International Human Rights Law (2020)

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In 2020, UN human rights law practice was of course heavily shaped by the onset of the COVID-19 pandemic, a global health crisis,¹ that could easily be qualified as a ‘disaster’ situation due to its overwhelming and seriously disruptive nature, the extent of injuries and casualties inflicted,² but also the demonstrated importance of adequate hazardous risk assessment, mitigation, preparation and response.

The application of human rights to the COVID-19 pandemic is well covered by the Yearbook’s thematic section this year.³ Therefore, this section only gives a short summary of developments on COVID-19 in UN human rights law practice, after which it turns to other disaster events during 2020, including several (pending) oil spills (from ships) or collapses of dams. The UN treaty bodies did not take further steps in several climate cases pending since 2019⁴ and, in fact, their practice was generally limited because the review of periodic State reports was partially suspended over 2020, and hampered by lack of submission of new reports due to the pandemic.⁵

1 COVID-19

The practice of the UN human rights system regarding COVID-19 is well documented on the OHCHR’s website. Especially the work of the UN Special Rapporteurs has been comprehensive,⁶ with the adoption of at least ten full

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1 See e.g. on COVID-19 as a global health crisis the contribution by Stefania Negri in this volume of the Yearbook.

2 On this point, see Sommaro in this volume of the Yearbook, reporting on the debate between States in the Sixth Committee of the UNGA in 2020, during which many delegations stressed that the pandemic actually fits the definition of “disaster” provided in art. 3 of the ILC ‘Draft Articles on the Protection of Persons in the Event of Disasters’.

3 See e.g. Nifosi-Sutton in this volume of the Yearbook.

4 See also contributions of Wewerinke-Singh and Antoniadis in this volume of the Yearbook; and Hesselman in Issue No. 2 of this Yearbook (2019).

5 Since March 2020, the ICESCR Committee for example only discussed reports by Finland and Latvia in its session of February 2021.

6 See <<https://www.ohchr.org/EN/HRBodies/SP/Pages/COVID-19-and-Special-Procedures.aspx>>, last accessed (as any subsequent URL) on 15 August 2021.

dedicated reports by the end of 2020 by rapporteurs on the rights of older persons; peoples of African descent; indigenous peoples; contemporary slavery; toxic substances; violence against women; right to housing; right to privacy; right to education; and right to freedom of expression. This is followed by an even larger amount of reports published or announced for 2021.

UN Special Procedures have also been especially prolific in issuing COVID-19 related communications.⁷ By mid-2021 there were over 150 communications mentioning COVID, of which 54 had been communicated during 2020. Communications discussed a variety of settings, including: the vulnerability and safety of prisoners; persons without formal residence; precariously employed migrant workers; poor access to water and sanitation; or poor access to information about the pandemic, for example for persons with disabilities.⁸ Several individual and joint guidance notes and principles were issued too, including one by the Special Procedure on unilateral coercive measures. She interestingly called upon States 'to lift or suspend' any unilateral sanctions impeding the trade in or delivery of essential humanitarian goods and commodities – such as medicines, antivirals, medical equipment, its component parts and relevant software, or food. States were also encouraged to review and minimize unilateral sanctions so affected States can effectively protect their populations during COVID-19, repair their economies, and guarantee the well-being of their people in the aftermath. The rapporteur also sent a communication on this topic to the United States, for benefit of the management of the health crisis in Cuba.⁹ This may be one of the first instances that the rapporteur has addressed human rights and sanctions in the context of a (health) disaster event.

The practice of the UN treaty bodies is very limited by contrast: by the end of 2020, no Concluding Observations were adopted on COVID-19 specifically, and although treaty bodies continued to issue Views, they addressed communications from previous years. No views addressed COVID-19 or other disasters. Treaty body practice on COVID-19 therefore consisted mostly of issuing statements, toolkits and guidance notes. By the end of 2020, this included two statements by CESCR on universal affordable vaccines and the role of social, economic and cultural rights in the pandemic, and single ones

7 These can be accessed via <<https://spcommreports.ohchr.org>>.

8 See also contribution by Nifosi-Sutton in this volume of the Yearbook.

9 OHCHR, Joint Communication of the UN Special Procedures to the United States of America UA USA 8/2020 (17 April 2020) via <<https://spcommreports.ohchr.org/>>.

on discrimination by CERD, CMW, CRPD and CEDAW.¹⁰ Most of these are discussed in some detail by Nifosi-Sutton in this year's Yearbook.

