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State Responsibility in relation to  
Transboundary Environmental  
Damage

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# Contents

<b>SUMMARY</b>	<b>1</b>
<b>PREFACE</b>	<b>2</b>
<b>ABBREVIATIONS</b>	<b>3</b>
<b>INTRODUCTION</b>	<b>4</b>
<b>DELIMITATION</b>	<b>6</b>
<b>METHOD AND MATERIALS</b>	<b>7</b>
<b>1 ICJ – A BRIEF HISTORY</b>	<b>8</b>
1.1 Jurisdiction of the Court	8
1.2. Friendship, Commerce and Navigation Treaties	9
<b>2 STATE RESPONSIBILITY IN AN ENVIRONMENTAL LAW CONTEXT</b>	<b>12</b>
2.1 The appropriate standard and state conduct	13
<b>3 RULES, PRINCIPLES AND TREATIES GOVERNING INTERNATIONAL AND INTERNATIONAL ENVIRONMENTAL LAW</b>	<b>16</b>
3.1 Principle 21/Principle 2	17
3.1.1 Sovereign right to exploit natural resources	17
3.1.2 Responsibility not to cause environmental damage	18
3.2 <i>Erga Omnes</i>	19
3.2.1 <i>Erga Omnes Partes</i>	23
3.2.2 <i>Erga Omnes and the Environment</i>	23
3.3 The remaining principles	24
3.3.1 <i>The Principle of Sustainable development</i>	24
3.3.2 <i>The Precautionary Principle</i>	25
3.3.3 <i>The Principle of Co-operation</i>	27
3.3.4 <i>The Principle of Preventive Action</i>	28
3.3.5 <i>The Principle of Common but Differentiated Responsibility</i>	28
<b>4 IS THE RIGHT TO A CLEAN ENVIRONMENT ALSO A HUMAN RIGHT</b>	<b>30</b>

4.1 Universal and regional level	31
<b>5 GLOBAL WARMING AND THE OZONE LAYER</b>	<b>34</b>
5.1 The Kyoto Protocol – a brief history	36
<i>5.1.1 Emission trading, clean environment mechanism and joint implementation</i>	<i>38</i>
<b>6 TUVALU TURNING TO LEGAL ACTION?</b>	<b>40</b>
<b>7 INTERNATIONAL ENFORCEMENT</b>	<b>43</b>
7.1 Damage to the environment of another state	44
<i>7.1.1 Environmental damage in areas beyond national jurisdiction</i>	<i>44</i>
<b>8 HUMAN RIGHTS LITIGATION AS AN OPTION</b>	<b>46</b>
8.1 Possible forum	47
8.2 Other Optional Forums	48
8.3 Other Options for Damaged States or private entities	50
<i>8.3.1 What could a damaged State ask for</i>	<i>50</i>
<b>9 CONCLUSION</b>	<b>53</b>
<b>BIBLIOGRAPHY</b>	<b>58</b>

# Summary

With the effects of global warming spiraling out of control States are rapidly recognizing the urgent need for behavioral change. The reactions of the planet to centuries of toxic emissions have to be battled collectively as soon as possible.

Some States, especially developing States, are feeling the effects more tangibly and for them time is running out. Some scientific scholars already claim that time has run out and that we cannot alter the effects, but have to accept them and find solutions.

This thesis will examine what legal options Small Island States have in general, and as a specific example the State of Tuvalu is being studied. How should these States proceed legally, and which would be the most advantageous way? The choice of Tuvalu was obvious as an example, as they in the past have threatened to instigate procedures against the United States of America for the effects they suffer from global warming. The Tuvaluan threat to instigate procedures against the United States, seems logical at least from the moral aspect. The United States is one of the largest emitters in the world and yet it refuses to ratify the Kyoto Protocol.

This work also investigates the possibilities a State may have to use human rights as a litigation tool, but also the UN Convention on the Law of the Sea. It should not be seen as a helpful tool for States but rather as an investigation of where international law stands today.

# Preface

While writing this thesis the help of several persons have been of great inspiration and invaluable help.

First, I would like to thank my sister and girlfriend who have helped me in times when linguistic battles have occupied my mind. The positive support and encouragement from parents and my grandmother is invaluable, without who's help this work would not have been possible.

I would also like to express my gratitude to my supervisor Jur. Professor Gregor Noll for providing useful insights, and for leading me into alternative routes of discussion.

When all the trees have been cut down,  
when all the animals have been hunted,  
when all the waters are polluted,  
when all the air is unsafe to breathe,  
only then will you discover you cannot eat money.

Cree Prophecy

# Abbreviations

American Journal of International Law	AJIL
International Covenant on Economic Social and Cultural Rights	IESCR
Inter-American Commission on Human Rights	IACHR
Intergovernmental Panel on Climate Change	IPCC
International Court of Justice	ICJ
International Law Commission	ILC
Pacific Island Developing State	PCIDS
Permanent Court of Arbitration	PCA
Permanent Court of International Justice	PCIJ
Small Island Developing States	SIDS
United Nations	UN
UN Conference on Environment and Development	UNCED
UN Framework Convention on Climate Change	UNFCCC

# Introduction

During the past approximately 150 years, since the collection of temperature data started, the world's average temperature has been rising. Eleven of the past twelve years (1995- 2006) are among the warmest in the instrumental record of global temperature<sup>1</sup>. The reasons for this rise in temperature are disputed; some scholars claim that it is due to normal fluctuations in our planet's climate while others claim that the change is manmade mainly due to the increased emissions of greenhouse gases, deforestation, cement manufacture and the depletion of the ozone layer.<sup>2</sup> With the last Intergovernmental Panel on Climate Change (IPCC) report, published in April 2007, scientists have come to the conclusion the emission of greenhouse gases already has caused large impact on our planet.

In the mid 90's the small Oceanic State of Tuvalu threatened to instigate procedures against the United States and Australia for their failure to ratify the Kyoto protocol and the effects of global warming. Tuvalu is threatened by global warming in a more severe way than other states; the nation is literally about to be engulfed by the surrounding sea. The melting of glaciers and the huge ices at the North- and South Pole together with thermal expansion of the oceans brings about the effect of rising sea levels. Together with coastal erosion this threatens the very existence of Tuvalu with its highest point at only five meters above sea level, and a population of approximately 12,000.<sup>3</sup> However not only the mere rising of the sea levels cause problems for Tuvalu, the intrusion of saltwater is adversely affecting its drinking water and the increased soil salinization disturbs its food production. The land also becomes more vulnerable to large waves, such as the recent tsunami, and storms. The Tuvaluan threat of turning to the International Court of Justice (ICJ), on the above mentioned grounds brings about legal difficulties of a nature that require further investigation. Never before has legal procedures of this nature been brought in front of the ICJ, and never before has the subject of climate change been as acute as it is today. Other Pacific island States facing the same threats include Tonga with a population of 116,000 people, Kiribati with a population of 107,000 people and the Maldives in the Indian Ocean with a population of 370,000 people.<sup>4</sup> In total there are almost 30,000 islands in the Pacific, however not all are inhabited. There are three dominant ethnic groups in the area; Polynesian, Melanesian and Micronesian peoples. There are 22 different political entities, 15 of those politically independent, with a combined population of approximately one million, with Papua New Guinea being the largest State.

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<sup>1</sup> Climate Change 2007: The Physical Science Basis, Summary for Policymakers, Intergovernmental Panel on Climate Change, p. 4

<sup>2</sup> B. Boer, R. Ramsay, D. R. Rothwell, International Environmental Law in the Asia Pacific, p. 146:30

<sup>3</sup> <https://www.cia.gov/cia/publications/factbook/geos/tv.html>, (Accessed 2007/04/03, 08:30)

<sup>4</sup> Ibid., (Accessed 2007/08/22, 16:00)

The damages caused cannot be isolated and neither can the effects as such. Pollution as a phenomenon is transboundary by its very nature and hence difficult, if not impossible to protect against. Most inhabitants of this planet will be affected in ways perhaps not yet foreseeable. Certain degrees of effects can already be detected in tourism, the food-industry and soon also in the fields of migration as well as many others. People will be forced to leave their homes due to extreme weather conditions such as flooding or draught. Despite the devastating consequences this will have on the single individual, one might wonder what will happen when an entire nation such as Tuvalu is threatened? Small Island Developing States (SIDS) or Pacific Island Developing State (PCIDs) such as Tuvalu only produce a negligible fraction of the total global greenhouse gas emissions but pay the price for decades of pollution by the industrialized world, which historically have been responsible for the main fraction of emissions. PCID's are only responsible for 0.03% of the worlds carbon dioxide emissions, and on average their inhabitants only produce one quarter of the emissions compared to the world average. Furthermore the people affected by climate change are often the ones with the least possibilities to cope with the changes facing them. Adding to this five of the PCID's, the Solomon Islands, Tuvalu, Kiribati, Vanuatu and Samoa, have been classified as among the 49 least developed countries in the world, based on GDP per capita (under 900 \$), human resource weakness criterion and economic vulnerability criterion.

Are there any realistic chances of reaching a satisfactory result by instigating procedures before the ICJ against giants as the United States or other large greenhouse gas emitters? What obligations exist with international law for the protection of the environment in areas beyond national jurisdiction?

According to the IPCC's fourth assessment report of 2007, their panel of experts proclaim with a high level of confidence that the effects of human activities since 1750 has been one of warming of global temperature.<sup>5</sup>

The purpose of this work will be to investigate what can be held against states that do not comply with obligations of a non-compulsory nature such as the Kyoto Protocol (the Protocol itself is in fact a legal binding instrument). Is there any real possibility for other states damaged by the climate change to hold other states responsible?

