concept of 'kaitiaki' (guardianship) is used to reflect the notion that they must care for the land and its resources.[28] In Australia, First Nations' fire management practices help ease the risk of wild bushfires in hotter months.[29] The lighting of 'cool' fires in March to July dots the land with burnt and unburnt country, similar to what the landscape would have been when First Nations people moved and lit fires for hunting, ceremony and other cultural purposes.[30] This removes the amount of fuel available for fires later in the dryer months and therefore protecting flora and fauna.[31]

This deep connection to their ancestral lands means that climate degradation and the loss of biodiversity is a direct threat against important culture practices that define indigenous groups.[32] Protecting our environment therefore means protecting the cultural integrity of IPs.

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[23] Rishabh Kumar Dhir, Martin Olez and Marek Harsdorff (eds) "Indigenous peoples and climate change: From victims to change agents through decent work" (International Labour Office, Gender, Equality and Diversity Branch, 2017) at 7.

[24] Eric Appau Asante, Stephen Ababio and Kwadwo Boakye Boadu "The Use of Indigenous Cultural Practices by the Ashantis for the Conservation of Forests in Ghana" (2017) January-March SAGE Open 1 at 3.

[25] Asante, Ababio and Boadu, above n 24.

[26] Asante, Ababio and Boadu, above n 24.

[27] Asante, Ababio and Boadu, above n 24.

[28] Joseph Williams "Lex Aotearoa: A Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" ("Lex Aotearoa") (2013) 21 Waikato L Rev 1 at 3.

[29] Kimberly Land Council "Indigenous Fire Management" (no date) Kimberly Land Council < https://www.klc.org.au/indigenous-fire-management>.

[30] Kimberly Land Council, above n 29.

[31] Kimberly Land Council, above n 29.

[32] Metcalf, above n 21, at 106.

B The Threat of GHG Emissions

The connection to the land that is integral to indigenous self-identification is being threatened by climate change and the effect of GHGs on our environment. As touched on above, GHGs (mainly carbon dioxide) trap heat in the earth's atmosphere, creating a 'greenhouse effect' by intercepting infrared radiation and re-radiating it in all directions including back to Earth.[33] Although some GHGs are needed to ensure the earth remains habitable, too high a concentration has disastrous consequences.[34] In its Special Report, the Intergovernmental Panel on Climate Change (IPCC) has warned of the grim consequences on the impacts of the earth warming 1.5 degrees Celsius over pre-industrial levels.[35] The IPCC concludes that limiting global warming to combat ocean acidification, sea-level rise and other related environmental effects requires the total cumulative global anthropogenic emissions to be tightly limited.[36] However, currently stated national mitigation tactics submitted under the Paris Agreement would not limit global warming to the 1.5 degrees necessary to continue life on Earth as we know it.[37] This is the case, even if supplemented by high levels of emissions reductions after 2030.[38]

IPs inhabit some of the most vulnerable areas on this earth which see the effects of climate change most drastically. This threatens indigenous ways of life in innumerable ways. In Alaska, the indigenous Yupik have a vocabulary dedicated to different types of sea ice.[39] One word is "tagneghneq," used to describe thick, dark, weathered ice.[40] As GHGs trapped in our atmosphere increase the temperature of the earth, ice caps begin to melt, and with it, the language to which it is so closely connected.[41] In the Kalahari Desert, indigenous

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[33] National Institute of Water and Atmospheric Research "What are greenhouse gases?" (date unknown) National Institute of Water and Atmospheric Research < https://niwa.co.nz/atmosphere/faq/what-are-greenhouse-gases>.

[34] See above.

[35] Masson-Delmotte and others (eds) *Summary for Policymakers: Special Report by the Intergovernmental Panel on Climate Change* (Intergovernmental Panel on Climate Change, 2018) at 4.

[36] Masson-Delmotte and others (eds), above n 35, at 18.

[37] Paris Agreement to the United Nations Framework Convention on Climate Change TIAS No 16-1104 (22 April 2016).

[38] Masson-Delmotte and others (eds), above n 35, at 18.

[39] Oliver Milman "Alaska indigenous people see culture slipping away as sea ice vanishes" (19 December 2006) The Guardian <https://www.theguardian.com/environment/2016/dec/19/alaska-sea-ice-vanishing-climate-change-indigenous-people>

[40] Milman, above n 39.

[41] Milman, above n 39.

groups are forced to live around government drilled bores to access water supplies.[42] Climbing temperatures, increased wind speeds and dune expansions have also threatened traditional livestock farming practices.[43] To make matters worse, climate change mitigation tactics often exacerbate the vulnerabilities of IPs. 'Sustainable' development efforts such as hydroelectric power generation and forest conservation can often be carried out at the expense of indigenous people.[44] For example, 10,000 indigenous people were displaced as a result of the Bakun dam project, which flooded their surrounding ancestral land.[45]

Therefore, we see that climate change and the high emissions of GHGs presents a unique challenge to indigenous groups. Not only do they face the effects of a planet that is degrading around them, but so too the threat that manifests against their cultural identity. So what, then, can be a legal solution to this problem? Much more than just a buzz-word in international law, human rights in international jurisprudence can be weaponised to help indigenous peoples in this climate crisis. Although much effort has been devoted to asking questions of an international right to an environment, or to health and life, this paper focuses on the right to self-determination;[46] a right that has received less attention in the discourse at the intersection between indigeneity and climate change.

III The Legal Implication of Climate Change on Indigenous Peoples – an International Rights-Based Approach

Before we begin to analyse the efficacy of an approach based on the right to self-determination, it is imperative to outline the ambits of the right.

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[42] United Nations Department of Economic and Social Affairs, "Climate Change" (date unknown) < https://www.un.org/development/desa/indigenouspeoples/climate-change.html>

[43] United Nations Department of Economic And Social Affairs, above n 42.

[44] Abate and Kronk, above n 1, at 9.

[45] Abate and Kronk, above n 1 at 9.

[46] See, for example, the *Urgenda* case (discussed at IV below) or the discussion of the right to life and its intersection with environmental protection in Richarge Desgangé "Integrating Environmental Values into the European Convention on Human Rights" (1995) 89 AJIL 263.

A Origins and Ambit

Historically, the right to self-determination emerged in response to colonialism, imperialism and the growing focus on one's autonomy as distinct from the state.[47] The right was born from the revolutions of eighteenth- and nineteenth- century Europe and morphed through the wars of national liberation in the Third World.[48] At its origin, the right was intended to be the basis under which peoples facing oppressive (usually colonial) rule could legitimise efforts for accession to independent statehood.[49]

As time has gone on, however, the right to self-determination has expanded as an accepted norm of modern international law.[50] Although the meaning of the right to collective self-determination is an ambiguous one, self-determination at international law is not taken to necessarily involve succession.[51] Recognition of the right to self-determination in its traditional form can be seen in the ability for IPs to develop their own legal institutions within a nation state.[52] Take, for example, indigenous youth courts in Australia or Aotearoa New Zealand.[53] On an even broader level, the right is now taken to mean the right of the self (and peoples) to express themselves, and to have their cultural identity to exist as a right of their own.[54]

B External and Internal Self-Determination Traditionally

The right to self-determination is traditionally split into its 'external' and 'internal' elements.[55] External self-determination refers to an indigenous groups' standing as against other groups, peoples or institutions.[56] For minority groups within states, external self-determination could also refer to the exercise of their autonomy in relation to other peoples

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[47] Anna Michalska "Rights of Peoples to Self-determination in International Law" in William Twining (ed) *Issues of Self-Determination* (1991, Aberdeen University Press, Aberdeen) at 78.

[48] Issa G Shivji "The Right of Peoples to Self-determination: an African Perspective" in William Twining (ed) *Issues of Self-Determination* (1991, Aberdeen University Press, Aberdeen) at 44.

[49] Michalska, above n 47.

[50] R S Bhalla "The Right of Self-Determination in International Law" in William Twining (ed*) Issues of Self-Determination* (1991, Aberdeen University Press, Aberdeen) at 93.

[51] Bhalla, above n 50, at 92.

[52] Daes, above n 15.

[53] Eleanor Brittain and Keith Tuffin, "Ko tēhea te ara tika? A discourse analysis of Māori experience in the criminal justice system" (2017) 46 NZPsS 99 at 105; Sue Duncombe "The trauma-informed approach of the NSW Youth Koori Court" (2020) 32 Judicial Officers Bulletin 21.

[54] Bhalla, above n 50, at 92-93.

[55] Summers, "The internal and external aspects of self-determination reconsidered", above n 12.

[56] Summers, "The internal and external aspects of self-determination reconsidered", above n 12, at 232.

or institutions within the state.[57] This would include, for example, procedural rights given to indigenous groups to participate in international climate decision-making, or their ability to act as signatories to international agreements.