2 Climate Change: Persons with Disabilities, Displacement, Cultural Rights, Solidarity

In 2020, UN Charter-based bodies adopted several studies, reports and communications dedicated to the topic climate change and climate-related disasters. The UN Special Rapporteur on the Right to Housing adopted a new set of 'Guidelines on the implementation of the right to housing', which also addressed climate change and housing for disaster-prone populations.¹¹ Since the guidelines only partially deal with this topic, it is not discussed separately here. Yet, Guideline No. 13 for example demands that the right to adequate housing is 'integrated into strategies for the adaptation to and mitigation of climate change, as well as in planning, preparing and implementing strategies for addressing climate change displacement'. In addition, States should give priority to protecting and preserving existing communities *in situ*, for example by installing protective infrastructure, moving households to safer sites within the community, and ensuring adequate availability of resources. This is of some interest in light of some ongoing developments, like the joint communication of UN Special Rapporteurs to the United States discussed in section 2.4.

2.1 *The OHCHR Analytical Study on Rights of Persons with Disabilities*

In April 2020, the OHCHR published its analytical study on States' and other actors' human rights obligations and responsibilities for disability-inclusive approaches in the context of climate change, as part of its wider structural annual attention to climate change.¹² This study also collects good practices, which are rich and of considerable interest, but will not be repeated in full here.

Overall, this report unpacks the impacts of climate change on persons with disabilities' health, food security, adequate housing, water and sanitation, livelihoods and decent work, and human mobility, and provides several

10 They are available via <<https://www.ohchr.org/EN/HRBodies/Pages/COVID-19-and-Treaty-Bodies.aspx>>.

11 Report of the Special Rapporteur on the Right to Adequate Housing: Guidelines for the Implementation of the Right to Adequate Housing (26 December 2019) UN Doc A/HRC/43/43, Guideline 13. The report is listed for 2020.

12 OHCHR, 'Analytical study on the promotion and protection of the rights of persons with disabilities in the context of climate change' (22 April 2020) UN Doc. A/HRC/44/30.

conclusions and recommendations. On disasters specifically it notes that ‘persons with disabilities are disproportionately affected by the adverse impacts of disasters and are at greater risk of death, injury and additional impairments’. This is due to ‘their general exclusion from disaster risk reduction policies, plans and programmes’. As is well known, emergency-related information and warnings are often not accessible to persons with disabilities, which has been a problem during COVID-19 too.¹³ Moreover, extreme weather events can disrupt the availability and accessibility of health-care services, especially in rural areas.¹⁴ Particularly problematic is that persons with disabilities may rely on assistive devices to enhance physical functions, e.g. for hearing, seeing or mobility. During disasters, such devices may be lost or damaged, but they are typically not distributed among relief materials – and ‘when they are, they may not provide for the same functionality that the lost devices provided’.¹⁵ The study highlights that Article 21 of the CRPD addresses people’s rights to be provided with information in accessible formats, as vital to emergency warnings, information related to disasters and emergencies, or enabling participation in climate action.¹⁶

The analytical study explicitly acknowledges the relevance of the Sendai Framework on Disaster Risk Reduction, noting that ‘in case of extreme weather events and natural disasters, the principle of “building back better” should involve rebuilding housing and infrastructure in an inclusive manner, following the principles of universal design’. The latter entails that products, environments, programmes and services are designed in such a way that everyone can use them ‘to the greatest extent possible, without the need for adaptation or specialized design’.¹⁷ To address and prevent discrimination and abuse against persons with disabilities, States and other stakeholders are asked to promote disability-inclusive design and implementation of humanitarian, migration and disaster risk reduction plans and policies.¹⁸

2.2 *Report of UN Special Rapporteur on Internal Displacement on Slow-Onset Effects of Climate Change*

This report of July 2020, sketches the complex relationship between human mobility and the stress factors for movement caused or exacerbated by climate change. It also highlights that due to such stressors it can be hard to distinguish

13 See Nifosi-Sutton in this volume of the Yearbook.

14 See UN Doc. A/HRC/44/30 (n 12) para. 10.

15 *Ibid.*, para 11.

16 *Ibid.*, para 27.

17 *Ibid.*, para 47.

18 *Ibid.*, para 66.

clearly between 'forced' or 'voluntary' movements: as such, movement often falls on a *continuum* between the two.¹⁹

This report endorses the four key ways in which slow-onset adverse effects of climate change could 'turn into a disaster and increase displacement risk', set out earlier by the Displacement Task Force of the UNFCCC in 2018. They include: disruption in the availability of vital resources, such as water, food, shelter and energy production; occurrence of sudden-onset events, like flooding, wildfire or heat waves, with increased frequency and intensity; the erosion of communities' capacity to withstand further hazards, increasing vulnerability to the next hazard; and climate change as (hidden) threat multiplier for economic, social, cultural and political factors of crisis.²⁰ The report also (re)affirms that the 'applicable legal framework' to climate-related movements lies at the intersections of 'various legal and policy fields, including international human rights law, international environmental law, international disaster relief law, disaster risk reduction and sustainable development, and requires concerted action'. Despite not discussing international humanitarian law clearly, rapporteur Jimenez-Damary also addresses the interaction between slow-onset events and armed conflict. Moreover, she specifically explains the challenges faced by indigenous peoples, farmers, herders, pastoralists and fisherfolk, children and young persons, women, and the elderly, all of whom may have few choices in terms of adaptation and movement due to climate change.