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<sup>5</sup> Climate Change 2007: The Physical Science Basis, Summary for Policymakers, Intergovernmental Panel on Climate Change, p.3



# Delimitation

For the sake of argument I am choosing to rely on the scientific evidence claiming that global warming is caused by increased emission of greenhouse gases causing a depletion of the ozone layer. This has with a high degree of certainty also been confirmed by the fourth assessment report of the IPCC. Theories based on the climate change being a natural phenomenon caused by climate cycles will therefore not be taken into account. The reasons for choosing to rely on the scientific evidence are obvious, since no State can be held responsible for actions beyond its control such as climate fluctuations.

The focus of this work will be put on the possibilities of instigating procedures against a State actor in front of the ICJ or any other Court or forum for alleged breaches of principles in international law regarding environmental issues or contractual breaches. Does a population forced with migration have anywhere to turn when their State of nationality ceases to exist, due to a failure to reach the statehood criteria of the Montevideo convention? No immediate focus will be placed on what rights such a population can demand from an admitting State in terms of citizenship rights etc.

The UN and its member States have often addressed the issue of State succession, where one States transfers into several new States, or several States turn into one, but it would appear that the extinction of a State, without a successor is not yet accounted for.

# Method and materials

The method used in this work has primarily been legal dogmatic together with a traditional legal method. The legal dogmatic method entails a description of the state of international law by analyzing the sources of the law including; conventions, treaties, customary international law, general principles, jurisprudence and literature. This method has been used to determine the obligations of States in the fields relevant for this work. The literature used is primarily and as far as possible by famous scholars, but in some parts other opinions have been taken into account. When using internet based materials, I have focused on using official sites of international organizations and agencies.

# 1 ICJ – a brief history

The ICJ is according to article 92 of the United Nations (UN) Charter the principal judicial organ of the UN. It was established in June 1945 by the Charter of the UN and began its work in April 1946. The seat of the Court is at the Peace Palace in The Hague (Netherlands). Of the six principal organs of the UN, it is the only one not located in New York (United States). The Court's role is to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized UN organs and specialized agencies. The Court is composed of 15 judges, who are elected for nine year terms of office by the UN General Assembly and the Security Council. The procedure of election combines both political and legal elements in a system established by the Root-Phillimore plan in 1920.<sup>6</sup> It is assisted by a Registry, its administrative organ. Official languages used are English and French.<sup>7</sup>

Any State member to the UN charter obliges itself to solve all matters of international concern by peaceful means.<sup>8</sup> In specific terms this means that parties are to seek to solve their disputes through diplomatic channels, international arbitration or by submitting the matter to international judicial settlement, these amicable means of dispute settlement are enumerated in Article 33 paragraph 1 of the Charter but the list is not exhaustive.

## 1.1 Jurisdiction of the Court

The Court is given its mandate through Article 92 of the UN Charter that stipulates that the Court shall function in accordance with its own statute (ICJ Statute).<sup>9</sup> The jurisdiction of the Court is based upon the consent of the States before it. Only States can be parties before the Court in accordance with ICJ Statute art. 34, international organizations and individuals do not have access to the ICJ. The State in question must also be bound by the Statute, at least that is the general idea. Since the Statute is no treaty itself, rather an integrated part of the UN Charter, all states member of the UN are bound by the Statute (see restrictions in ICJ Statute art. 35 § 3).

The Courts competence to investigate a case is not only based on the membership of the state parties. There must also be a ground for jurisdiction in the specific case pending before the court. Grounds for jurisdiction that

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<sup>6</sup> Shaw, Malcolm N, *International Law* 5th ed., p. 961

<sup>7</sup> <http://www.icj-cij.org/court/index.php?p1=1&PHPSESSID=513bc1e13224ac5f3939a9ecf2eeb4f5>  
(Accessed 2007/04/18, 10:50)

<sup>8</sup> Charter of the United Nations, YEAR, art. 2 para 3

<sup>9</sup> Ibid, art 92

the court has are Special Agreements between the parties giving the court jurisdiction in the specific case, a treaty between the parties established prior to the ICJ giving the Permanent Court of International Justice (PCIJ) jurisdiction, or through declarations to the Court giving it jurisdiction to cases of a certain nature.<sup>10</sup>

As noted earlier the Court is a judicial institution given the task to decide cases on the basis of international law, as it exists at the time of its decision.<sup>11</sup> The Court does not create law since it is not an organ of legislative character, as the Court states it in the *Legality of the Threat or Use of Nuclear Weapons Case* “it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend”.<sup>12</sup> Despite the fact that the Court only has jurisdiction over questions concerning international law, it is impossible not to entwine those questions with factors of a political nature. While political aspects of a problem may be present in a case the Court is only concerned with establishing whether the pending dispute is one of a legal character able to be settled by means of international law or not. The fact that other elements may be present in a case cannot detract it from being a legal dispute.<sup>13</sup>

In July 1993 the ICJ established a special chamber only created to deal with issues of an environmental nature, however as of today no case has been heard before this chamber.<sup>14</sup> Despite this, the mere fact that it has been established clearly shows that there is a growing understanding among states of this problem of international concern.

## 1.2. Friendship, Commerce and Navigation Treaties

The ICJ can as already mentioned earlier gain jurisdiction, pursuant to Article 36(1), if the parties before the Court have specially provided for it as a dispute solution mechanism under a treaty in force. The United States (as well as all other States) has entered into many Friendship, Commerce and Navigation (FCN) treaties with different states. These treaties are agreements of a broad character, which ensure that states are to treat the nationals of the other state in the same favorable manner as it treats its own nationals. There are generally dispute solution mechanisms in these treaties and even though they may vary, some do prescribe the ICJ as this mechanism. Despite the reluctant standpoint towards the ICJ the United States has shown historically, some treaties with the United States as one

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<sup>10</sup> Ibid, p. 114

<sup>11</sup> Shaw, Malcolm N, *International Law* 5th ed., p. 966

<sup>12</sup> *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, 1996, pp. 226, 237.

<sup>13</sup> Shaw, Malcolm N, *International Law* 5th ed., p 967. See also the *Iranian Hostages* case, ICJ Reports, 1962, pp.151, 155.

<sup>14</sup> Shaw, Malcolm N, *International Law* 5th ed., p. 754

state party do refer to disputes to the ICJ. For instance the FCN treaty which the United States has entered into with Denmark stipulates that the ICJ should be the dispute solving mechanism used by the parties under certain given circumstances, in detail it notes that:

”Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means.”<sup>15</sup>

The wording in the treaty between the United States and the Netherlands is identical and the treaty is of the same character, an FCN treaty.<sup>16</sup> Both the Netherlands and Denmark are low lying coastal nations who could in the future become potential plaintiffs should the rise of the sea levels continue, but any such speculation is of course very hypothetical. However the purpose of the treaty and especially the purpose of the ICJ as a dispute settler was not intended to cover disputes of this kind.

As described above these treaties prescribes how the Parties shall, within its own national borders, treat nationals of the other Party. Hence disputes of this nature were with certainty amongst the intended ones the parties intended to be decided by the ICJ. The activities on American soil which contribute to global warming, such as greenhouse gas emissions, certainly harm foreign nationals as well as their property within the United States, but does it also contain an extension of the harm outside US borders.

The ICJ has earlier had the opportunity to decide on an attempt to use an FCN treaty as basis for jurisdiction. In the preliminary phase of *The Case Concerning Oil Platforms (Islamic Republic of Iran v. United States)*<sup>17</sup>, Iran requested the ICJ to accept jurisdiction over a dispute concerning the destruction of three Iranian oil complexes by the United States Navy during the war between Iran and Iraq. In the case Iran argued that the court should accept jurisdiction over the dispute on the basis of an FCN treaty, the Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States. The treaty (which is no longer in force) contained a dispute solving mechanism clause that called for the ICJ to settle the dispute.<sup>18</sup> According to Iran several treaty obligations of a general nature had been violated by the United States as a result of its military actions.

In that case the Court found itself to have jurisdiction and hence recognized that FCN treaties may have an extraterritorial application. This decision

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<sup>15</sup> Treaty of Friendship, Commerce and Navigation Between the United States of America and the Kingdom of Denmark, Oct. 1, 1951, U.S.-Denmark, art.XXIV para 2.

<sup>16</sup> Treaty of Friendship, Commerce and Navigation Between the United States of America and the Kingdom of the Netherlands, Mar. 27, 1956, U.S.-Netherlands, art.XXV para 2.

<sup>17</sup> Concerning Oil Platforms (Iran v. United States of America), 1996 ICJ, 803.

<sup>18</sup> Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, U.S.-Iran, 8 U.S.T. 899, 901

made by the ICJ came despite the fact the dispute at hand was probably not one that was intended to be brought before the ICJ under the treaty, but the Court also generally reject the kind of broad interpretation of the language that would be necessary to bring a global warming case before it under these dispute solving mechanisms that are present in the treaties.<sup>19</sup> It is obvious that there would have to be a broad interpretation of any such clause in order to include also global warming as one of the breaches or misbehaviors mentioned in the provision. The clause used by Iran was Article XXI p. 2 in the treaty and it is identical to then one quoted above from the FCN treaties between the United States and Denmark as well as the Netherlands. Prior to this the ICJ had also accepted jurisdiction partly on the basis of a binding dispute resolution mechanism in a FCN treaty between the United States and Nicaragua in the *Nicaragua case*.<sup>20</sup> Jurisdiction was accepted by the ICJ even though the United States tried to put the treaty out of force prior to the start of the proceedings. This was not accepted by the ICJ and Nicaragua was allowed to instigate procedures. That was however a procedural question and one that will not be dealt with in this work.