So what, then, does external self-determination currently look like for indigenous groups in the climate space? Unfortunately, the answer is; not much. As outlined above, this paper is rooted within the UNFCCC framework, the main international climate change agreement. Because indigenous groups are not nation-states themselves they cannot be signatories – and therefore parties – to any international environmental agreements.[58] This means that indigenous participation in the various Conferences of Parties (COPs) – the UNFCCC's main decision-making body reviewing and promoting the framework's implementation – is covered by the umbrella of 'public participation'.[59] COPs also facilitate the negotiation of legal instruments.[60]

Procedurally speaking, indigenous participation in climate decision-making is far from full. As a subset of non-state actors, 'public participants' are deemed as 'observers' in COP processes.[61] This means that they have no voting rights and limited abilities to intervene in negotiations.[62] This is unequal to the status of state parties, who have voting rights and an ability to guide negotiations.[63] Given that indigenous groups are not party the UNFCCC, their observer status means that they can be blocked unilaterally from participating in discussions.[64] This is because state parties decide what observers are allowed in negotiations and can block dissenting indigenous groups by arguing that a certain discussion is not relevant to them.[65]

[57] Summers, "The internal and external aspects of self-determination reconsidered", above n 12, at 234.

[58] Marzia Scopelliti *Non-Governmental Actors in International Climate Change Law: The Case of Arctic Indigenous Peoples* (Routledge, Oxford, 2022) at 2.

[59] Scopelliti, above n 58, at 2.

[60] United Nations "Conference of the Parties (COP)" United Nations <https://unfccc.int/process/bodies/supreme-bodies/conference-of-the-parties-cop>.

[61] Scopelliti, above n 58, at 2.

[62] Metcalf, above n 21, at 119.

[63] Scopelliti, above n 58, at 7.

[64] Ella Belfer and others, "Pursuing an Indigenous Platform: Exploring Opportunities and Constraints for Indigenous Participation in the UNFCCC" (2019) 1 *Global Environmental Politics* 12 at 23.

[65] Belfer and others, above n 64.

Moving to internal self-determination, this element covers the right of IPs to develop their cultural identities *within* an already established nation-state.[66] This means that the right to internal self-determination should cover all issues integral to maintaining and developing the economic, social and cultural aspects of indigenous communities.[67] As discussed above, this is important for indigenous groups, whose identification – both within themselves and under UNDRIP – is characterised by their spiritual connection to the environment. The internal right to self-determination was first underscored by the International Labour Office Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169).[68] As outlined by Fitzmaurice, this Convention was based on the idea that indigenous structures and ways of life have their own intrinsic value requiring protection.[69]

The level at which indigenous groups have internal self-determination varies across the world. Some groups have the ability to pursue, their economic, social and cultural goals freely in certain capacities. An example of this is for First Nations people residing in the United States of America who have the ability to freely pursue their economic gains on reservation land. This is evidenced, for example, by the ability for First Nations groups to establish casinos on reservation land despite the state law within which the reservation is located prohibiting gambling.[70] Other indigenous groups, however, do not have the same level of internal self-determination within the nation-state in which they reside. This includes groups such as the Uyghur, who are recognised as indigenous an area in Northwest China, where they are forbidden from freely practicing their religion and developing their culture without persecution.[71]

Another key facet of the right is the ability of indigenous peoples to seek assistance from others as they strive towards self-determination.[72] This can be one of two ways. The first sees nation-states allow indigenous groups the space to pursue their own cultural goals,

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[66] Summers, "The internal and external aspects of self-determination reconsidered", above n 12, at 2.

[67] Fitzmaurice, above n 13, at 361; Quane, above n 14, at 262.

[68] Convention concerning Indigenous and Tribal Peoples in Independent Countries, C169 (No. 169) (International Labour Office, adopted 27 June 1989, entered into force 5 September 1991), art. 7.1.

[69] Fitzmaurice, above n 13, at 359.

[70] USA Today News "How a Native American Tribe Change the Gambling Industry by Standing Up to the FBI" (21 May 2022) <https://www.usatoday.com/in-depth/news/nation/2022/05/20/native-american-casinos-gaming-gambling-tribal-rights-free-speech-fbi-us-government-indians/9655379002/>.

[71] United Nations High Commission for Refugees "World Directory of Minorities and Indigenous Peoples - China: Uyghurs" (November 2017) <https://www.refworld.org/docid/49749d3c4b.html>.

[72] See, for instance, the preamble to UNDRIP.

allocating them the resources and legal ability to do so. Where the right to self-determination also incorporates the principle of non-interference,[73] nation-states can assist indigenous groups by allowing them to develop initiatives free from any interjection.

In summary, self-determination is a critical element of indigenous rights. It is necessary for the protection of indigenous identities as apparent in culture, language, religion, tradition and custom.[74] So, to be sure, the right to self-determination does not necessarily mean the right simply to secession from a state. Instead, the right is now considered to be a much broader one. The right is not simply one that makes space for indigenous groups to have their own legal machinery and institutions within a traditional nation-state, but that sanctifies the right for indigenous groups to develop their own cultures on their own terms. Self-determination can be seen as an endless process.[75] The right is one that does not end – it is a continuing right that allows IPs the ability to determine their lives for themselves.[76]

C Acknowledgment of the Right in International Agreements

Having now outlined the components of the right to self-determination, we must explore how this right is recognised on the international stage. Although the right to self-determination is inseparably linked to other human rights,[77] Bhalla argues that the right is more legal-political in nature, rather than strictly in the realm of human rights.[78] What this means is that the right to self-determination is necessary for the realisation of other human rights, but can exist independently from others.[79] There are two reasons that make the right to self-determination a distinctly unique right in the international sphere. Firstly, the right has an ergo omnes effect; it includes obligations that are of legal interest to all states because the subject matter is of importance to the international community as a whole.[80] Accordingly, failure to uphold the ergo omnes obligations is taken to affect the

[73] Richard T De George "The Myth of the Right of Collective Self-Determination" in William Twining (ed) *Issues of Self-Determination* (1991, Aberdeen University Press, Aberdeen) at 1.

[74] Daes, "The Concepts of Self-Determination and Autonomy of Indigenous Peoples in the Draft United Nations Declaration on the Rights of Indigenous Peoples", above n 15.

[75] Daes, "The Concepts of Self-Determination and Autonomy of Indigenous Peoples in the Draft United Nations Declaration on the Rights of Indigenous Peoples", above n 15.

[76] Shivji, above n 48, at 43.

[77] Michalska, above n 47, at 81.

[78] Bhalla, above n 50, at 96.

[79] Bhalla, above n 50, at 96.

[80] Marc Weller "Self-Determination of Indigenous Peoples: Articles 3, 4, 5" in Jesse Hohmann and Marc Weller (eds) *The UN Declaration on the Rights of indigenous Peoples: A Commentary* (2022, Oxford University Press, Oxford) at 146.

international community as a whole.[81] Secondly, the right is taken as a part of customary international law, or jus cogens.[82] This will be discussed further below. This importance of the right of self-determination is reflected in its positioning in two key UN instruments – the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[83] Here, art 1 of both covenants place the right at the beginning of their regimes, and separate from the other rights enshrined therein.[84] This indicates that the right is an integral one and is a necessary a requirement for the realisation of other human rights.[85]

Although the right is enshrined in ICCPR and ICESCR, the main citation of the right to self-determination is in reference to art 3 of UNDRIP. This is a specialist agreement relating to the rights of indigenous peoples,[86] and is the main iteration of indigenous rights on the international level.[87] Article 3 states that "[i]ndigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[88] Another popular expression of the right is outlined in ILO 169 which outlines that:[89]

> The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

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[81] "ergo omnes obligations" in *Oxford: A Dictionary of Law* (8th ed, 2015, Oxford University Press, Oxford); note that the definition of 'ergo omnes' includes the right to self-determination as an example.

[82] Weller, above n 80, at 146.

[83] *International Covenant on Civil and Political Rights* GA Res 2200A (XXI) (1966); *International Covenant on Economic, Social and Cultural Rights* GA Res 2200A (XX) (1966).

[84] Above, n 83.

[85] Michalska, above n 47, at 81.

[86] James Anaya *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Doc A/HRC/9/9 (11 August 2008) at [18].

[87] Felipe Isa "The UNDRIP: an increasingly robust legal parameter" (2019) 23 IJHR 7 at 11-12.

[88] UNDRIP, above n 11, art 3.

[89] ILO 169, above n 68, art 7.1.