In terms of obligations, it is affirmed that States have duties and responsibilities to 'prevent and avoid the conditions' leading to (disaster) displacement; to provide humanitarian assistance and protection to IDPs; and to support durable solutions, as previously explained in the UN Guiding Principles on Internal Displacement. Moreover, 'in the context of climate change and disaster displacement, States must take positive action to protect people from direct threats to life and other human rights impacts of foreseeable natural hazards and related displacement by taking both *preventive and remedial action*'.²¹ This follows the adoption of the new HRC General Comment No. 36 on the Right to Life adopted in 2018.²² It then defines several obligations of 'prevention and preparedness', 'protection and assistance', 'durable solutions' and 'other obligations', like participation of affected persons in decision-making, free, prior and informed consent, transparency and access to information, equality and

19 UNGA, 'Report of the Special Rapporteur on the human rights of internally displaced persons, Cecilia Jimenez-Damary' (21 July 2020) UN Doc. A/75/207; see on this report also Scott in this volume of the Yearbook.

20 *Ibid.*, para 13.

21 *Ibid.*, para 41 (emphasis added).

22 See Hesselman in Issue No. 1 of the YIDL (2018).

non-discrimination, accountability and access to effective remedies. It also formulates responsibilities for business actors, and even academia.

2.3 *Report of UN Special Rapporteur on Cultural Rights*

This report of August 2020, by rapporteur Karima Bennouna, draws attention to the cultural rights dimensions of the climate emergency which, she notes, are still too often overlooked.²³ Bennouna notes that the climate impacts of disasters are often gendered, with women facing higher vulnerability due to cultural factors such as inability to swim, mobility-restrictive clothing, or culturally assigned gender roles. Alternatively, humanitarian (disaster) assistance tends to ignore relevant caste dynamics or caste-related power structures, thereby exacerbating existing caste-based exclusion.²⁴

Climate change may also fast track damage to buildings, places of cultural practices, cultural heritage, and harm people's ability to dedicate time to a full cultural life. In some cases, this is due to climate related-disasters, and in other cases due to the (entire) disappearance of cultural sites and practices. Particular concern exists for Small Island Developing States and low-lying areas, as these communities face 'catastrophic destruction of their natural and cultural heritage': climate change may put the cultural identities and traces of entire nations at risk, effectively amounting to '*cultural extinction*', including by 'total disappearance of human settlements and related ancestral cultures'.²⁵ The report therefore supports that effectively safeguarding cultural heritage will require the integration of 'appropriate human rights-respecting traditional knowledge systems' into heritage site disaster management plans, whilst it is also relevant to pay attention to 'traditional land management and land monitoring systems and traditional construction and planning techniques'.²⁶ Bennouna explicitly recommends States to adopt

a human rights-based global action plan to save the cultures of humanity and protect cultural rights from the climate emergency, a plan that is globally coordinated and resourced, but driven by local priorities and concerns, with adequate funding, monitoring and follow-up.²⁷

23 UNGA, 'Report of the Special Rapporteur in the field of cultural rights, Karima Bennouna' (10 August 2020) A/75/298. See on cultural rights also the contribution by Nwankwo, Wendt and Mifsud Bonnici in Issue No. 1 of the YIDL (2018).

24 *Ibid.*, para 48.

25 Emphasis added. See on the latter, *ibid.* para 26, 37, 81.

26 On protection of cultural heritage against disasters see also Zorzi Giustiniani in Issue No. 2 of the YIDL (2019).

27 *Ibid.*, para 81(a).

Finally, this report calls for the development of 'creative ways to respect, protect, ensure and fulfil the cultural rights of persons who become displaced in the context of disasters and climate change'. It views cultural rights as 'a *primordial component of "migration with dignity"*'.²⁸

Lastly, tying in with the UN Rapporteur on Solidarity, Bennoune concludes that threats to cultural rights have been 'created transnationally' and require a 'transnational response': those facing existential levels of damage are 'entitled to robust international solidarity, support, cooperation and compensation'. The concept of 'compensation' particularly, is not further elaborated, although she included a separate recommendation for States to 'develop remedies, compensation and mechanisms for accountability for climate-related damage to culture, cultural rights and cultural heritage'.²⁹ To the author's knowledge, debates on rights-based 'compensation' for climate change damages are still in their infancy in UN practice, and indeed the UN Rapporteur on IDP for example noted in passing that