In the *Nicaragua case* as in the *The Case Concerning Oil Platforms* the military activities caused by foreign involvement ha a direct impact on specific provisions of the treaty (the FCN treaty), more so than would global warming ever would. To what extent can damages caused by global warming be related to foreign activity, and can these be used as a basis for allocating jurisdiction to the ICJ on the basis of such a treaty? The first part of the question is a mere question of proof and not one which should be considered at the first stages. It is the second one which raises more difficulties, that question has to be answered affirmatively in order for the proceedings even to begin.

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<sup>19</sup> Concerning Oil Platforms (Iran v. United States of America), 1996 ICJ, 811-812.

<sup>20</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), 1986 I.C.J., p. 14, 116, 136

## 2 State Responsibility in an environmental law context

States are accountable for their breaches of international law under the principles of state responsibility. Breaches of international law, a customary law or treaty obligation legitimizes a claim from the injured state towards the violating state. These claims may take the form of diplomatic action or recourse to international mechanisms or to courts or tribunals where there is a jurisdictional ground at hand. Where obligations of a treaty have been breached, the injured states right to enforce these obligations are usually settled by the terms of the specific treaty. The EC Treaty for instance allows a member state that is of the opinion that another member to the treaty has failed to fulfill an EC obligation, to have the matter brought in front of the European Court of Justice.<sup>21</sup> No damage has to have been suffered by the claimant, the violation of EC law is enough to acquire legal standing before the Court.

In the field of environmental law and protection customary international law becomes important since it imposes several fundamental obligations upon states. The concept of territorial sovereignty is altered when it comes to actions within national territory that may affect neighboring states. The duty customary law imposes upon states is not to act as to injure the rights of any other state.<sup>22</sup> This custom evolved from the regime concerning international waterways and the PCIJ judgment in the *International Commission on the River Oder* case. Here the court stated that the rights in a river are common for all riparian states. This was brought even further in the *Island of Palmas* case where it was argued that the territorial sovereignty also included an obligation for states to protect the rights of other states within its territory. In the *Trail Smelter* arbitration there was a dispute between Canada and the United States over sulphur dioxide pollution from a Canadian smelter factory close to the US border. The pollution from the factory caused damage to trees and crops on US territory.<sup>23</sup> The Tribunal noted that:

“under principles of international law, as well as the law of the United States, no state has the right to use or permit the use of territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.”<sup>24</sup>

This approach has been reinforced by the ICJ in other cases such as the *Corfu Channel* case where it came to the conclusion that it was the

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<sup>21</sup> EC Treaty, Art. 227.

<sup>22</sup> Shaw, Malcolm N, *International Law* 5th ed., p.760

<sup>23</sup> Ibid. p.760-761

<sup>24</sup> 35 AJIL, 1941, p. 182 and 35 AJIL, 1941, p 684

obligation of every state "not to allow knowingly its territory to be used for acts contrary to the rights of other states".<sup>25</sup> Furthermore the court noted in the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Nuclear Tests Case in 1974* case in 1995 that the French nuclear testing in the Pacific was "without prejudice to the obligations of states to respect and protect the environment".<sup>26</sup> The obligations transferred onto States for activities within their jurisdiction that may harm other states appears to have increased as far as they are now part of a international customary law which may be growing more powerful. In the advisory opinion the ICJ gave to the UN General Assembly on the *Legality of the Threat or Use of Nuclear Weapons* the ICJ noted that:

"the existence of the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now part of the corpus of international law relating to the environment".<sup>27</sup>

This is of course very similar to what was noted in the *Trail Smelter* arbitration, but in the beginning of the 1940's not yet part of the international customary law. This approach of a stricter responsibility upon states has now been reaffirmed in several international instruments such as articles 192 and 194 of the Law of the Sea Convention. The responsibility has become wider and now includes damage caused by pollution to the high seas, deep seabed and outer space.<sup>28</sup> Not to be forgotten in this context is the Stockholm Declaration on the Human Environment of 1972 (hereafter Stockholm Declaration) and its Principle 21, which very much reflects what was noted in the cases described above. In addition to a state's right to exploit resources within its jurisdiction, it also has a responsibility to ensure that such exploitation or other activities under their jurisdiction or control do not harm or cause damage to the environment, other states, or any other states.

## 2.1 The appropriate standard and state conduct

What could be considered the appropriate standard for the conduct of states in this field? Some argue that it is the standard of strict liability, according to which states are liable for the result of any pollution it was obligated to prevent, irrespective of fault from the state's side. The advantage of this is of course that more responsibility is placed upon state actors, but it is indeed doubtful whether international law as of today has accepted such a general

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<sup>25</sup> Shaw, Malcolm N, *International Law* 5 th ed., p. 761

<sup>26</sup> Ibid. p. 761

<sup>27</sup> ICJ Reports, 1996, para. 29

<sup>28</sup> Shaw, Malcolm N, *International Law* 5 th ed., p. 762



principle.<sup>29</sup> Case law in the field is not conclusive and opinions differ. While Canada's responsibility was accepted from the start in the *Trail Smelter* case the strict liability theory was not accepted in the *Corfu Channel* case. Furthermore, treaty practice is inconclusive, and different treaties suggest different approaches towards the issue. However, most treaties tend to use the formula of the exercise of diligent control of sources of harm by the state.<sup>30</sup> This test of due diligence (the level of judgement, care, prudence and determination that a person would reasonably be expected to do under particular circumstances) appears to be the most accepted standard and the one seen as the most appropriate one. As provided in article 194 of the Convention of the Law of the Sea from 1982, states are provided to take

“individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities”.<sup>31</sup>

In general it can be said that states are not automatically liable for all damages caused but it is dependent on other factors, which are specific for the treaty in question. The flexibility of the due diligence test must bring more complexity into the equation and it can only be seen in the light of the case specific circumstances. Yet a lot is required of the state actors, they are expected to take all necessary steps in order to prevent substantial pollution and to demonstrate behaviour expected of a state actor, which could be the establishment of systems of consultation and notification.<sup>32</sup> Responsibility for states becomes relevant for damages that have already occurred. According to Malcolm N. Shaw international law does not recognize the responsibility for a risk of damage. Difficulties that would arise are obvious, how should the risk be assessed and how should compensational claims be calculated for a possible future event? It is however possible argues Shaw that customary international law in the future may evolve in this direction. But this remains to be seen.<sup>33</sup> When damage has occurred the issue becomes to determine whether a certain level of damage has been reached. In the *Trail Smelter* arbitration the Tribunal emphasized the need to prove that “serious consequences” came from the toxic emissions, while other international treaties stipulates other obligations upon states when it comes to the effects of pollution.

“The issue of relativity and the importance of the circumstances of the particular case remain significant factors, but less support can be detected at this stage for the linkage to

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<sup>29</sup> Ibid, p 762-763

<sup>30</sup> Ibid. p. 763-764

<sup>31</sup> United Nations Convention on the Law of the Sea, 1982, art. 194, para. 1

<sup>32</sup> Shaw, Malcolm N, *International Law* 5 th ed., p. 764

<sup>33</sup> Ibid, p. 765

a concept of reasonable and equitable use of its territory by a state occasioning liability for use beyond this.<sup>34</sup>”

International instruments use a broad definition of pollution and its adverse effects, which stretches from harm to living resources or ecosystems, interference with amenities, and other legitimate uses of the environment, whereas the focus in the *Trail Smelter* arbitration was on loss of property.

The Vienna Convention on the Ozone Layer of 1985 defines the adverse effects on the ozone layer in article 1(2) as changes in the physical environment including climatic changes “which have significant deleterious effects on human health or on the composition, resilience and productivity of natural and managed ecosystems or on materials useful to mankind.”<sup>35</sup> Whereas the UN Framework Convention on Climate Change (UNFCCC) of 1992 is even more detailed and brings in matters of biota and socio-economic systems in its definition of the adverse effects of climate change.<sup>36</sup>

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<sup>34</sup> Ibid, p. 766

<sup>35</sup> Ibid, p. 766

<sup>36</sup>United Nation Framework Convention on Climate Change, 1992, Article 1(1)

# 3 Rules, Principles and Treaties governing international and international environmental law

In international environmental law, there are a set of principles and rules of a general character that are potentially applicable to all members of the international community for all the activities they carry out or authorize in respect to the protection of the environment. These are to be found in treaties, binding acts of international organizations, state practice and soft law commitments. Some of the more important principles and rules will hereafter be presented and described, they all have a broad, some even universal, support and are often used. These are:

1. Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration;
2. the principle of preventive action;
3. the principle of co-operation;
4. the principle of sustainable development;
5. the precautionary principle;
6. the polluter-pays principle;
7. the principle of common but differentiated responsibility.<sup>37</sup>

It is difficult to precisely determine the international legal status of all of these rules and principles. Therefore, rather the application of these in respect to a certain activity or incident, and the following consequences, have to be considered individually for each specific case. The source of the principle; its language and textual content; the activity at issue; consequences of the activity (environmental as well as other); under which circumstances the issue occurred (actors, geographical location etc.) are all factors which need to be taken into consideration.<sup>38</sup>

Of the above listed principles the Principle 21/Principle 2 as well as the principle of co-operation are the most well established and are basis for an international cause of action. In other words, these principles are part of the corpus of international customary legal obligations. A breach of these obligations would allow injured members of the international community to seek legal remedy.<sup>39</sup> State practice among European states points in the same direction concerning the precautionary principle, which can be said to be part of a regional customary law in Europe. The legal status of the other principles is less clear, as they do not have the same internationally customary effect upon states, however they are binding in respect to treaty obligations and in some specific contexts as customary obligations. Even

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<sup>37</sup> P. Sands, *Principles of International Law 2 nd ed.*, p 231

<sup>38</sup> Ibid, p. 231

<sup>39</sup> Ibid, p. 232

though their status is not always clear the principles are likely to shape the future development of international environmental law. In the following an attempt will be made to clarify the meaning and the status of these principles, whereas most focus will be placed on the Principle 21/Principle 2.