Article 7 of the ILO Convention continues by making it clear to governments that, in co-operation with the indigenous peoples so affected, they must take measures to protect and preserve the environment of their traditional territories.[90]

One issue that reared its head when the right to self-determination was first conceptualised was how the right could be held collectively.[91] Indeed, some struggled with the idea that human rights could be anything but individually held.[92] A collectively held right in this context means a right that is held by IPs, as Peoples of a certain ethnic group, but also simply as people with indigenous ancestry.[93] There are a number of explanations this. From a strict, positivist perspective, it can be argued that this right is one held collectively precisely because UNDRIP, ILO 169 and other international instruments tell us that it is.[94] Therefore, the signatories to these agreements acknowledged that the right was one that could be (and is) held collectively. Further, UNDRIP at its drafting was not the first rights instrument to attribute a right to the individual, as well as to groups or peoples.[95] A second explanation is much more holistic. Gilbert notes that, as above, indigenous identities are linked to their territoriality, and the use of, access and disposal of natural resources within this territory often take the approach of collective rights and obligations.[96] Where the right to self-determination in this context is one held by indigenous peoples, this means that emerging jurisprudence connects the dots between the right and how it would practically be exercised in indigenous communities.[97] As a right that is intended to benefit indigenous communities, it makes sense to understand the right as indigenous groups themselves would understand it, therefore leaning towards this collective approach.[98]

This conceptualisation of the right is in line with that intended by the UN Working Group tasked with drafting UNDRIP. Its chairperson at the time of its drafting, Erica-Irene Daes saw that the true test of self-determination for IPs is not necessarily whether they have their

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[90] The ILO Convention, above n 68, art. 7.4.

[91] Isa, above n 87, at 10.

[92] See discussion in Prosper Nobirabo Musafiri "Right to Self-Determination in International Law: Towards Theorisation of the Concept of Indigenous Peoples/National Minority?" (2012) 19 International Journal on Minority and Group Rights 481 at 486-487.

[93] Technical Review of the UNDRIP, above n 18.

[94] Isa, above n 89, at 12; Anaya, above n 86, at [43].

[95] Technical Review of the UNDRIP, above n 18, at 6.

[96] Jérémie Gilbert *Indigenous Peoples' Land Rights Under International Law: From Victims to Actors* (2nd ed, 2016, Brill Nijhoff, Lieden) at 238.

[97] Gilbert, above n 96.

[98] Gilbert, above n 90.

own legislative authorities, laws or judicial systems.[99] Daes argues that the right to indigenous self-determination is about IPs feeling that they have choices about their way of life, and being able to pursue these choices freely and without external interference.[100] UNDRIP was intended to protect collective and individual rights of IPs, with the collective element recognising IPs' "prevalent communal lifestyle".[101]

To summarise, the right to self-determination is one that is recognised in multiple rights agreements as being integral to the international human rights regime. This is both on a general level as a right guaranteed to all humans but also particularly in the case of indigenous peoples, as shown in UNDRIP and ILO 169. The right is held both collectively and individually, meaning it can be exercised by individual indigenous peoples or an indigenous community as a whole.[102] Its aim is to empower those working to preserve their own cultures within the traditional Westphalian structure of international law.[103] As put by Isa "[t]he multiculturalism that indigenous peoples advocate in addressing human rights clearly challenges, and eventually enriches, a concept of human rights that has been essentially mono-cultural so far," allowing for a human rights regime that is more reflective of the diverse peoples which it is intended to serve.[104]

IV Connecting Self-Determination and GHG Emissions

So far, this paper has set the context for the analysis to come. We have outlined that indigenous identification is tied so closely to their environmental surroundings and we have seen how this is jeopardised by climate change and the emission of GHGs. The previous section of this paper outlined how the right to self-determination guarantees IPs the ability to pursue their own economic, social and cultural development. It is hopefully beginning to emerge to the reader that there is a connection to be made here. If climate change degrades the environment, and the environment is integral to indigenous preservation of society and culture, then surely the right to self-determination is being eroded too? The

[99] Daes, "The Concepts of Self-Determination and Autonomy of Indigenous Peoples in the Draft United Nations Declaration on the Rights of Indigenous Peoples", above n 15.

[100] Daes, "The Concepts of Self-Determination and Autonomy of Indigenous Peoples in the Draft United Nations Declaration on the Rights of Indigenous Peoples", above n 15.

[101] Technical Review of the UNDRIP, above n 18, at 5.

[102] Technical Review of the UNDRIP, above n 18, at 5-6.

[103] Stefania Errico "The Controversial Issue of Natural Resources: Balancing States' Sovereignty with Indigenous Peoples' Rights" in Stephen Allen and Alexandra Xanthaki (eds) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (2011, Hart Publishing, Oxford) at 333.

[104] Isa, above n 87, at 10.

next section of this paper seeks to solidify this link and present a potential argument that could be used to connect the indigenous right to self-determination to a duty for states to reduce their GHG emissions.

A Building the Argument: The Interdependence of Internal and External Self-determination

As discussed above, where this paper seeks to analyse a potential argument that can be used to link self-determination and the right to self-determination, the link must first be made between its internal and external elements.

The link is made, first, by focussing on the internal aspect of self-determination. As we outlined in Part III, internal self-determination and the ability for indigenous groups to freely decide their own futures within nation-states is closely linked to their spiritual connection to their surrounding natural environments. Put another way, what justifies the provision of internal self-determination – that is, recognition of a distinct relationship between IP and their respective environments, as well as a recognition that this connection exists outside of the majority culture – is the connection to their ancestral territories.[105] A similar argument can be made connecting internal and external self-determination. Where external self-determination concerns itself with the status of a group in relation to others,[106] it follows that we must outline what specifically allows indigenous groups to participate in the international arena. As with any many minority groups, the argument for their distinct participation in international negotiations (as opposed to under the umbrella of their nation-state) is rooted in the fact that they have different opinions from the majority on certain issues.[107] What distinguishes indigenous groups further and is key to this argument is that – pursuant to their right to self-determination under UNDRIP, ILO 169 and other rights instruments – their right to hold and pursue this differentiated perspective has been recognised internationally and forms an ergo omnes obligation.[108] In other words, IP can argue that they must have a seat at the table because they have the right to determine their own economic, social and cultural outcomes; they have the right to external self-determination *because* they have the right to their own internal self-determination. In this way, similar to how indigenous connection to natural resources justifies the provision of

[105] Summers, *Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations,* above n 20, at 5, 4.

[106] Summers, "The internal and external aspects of self-determination reconsidered", above n 12, at 234.

[107] Technical Review of the UNDRIP, above n 18.

[108] Fitzmaurice, above n 13, at 356; Weller, above n 80.

internal self-determination, having this internal self-determination then necessitates external self-determination.[109]

Similarly, the logic of this argument can be reversed to argue that the recognition of internal self-determination requires a level of external self-determination for indigenous groups. One could argue that there cannot be the granting of internal self-determination without also granting the right to defend it from imposition at the hands of other groups.[110] By analogy, the right to exclusive economic zones under the law of the sea would be rendered useless if states could not externally enforce or negotiate it. Territorial sovereignty of a landlocked state would be functionally ineffective if its government was not given the ability to regulate immigration at its borders. In these examples, we see a nation-state's *internal* rights to self-determination – namely, the ability decide how to explore marine resources and manage immigration – justify *external* methods of enforcement. These previous examples showcase that much of our international legal order is built on the idea that one's ability to pursue their own prerogative *within* their jurisdiction justifies regulating the behaviour of external actors that may jeopardise it.[111] Therefore, where there is an indigenous right to internal self-determination, it requires the ability for indigenous groups to be able to defend their right on the international scale in order to be meaningful.[112] Seeing as external self-determination is taken to relate to the standing of indigenous actors in relation to others, defending their internal self-determination on the international scale means allowing them full participatory rights in climate decision-making.[113] Even where internal self-determination is theoretically satisfied completely, because self-determination is an ergo omnes obligation, there must still remain a way for indigenous groups to ensure the realisation of this right at an international scale (as this is the community which the obligation binds).[114] This means that realising self-determination is more than guaranteeing a basic right to succession and its realisation in the climate space should include the ability for indigenous groups the ability to fully participate in climate negotiations. This could include, inter alia, indigenous groups' elevation to party status in

[109] See, for example, the idea presented by Inuit lawyer Dalee Sambo Dorough that the distinction between 'internal' and 'external' self-determination was a "false dichotomy". Dorough highlights that the right to self-determination expressed as an ability to pursue one's own economic, social and cultural goals it what, in itself, underpins indigenous advocacy; Davis, above n 17, at 31.

[110] De George, 73 at 1.

[111] Peter Danchin "Whose public? Which law? Mapping the internal/external distinction in international law" in Jeremy Farrall (ed) *Sanctions, Accountability and Governance in a Globalised World* (2010, Cambridge University Press, Cambridge) at 35.

[112] Belfer and others, above n 64, at 29.

[113] Belfer and others, above n 64, at 29.