Under international human rights law, States are required to ensure accountability and access to effective remedies for human rights harms, including harm resulting from the adverse effects of climate change. Remedies such as *restitution of lands* or *compensation for loss and damage* can go a long way towards helping internally displaced persons to rebuild their lives and achieve durable solutions'.³⁰

2.4 *Report of UN Special Rapporteur on Solidarity*

In April 2020, rapporteur Obiora Chinedu Okafo published his report on the need for improved human rights-based international solidarity amongst States and all of the world's peoples, both by eliminating their own contributions to the problem of climate change, and by ensuring that sufficient international assistance and cooperation occurs.³¹ This report provides an overview of country-level, regional-level, global-level, and city-level or local government-level laws and practices that express rights-based solidarity. In terms of city and local government practice, it observes that important 'human rights partnerships' may arise nationally or transnationally between cities and local governments. Local initiatives may be valuable, since effective 'urban

28 *Ibid.*, para 44 (emphasis added).

29 *Ibid.*, para 37, 81 (q).

30 See UN Doc. A/75/20, para. 55 (emphasis added).

31 HRC, 'Report of the Independent Expert on human rights and international solidarity' (1 April 2020) UN Doc. A/HRC/44/44.

governance' could help diminish the negative effects of climate change both through 'solidarity-driven partnerships' and through 'catalytic reforms'. Especially, cities may take on more ambitious GHG reduction objectives than their States, or otherwise 'compensate for deficiencies' in the States' ambitions. This clearly raises pertinent questions about local governments' human rights roles and responsibilities, especially vis-à-vis the State, or in absence of effective protection by higher level governments.

The rapporteur further identifies several key human rights-based solidarity gaps, such as: the need for more radical transformation of fossil fuel economies; reforms of corporate laws and practices; greater adequacy and equity of climate financing and redistribution of technology; and access to justice for affected populations, including loss and damages due to the climate crisis. The report does not refer in any detail to climate 'disasters', nor addresses the aspect of loss and damage or compensation in any great detail. On the 'rectification of loss and damage from climate change' it states this can occur 'in various ways', but must be seen as a legal and moral response in addressing inequality arising from climate change, even if discussion of loss and damages 'still faces resistance from certain States, contrary to human rights-based international solidarity'.³²

This report ends with two pages of concrete recommendations to improve solidarity, like cooperating 'to reform basic transnational norms of corporate governance'; elaborating the treaty on transnational corporations and human rights; ceasing new exploration of and investments in fossil fuels 'as a matter of human rights-based international solidarity, since the shared carbon budget will be exceeded if already existing and proposed fossil fuel developments proceed'; meeting 'obligations to provide financial and technological support to other States under the international climate regime, and scaling up these obligations as much as possible, and stipulating 'precise obligations where this level of precision is lacking'. The latter is of interest, since the absence of precise obligations of cooperation and assistance has long been a major concern in international disaster law.³³ Finally, States must eliminate barriers that prevent developing countries, especially the poorest and most vulnerable among them, from accessing international climate finance and technologies, including barriers created by intellectual property rights regimes.

32 *Ibid.*, para 47–48.

33 See e.g. Marlies Hesselman, 'A Right to International (Humanitarian) Assistance in Times of Disaster: Fresh Perspectives from International Human Rights Law' in Flavia Zorzi Giustiniani et al (eds), *Routledge Handbook on Human Rights and Disasters* (Routledge 2018) 65–86.

2.5 *Communication of Ten UN Special Procedures to the USA on the Indigenous Alaskan Town of Kivalina*

Finally, the UN Rapporteur on IDPs' report on the slow-onset adverse effects of climate change correlates to a landmark communication issued by ten UN Rapporteurs to the United States, regarding the impacts of natural hazards and the adverse effects of climate change, and development projects and oil and gas exploration on the rights of indigenous peoples living along the coastal regions of Louisiana and Alaska, including in the town of Kivalina.³⁴ The indigenous tribes claim to be 'severely affected by the slow-onset adverse effects of climate change such as sea level rise and saltwater intrusion and resulting coastal land erosion, and extreme weather events such as hurricanes, storms and flooding', as well as displacement from ancestral lands. They note, for example, that Louisiana has one of fastest eroding shorelines in the world, leading to a decrease of landmass from 22,000 acres to only 110 inhabitable acres for the *Isle de Jean Charles*, between 1955 and 2015 (a reduction of 98%). A two-foot sea level rise is expected to threaten human rights in the *Terrebonne* Basin over the next 50 years, according to estimates of the Louisiana Coastal Restoration and Protection Authority.