### 3.1 Principle 21/Principle 2

The objectives moving environmental law and its general principles forward are pulling in different directions. There is on one hand the idea that states must not cause any damage to the environment and on the other hand that states have sovereign right over their natural resources. This is also provided for in the Stockholm Declaration Principle 21, which states that:

“States have in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”

The importance of the Principle has been growing ever since it was first adopted, and yet it has not been significantly altered since. However at the United Nations Conference on Environment and Development (UNCED) in 1992, the Rio Conference, two words were added into its Principle 2, to recognize that states have the right to pursue “their own environmental *and developmental* policies”. Principle 21 is now part of international customary law and the ICJ in its advisory opinion on *The Legality of the Threat or Use of Nuclear Weapons* confirmed this in 1996.

#### 3.1.1 Sovereign right to exploit natural resources

States have the right within the boundaries of international law to make use of their natural resources in ways they find suitable even though it may have adverse effects on the environment. This is the first fundamental part of the Principle 21/Principle 2, this idea was pre-existent to the Stockholm Declaration and comes from the general idea of permanent sovereignty over natural resources from several UN General Assembly resolutions from 1952 and onwards.<sup>40</sup> These resolutions were adopted to ensure some state control over natural resources, and giving them legal safety to their investments with regards to foreign investors.<sup>41</sup> In the beginning of the 1970’s reflections on the principle of state sovereignty in contrast to the need for

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<sup>40</sup> UNGA Res. 626 (VII) (1952); UNGA Res. 837 (IX) (1954); UNGA Res. 1314 (XIII) (1958); UNGA Res. 1515 (XV) (1960).

<sup>41</sup> P. Sands, *Principles of International Law 2 nd ed.*, p. 236.

preservation of the environment started to appear<sup>42</sup>. In 1971 before the Stockholm Declaration was adopted the UN General Assembly stated that:

“each country has the right to formulate, in accordance with its own particular situation and in full enjoyment of its national sovereignty, its own national policies on the human environment”<sup>43</sup>

This was later formally recognized by of the Stockholm Declaration.

### **3.1.2 Responsibility not to cause environmental damage**

The second fundamental part of the Principle 21/Principle 2 is the responsibility not to cause damage to the parts of the environment stretching beyond national jurisdiction. It reflects the opinion that states are subject to legal environmental limits despite its national sovereignty. The Principle 21 and the responsibility not to cause these damages have been accepted as an obligation by all states and hence part of the international customary law placing legal constraints on the rights of states.<sup>44</sup> The obligation of States not to cause environmental damage to areas beyond their jurisdiction is a principle that dates prior to the establishment of the Stockholm Declaration, although it was not until then it became part of international customary law. Now it can also be found in the preamble of the UNFCCC. The Permanent Court of Arbitration (PCA) noted in the *Island of Palmas* arbitration that it was the obligation of all states “to protect within the territory the rights of other states, in particular their right to integrity and inviolability in peace and war”.<sup>45</sup> This obligation upon states was later relied upon and widened in the *Trail Smelter* case when the arbitral tribunal stated that:

“ Under the principles of international law... no state has the right to use or permit the use of territory in such a manner as to cause injury by fumes in or to the territory of another of the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.”<sup>46</sup>

This statement used by the tribunal was a citation from Eagletons work, *Responsibility of States* (1928) and has been accepted as customary law. This is supported by Judge de Castro in his dissenting opinion to the *Nuclear Tests* case.<sup>47</sup>

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<sup>42</sup> Ibid, p. 237.

<sup>43</sup> UNGA Res. 2849 (XXVI) (1971).

<sup>44</sup> P. Sands, *Principles of International Law 2 nd ed.*, 241

<sup>45</sup> PCA, *Island of Palmas Case*, 2 HCR (1928) 84 at 93.

<sup>46</sup> *United States v. Canada*, 3 Reports of International Arbitral Awards 1907 (1941)

The general rule from the Trail Smelter case is closely related to the principle of good-neighborliness that is spoken of in article 74 of the UN Charter. This general principle is embodied in the principle of sovereignty which can be seen in a statement from the ICJ in the *Corfu Channel* case where it notes that it embodies “the obligation of every state not to allow its territory to be used for acts contrary to the rights of other states”.<sup>48</sup>

Conclusively it can be said that the strong support reflected in the Principle 21 manifests its central role as part of international customary law. The rule has developed with the conclusion of agreements in the environmental field, creating more detailed obligations to the basic objectives. The principle may very well provide for a legal basis for bringing claims under customary law of environmental damage. Application of the principle has to be seen in the light of the case specific circumstances and facts.

## 3.2 Erga Omnes

Traditionally the greater part of international law has its basis in relations between States, contractual or not, and is of a bilateral nature. Obligations agreed upon are owed to counterparts in a reciprocal manner, and any breach can potentially be a basis for the invocation of State responsibility. Professor Philip Allott has captured the special character of international law well when he described it as “the minimal law necessary to enable state-societies to act as closed systems internally and to act as territory owners in relation to each other”.<sup>49</sup> This bilateral view was very well expressed by the ICJ in 1949 in the *Reparation for Injuries suffered in the Service of the United Nations, Advisory Opinion*, where it stated that: “only the party to whom an international obligation is due can bring a claim in respect of its breach”.<sup>50</sup>

*Erga omnes* (which is Latin and equivalent to “towards everyone/all”) obligations differs from *jus cogens* of Article 103 of the UN Charter. The latter is distinguished by its normative power – the ability to override any conflicting norm – whereas *erga omnes* obligations “designate the *scope of application* of the relevant law, and the procedural consequences that follow

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<sup>47</sup> Australia v. France (1974) ICJ Reports 253 at 389. de Castro stated: “If it is admitted as a general rule that there is a right to demand prohibition of the emission by neighbouring properties of noxious fumes, the consequence must be drawn, by an obvious analogy, that the Applicant is entitled to ask the Court to uphold its claim that France should put an end to the deposit of radio-active fall-out on its territory.”

<sup>48</sup> P. Sands, *Principles of International Law 2nd ed.*, p. 242-243; Corfu Channel case (UK v. Albania) (1949) ICJ Reports 4 at 22.

<sup>49</sup> Philip Allott, *Eunomia. New Order for a New World*, Oxford University Press, 1990, p. 324

<sup>50</sup> *Reparation for Injuries suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, pp 181-182

from this.”<sup>51</sup>. These obligations are owed to the international community as a whole, excluding no State, and entitles anyone to invoke State responsibility in case of breach. However no superiority is given to these obligations in respect to others, that is these obligations do not translate into any hierarchy.<sup>52</sup>

International law as we know it today has moved away from the traditional view of bilateralism. As early as the 1950s during the International Law Commission (ILC) debates on the Vienna Convention, the Special Rapporteurs recognized the difference between obligations that were owed to States through treaties in reciprocal relationships and what Fitzmaurice called “a more absolute type of obligation” – which is an obligation of an “integral” or “interdependent” character. He saw disarmament and humanitarian law conventions as obligations of such a character and such obligations could not be reduced into reciprocal State-to-State relationships.<sup>53</sup>

The case most frequently referred to in early discussions on these obligations of a universal interest is the ICJ *Reservations to the Genocide Conventions* case. According to the court classical treaties were about normal State to State relationships, advantages and disadvantages and a basic contractual balance.<sup>54</sup> From the reasoning it follows that under Conventions such as the Genocide Convention States are not pursuing their own national, individual interests but rather they had a “common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention” and “consequently, in a convention of this type one cannot talk of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between the right and duties”.<sup>55</sup>

The concept of *erga omnes* was first introduced to international law after the *Barcelona Traction* case where the ICJ in the dicta noted that:

“an essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising vis-à-vis another state in the field of diplomatic protection. By their very nature the former are the concern of all states. In the view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes*.”<sup>56</sup>

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<sup>51</sup> Fragmentation Of International Law: Difficulties Arising From The Diversification And Expansion Of International Law, p. 193 para 380

<sup>52</sup> *ibid*

<sup>53</sup> *ibid*, p. 195 para 385.

<sup>54</sup> Reservations to the Convention on the Prevention on the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p 23

<sup>55</sup> *Ibid*.

<sup>56</sup> Barcelona Traction Company Case (Belgium v. Spain) (1970) ICJ Reports 4 at 32.

“Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law... other are conferred by international instruments of a universal or quasi-universal character.”<sup>57</sup>

Regardless of the fact that it is being mentioned in the *orbiter dictum*, the ICJ has approved the concept and its importance across the globe has grown ever since.

The Court here comes to the conclusion that there are different types of obligations, those that exist towards other States in the classical bilateral way and those which are the concern of all and in which all have a legal interest. The examples given by the Court of obligations *erga omnes* may have the nature of *jus cogens* as well, but the Court’s purpose was not to show their non-derogability, it wanted to emphasize the fact that some rules give rise to legal standing in the event of their violation.<sup>58</sup> These obligations or rules are rules of a certain procedural character. The doctrine of *erga omnes* obligations has been confirmed by the ILC, in the ILC Draft on State Responsibility (2001) article 48 the final text, due to a compromise, was as follows:

“Any state other than an injured State is entitled to invoke the responsibility of another in accordance with paragraph 2 if:

- (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
- (b) the obligation breached is owed to the international community as a whole.”

Despite the compromise where violations constituting such grave violations against the international community were not labeled as “crimes” in the final draft, it was easily recognized from the text that there exists the possibility of invocation of responsibility by other than the injured State, which in its essence is *erga omnes*. In the Commentary to the Draft the Commission clarifies that this provision is intended to deal with the obligations referred to in the *Barcelona Traction* case.

Most, but not all, *erga omnes* obligations are to be found in the field of humanitarian law and the human rights. Legally no reciprocal obligations

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<sup>57</sup> Ibid.