[114] Weller, above n 80.

the UNFCCC framework, and full participatory rights in negotiations such as COP or its various subsidiary bodies.[115]

Therefore, we see that internal and external self-determination are interrelated, and one cannot exist without the other. Where one is eroded, so too, is the other. The right for indigenous groups to participate on the international stage is justified by their internal ability to freely choose their economic, social and cultural goals; it is justified by the right to internal self-determination. Further, internal self-determination needs its external counterpart in order to be rendered functionally effective; indigenous groups must have the ability to defend their right to pursue their own goals in order for it to be meaningfully secured.[116] This connection forms the building block for the argument that the emission of GHGs degrades and dilutes the right to indigenous self-determination, as enshrined in UNDRIP.

B Connecting the Dots

Before we pull the thread and connect the building blocks of our argument, let us outline what we have already established in relation to a potential argument for mandating the reduction of state's GHG emissions. Firstly, we have outlined that the environment is incredibly important to IP. This is both in the transmission of their cultural practices, but the societies that are built around their cosmology and beliefs.[117] The environment is also important in that indigenous groups maintain the right to dispose of their surrounding resources as they see fit, and, to seek the economic benefit that flows from this.[118] Next, we have seen that the definition of IPs as enshrined in various UN documents – including UNDRIP – includes a direct reference to IPs connection with their ancestral lands, noting that this connection is distinct from the sentiments of the majority of a nation.[119] Thirdly,

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[115] Belfer and others, above n 64, at 29.

[116] I am not suggesting that Indigenous groups must always act as independent parties on the international stage. This would suggest something akin to secession and therefore relegates the premise of this argument back to the more simplistic and historical view of self-determination. Instead, indigenous groups should have the *option* to act as independent parties where they believe that a particular matter affects their economic, social or cultural development in a way that is not being advocated for by the nation-state in which they reside.

[117] UNDRIP, above n 11, art 25.

[118] Daes, "The Concepts of Self-Determination and Autonomy of Indigenous Peoples in the Draft United Nations Declaration on the Rights of Indigenous Peoples", above n 15.

[119] Erica-Irene Daes "An Overview of the History of Indigenous Peoples: Self-determination and the United Nations" (2008) 21 Cambridge Review of International Affairs 7 at 8.

we have outlined that the right to self-determination includes both the internal right for indigenous groups to be able to freely pursue their own social, cultural and economic development, as well as the external right to defend and protect this from interference by other groups.[120] The internal justifies the external and the external protects the internal. Lastly, in Part II, we have seen how the rising concentration of GHGs degrades our natural environment, and threatens indigenous cultural practice with it. So how are these dots connected? The answer lies in a close reading of what is guaranteed to indigenous groups under art 3 of UNDRIP.

1 What is being guaranteed in Article Three?

For the sake of convenience, let us set out again the right to self-determination as enshrined in art 3 of UNDRIP: "[i]ndigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[121]

Breaking this right down into its constituent parts is necessary in order to establish its link with GHG emissions. We can begin by analysing what is meant by the words 'freely pursue'. The word 'freely' is particularly important here. In accordance with the definition in the Oxford English Dictionary, the word 'freely' is taken to mean an action taken "without constraint".[122] Another definition is "with freedom of will or choice".[123] One further definition of the word outlines that to act freely means "without restraint or restriction upon action or activity; without hindrance, inhibition, or interference."[124]

We see that the word 'freely,' in this context, is comprised of a few components. Firstly, there is the element of *choice*.[125] Predicated in the idea of one acting out of their own free will (acting out of choice) is that they have decided how to act out of a number of possible options.[126] The next key element of the definition is that this choice to act is done without any kind of 'restraint or restriction,' including the ability for the action to be made without

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[120] Quane, above n 14, at 260.

[121] UNDRIP, above n 11, art 3.

[122] "freely, adv." in *Oxford English Dictionary Online* (June 2022, Oxford University Press, Oxford) <https://www.oed.com/view/Entry/74414?rskey=wsmR7C&result=2&isAdvanced=false>

[123] Above, n 122.

[124] Above, n 122.

[125] Weller, above n 80, at 142; Daes, "The Concepts of Self-Determination and Autonomy of Indigenous Peoples in the Draft United Nations Declaration on the Rights of Indigenous Peoples", above n 15.

[126] Daes, "The Concepts of Self-Determination and Autonomy of Indigenous Peoples in the Draft United Nations Declaration on the Rights of Indigenous Peoples", above n 15.

any kind of 'interference'.[127] Where the right to choose is without interference, the argument can be made that this is impeded where the *range* of choice available is diminished by the actions of an third party agent; the language of choice presupposes the idea that there needs to be a plethora of potential avenues a particular group could choose from. Another key component of the right to self-determination as enshrined in art 3 is the word 'pursue'. To 'pursue' includes "to try to obtain or accomplish, to work to bring about, to strive for (a circumstance, event, condition)".[128] Therefore, we get this idea that pursuance in relation to art 3 means the right of indigenous groups to bring about economic, social and cultural development. Paired with the word 'freely', this means that indigenous groups have enshrined within art 3 the ability to bring about such development in circumstances where there are a number of choices available to them in determining how to do so; there must exist a domestic and international regime that enables indigenous groups to make meaningful choices about their lives.[129] One would anticipate that, in order to truly bring about economic, social or cultural goals, indigenous groups must have the ability to negotiate, defend and ensure these goals are recognised by the international community in order to realise them 'without restraint or restriction'.[130] In other words, indigenous groups need participatory rights in the international decision-making regime;[131] they need the external realisation of their self-determination.[132] Indeed, UNDRIP and ILO 169 call for the establishment of meaningful procedures for the consultation and participation of indigenous group and the right exists on the international scale as an ergo omnes obligation.[133]

So what is enshrined in art 3 is *both* the internal and external elements of self-determination. As alluded to above, internal self-determination relates to the ability for indigenous groups to be able to develop their own economic, social and cultural goals as within an already existing nation-state. Internal self-determination also encompasses the ability for nation states to be able to determine how to meet these goals of development; it encompasses the ability to *freely choose* how these goals are met.[134] As noted above in Part A of this section, the right to internal self-determination cannot be fully realised

[127] "freely, adv.", above, n 122.

[128] "pursue, v." in *Oxford English Dictionary Online* (June 2022, Oxford University Press, Oxford) <www.oed.com/view/Entry/155076>

[129] Davis, above n 17, at 31.

[130] Dhir, Olez and Harsdorff, above n 23, at 18, 33.

[131] Dhir, Olez and Harsdorff, above n 23, at 18, 33.

[132] Fitzmaurice, above n 13, at 361.

[133] UNDRIP, above n 11, art 5; ILO 169, above n 68, at art 2; Weller, above n 80.

[134] Weller, above n 80, at 124.

without also acknowledging that the right must have an ability to be protected from restriction by actions of other groups; it must come with the ability to participate in decision-making to ensure the defence of such a right.[135] Arguably, this is acknowledged in the term and the word 'pursue' – which guarantees the ability for a group to strive to bring about a certain goal – being preceded by the use of 'freely,' where 'freely' includes the ability to make a choice without interference. As noted above, there is no sense in the international order providing indigenous groups with a right that can be exercised without interference, but then not allow this right to be defended in the international space. Therefore, art 3 of UNDRIP protects the right of indigenous groups to be able to make choices concerning their economic, social and cultural development, and, their ability to defend these rights from interference by other groups.[136]

2 Degrading the environment leads to degrading choice

As has been highlighted multiple times throughout this paper, as the earth's temperature rises as a result of trapped GHG emissions within the atmosphere, we are likely to see a number of devastating climate impacts.[137] Downstream, a degradation in the environment leads to a lessening of the range of choice available to indigenous groups when determining how to freely pursue their social, economic and cultural benefit. To illustrate this effect, let us take the example of the indigenous groups in the Kalahari Desert.[138]

Indigenous groups in the Kalahari Desert are beginning to see their cultural practices degrade as a result of climate change and the increase in the Earth's temperature.[139] As noted above, one instance of this is that these groups can no longer engage in their traditional farming practices as a result of unsustainable high temperatures and increasing windspeeds.[140] It is conceivable that, as the instances of this particular farming practice begin to decrease, there will be less and less people available to transmit the knowledge of such practices to future generations.[141] In this way, the indigenous peoples have lost a

[135] Susan Glazebrook "Human Rights and the Environment" (2009) 40 VUWLR 293 at 311.

[136] Davis, above n 17, at 31; Weller, above n 80, at 124.

[137] See discussion above in Part II.

[138] United Nations Department of Economic and Social Affairs, above n 42.

[139] United Nations Department of Economic and Social Affairs, above n 42.

[140] United Nations Department of Economic and Social Affairs, above n 42.

[141] The wording of 'submitting these practices to future generations' is closely connected with the definition of IP used in the drafting of UNDRIP (noted above at 6). That definition outlined that indigenous communities are also distinguished from a population as a result of their desire to "transmit to future

cultural practice that they could have *chosen* to transmit and pass on to future generations. They have lost the ability to *choose* whether to include traditional farming practices when developing their culture and societal structures across generations.