According to the facts, the US government allegedly failed to support the tribes in identifying and implementing community-led adaptation strategies, by allocating adequate resources, providing technical assistance, or engaging and consulting with them. The Government equally failed to provide protection of 'historic and cultural sites through the existing historic preservation mechanisms, such as listing them on the National Register of Historic Places, despite the clear threats on indigenous historical and sacred sites'. After other disasters, such as Hurricane Katrina, the indigenous tribes also received limited support to rebuild their homes, for example because they could not qualify for support due to the collective ownership of their housing. All in all, this is now placing the communities at 'existential risk'. In particular, diminishing landmasses and repeated saltwater intrusions, due to lacking or poor protective works, are harming subsistence lifestyles and traditional practices like herding, trapping, fishing, hunting, farming, cattle raising, gardening, agriculture, traditional medicine, forestry and traditional housing construction. Natural barriers, like wetlands, can no longer protect them. The eroded living conditions are also caused by development projects in the river, particularly for oil and gas industries.

34 OHCHR, Joint Communication by UN Special Procedures to the United States of America, JAL USA 16/2020 (15 September 2020) via <<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25381>>.

Citing the ICCPR, ICESCR, CERD, UN Guiding Principles on Internal Displacement, on Business and Human Rights, on Development-based Evictions and Displacement, the Paris Agreement, various international instruments on Indigenous People's Rights, and others, the rapporteurs summarise existing human rights norms related to forced displacement and evictions, climate change, IDPs, cultural rights, and indigenous rights, with a final conclusion that indigenous peoples 'have lost their land and resources to colonists, commercial companies and State enterprises': their human rights and equal rights to effective participation in public life must be guaranteed. No decisions directly relating to their rights and interests may be taken without their informed consent. This communication and its contribution to the development of climate displacement norms is further discussed by Wewerinke and Antoniadis in this volume of the Yearbook.

3 Other Disasters: Oil Spills, Dam Collapse, Business and Human Rights, and International Cooperation and Assistance

Aside from the aforementioned communications, the UN Special Procedures also issued several very interesting communications on specific disaster events occurring or pending prior or during 2020, such as oil spills (from ships) and the risks associated with dams, in particular their collapse.

3.1 *Oil Spill from Bulk Carrier Vessel MV Wakashio near Mauritius*

One of the communications concerned the major ecological disaster resulting from the stranding of the bulk carrier vessel *MV Wakashio* off the coast of Mauritius on 25 July 2020, on sensitive coral reefs approximately 40 kilometres southeast of the country's capital, Port Louis.³⁵ The communication was jointly issued by the three Rapporteurs on environment, toxic wastes, and business enterprises to several parties: the affected country (Mauritius), the flag state (Panama), and the state (Japan), where both the owner of the vessel, Nagashiki Shipping Co Ltd, and its operator, Mitsui OSK Lines, were domiciled. It also sent the communication to the two companies. The background to

35 E.g. OHCHR, Joint Communication of UN Special Procedures to Mauritius, AL MUS 1/2020 (14 December 2020) via <<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25645>>. There are slightly different communications sent to the other parties, which can be found via the communications database <<https://spcommreports.ohchr.org/>>. On this disaster see also Telesetsky in this volume of the Yearbook.

this incident is detailed elsewhere in this Yearbook,³⁶ but it is helpful to note that after stranding with (a limited amount of) 4.000 tonnes of harmful fossil fuels on board, the *MV Wakashio* began leaking fuels around 6 August 2020. Mauritius declared a 'state of environmental disaster' on 7 August 2020, and ultimately, the ship ruptured on 15 August 2020.

The communication details the efforts of Mauritius' National Crisis Committee to carry out environmental impact assessments, respond to the spill, clean-up, and daily monitor the danger of air pollution, and damage at specific sites. It also noted the payment of compensatory solidarity grants to affected fisher people and fishmongers, starting per August. The main grievance articulated by the Special Rapporteurs in the 'facts' seems to be a lack of transparency in communicating about the oil spills' impact. According to the UN Rapporteurs, it seemed that the lack of transparency regarding several incidents, such as the death of about fifty whales and dolphins near the pollution site, caused concerns among the Mauritian population, leading to national protests about the handling of the oil spill. Aside from Mauritius' response, the rapporteurs also detail several activities of UN agencies and a reaction of the African Commission for Human and People's Rights (ACmHRP).

The latter expressed grave concern about the dire consequences for Mauritius' environment, economy and biodiversity, and interestingly, stresses the consequences for the thousands of species around the pristine lagoons, as much as the generally harmful effects of pollution, threats to food security, the health of people, and the Mauritian ecosystem and biodiversity. The ACmHRP highlighted that the spill caused 'serious immediate and potential risks' to the rights to health, life, a satisfactory environment favourable to development, food, livelihood and economic development. There was a need to investigate preventive measures which 'could have avoided or limited the risk of the oil spill'. The UN Rapporteurs in turn stressed similarly important human rights.