<sup>58</sup> Michael Byers, “Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules”, *Nordic Journal of International Law*, vol. 66 (1997) 211, p. 230.



are created in the classic bilateral manner, for example the obligation to respect the prohibition of slavery is not directed towards any particular State or its citizens, but rather towards everyone under its jurisdiction regardless of citizenship. In these situations there exists no *quid pro quo*, the obligation stays regardless of any other States behaviour. Normally according to the classic bilateral view a State which is responsible of torturing its own citizens, could only be held accountable by those, any harm attributed to anyone else would be purely notional in the sense that it would have to be based on a theory such as the *erga omnes* obligations. Despite a breach of obligations, no other harmed State would be found and under classic bilateralism there would be no State able to claim a right. But of course now the ILC has accepted the fact that there may be situations where States not directly affected by the breach in a material manner are entitled to claim that the breaches have infringed upon their rights, as being part of the international community as a whole. The ICTY summoned the concept of *erga omnes* in a good manner in its Furundzija judgement where it stated that:

“Furthermore, the prohibition of torture imposes on States obligations *erga omnes*, that is, obligations owed towards all the other members of the international community, each of which then is a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative rights of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfillment of the obligation or in any case to call for the breach to be discontinued.”<sup>59</sup>

The difference between “bilateral” and obligations *erga omnes* is very similar to the difference in domestic law between contracts and public law obligations. Contracts are made between two or more parties assigning rights and obligations only to the contract parties, whereas public law obligations concentrates on the situation where the relationship is between the public power and a single legal subject. Even if a breach of the public power obligation, which may violate an individual interest, is at hand the capacity to react to the breach lies in the hand of the public power.

The ability of States to react is not restricted to measures of a collective process, this would actually lead to the meaningless of the *erga omnes* process as the only general collective reaction procedures are to be found in Chapter VII of the UN Charter. It would be practically impossible to instigate such collective procedures due to the political nature of the UN. An obligation *erga omnes* is as mentioned above owed to the international community as a whole, but also to each and every State individually without any attachments. And hence any State may raise its voice and claim its right in case of another State breaching its *erga omnes* obligations.

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<sup>59</sup> *Prosecutor v. Anto Furundzija*, Judgement of 10 December 1998, Case No. IT-95-17/1, Trial Chamber II, 121 *ILR*(2002) p. 260, para. 151

An obligation *erga omnes* is hence an obligation of such great value and importance that they are a concern of the entire international community where all states are the bearer of the legal interest regardless of any damage suffered. Obligations that are considered to be of an *erga omnes* nature are for instance the outlawing of aggression and of genocide and the protection from racial discrimination and slavery as well as a peoples right to self-determination. The fact that all States may complain upon a breach of such an obligation increases the likelihood that a complaint will be made also emphasizes on the priority accorded to these norms. Obligations of an *erga omnes* character are defined through treaties or customary law and all international crimes are obligations with this character. This may seem logical as the international community as a whole identifies and may prosecute and punish the commission of these crimes, however the opposite is not the case, not all *erga omnes* obligations are international crimes.

And even if a breach of an *erga omnes* obligation is at hand, the problem of judicial forum arises. In what forum can a State seek remedy for breached obligations of another State?

### 3.2.1 Erga Omnes Partes

Human rights agreed upon under treaties may constitute *erga omnes* obligations for the state parties, and only those, are to be known as *erga omnes partes*. This raises the obvious question of whether the right to a clean environment is considered as a human right and then an *erga omnes* obligation. The wide scope of the obligation may be based on the fact that the obligations in question often regulate internal behaviors of the State and hence no other states are likely to be materially affected by the breach.

### 3.2.2 Erga Omnes and the Environment

Some scholars such as Verheyen and Tol firmly believe that the Kyoto Protocol is part of what we know as *erga omnes*. Traditional *erga omnes* obligations were thought to be restricted to the protection of fundamental human rights as well as the prohibition of acts of aggression. But more recent international law and the jurisprudence there of has recognized the protection of environment as an obligation *erga omnes*. In his separate opinion in the *Gabcikovo Nagymaros Case*, Judge Weeramantry stated that:

“There is substantial evidence to suggest that the general protection of the environment beyond national jurisdiction has been received as obligations *erga omnes*.”<sup>60</sup>

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<sup>60</sup> Case Concerning the Gabcikovo Nagymaros Project: *Hungary v Slovakia*. 37 ILM 162.

This separate opinion, from one Judge only, shows that there is recognition at a very high level of environmental protection being part of *erga omnes*.

The ILC in the commentary to the Draft Articles on State Responsibility mentions rules of special importance for safeguarding the human environment and rules prohibiting large pollutions of the world as being obligations *erga omnes*. Judge Weeramantry connects these rules to the question of climate change in his dissenting opinion in the *Legality of the Threat or Use of Nuclear Weapons* case, where he states that:

“The Global environment constitutes a huge, intricate, delicate interconnected web in which a touch there or a palpitation there sends tremors throughout the whole system. Obligations *Erga Omnes*, rules *jus cogens* and international crimes respond to this state of affairs by permitting environmental wrongs to be guarded against by all nations.”<sup>61</sup>

From this it can be deduced that contemporary jurisprudence and the opinion of scholars recognizes that State actions that may damage the environment have to be considered obligations *erga omnes*. There is recognition and support for this as the destruction that would follow from climate change is so extensive and humanity as a whole would/will suffer from it. In the same dissenting opinion as above, Judge Weeramantry reasoned along the same lines when recognizing the adverse effect the use of nuclear weapons would have on humanity as a whole.

### **3.3 The remaining principles**

The next part describes the legal status of principles 2-7 from the listing above.

#### **3.3.1 The Principle of Sustainable development**

The general idea behind this principle is that states should ensure that the use and development of their natural resources does not infringe on the needs of generations to come. In state practice the idea of sustainable development has been an issue since 1893 and the Pacific Fur Seals Arbitration, where the United States claimed their right to ensure the proper and legitimate use of fur seals, and for the protection of them from destruction by mankind. In 1987 the Brundtland Report (formally the World

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Separate Opinion of Vice President Weeramantry section B.

<sup>61</sup> International Court of Justice: *Legality of the Threat or Use of Nuclear Weapons*. Dissenting Opinion of Judge Weeramantry, Part 3 sec 4:1 (b)

Commission on Environment and Development) defined the term as: "development that meets the needs of the present without compromising the ability of future generations to meet their own needs". There are other elements to the principle which actors are to take into account besides the considerations of future generations and the "sustainable" exploitation of resources. Use of natural resources is to be equitable, considerations are to be taken of the needs of other states, and that environmental considerations are to be integrated into economic and development plans. The Rio Declaration Principle 3 concisely describes it as:

"The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations"<sup>62</sup>

For this investigation it is important to point out that states according to the principle are mandated to, instead of burning fossil fuels, find alternative sources of energy in pursuing the goal to reduce global warming.

### 3.3.2 The Precautionary Principle

The objective behind the principle comes from scientific uncertainties. It is to provide guidance for states in the development of the environmental field. Its origin can be traced to domestic German law and the concept of "Vorsorgeprinzip".<sup>63</sup> No state shall be able to hide from responsibility by referring to an inconsistent scientific consensus, the principles main feature is described in Principle 15 of the Rio Declaration, which provides the following:

"In order to protect the environment the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."<sup>64</sup>

What this means is that, uncertainties on, for instance the environments capacity to absorb pollution, natural resources ability to cope with exploitation or the impact of certain activities, is to be taken into account when determining whether to proceed and what controls are needed. If

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<sup>62</sup> Rio Declaration on the Environment and Development, Principle 3, <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163> (Accessed 2007-10-22)

<sup>63</sup> P. Sands, *Principles of International Law 2 nd ed.*, p. 267.

<sup>64</sup> Rio Declaration on the Environment and Development, Principle 15, <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163> (Accessed 2007-10-24)

harmful effects of a certain activity are expected actors should be more cautious and allow for the possibility of error or ignorance, hence reflect a better understanding of science. This lowers the required standard of proof before preventive action is required, it doesn't allow states to proceed with their activities merely because of lacking scientific evidence, nor does it require proof that there is no risk of harm.<sup>65</sup>

Another formulation of this principle is to be found in Article 206 of the 1982 UNCLOS which provides that:

“When states have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments to the IMO.”

Yet another recognition of this principle leaving even less room for confusion, as well as removing a possible use of a veil of ignorance, is to be found in the 1990 Bergen Ministerial Declaration on Sustainable Development, which provides the following:

“Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.”

The principle's use is more widely spread in Europe than in the United States and it has been included in the Maastricht Treaty, the Barcelona Convention for Protection against Pollution in the Mediterranean Sea and the Global Climate Change Convention.<sup>66</sup> Countries like Sweden and Denmark have even made the precautionary principle as well as other principles part of their national environmental policies.<sup>67</sup> The use of the policy in the United States is however less clear, on a national level it has on occasions been used as a guide policy. However at an international level the United States does not adhere to it. It objects to other countries using it especially in the area of international trade. Against European countries active lobbying was conducted by the United States to prevent them from adopting the precautionary principle in the fields of beef hormones, genetically modified foods, electronic take-back and others.<sup>68</sup>

### 3.3.4 The Polluter Pays Principle

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<sup>65</sup> P. Birnie, A. Boyle, *International Law & The Environment*, 2nd ed., Oxford University Press, 2002, p. 117

<sup>66</sup> J. Tickner, *The Precautionary Principle in Action A Handbook*, Written for the Science and Environmental Health Network, p. 2

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.* p. 3

This emerging principle is more widely accepted in certain regions of the world than others, the concept is simple: the polluter should carry the cost of pollution. The Rio Declaration Principle 16 notes that:

”National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.”<sup>69</sup>

In general the application of the principle remains open to interpretation in the particular cases, especially with regards to the extent of the costs and the circumstances in which it will apply.<sup>70</sup> The principle has been adopted by the European Community<sup>71</sup> and by the Organisation for Economic Cooperation and Development<sup>72</sup>.