The right to the use of the land to pursue an indigenous community's economic development is also diluted as a result of GHG emissions. Take, for example, the Māori economy in Aotearoa New Zealand. Almost 50% of the Māori asset base is invested in primary industries, including fisheries.[142] Large bodies of research have shown that the climate impacts, including those cause by an increase in the concentration of GHG emissions, can affect the physiological processes of fish.[143] This can include effects on their growth, maturation and swimming speed.[144] This, in turn, influences their mortality rate, distribution and ultimately, their availability for fishing.[145] It is conceivable that this could all impact the amount of revenue Māori holdings in fisheries make, and therefore how much of this revenue is available to be reinvested in Māori initiatives. Consequently, as with the ability to develop an indigenous culture as a result of losing farming practices in the Kalahari, Māori may lose the ability to include fisheries as a key part of their economic development. They lose their ability to *choose* to pursue this particular economic gain.

As we have seen above, choice is a key component of the right to self-determination as guaranteed by art 3 of UNDRIP Therefore, there is definitely a logical link to be made between the deleterious effects of GHGs, and a lessening in choice for indigenous groups when determining how best to pursue their economic, social and cultural goals. In our discussion above, we noted that the concept of 'free choice' is intrinsically linked to both internal and external self-determination. Where the emission of GHGs leads to climate degradation that leads to a degradation of choice available to indigenous people, the link is

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generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, *in accordance with their own cultural patterns, social institutions and legal systems."* (emphasis added). Therefore, another key element of the identities of indigenous groups as enshrined in rights legislation includes the need to pass on to future generations their cultural practices, including such things as language, farming, cultural dress etc.

[142] Darren N King, Guy Penny and Charlotte Severne "The Climate Change Matrix Facing Māori Society" in Richard A C Nottage (ed) *Climate Change Adaptation in New Zealand: Future Scenarios and Some Sectoral Perspectives* (2010, New Zealand Climate Change Centre, Wellington) at 108.

[143] V J Cummings and others *Assessment of potential effects of climate-related changes in coastal and offshore waters on New Zealand's seafood sector* (Fisheries New Zealand, May 2021) at 39.

[144] Cummings and others, above n 143, at 39.

[145] Cummings and others, above n 143, at 39.

therefore made between GHGs and the right to self-determination. As both elements of the right are enshrined in art. 3 of UNDRIP, this means that the deleterious effect of greenhouse gases has a logical link to the indigenous right of self-determination guaranteed therein.

C The Creation of a Legal Duty

At this stage, the reader may be wondering how all the above actually places a legal duty on nation-states to reduce their emission of GHGs. The answer to this can come in a number of forms, these will be set out and analysed below.

1 Duty derived from signing UNDRIP

An argument can be made that, for the 148 signatories of UNDRIP, in signing on to the acknowledgment of the right to indigenous self-determination in art 3, they also signed on to any correlated duties. This is in spite of it not being a binding legal instrument as a resolution of the UN General Assembly. Indeed, such is the position of Voyiakis, who states that UN General Assembly resolutions such as UNDRIP simply "reflect legal commitments that are related to the [International] Charter [on Civil and Political Rights]".[146] One can argue that in signing UNDRIP, these nation-states agreed to do what was necessary in order to help IP have full realisations of their rights under the instrument and other, binding legal agreements such as the ICCPR. As we have just seen above, full realisation of the right to self-determination means that the amount of GHGs being emitted into the atmosphere must be reduced, in order for there to be a preservation of the choice available to indigenous peoples when deciding how best to pursue their economic, social and cultural goals.

This line of reasoning can be further underscored by the preamble to UNDRIP.[147] Here, it is explicitly noted that in signing on to UNDRIP, nation-states are doing so in recognition of the "urgent need to protect and promote the rights of indigenous peoples affirmed in treaties, agreements, and other constructive agreements with states".[148] Further on in the preamble, it is noted that various rights instruments (including the ICCPR and ICESCR) affirm the "fundamental importance" of the right to self-determination of all peoples.[149] It is further outlined that, provided it is exercised in accordance with international law,

[146] Davis, above n 17, at 42.

[147] UNDRIP, above n 11, preamble.

[148] UNDRIP, above n 11, preamble.

[149] UNDRIP, above n 11, preamble.

nothing in UNDRIP should be used to deny indigenous groups their right to self-determination.[150]

The argument can be made therefore that the text of UNDRIP explicitly confers on to states the responsibilities associated with "protect[ing] and promot[ing]" the rights of indigenous peoples.[151] One can argue that by assenting to the terms of UNDRIP – with the above express acknowledgment – states thereby asserted their willingness to be subject to any rights or duties that could be showed to be connected to any rights or duties within UNDRIP itself.[152] By extension, where the emission of GHGs by nation-states can be linked to a degradation of the right to self-determination as guaranteed in art 3, nation-states have a legal duty upon them to mitigate the effects of this in line with their signing of UNDRIP. Mitigation, in this context, means reducing that nation-state's GHG emissions.

This argument has a number of strengths and weaknesses, however. The main strength in this line of argument is that it builds on something that one would logically expect in the realm of international negotiations. Namely, that nation-states sign international agreements (albiet non-binding) only when they agree to the provisions within it and will continually seek to uphold the provisions therein. However, it is relatively easy for a nation-state to argue that a line of argument based on the preamble to UNDRIP can never create a binding duty on signatories. This is because a preamble does not create any kinds of rights or duties in and of itself; all it does is underscore, highlight and repeat the key principles underlining the international instrument which it precedes.[153] Therefore, without art 3 (or indeed, any other provision in UNDRIP) making clear that there is any legal duty on nation-states under the instrument, one cannot concretely argue that signatories have signed on to UNDRIP with the intention of upholding any duty to reduce GHG emissions.

2 Other indigenous rights guarantee state co-operation

Another line of reasoning is that other rights contained within UNDRIP mean that nation-states have an obligation to reduce their GHG emissions. The most effective provision that can be used for this particular line of argument in art 29 of UNDRIP. This article guarantees

[150] UNDRIP, above n 11, preamble.

[151] UNDRIP, above n 11, preamble.

[152] As discussed by Daes although General Assembly resolutions are not ordinarily binding under UN procedure, "where these resolutions or Declarations contain principles of general international law, states are not expected to disregard them"; Daes, "An Overview of the History of Indigenous Peoples: Self-determination and the United Nations", above n 119, at 23.

[153] Johannes van Aggelen "The Preamble of the United Nations Declaration of Human Rights" (2000) 28 Denv J Int'l L & Pol'y 129 at 132 at 152.

that IP have the right to conservation and protection of the environment and that "[s]tates shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination."[154]

As outlined by the Former Chairperson of the UN Working Group in Indigenous Populations, an analysis of art 29 will illuminate that IP have the right to have their environment preserved and also to have it "safeguarded by possible damage by the State".[155] It is clear, therefore, that the Working Group in drafting art 29 (and UNDRIP itself) imagined that there be a high level of co-operation by nation-states when working with indigenous groups in protecting the environment and their rights to it. In fact, Daes goes on to elaborate that the State must also "implement assistance and take effective measures" to monitor the degradation of the environment, restoring its health.[156] Similarly, ILO 169 outlines that "governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit".[157]

However, this argument can fall victim to a similar counter-argument to the one above. That is, neither art 29 of UNDRIP nor ILO 169 go the step further in placing any kind of positive obligation or legal duty onto states. As above, nothing in the wording of the provisions goes so far as creating a concrete duties on to states to act (or not act) in a certain way. Although one can argue that the reduction of GHGs could fall within the umbrella of states 'implement[ing] assistance and tak[ing] effective measures' to help protect indigenous rights to the environment,[158] this phrase is so broad that it cannot be said with any kind of certainty that it translates as a legal duty being placed on to states. Therefore, whilst this line of reasoning certainly underscores that States acknowledge the need for co-operation by signing on to UNDRIP, it guarantees nothing more than this co-operation.

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[154] UNDRIP, above n 11, art 29.

[155] Daes, "An Overview of the History of Indigenous Peoples: Self-determination and the United Nations", above n 119, at 152.

[156] Daes, "An Overview of the History of Indigenous Peoples: Self-determination and the United Nations", above n 119, at 152.

[157] ILO 169, above n 68, art 7.4.

[158] UNDRIP, above n 11, art 29(1); Daes, "An Overview of the History of Indigenous Peoples: Self-determination and the United Nations", above n 119.