Although the communication does not add much in terms of applying or analysing these rights to the facts, the calls for additional information reveal some interesting points of attention, such as:

- the *oil spill response plans, procedures, and resources* put in place by government(s);
- activities to *reduce or eliminate the effects* of the oil spill on human rights or to ensure '*timely and accessible information* about the health and environmental impacts of the oil spill' to the public;
- actions being taken to *clean up and restore the environment*;

36 See Telesetsky in this volume of the Yearbook.

- steps taken to guarantee *the public's right to participate* in the required investigation and in decision-making about clean up and restoration activities;
- 'why there was a two-week delay between the vessel running aground on 25 July and the declaration of a state of emergency on 7 August' by Mauritius; and
- 'why had it allowed single hulled vessels to travel near sensitive and biodiverse marine regions in the first place?'³⁷

Lastly, all actors were asked to pay specific attention to the affected fisher people's right to food and livelihoods, and to report on any foreseen compensation measures to victims. Specifically, States were asked about steps, taken or planned, to uphold their extraterritorial obligations to protect human rights against abuse by business enterprises in its territory or jurisdiction, especially by requiring 'effective human rights due diligence'. Such diligence must 'identify, prevent, mitigate and account for how companies address their impacts on human rights throughout their operations', per the UN Guiding Principles on Business and Human Rights. Rapporteurs equally asked the parties to detail whether any specific initiatives were taken to ensure that those affected by business-related human rights abuse have access to an effective remedy.

By late February 2021, all actors responded to the communication. In its response, Japan affirmed 'that human rights are fundamental values and protecting them is the most fundamental responsibility of any nation'. It also endorsed the relevant 'international documents on business activities such as the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises', and explicitly explained its efforts to implement these documents, including its National Action Plan (NAP) on Business and Human Rights adopted in October 2020. Japan equally explained its dispatch of expert teams and provision of necessary equipment and assistance 'in the form of oil leakage surveys, oil removal and control, responses to the oil washed ashore, and monitoring of the impacts on local ecosystems'. It did so in part in response to requests for assistance by Mauritius – which clearly communicated it could not handle the removal of the stranded vessel, the spill and aftermath by itself, and also received help from neighbouring state France via the island of Réunion.³⁸ Japan's government interestingly clearly stressed that it bore 'no responsibility for the accident', but its response actually shows

37 Emphasis added.

38 BBC News, 'MV Wakashio: Mauritius declares emergency as stranded ship leaks oil' (8 August 2020) available at <<https://www.bbc.com/news/world-africa-53702877>>.

a great involvement of the 'state of domicile' of the vessel causing the incident, through cooperation and assistance. It indicated its intention to advance medium- and long-term cooperation, aiming to prevent maritime accidents, recover the environment, restore the livelihoods of local people engaging in fishery, and recover and develop the Mauritian economy. The latter might entail financial support through emergency assistance loans, supposedly also requested by Mauritius.

These comments are of interest in light of the aforementioned lack of 'operationalisation' of 'rights and duties of international cooperation and assistance' in international disaster law,³⁹ and in light of Panama's opposite response. Panama denied any 'flag state responsibilities' under international maritime law for the incident, or as a member of the International Maritime Organization (IMO). In fact, Panama deflected any answer on responsibility for *human rights* by pointing to *maritime law*. Such an answer seems to negate the possibility that Panama nevertheless has human rights obligations as a party to UN human rights treaties generally, or specifically as a flag-state with heightened (extra)territorial obligations. Since Panama is known to be the largest flag state globally, understanding its human rights obligations in the maritime sector is vital.⁴⁰ From this perspective, it is regrettable that the communication actually does not explain in any detail under what circumstances, or in what capacity, each State was addressed by this communication.

In this context, it is particularly interesting that during 2020 the UN Special Rapporteur on Toxics commenced a specific study on the impact of the IMO and its key international marine anti-pollution conventions on human rights. The new rapporteur Marcos Orellanas completed a series of meetings with the IMO between 7 to 18 December 2020, and invited comments by civil society until 31 March 2021 on matters like oil pollution, ship breaking, and other aspects of marine pollution. This section may return to these developments next year.