### 3.3.3 The Principle of Co-operation

The Stockholm Declarations principle 24 reflects a general obligation for States regarding the issue of environmental protection. It is noted in the article that: “international measures concerning the protection and improvement of the environment should be handled in a co-operative spirit”, and the Principle 7 of the Rio Declaration noted that: “states shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem”. The principles can be interpreted widely and includes more than just a co-operation to prevent environmental damage. In the light of the good-neighbourliness principle and the Rio Declaration principle 18, states are obliged to immediately notify states of any natural disasters or other events that are likely to cause unexpected harm to the environment of these states. This was clearly neglected by the Soviet Union in 1986 after the Chernobyl disaster but no States sought compensation, which was merely due to political considerations and not legal.<sup>73</sup> A similar commitment can also be found in the *Lac Lanoux* and *Gabcikovo Nagymaros Project* cases, where notifications were central issues in the disputes.

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<sup>69</sup> Rio Declaration on the Environment and Development, Principle 3, <http://www.unep.org/Documents/Multilingual/Default.asp?DocumentID=78&ArticleID=1163> (Accessed 2007-10-22)

<sup>70</sup> P. Sands, *Principles of International Law 2nd ed.*, p. 280

<sup>71</sup> Article 174 of the EC Treaty

<sup>72</sup> OECD Council Recommendations C(89)88 (1989)

<sup>73</sup> P. Sands, *Principles of International Law 2nd ed.*, p. 887

### 3.3.4 The Principle of Preventive Action

As can be deduced from the name of the principle, the principle obliges states to prevent damage to the environment, and otherwise to limit, reduce or control activities which may cause such damage. The rationale behind the principle is to minimize environmental damage, and it requires action to be taken at an early stage, if possible even before the occurrence of damage. Indirectly the principle can be found in the 1972 Stockholm Declaration<sup>74</sup> and also in Principle 11 of the 1992 Rio Declaration, which all speak of measures or legislative issues which should be considered. Implicitly the principle can also be found in a number of cases such as the *Trail Smelter* case and the *Lac Lanoux*<sup>75</sup> arbitration. The principle is also to be found in a large number of treaties and conventions aiming to prevent environmental damage and harm to human health such as; the 1951 Plant Protection Convention Art. 1(1), the preamble of the Oil Pollution Prevention Convention from 1954 and the UNFCCC Art. 2 as well as many others. This shows the wide support from the international community in this principle.

### 3.3.5 The Principle of Common but Differentiated Responsibility

Equity is the ruling thought behind this principle. It has developed from the recognition of the differentiated needs and capabilities of different state actors. The special needs of developing countries in respect to the developed countries must be taken into account in the development, interpretation and application of international environmental law. Principle 7 of the Rio Declaration notes the following on the principle:

“States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem. In view of the different contributions to global environmental degradation, states have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.”

The UNFCCC Article 3(1) uses a similar language and provides that state parties to the Convention should act to protect the climate system “on the basis of equity and in accordance with their common but differentiated responsibilities and capabilities”. The principle contains two elements of

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<sup>74</sup> See Principles 6, 7, 15, 18 and 24 of the 1972 Stockholm Declaration on the Human Environment

<sup>75</sup> The Lac Lanoux arbitration between France and Spain concerned the proposed diversion of a shared watercourse by France which had impacts on the Spanish side of the border.

which the first is the common responsibility of states for the protection of the global environment, or at least parts of it. The second elements takes into consideration the different capabilities states have, the different circumstances at hand in relation to each states contribution to a specific environmental problem and its ability to prevent, control and reduce the problem.



# 4 Is the Right to a Clean Environment also a Human Right

A clean or healthy environment as a term in this context refers to a right to individuals and groups of people to live in an environment that is free from largescale air-, water-, or landpollution.<sup>76</sup> In this study it would relate to the people of Tuvalu not to have their country flooded by sea-water. In the following it will be investigated whether such a right exists in contemporary international law.

Article 38.1 of the ICJ Statute sets out the sources of international law, from where obligations upon States are obtained. It states that:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Courts in interpreting international law generally follow the hierarchy of the article. While Article 59 of the Statute makes it clear that the ICJ should not take past decisions (except its own) into consideration it is very rare that the Court departs from its previous decisions and does treat them similar to precedents in the common law system.

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<sup>76</sup> R. Churchill, *Environmental Rights in Existing Human Rights Treaties*, (found in Anerson and Boyle, *Human Rights to Environmental Protection*, p 89.)

## 4.1 Universal and regional level

A right to a healthy environment is only found explicitly mentioned in regional instruments in Africa and the Americas.<sup>77</sup> In other, universal instruments this right cannot be found this clearly, but its existence in those above mentioned instruments is evidential of an existing regional customary law. There are references to rights in universal instruments that may be seen as inseparable from the right to a healthy and clean environment, but it requires extensive interpretation which may not be appropriate. In the International Covenant on Economic Social and Cultural Rights (ICESCR) it is stated that parties to it should:

“recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health...steps to be taken by the State Parties to achieve the full realization of this right shall include those necessary for...the improvement of all aspects of environmental and industrial hygiene.”<sup>78</sup>

This article recognizes the right to a high standard of living and puts environmental hygiene as prerequisite to be able to attain this standard. Article 24 of the UN Convention of the Rights of the Child links the right to the obligation of States to consider any risks of environmental pollution.<sup>79</sup> Despite these references being made to the right of a healthy environment they are being seen as peripheral to other rights considered to be of greater value.

The Stockholm<sup>80</sup> and Rio Declarations<sup>81</sup> have however gone somewhat further and recognized that there is a connection between the right to a healthy environment and human rights. These declarations are though only considered to be of a declaratory nature and are hence not part of binding international law. Despite that some of their principles have now become part of international customary law, the right to a healthy environment cannot be considered as one of those. However as recognition of these issues is increasing, a new set of human rights might evolve in the future.

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<sup>77</sup> African Charter on Human and People's Rights, Article 24, and the American Convention on Human Rights (Protocol of San Salvador), Article 11.

<sup>78</sup> International Covenant on Economic Social and Cultural Rights, Article 12:1

<sup>79</sup> UN Convention on the Rights of the Child, Article 24

<sup>80</sup> 1972 Stockholm Declaration of the UN Conference on the Human Environment, *“Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights the right to life itself.”*, Preamble, and, *“Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being”*, Principle 1

<sup>81</sup> 1992 Rio Declaration on Environment and Development, *“Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”*, Principle 1.

In Europe neither the European Social Charter nor the European Convention for the Protection of Human Rights and Fundamental Freedoms recognize the right to a healthy and clean environment; the Treaty of Amsterdam contains no such rights either. As none of these important human rights instruments recognize this right, it cannot be considered part of a regional customary law in Europe. Hence with the exception of European and North American custom it can most likely not be considered to be a general principle of international law, as these two systems are important in such determination. There is however in the Aarhus Convention a statement which reads: "...every person has the right to live in an environment adequate to his or her wellbeing...".<sup>82</sup> But according to the authors that does not guarantee a right to an "adequate environment".

The second source in determining international law is customary law, this is a more living part of international law and its consists of two elements, *opinio juris* and state practice. The practice of Latin American and African courts and treaties in recognizing the right to a healthy environment as a human right indicates the existence of a regional customary law, but not a universal. Customary international law can be created very fast and even though the rules considered are relatively new, in the *North Sea Continental Shelf Case* the ICJ came to the conclusion in that:

"Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; -and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."<sup>83</sup>

This is what is today sometimes referred to as instant customary law.

General principles of international law are supplementing custom and treaties when it comes to the determination of existing international law. The practice of the international community may in some cases lead to a principle's evolvement into customary law. In the *Trail Smelter Case* the court reached the conclusion that States shall not allow activities within their territory that may harm territory outside its own jurisdiction. This general principle has since that been included in many treaties and declarations and is now considered part of international customary law. Many States have included a right to a healthy environment in their national

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<sup>82</sup> M. Adebowale, C. Church, B. Nduta Kairie, B. Vasykivsky, Y. Panina, *Environment and Human Rights: A New Approach to Sustainable Development*, International Institute for Environment and Development p.3

<sup>83</sup> *North Sea Continental Shelf (F.R.G. v. Den. & Neth.)*, 1969 I.C.J. 3, para. 74

legislations, for instance Colombia and Croatia have such rights.<sup>84</sup> But as dominating countries such as the United Kingdom and the United States do not recognize these rights it may be too early to speak of this as a general principle of international law.

The principle of *stare decisis*, where prior judicial decisions are considered, does as described earlier not exist in international law. It is however common in the decisions of the European Union Court of Justice, European Court of Human Rights and ICJ to consider past decisions. Past decisions on the content of international law are often given the status of persuasive evidence, and decisions of international tribunals are considered more important than domestic courts. Most important are the decisions of the ICJ. As of today none of the above mentioned courts have adjudicated a case where recognition was specifically paid to a right to a healthy environment. However the ICJ in the case *Gabcikovo-Nagymaros*, a case of treaty interpretation between Hungary and Slovakia, highlighted the importance of evolving environmental norms, and that States shall take these into consideration. But they were not declared to be obligatory by the ICJ. And while the case does not directly recognize the existence of a human right to a healthy environment, international law seems to be evolving in this direction and the future will most likely hold such a right.

Despite all this there is no doubt that a human right to a healthy environment does exist in some regions of the world, but it is not legally binding upon others outside of that territory.