3 The modern line of international law

The final potential rationale for the imposition of a duty on states to reduce their GHG emissions flows from a conception of the right to self-determination as an accepted, customary norm of modern international law.[159]

International law has accepted that the burden of compliance with the right to self-determination falls on states.[160] Shivji notes that the right to self-determination is a right given to "oppressed nations, within otherwise sovereign states".[161] This means that the "duty-bearers" in upholding the right are "states, oppressor nations and nationalities, and imperialist countries".[162] Shivji is not the only academic who holds that the right of self-determination places a duty on states to act in compliance with it in the realm of international law. Errico argues that:[163]

> The obligations that states have towards indigenous peoples in connexion with the exploitation of natural resources seem to be perfectly in line with modern development of international law, which stresses more and more the association that exists between the sovereignty of States and their responsibilities. *The state is not only a sovereign it is clearly also a duty bearer.*

Errico considers that states also have the primary responsibility for creating conditions favourable to the development of its peoples and individuals.[164] Edith Brown Weiss further outlines three basic principles of state responsiblity.[165] Two of these principles place express duties on people (and therefore states as a whole) to "preserve the diversity and options available to subsequent generations" and a "duty to maintain the quality of the planet".[166] Bankes underscores that the purpose of the UNFCCC is to stabilise greenhouse gas concentrations in the atmosphere, and when read with art 3 of that convention, an obligation is placed on states to combat climate change.[167] This sentiment is echoed by the

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[159] Bhalla, above n 50, at 93.

[160] Shivji, above n 48, at 43.

[161] Shivji, above n 48, at 37.

[162] Shivji, above n 48, at 43.

[163] Stefania Errico "The Controversial Issue of Natural Resources: Balancing States' Sovereignty with Indigenous Peoples' Rights" in Stephen Allen and Alexandra Xanthaki (eds) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (2011, Hart Publishing, Oxford) at 341, emphasis added.

[164] Errico, above n 163, at 341.

[165] Bankes, above n 10, at 116.

[166] Bankes, above n 10, at 116.

[167] Bankes, above n 10, at 122.

Former Chairperson of the Working Group responsible for the drafting of UNDRIP, who outlined that the inclusion of the right of self-determination in an international human rights instrument in itself places an obligation on nations to honour it.[168] As theorised by Daes, UNDRIP is a declaration of human rights and it is "universally understood in the law of nations that human rights obligations are not subject to contrary domestic legislation".[169] Put simply, "[h]uman rights law prevails over national law".[170] By conceiving of the right to self-determination as a principle of customary international law we therefore get rid of another potential issue; that UNDRIP, as a UN General Resolution, is not legally binding. Davis notes that UNDRIP, although being non-binding, fulfills an "amorphous role" as a statement of soft law but in also reflecting binding rules of customary international law.[171]

Alongside climate agreements such as the UNFCCC, there have been a slew of cases from jurisdictions across the world that underscore the existence of a duty on nation-states to mitigate the effects of climate change, where the duty derives from customary international law. The first example of this is in *Urgenda*, which made use of the customary no-harm principle.[172] The Urgenda Foundation (Urgenda) was arguing that the Dutch State was obliged to reduce its GHG emissions under obligations placed upon it by the European Convention on Human Rights.[173] The Supreme Court of the Netherlands upheld previous orders by the District Court and Court of Appeal, directing the State to reduce its GHGs by the end of 2020 at a level of 25 per cent compared to 1990.[174] Urgenda argued that the Netherlands had a duty of care to prevent the dangerous effects of climate change and that

[168] Daes, "An Overview of the History of Indigenous Peoples: Self-Determination and the United Nations," above n 155, at 23.

[169] Daes, "An Overview of the History of Indigenous Peoples: Self-Determination and the United Nations," above n 155, at 23.

[170] Daes, "An Overview of the History of Indigenous Peoples: Self-Determination and the United Nations," above n 155, at 25.

[171] Davis, above n 17, at 19.

[172] *The State of the Netherlands v Stichting Urgenda (Urgenda*) ECLI:NL:HR:2019:2007, Hoge Raad, 19/003135 (Engels).

[173] Although *Urgenda* was also brought on human rights justifications, it is based on arts 2 and 8 of the European Convention on Human Rights. These protect the right to life, and the right to private and family right respectively. This paper does not suggest that an argument based on these rights be made, rather, the case is used to show that courts are willing to place duties on nation-states to reduce their GHG emissions in response to possible rights violations; *Urgenda,* above n 172, at [5.2.1]-[5.2.3]; European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 ETS 5 (4 November 1950), arts 2 and 8.

[174] *Urgenda,* above n 172, at [8.3.5].

a reduction in GHG emissions was necessary in order to adequately discharge this duty.[175] Urgenda successfully established as fact that the Dutch State was capable of causing, or at least in any event contributing, to the climate crisis. Therefore, even though no single country can be said to fulfill the 'but for' test generally required to find a sufficient nexus between an act/omission and a harmful consequence, the Court found that the Netherlands was still obliged to "do its part".[176] The Supreme Court made it clear that, where GHG accumulation occurs as a result of emissions worldwide, a nation's domestic emissions can in itself slow down the rate of climate change. This means that it could be adequately said that each nation-state has a share in causation of global warming, and therefore the consequences and responsibilities that flow on from it.[177] The Court related the emission of GHGs to the no-harm principle that exists as a norm of customary international law.[178] The implication of this is that States can have a duty applied unto them, in accordance with which they must reduce their GHG emissions.[179] According to the court "[t]his approach justifies partial responsibility: each country is responsible for its part and can therefore be called to account in that respect."[180]

What becomes clear in the *Urgenda* case is that domestic Courts are applying customary principles within international law (and within the framework of international human rights law) to hold States liable for the GHG emissions, going so far as to place a duty on them to reduce doing so.[181] In [6.5], it was noted that, where human rights law requires governments to pursue good governance and practice due diligence, there is an obligation to take measures of a certain scope or quality as a result; including the imposition of a policy which pursues a reduction in a 'fair share' of that nation-state's GHG emissions.[182]

Similar sentiments were echoed in the case of *Massachusetts v EPA*.[183] That case concerned whether or not the EPA (Environmental Protection Authority) could regulate

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[175] *Urgenda,* above n 172, at [2.2.2]

[176] *Urgenda,* above n 172, at [5.7.1]

[177] RHJ Cox "The Liability of European States for Climate Change" (2014) 30 Utrecht J. Int. Eur. Law 125 at 132-133.

[178] Sandrine Maljean Dubois "The No-Harm Principle and the Foundation for international Climate Law" in Benoit Mayer and Alexander Zahar (eds) *Debating Climate Law* (2021, Cambridge University Press, Cambrigde) at 15; *Urgenda,* above n 172, at [5.7.5]

[179] *Urgenda,* above n 172, at [5.7.5]

[180] *Urgenda,* above n 172, at [5.7.5].

[181] *Urgenda,* above n 172, at [5.7.5].

[182] *Urgenda,* above n 172, at [6.5].

[183] *Massachusetts v EPA* 549 U.S 497 (U.S April 2, 2007).

motor-vehicle emissions across the United States, given that its regulation would be arguably "useless in the face of the magnitude of the climate problem".[184] This was no excuse. The Supreme Court of the United States held that a reduction in domestic emissions would slow the pace of climate change globally.[185] Similarly, the Colombian Supreme Court held that there is a duty and co-responsibility on the Colombian state to stop the increase in GHG emissions resulting from forest reduction in the Amazon.[186] It was held that:[187]

> ... it is imperative to adopt immediate mitigation measures, and to protect the right to environmental welfare, both of the plaintiffs, and to the other people who inhabit and share the Amazonian territory, not only nationals, but foreigners, together with all inhabitants of the globe, including ecosystems and living beings.

This shows us that the conceiving of self-determination as a form of customary international law allows us to link the right to a State's corresponding duty to reduce their GHG emissions. As has been seen in the aforementioned cases, such is already being done in jurisdictions across the world.

4 A hybrid justification

Overall, the strongest rationale for imposing an obligation onto states to reduce their GHG emissions comes in taking a two-fold approach. That is, one based on state's accession to UNDRIP and the accepted, customary norms of international law. There are two main benefits for this. Firstly, an argument based on a State's recognition of UNDRIP can be weaponised to show a clear intention by that State to be bound by its obligations. This means that Courts and decision-makers can clearly point to a government's intention in signing UNDRIP when justifying taking actions to reduce GHG emissions. However, taking the position that norms of international law also place obligations on nation-states to reduce their emissions – given the global nature of the climate problem – states that are not signatories to UNDRIP cannot shirk their responsibilities to take action against climate change simply because they did not sign the declaration. As well as this, the norms of international law clearly place the right to uphold self-determination with nation-states, meaning that the absence of an explicit duty in UNDRIP does not prevent a legal duty to reduce GHG emissions falling on states.

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[184] Cox, above n 177, at 132.

[185] *Massachusetts v EPA,* above n 183, at [546].

[186] *Demanda Generaciones Futuras v Minambiente* (2018) CSJ STC4360-2018 Radicación no. 11001-22-03-000-2018-00319-01 at 34.