3.2 *Threat of Oil Spill from SAFER Super Tanker in Yemen Conflict*

Despite lacking clarity regarding some aspects of the *MV Wakashio* communication, it was more elaborate than the succinct SAFER communication that

39 See e.g. Hesselman (n 33) 65–86.

40 See e.g. Human Rights at Sea & University of Bristol, 'Flag States and Human Rights Report 2019' (2020) available at <<https://respect.international/wp-content/uploads/2019/06/Protecting-Human-Rights-at-Sea.pdf>>, 10.

was sent to Yemen and 'other actors' a few months earlier.⁴¹ This communication concerned the threat of what risks becoming one of the largest oil spill disasters in history, from the SAFER single-hull oil super-tanker located some 60km off the coast of Yemen. Originally, this tanker was controlled by the leading Yemeni state-owned oil and gas enterprise SAFER, until Houthis took over in 2015. After this period, no maintenance of the ship occurred, and by now both Yemen's Government and the Houthi authorities formally requested UN assistance in 2018. Negotiations for a UN probe of the ship are presently still underway, with the UN Security Council being involved as well.⁴²

SAFER allegedly carries 1.1 million barrels of oil – or about four times as much oil as released during the Exxon Valdez disaster of 1989. The rapporteurs on the Environment and Toxic Wastes therefore express concern about the impacts of a potential spill on up to 1.6 million Yemeni's, and the wider region, for the rights to life, a life with dignity, health, food, water, culture, and to a healthy environment. They also point out that Yemen has ratified seven core human rights Conventions, and that *de facto* authorities in Sana'a are responsible for acts committed in territory under their control, and perpetrated by those acting on their behalf, including human rights violations. The petition thereby raises important questions of human rights responsibilities and violations in the context of armed conflict.⁴³ Again, there is no explanation of how these rights would apply to the situation exactly or create obligations or responsibilities for specific State or non-State actors. There are simply requests for information about reasons for delays in necessary clearances for the UN team to conduct assessments of the SAFER tanker; any steps taken to support the UN technical team's access on the SAFER tanker; the oil spill response plans, procedures, and resources (being) put in place. There are no responses recorded by any actor.

41 OHCHR, Joint Communication of UN Special Procedures to Yemen and others AL OTH 68/2020 (21 September 2020), via: <<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25569>>.

42 Aljazeera, 'UN calls on Yemen's Houthis to allow stranded oil tanker probe' (4 June 2021) available at <<https://www.aljazeera.com/news/2021/6/4/un-calls-on-yemens-houthis-to-allow-examination-of-oil-tanker>>; United Nations, 'Questions and answers about the UN mission to the SAFER oil tanker in Yemen' (UN News, 30 December 2020) available at <<https://news.un.org/en/story/2020/12/1081162>>.

43 See also the contribution by Tignino in this volume of the Yearbook.

3.3 *Human Rights Risks of the Sepik Development Project in Papua New Guinea*

On 20 July 2020, a group of ten UN Special Procedures issued a long communication to Papua New Guinea, Australia, Canada, China and several companies domiciled in these countries, about the serious risks arising from dam failures, and other human rights impacts of the proposed Sepik Development Project. The project comprises of a planned open pit gold and copper mine, tailings dam, hydroelectric project, and related infrastructure of roads, airports and power grid project, along the Frieda river in Papua New Guinea.⁴⁴ There are particular concerns about toxic waste releases on the river area, home to many Papuan New Guineans and indigenous Melanesian peoples; the risk of failure of a tailing dam located in a seismically active area; the destruction of livelihoods; and the poor consultation process with affected communities, including access to information. These concerns stem from the (inadequacy) of the environmental impact statement (EIS), and unavailability of underlying studies to the public. After raising concerns, activists have received death threats, intimidation, and some reported gunshots fired at them.

The communication comes with a comprehensive annex that lists the relevant applicable legal instruments, and includes explanations of how several rights may apply, including right to life, the right to health, and the right to adequate standards of living, with specific attention to the ICCPR, ICESCR, CRC and indigenous peoples' rights under the UN Declaration on the Rights of Indigenous Peoples. Particular elaborate attention is paid to the right to food, and more indirectly the right to water, and the right to free, prior and informed consent, as well the 'right of access to information under Article 19(2) ICCPR' as an enabling right for all these rights. On the latter, it is noted that 'in order to fully realize the right of access to information, and to ensure accountability of decision-making', States

must implement frameworks for *measuring, monitoring, reporting and verifying information*. In this regard, States should ensure collection and proper management of information on *exposure levels, contamination and long-term health implications* of exposure to chemicals, especially with regard to affected communities.⁴⁵

44 OHCHR, Joint Communication of UN Special Procedures to Papua New Guinea and others AL PNG 1/2020 (20 July 2020) via: <<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25423>>.