However there are other rights that may also be in danger in the aftermaths of global warming. For instance the right to life itself is likely to be infringed upon by global warming. The possibilities of survival decrease as the effects of global warming become more apparent, the rise of oceans make certain inhabited areas inhabitable.

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<sup>84</sup> Constitution of Colombia, Article 79, and, Constitution of Croatia, Article 69, found at, <http://confinder.richmond.edu/country.php>. (Accessed 2007/10/11)

# 5 Global Warming and the Ozone Layer

The ever rising temperature of the last decades, and the expected rise in the decades to come has come to turn focus onto consumption of fossil fuels and deforestation. Together with the depletion of the ozone layer, that has the effect of letting through more ultraviolet radiation to the surface of the earth, this is a matter of growing concern. Regarding the ozone layer there is a problem of legal characterization, the layer is, according to article 1(1) of the 1985 Vienna Convention for the Protection of the Ozone Layer, “the layer of atmospheric ozone above the planetary boundary layer”. Hence this area constitutes a unit of itself not part of any national jurisdiction or sovereignty. But according to the UN General Assembly resolution 43/53 global climate change, of which also the depletion of the ozone layer is part, “is the common concern of mankind”. A growing number of voices worldwide also recognize that issues of this magnitude can only be tackled on an international or global scene. Under the Convention, which was adopted in 1985 and entered into force three years later, state parties agree to take actions to protect human health and the environment from adverse effects resulting from human activities that modify or may modify the ozone layer. Co-operation, collective collection of relevant data and agreed measures such as legislative or administrative action were also agreed upon in order to control, limit, reduce or prevent human activities under their jurisdiction or control “should it be found that these activities have or are likely to have adverse effects resulting from modification or likely modification of the ozone layer”<sup>85</sup>. The Convention is however not much more than a framework within which further action can be taken, for instance with the help of more detailed protocols. One such is the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, it urges its signatories for a phased reduction of chlorofluorocarbons and a freeze on the use of “halons”<sup>86</sup>,<sup>87</sup>.

Regarding the results of the depletion of the ozone layer and specifically the global warming less action has been taken at an international level. The UN General Assembly in 1988 and 1989 brought forward the resolutions 43/53 and 44/207, which recognized that the climate change was a concern common to all mankind and determined that action had to be taken to deal with the issue. A call for a convening conference on climate change was brought forward by the General Assembly and the UNEP Governing Council Decision on Global Climate Change. Complementing this the Hague Declaration on the Environment 1989, urged states to establish a new

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<sup>85</sup> Vienna Convention for the Protection of the Ozone Layer, 1985, Article 2

<sup>86</sup> Defined as any of a number of unreactive gaseous compounds of carbon with bromine and other halogens, used in fireextinguishers, but now known to damage the ozone layer.

<sup>87</sup> Shaw, Malcolm N, *International Law* 5 th ed., p. 785

institutional body, under the UN regime to work against global warming and to start negotiations on the necessary legal instruments. Following this the UNFCCC was adopted in 1992.

The purpose of the Convention, which can be found in its second article, is to achieve a stabilization of greenhouse gases in the atmosphere at a level that prevent dangerous anthropogenic interference with the environment. Such a level should be reached within a time frame sufficient to allow ecosystems and organisms to naturally adapt to climate change, and to ensure that food production is not threatened as well as to enable economic development to proceed in a sustainable manner. States parties to the Convention commit themselves to develop, update and publish national inventories of anthropogenic emissions (emissions related to or influenced by the impact of man on nature) by sources and removals by sinks<sup>88</sup> of all greenhouse gases not covered by the Montreal Protocol. Article 3 of the Convention sets out a number of principles for its signatories, one of these provides for differentiated responsibilities between the developing and the developed countries as follows:

“In their actions to achieve the objective of the convention and to implement its provisions the parties shall be guided, *inter alia*, by the following:

1. The parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.”

This grouping of countries is consistent throughout the Convention and it groups countries into four categories reaching from the “developed countries” to the “least developed countries”. In between these two are “countries undergoing the process of transition to a market economy” and the “developing countries”.<sup>89</sup> Due to the differing economic capacities of developed states and the problems faced by the former socialist states of eastern Europe led to an unusual distinction to be drawn in the Convention. A distinction was made between “all developed country parties and developed parties (included in Annex I), and those developed country parties and developed parties not “undergoing the process of transition to a market economy””(listed in Annex II).<sup>90</sup> Several other measures that states committed themselves to can be found in article 4(1) of the Convention. These include the formulation and implementation of national and regional

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<sup>88</sup> Defined as a body or process that acts to absorb or remove energy, in this case greenhouse gases, an aerosol or a precursor of a greenhouse gas from the atmosphere. This can be the increasing of forests.

<sup>89</sup> B. Boer, R. Ramsay, D. R. Rothwell, *International Environmental Law in the Asia Pacific*, p. 153

<sup>90</sup> P. Sands, *Principles of International Law 2 nd ed.*, p. 361

programmes containing measures to mitigate climate change and the update of such already existing; to promote and co-operate in the development, application and transfer of technologies and processes to control, reduce or prevent anthropogenic emissions; to promote sustainable management and conservation of sinks and reservoirs of all greenhouse gases not controlled by the Montreal Protocol; to take climate change considerations into account to the extent feasible in their relevant social, economic and environmental policies; and to promote and co-operate in research, exchange of information and education in the field of climate change.<sup>91</sup> The commitments that more developed countries oblige themselves to are naturally more far-reaching than those of developing countries, the former are to take the lead in scientific development and policy making. The supreme body of the Convention is its Conference of all the member states, which in general meets annually for a session period of two weeks. The main objective of the Conference is to evaluate the status of climate change and the effectiveness of the treaty. National activities of member states are examined, mainly by reviewing national communications and emissions inventories. It also evaluates new scientific findings and tries to capitalize on experience as efforts to address climate change proceed.<sup>92</sup> In 1994 the Convention entered into force and in 1995 it held its first Conference in Berlin. Here it was agreed upon that the pledges by developed countries to reduce emissions by 2000 to the levels of 1990 were not enough, and commenced to draft further legal instruments by 1997. No further commitments should be placed on developing countries, but they should be assisted so they could reach the already existing commitments.<sup>93</sup>

## 5.1 The Kyoto Protocol – a brief history

In 1997 the Convention was supplemented by the Kyoto protocol. It is an international agreement which builds upon the UNFCCC, and sets legally binding targets and timetables for the reduction of greenhouse gas emissions. The Protocol was adopted since the parties to the Convention in 1995, at a meeting in Berlin, determined that the commitments provided for in Article 4(2)(a) and (b) of the Convention were not adequate.<sup>94</sup> The text of the protocol was unanimously adopted in 1997 and entered into force on February 16 2005. The Protocol is a complicated agreement that was slow in coming and required long negotiations between the parties, due to the need for an effective instrument which could effectively tackle the problem and of political considerations. After the Protocol was accepted in 1997 further negotiations were needed on how it should operate. Rules relating the operative part were agreed upon in 2001 and are known as the “Marrakesh Accords”. Bearing in mind the economic and developmental implications

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<sup>91</sup> United Nation Framework Convention on Climate Change, 1992, Article 4(1)

<sup>92</sup> [http://unfccc.int/essential\\_background/feeling\\_the\\_heat/items/2915.php](http://unfccc.int/essential_background/feeling_the_heat/items/2915.php), (Accessed 2007/05/17, 09:50)

<sup>93</sup> Shaw, Malcolm N, *International Law* 5 th ed., p. 788

<sup>94</sup> P. Sands, *Principles of International Law* 2 nd ed., p. 369

for the parties, it is not surprising that the negotiations were among the most difficult and complex ever conducted for a multilateral treaty in the field of environmental protection. There were deep divisions between the state parties regarding many of the most important issues of the treaty, such as emission reduction targets, sinks, emission trading, joint implementation and the treatment of developing countries. Despite the consensus reached following negotiations regarding detailed rules, guidelines and methodologies needed for the implementation have proven difficult. In the beginning of 2001 the future of the Protocol was at stake as the President of the United States George W. Bush announced that the United States would not ratify the Protocol, this despite the fact that the United States is responsible for about a quarter of 1990 greenhouse gas emissions globally.<sup>95</sup>

Despite this setback the remaining states reached an agreement on mechanisms for implementing the commitments under the Protocol, these are known as the “Bonn Agreements” and are not drafted as legal text. It instead reflects the remaining states will proceed with the Protocol with or without the United States. It then remained for the parties of the political agreement in Bonn to convert this into a legal text, this was agreed upon in 2001, the “Marrakesh Accords”, and almost all of the agreements made in Bonn were incorporated.

The mandatory greenhouse gas emission targets for the world’s leading economies is the Protocol’s most important feature. The targets set vary from -8% to +10% from the nations 1990 gas emissions levels. In the majority of cases the new limits for nations, even those at the +10% level, call for a significant reduction of emissions from the prior level, all levels are set at an individual basis for each nation.<sup>96</sup> If a nation should fail to reach up to the levels put up in the Protocol there is a possibility to compensate this by increasing sinks, that is forests or other carbon dioxide removing mechanisms. There are other mechanisms in sub-chapters to the Protocol, named “emission-trading”, the “clean development mechanism” and “joint implementation”, which can be used to get around the set emission levels.