[187] *Demanda Generaciones Futuras v Minambiente,* above n 186, at 34.

Therefore, it becomes clear that courts internationally are beginning to hold their respective governments accountable by finding that they are subject to a duty to reduce their GHG emissions. The reasoning for this is often based on international law and rights-based approaches, whether the right be to the environment, the right to life or the right to family life.[188] As such, Courts have drawn a similar link between human rights and a duty for states to reduce GHG emissions as outlined in section 3 above. Where there can be shown to be a link between the emission of GHGs and a negative effect on guaranteed human rights, there can be the imposition of a legal duty on to States to reduce their GHG emissions. As outlined above, the logical link between GHGs and the degradation of the right to self-determination held by indigenous peoples has been made; as the climate degrades, so too does the range of choice available to indigenous groups when pursuing their own economic, social and cultural goals. As has been underscored throughout this paper, to dilute that right is to dilute the very identity of indigenous peoples themselves.[189] This means that there is definitely scope to argue the legal imposition of a legal duty on states to reduce their GHG emissions in order to honour the indigenous right to self-determination.

V Discussion

Having established a potential basis for the imposition of a legal duty to reduce GHG emissions, the efficacy of this argument remains to be evaluated. A number of possible critiques will also be indicated, as well as points that can be used in rebuttal. Then, this paper will outline the strengths and weaknesses of the argument developed on the basis of the right to self-determination as outlined in art 3 of UNDRIP. Once these have been set out, this paper will critically analyse where the balance lies in order to determine whether there is the ability to argue that States must reduce their GHG emissions in order to better uphold the right to self-determination.

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[188] As well as in *Urgenda,* the degrading effect of climate change on the rights of indigenous peoples has recently been confirmed within a United Nations rights framework itself. In its recent decision, the United Nations Human Rights Committee found that the State of Australia violated indigenous Torres Islanders' ICCPR rights to private life, family and home. The Human Rights Committee considered the spiritual connection of the Torres Islanders to their lands. They outlined that Australia's failure to take timely steps to mitigate the effects of climate change and its negative consequences on the Torres Island peoples' ability to enjoy their rights free from arbitrary interference; *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019* CCPR/C/135/D/3624/2019 (21 July 2022).

[189] Technical Review of the UNDRIP, above n 18, at 3.

A Is This a Duty Only on Those Who Have Indigenous Populations?

One potential way in which to critique this argument is to assert that it is only those states who have indigenous populations within them who must uphold the right to indigenous self-determination. States who do not have these populations within them can argue that they do not have people within their territory to which these duty is owed, and therefore, they have no need to reduce their GHG emissions based on the above argument.

There are a number of ways that this counter-argument can be rebutted. The first is to point to the fact of inclusion of the right to indigenous self-determination in UNDRIP. UNDRIP itself has 118 signatories, all who, in signing the declaration, have agreed that they will be held accountable to the provisions within it. As we have discussed above, self-determination is often conceived of as a principle of customary international law,[190] and an ergo omnes obligation,[191] meaning there is an expectation in the international community that a state will always honour it.[192] As well as this, one can point to the transboundary nature of climate change, noting that emissions that occur in one country can potentially impact life in another.[193] By extension, although a particular state may not have a recognised indigenous group within its borders, it emissions will affect other indigenous groups across the world in the ways set out above. Indeed, legal recognition of the transboundary effects of climate change are recognised and supported in the *Urgenda* case, as we have seen.[194] This way, there is no defence to the imposition of a duty to reduce GHG emissions by arguing that one does not have an indigenous population within their borders.[195]

What could potentially be argued for, however, is that there is a more stringent duty to reduce GHG emissions imposed on those who go have recognised indigenous populations within their borders. Whilst there is limited scope to argue that states are not subject to upholding art 3 of UNDRIP due to a lack of indigenous populations within their borders, it is a stronger argument to argue that those states with indigenous populations have a more rigorous duty to reduce their GHG emissions. This is because, as alluded to above, whilst links can be made between *all* nations and *all* GHG emissions in the causation of climate

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[190] Bhalla, above n 50, at 93.

[191] Weller, above n 80, at 146.

[192] "ergo omnes obligations", above n 81.

[193] Van Erp and others *The Concept of Smart Mixes for Transboundary Environmental Harm* (2019, Cambridge University Press, Cambridge) at 1.

[194] *Urgenda,* above n 172, at [5.7.1]-[5.7.2].

[195] *Urgenda,* above n 172, at [5.7.1]-[5.7.2].

change (warranting all states to be beholden to a duty under art 3) a stronger and more direct link can be made between states who have subjugated indigenous populations and the indigenous populations themselves.

B Further Strengths

Perhaps the biggest strength of this approach is that it draws, not only a legal, but a *logical* connection between indigenous populations and the impact of GHGs. It is important to highlight what this means. Where indigenous populations (and their definition) are so closely linked to the survival of the natural environments around them, to erode the environment through state actions is to erode their very existence. This means that the connection to the environment is what makes indigenous groups politically and legally cognisable in the first place.[196] As we have seen in the definition of indigenous peoples used in drafting UNDRIP, indigenous connection to their environment forms the basis of international agreements and underscores their participation in any climate or human rights decision-making regimes.[197] Threatening this connection – and once again, undermining the international definition of indigenous peoples – therefore destabilises the understandings on which various international agreements are built. This includes instruments such as UNDRIP or other international instruments with built-in rights for indigenous peoples.[198] Because the legal identity of indigenous peoples is so strongly linked to ancestral connection to land, it is therefore arguable that there is a translation into a legal duty imposed onto states to do what they can to protect the this identity. This includes in protecting their environment in order to ensure their continued legal standing in line with the definition adopted by the working group when drafting UNDRIP.

Another key strength is in relation to the 'hybrid justification' outlined above.[199] To recap, this argues that the duty to reduce GHG emissions based on the right to self-determination can be placed on states both by pointing to UNDRIP and/or noting the current position of the right to self-determination in the norms of modern international law. This is useful for a number of reasons. Firstly, allowing a fallback to the norms of international law means that there is scope to argue that *even though* some states are not signatories to UNDRIP, they are still required to uphold the right to self-determination as it exists in customary international law more broadly. This still allows duties to be placed on to states in line with

[196] Technical Review of the UNDRIP, above n 18, at 3-5.

[197] Technical Review of the UNDRIP, above n 18, at 3-5.

[198] Such as the ILO Convention 169, above n 68

[199] Part IV.

the right as, separate to its status within UNDRIP, it exists as an accepted human right, as per the above.

Secondly, allowing the norms of international law to sit alongside UNDRIP arguably strengthens the rights contained within it. With 118 signatories, UNDRIP is by all accounts a widely recognised and dynamic instrument on the international stage. What can be inferred from this is a widespread approval of the rights enshrined therein.[200] In other words, states would not have signed UNDRIP if they did not think that it reflected accepted positions within the international sphere anyway.[201] This, it can be argued, reflects the state of current international thinking when it comes to the legal rights of indigenous peoples, and by extension, that the signatories to UNDRIP had the intention to uphold the rights contained within it.[202] As discussed above, where the argument is made that it is a corollary duty of the right to self-determination that states reduce their GHGs, this means can one can argue that the imposition of such a duty is only underscored by the codification of art 3.[203] To put it simply, the logic would have already existed in the realm of international law to draw the link between the right to self-determination and a reduction of GHG emissions; all that UNDRIP does is show that the rights contained within it are really a reflection of international custom.[204] As a norm of customary international law, this means that states can be held to account where they have signed UNDRIP *and* where they have not.[205]

C Further Weaknesses

That being said, linking the right to indigenous self-determination with a duty on states to reduce their GHG emissions is a lot easier said than done. It is not a completely infallible argument.

Although a discussion on the applicability of international law is beyond the scope of this paper, it is worth noting that the inherent weakness in the approach set out in this paper is that the status of international law within different nation states. This may become determinative as to the extent to which any international duty must be followed by that state. For states with dualist approaches to international law, becoming signatories to

[200] Andrew Guzman *How International Law Works: A Rational Choice Theory* (2008, Oxford Academic, New York) at 119.

[201] Guzmnan, above n 200, at 119; Davis, above n 17, at 19.

[202] Davis, above n 17, at 19.

[203] Quane, above n 14, at 266.

[204] Davis, above n 17, at 19.

[205] Davis, above n 17, at 19; Weller, above n 80, at 120.