45 Emphasis added.

The 'long-term impact' is of particular interest here, as communities especially complained that the risks of project extending 'beyond their life span' were not adequately assessed by the impact assessment, i.e. after sites and facilities would no longer be in use or maintained. The Rapporteurs point in this respect to the Rapporteur on the Right to Water's 'megaproject cycle framework', that was introduced in her report of 2019. This framework consists of seven stages, and guides all accountable actors on their human rights obligations and responsibilities from macro-planning to decommissioning.⁴⁶ The communication also refers to the UN Rapporteur on Toxic Substances' report of 2019 on the 'duty to prevent exposure' to hazardous substances, and highlighted relevant aspects of the UN Guiding Principles on Business and Human Rights. It warns that businesses would be responsible for due diligence and for remedying any actual adverse impacts. Among all rights, the right to food was discussed in detail, including its core content as entailing availability of food in terms of 'possibilities for feeding oneself directly from productive land or other national resources, or for well-functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand'.

3.4 *Collapse of Auxiliary Dam to a Hydropower Dam in Lao PDR*

Finally, seven rapporteurs jointly sent communications to the Lao People's Democratic Republic, South Korea, Thailand, and several companies and banks domiciled in the latter two countries, about the alleged negative human rights impacts caused by the collapse of an auxiliary dam to a hydroelectric dam in Attapeu province, in South-East Lao PDR on 23 July 2018.⁴⁷ The collapse affected 19 villages through flooding of five billion cubic meters of water, leading to loss of productive land and property, displacement, and environmental damage, as well as 43 deaths and 28 missing persons, according to (disputed) government figures. Approximately 7,000 persons were displaced into small prefabricated metal structures, without appropriate cooking, eating and sleeping areas under a promise of resettlement and financial support. Owing to food shortages, inadequate and unhygienic living conditions, inadequate medical care, and exposure to dengue disease, wastewater and garbage disposal problems, the communication expresses concern for people's (rights to) health,

46 See UNGA, Report of the Special Rapporteur on the human rights to safe drinking water and sanitation (19 July 2019) UN Doc. A/74/197.

47 See e.g. OHCHR, Joint Communication of Special Procedures AL/LAO/1/2020 (17 April 2020) via <<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25088>>.

food, housing and water and sanitation. Indigenous farming communities specifically lost traditional lands and means of subsistence, and were unable to report loss for evaluation and reparation.

Moreover, the disaster response by government and relevant business enterprises had allegedly not 'been immediate or organized, despite having information' about flood risks and needs for warning systems and 'response plans agreed upon by affected communities' in the original Environmental and Social Impact Assessment and mitigation plan of the project. Business parties were particularly at fault for not notifying damage to the provincial government until noon on the day of the collapse, while the most affected areas were hit seven hours after the collapse. The companies themselves argue they immediately notified local authorities and began evacuation 24 hours before the collapse. All in all, the situation surrounding the early warning and evacuation lacks transparency, as did the situation around adequacy and timelines for compensation, recovery, and the companies' insurance coverage – aside from a one-time payment of USD 10,000 for families who were part of the official death/missing toll, and some compensation for surviving families.

The construction of this dam had started under a public-private partnership funded by Korean and Thai banks, as part of the 'battery of ASEAN policy'. The majority of electricity (90%) produced in Lao DPR was destined for export to Thailand. A national investigation determining the cause and degree of responsibility of different actors allegedly pointed to porous soil, rather than consequences of heavy rainfall, but the results were not made public. Some other studies pointed to construction failure, as a result of changes in design and a shortened construction period. The government was asked to describe how it plans to prevent recurrence of this type of disaster in the future, considering the wider critique on its hydropower sector – for example through better evacuation plans, monitoring systems, but also complete review of the hydropower sector, or any moratoriums on current and new hydro-dam projects. It was reminded of its duty to ensure that foreign businesses operating in its territory respect human rights, including by taking steps to 'prevent, investigate, punish and redress human rights abuse through legislation, regulation, policy and adjudication', in line with UN Guiding Principle 1 of the Business and Human Rights Principles. Similar to the communication on Papua New Guinea, the rapporteurs set out the applicability of several human rights obligations, but this time with considerable attention to cultural rights and cultural heritage, protection of ancestral lands and other natural resources traditionally owned, occupied or used by people, including indigenous peoples, or the cultural values attached to food and food consumption, use of water, health care, or construction of housing.

By the end of 2020, several companies and South Korea had responded, but not Thailand.⁴⁸ Korea's government explained in some detail how it was implementing business and human rights responsibilities, and was assisting Lao DPR 'in identifying and investigating the cause of the dam collapse as well as restoring and reconstructing the damaged parts since Korean enterprises participated in the construction'. Overall, Korea's response seems to refer to its responsibility to assist Lao DPR in capacity of: (a) state of domicile; (b) ODA country; (c) country responding to direct requests for assistance by Lao DPR. The government further notes that victims can bring complaints to Korean courts as part of national and international private law, and hopes to resolve any practical difficulties in bringing such suits by also reviewing practices of other counties in this regard.

48 See via communications database: <<https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=35415>>.