UNDRIP does not necessarily mean that the rights and duties included therein have become domestic law.[206] This may require UNDRIP to be enshrined in domestic legislation.[207]

Further than this, however, is an issue with this approach that may seem obvious to the reader; rights are not in themselves unlimited.[208] This is also true for the right to self-determination. De George notes that, whilst the right of collective self-determination can be claimed by a peoples against other groups, it is limited "only by other groups' ability to do the same".[209] This means that whilst indigenous groups have the ability to freely decide how to pursue their own economic, social and cultural gains, the same could be said of other nations, peoples and states.[210] It is therefore conceivable that a large emitter of GHGs could argue that, without engaging in activities that release fossil fuels, there will be severe economic impact on those within its borders. These large emitters can argue that, without the release of GHGs and the loss of capital that flows from this, the ability for that state to freely decide for itself how to pursue its own economic, social and cultural gains is taken away.

However, one can rebut this by stating that it is not so conclusive that the right to self-determination actually *is* limited in the same way that other rights are.[211] Certainly, this is the position taken by some academics, including Quane.[212] Quane argues that "the right to self-determination and UNDRIP is a codification of the right at customary international law, if this is the case, then this means that the right is not subject to any limitations".[213] This is underscored by the fact that the right to self-determination is not undermined by any other right contained within UNDRIP, and the ICCPR and ICESCR place the right ahead of all others.[214] Quane further asserts that, the scope of a nation-state's self-

[206] M Rafiqul Islam *International Law: Current Concepts and Future Directions* (2014, LexisNexis, Chatswood) at 105.

[207] Rafiqul Islam, above n 206.

[208] Henry Steiner "Prologue: Limits and Their Varieties" in in Bardo Fassbender and Knut Traisbach (eds) *The Limits of Human Rights* (2019, Oxford Academic, New York) at 23.

[209] Richarge T De George "The Myth of the Right of Collective Self-Determination" in William Tiwing (ed) *Issues of Self-Determination* (1991, Aberdeen University Press, Aberdeen) at 1.

[210] See the discussion on 'Two Sovereignties' (state vs popular) in relation to the right of self-determination as held by individuals generally in Kate Nash "Human Rights, Global Justice and the Limits of the Law" in Bardo Fassbender and Knut Traisbach (eds) *The Limits of Human Rights* (2019, Oxford Academic, New York) at 74.

[211] Quane, above n 14, at 266.

[212] Quane, above n 14, at 266.

[213] Quane, above n 14, at 266.

[214] Quane, above n 14, at 266.

determination reduces where there are indigenous populations within their borders.[215] However, this in itself is a weak rebuttal; if everyone has an unlimited right to self-determination, how would we ever justify the interference of one state with another? It seems Quane may have confused jus cogens rules with rules of customary international law; where the latter is owed independently of signing any international agreements, but must be balanced against other interests. If we were to take Quane's perspective and hold that states must limit their own self-determination to guarantee that of IPs, it still remains unclear to what point exactly the limitation must go. Scope can be made for the argument that the right to self-determination is metered by other rights contained in various rights instruments (such as the principle of non-interference). Whether or not this can be said to be a satisfying answer – and indeed, the principles regarding the interrelationship of various human rights – is unclear.

States could also disavow this argument by stating that decisions such as those in *Urgenda* undermine key legal norms, such as the separation of powers.[216] States may argue that where judiciaries choose to impose legal duties on to their respective governments as a result of international legal instruments, this is erring into the political realm. However, this can be relatively easily rebutted. As discussed in *Urgenda* itself, simply because a decision of a court has a policy implication, does not mean that it is, in itself, a form of political decision-making.[217] Where a court upholds an internationally-based duty on states to reduce their GHG emission, they are not outlining to their respective governments exactly *how* to go about this decision.[218] In this respect, they are not determining the exact scope of any policy or making any concrete decisions. Instead, all that is being done is the enforcement of a right that is founded in international law.

D Evaluation

Having said all that, it becomes clear that the argument is by no means completely water-tight. What I believe is most pressing is the issue in regards to what exactly *tempers* the right to indigenous self-determination. Whilst the answer to this likely requires looking outwards towards the interplay of the right to self-determination with other enshrined human rights (or other principles of international law, such as the non-interference principle),[219] it remains unclear exactly what other right is best used to counterbalance art

[215] Quane, above n 14, at 277.

[216] *Urgenda,* above n 172, at [2.2.3].

[217] *Urgenda,* above n 172, at [8.5.3].

[218] *Urgenda,* above n 172, at [8.5.3].

[219] See footnote 165 above.

3.[220] Whilst there is no doubt that some human rights may be more 'unlimited' than others,[221] the nature of the definition of the right to self-determination means that it is unclear whether this right is one of those.[222] Logic states that not all peoples can have a completely unchecked right to self-determine, this would surely lead to chaos. As such, there must be situations in which states, nations or peoples must exercise this right whilst taking into account the needs of others.

Another glaring issue is the status of international law more broadly, and more specifically, the enforceability of international agreements or resolutions like UNDRIP. Where states take a dualist approach to international law, it may be harder to place a duty on them to reduce their GHG emissions where the argument for doing so is based on a right that finds its main iteration in an international law instrument. As discussed above, although there is the ability to have recourse to the norms and customs of international law, the issue still stands as to how this would actually be enforceable on the international stage.

Overall, I believe that the balance falls slightly in favour of recognition of the argument set out in this paper. In other words, I believe that there is scope to argue that, as a result of the internationally recognised right to self-determination held by all indigenous peoples, states have a corresponding duty to reduce their GHG emissions. What I believe ultimately tips this balance is the recognition that the international status of indigenous peoples is so closely tied to their connection with their land and natural resources.[223] Where the emission of GHGs puts these resources in jeopardy, so too is the identity and status of the people to which it is connected. As discussed above, not only is this connection enshrined in the internal aspect of self-determination, but also externally, as it is the connection to their lands that means that indigenous peoples have a distinct voice that warrants their independent participation in international climate decision-making. In other words, it makes no sense for the international regime to accept (and indeed, use as a guiding benchmark) the connection between indigenous groups and their environments and then wash its hands clean of any corresponding duties to uphold that spiritual and legal connection. The precedent that this would set is dangerous – states cannot be allowed to inadvertently undermine definitions that are accepted in international law.

[220] UNDRIP, above n 11, art 3.

[221] Steiner, above n 208.

[222] Steiner, above n 208; Nash, above n 210.

[223] Technical Review of the UNDRIP, above n 18.

VI Conclusion

To conclude, this paper has attempted to shed light on a method which can be used in the international order to justify placing a duty on states to reduce their GHG emissions. This duty would be based on the right to self-determination, as guaranteed to indigenous peoples in various instruments such as the UNDRIP, ICCPR, ICESCR and ILO 169.[224] As well as this, there is scope to argue on the application of the right (and its corresponding duty) based on customs and norms of modern international law.

This paper grounded itself in a discussion of the *why,* outlining why the connection of indigenous peoples to their ancestral territories – and the natural resources therein – is so important to their identity. Next, it was important to clarify exactly what the effects of climate change would be on these natural resources, and the effects that GHGs would have. The argument for a duty requiring states to reduce their GHG emissions was essentially one of logic. Where the emission of GHG limits the ability for natural resources to be exploited in the way that indigenous peoples wish, the ability for those groups to decide how these natural resources will play into the development of economic, social and cultural goals is also limited. This means that the emission of GHGs can be logically linked to the deprivation of the meaningful choice that is required for the full realisation of the right to self-determination. As set out above, not only does this mean that the internal element of self-determination for IPs is being undermined, but without the ability to negotiate for these rights on the international stage, they are rendered powerless.

That being said, the argument is not without fault. Firstly, there are discrepancies with exactly how different states approach the applicability and enforceability of international legal instruments that have not been incorporated into domestic law. Further, there is scope to rebut that the right to self-determination as held by indigenous peoples is itself limited – and that other states are free to pursue their own economic, social and cultural gains by engaging in activities that result in the emission of GHGs.

Looking to the future, various decisions of courts around the world show that judiciaries are ready to enforce climate-related duties on to states, especially where their rational grounding is based on international human rights. Indigenous groups deserve security of their natural environment, indeed, it is integral to their continued survival and self-identity. It must be stressed that, without the preservation of the earth's natural resources, IPs face a disproportionate loss. Given that many indigenous groups lack the ability to negotiate

[224] UNDRIP, above n 11; ICCPR, above n 83; ICESCR, above n 83 and ILO 169, above n 68.

equally with other groups on the international stage, this loss is further exacerbated. The right to self-determination is a duty owed *to* indigenous groups *by* established nation-states. This right cannot be shirked from – it has been recognised in various legal instruments and in doing so reflects the sentiments of the international legal regime as a whole. I believe that this paper shows that there is a link that can be drawn between the right of self-determination and a corresponding duty on states to reduce their GHG emissions. Although there is work needed to be done in order to outline the precise scope of the right and the corresponding duty – including in outlining to what extent, if any, the right is limited and how it is to be enforced – the making of the logical link is the first step in this path.

Word count

The text of this paper (excluding abstract, table of contents, footnotes, and bibliography) comprises approximately 12,441 words.

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