The one most important achievement of the Kyoto Protocol was the commitments made by Annex I parties to quantified emission reductions targets, and a timetable for their compliance. This obligation is set out in Article 3(1), and the parties “shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts”. In accordance with Article 3(2) of the Protocol the Annex I parties are required to “have made demonstrable progress in achieving its commitments under the Protocol”. Not surprisingly the determination of emission targets for the Annex I parties proved to be a difficult issue, but Annex B lists differentiated targets set individually for countries which were agreed upon. There are six gases covered by the emission reduction commitments of the

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<sup>95</sup> Ibid, p. 370

<sup>96</sup> [http://unfccc.int/kyoto\\_protocol/background/items/2879.php](http://unfccc.int/kyoto_protocol/background/items/2879.php), (Accessed 2007/05/17, 13:55)



Annex I parties and these are: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulphur hexafluoride and they are to be found in Annex A. There were disputes over the number of gases to be included, but an agreement was reached on those six gases with the possibility to use 1995 as its base year for the latter three.<sup>97</sup>

### **5.1.1 Emission trading, clean environment mechanism and joint implementation**

Even with set emission levels for states there are possibilities to alter these with means acknowledged by the signatories of the Protocol. They were taken up in the Protocol mainly due to its strong support among some of the worlds leading economies. The most original and criticized aspect of the Protocol was the proposal to enable Annex I parties to meet their commitments by purchasing or trading credits representing greenhouse reductions in other countries parties to the Protocol. This was strongly opposed by China, the Group of 77 developing countries and other states, and hence a compromise had to be reached.<sup>98</sup> Article 17 of the Protocol allows Annex B parties to “participate in emissions trading for the purposes of fulfilling their commitments under Article 3”, however such trading must be a supplement to already domestically taken actions for emissions reductions. The conference of the parties was to decide on the details of such emission trading, for instance by defining relevant principles, modalities, rules and guidelines.<sup>99</sup>

Another incentive mechanism brought into the Protocol was the possibilities for Annex I parties to se joint implementation for emission reduction commitments. For the purpose of meeting the commitments provided for under Article 3 any Annex I party may transfer to, or acquire from another Annex I party “emission reduction credits resulting from projects aimed at reducing anthropogenic emissions by sources or enhancing anthropogenic removals by sinks of greenhouse gases in any sector of the economy”<sup>100</sup>. Private legal entities may be authorized by Annex I parties, under who’s jurisdiction they are, to participate in actions leading to the transfer, generation or acquisition of emission reduction units from joint implementation. But it must result in a reduction in emissions or an enhancement of removals by sinks which is additional to any other removals and supplemental to domestic actions already occurring.

Article 12 of the Kyoto Protocol defines the Clean Development Mechanism, this mechanism enables Annex I parties to gain emission

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<sup>97</sup> P. Sands, *Principles of International Law 2 nd ed.*, p. 372

<sup>98</sup> Ibid, p.373

<sup>99</sup> Kyoto Protocol, Article 17.

<sup>100</sup> Ibid, Article 6.

reduction credits to assist them in reaching compliance with their commitments under Article 3. This mechanism allows Annex I parties to invest in emission reduction projects in non-Annex I parties and use the certified emissions reductions benefits from those projects “to contribute to compliance with part of their quantified emission limitation and reduction commitments under Article 3”. In other words it is a way of cleaning the polluters conscience.<sup>101</sup>

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<sup>101</sup> P. Sands, *Principles of International Law 2 nd ed.*, p. 373-374

## 6 Tuvalu turning to legal action?

Until now, legal disputes between sovereign States have in general been concentrating on the matters of trans-boundary pollution, for which a damaged State has sought compensation or other relief from the polluting State.<sup>102</sup> There has never before been a case where one State has filed procedures against another State on the grounds of liability for climate change and specifically the effects of global warming. As of today no formal application to the ICJ has been filed and no written statements from Tuvaluan side are available, the following investigation will have to consider several tracks running side by side in order to see what routes might be open for Tuvalu.

The grounds on which Tuvalu appear to be preparing to instigate procedures against the United States and Australia, neither of whom have ratified the Kyoto Protocol, is that the rising sea levels threatening its existence are caused by global warming. Hence there must be found a casual relationship between the rising sea levels threatening Tuvalu and greenhouse gas emissions by the United States and Australia. The IPCC and its scientists in its last and fourth assessment report came to the conclusion that the emission of greenhouse gases has already had a significant impact on the planet. It was also noted with a high degree of certainty that the effects of human activities and emissions since 1750 have been one of global warming.

After a referral to the ICJ, but prior to the starting of procedures, it must be determined whether the disputed question lies within the competence of the ICJ. Does the ICJ have jurisdiction over the dispute and is the required consent from the disputing parties at hand?<sup>103</sup> Also, before proceedings may start, the admissibility of the case must be investigated, the disputants legal standing, the injured states legal interests, the governing legislation and the nature of the matter disputed.

The planned instigation of Tuvalu most likely seems to be based on breaches of general obligations under the UNFCCC of the United States and Australia. Lack of commitment from the defendants to combat global warming by not taking strong enough measures under the UNFCCC. The failure to ratify the Kyoto Protocol and not prioritizing the battle against global warming, have violated obligations of a general character in the UNFCCC. A failure to stabilize greenhouse gas concentrations, article 2. Not taken required precautionary measures, article 3. The lack of participation in various forms of international cooperation, articles 3-6. This

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<sup>102</sup> An example of this is the Trail Smelter case between the United States and Canada.

<sup>103</sup> Statute of the International Court of Justice, Article 36(1)

must be seen as the most likely way for Tuvalu to approach the matter of the governing legislation in the case, breaches of obligations in the UNFCCC. Article 4.2. of the Conventions stipulates measures States shall adopt for the mitigation of climate change, by “limiting its anthropogenic emissions of greenhouse gases.”<sup>104</sup> The treaty itself sets no binding limits or goals to reach it does impose some obligations of importance on States and it is according to Strauss, the most promising forum for a future climate change litigation.<sup>105</sup>

What Tuvalu appears to hope to achieve by instigating procedures against the defendants seems to be a retroactive relief, also known as *ex post facto* relief, for the violation of Tuvaluan legal interests. In other words from the submersion of Tuvaluan territory and damages that follows from this, caused by international illegal acts that stem from violations of the defendants obligations under the UNFCCC.

What also might cause some difficulties for Tuvalu in the dispute at hand is whether it can be argued that they have legal standing as plaintiffs under the present circumstances. Whether a plaintiff has standing or not is according to the ICJ to be determined in the light of the admissibility of the case, as the ICJ has pointed out earlier. It will not be enough for Tuvalu to demonstrate that it has suffered loss following breaches of general obligations under the UNFCCC, but rather Tuvalu must show that it has suffered losses following violations of its legal rights. Do the obligations included in the UNFCCC provide legal standing of Tuvalu when breached? Emissions of greenhouse gases are in most cases conducted by private entities such as multinational companies and associations and hence not *ipso facto* attributable to the state itself. So in order to point at a breach of an obligation from the United States or Australia, Tuvalu has to prove that these actions are attributable to the state even though not directly conducted by it. A specific obligation to control the emissions by private entities or regulate for the state has to be at hand.

Tuvalu is if they decide to instigate these procedures facing a real problem in this context, as the UNFCCC is nothing more than a framework with general principles and shared goals and future visions. The state parties are handed the responsibility to define its own obligations and standards. There are no specific reduction targets or other obligations to be met stipulated in the UNFCCC. These are to be found in the later concluded Kyoto Protocol which, as has already been mentioned, is an optional instrument to the UNFCCC. Since the United States and Australia as of today have refused to ratify the Kyoto Protocol, no agreement exists on specific emission reduction targets or other obligations for the two giants. Without this it will be difficult for Tuvalu to identify any specific violations of obligations that may have harmed their legal interests, and hence the legal standing of Tuvalu will be at stake.

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<sup>104</sup> [http://unfccc.int/essential\\_background/convention/background/items/2853.php](http://unfccc.int/essential_background/convention/background/items/2853.php),  
(accessed 2007/10/12)

<sup>105</sup> Andrew L. Strauss, *The Legal Option*, 10188

After the latest assessment report of the IPCC being published earlier this year opinions on the causes of global warming have shifted. Scientist now agree that the emission of greenhouse gases is the most likely cause to global warming. As in all fields of study there are dissenting opinions also to this view, but that will, as noted in the delimitation not be taken into account. Being able to demonstrate a casual relationship between these two factors, greenhouse gas emission and global warming, it might be possible and probably even likely to argue that the two countries are in violation of their general obligations under the UNFCCC.

# 7 International Enforcement

Enforcement in this context has to be understood as the right to take measures to ensure the fulfillment of international environmental legal obligations that have been infringed upon. In practice it can be obtained by a ruling of a court, tribunal or other agreed specified body that the obligations have not been fulfilled. International enforcement may be instigated by one or more states, an international organization or by non-state actors. Focus here will be placed on the instigation of state actors. States have the primary role when it comes to international enforcement as they are the principal subjects of international law. In order to enforce a rule of international law the state in question has to have legal standing. In order to have this, the state has to provide proof that its legal rights have been infringed upon, it is then, in the words of the International Law Commission (ILC), an “injured state”.<sup>106</sup> Article 42 of the ILC’s 2001 Articles on State Responsibility provides that:

“A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

- (a) that State individually; or
- (b) a group of States including that State, or the international community as a whole, and the breach of the obligation:

- (i) Specifically affects that State; or
- (ii) Is of such a character as radically to change the position of all other States to which the obligation is owed with respect to the further performance of the obligation.”

The first case where a State individually is entitled to invoke the responsibility of another State includes actions arising from bilateral treaties, special performances within multilateral treaties or rules of general international law which give rise to individual obligations. In the second case entitling a group of States to invoke responsibility, the right would for example, according to the ILC, arise in situations of pollution on the high seas contrary to the 1982 UN Convention on the Law of the Seas Article 194.<sup>107</sup> Other States than the “injured state” may also invoke the responsibility of another State under the provisions of ILC Draft Article 48, which notes that:

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<sup>106</sup> P. Sands, *Principles of International Law 2 nd ed.*, p. 182

<sup>107</sup> P. Sands, *Principles of International Law 2 nd ed.*, p. 183

“Any state other than an injured State is entitled to invoke the responsibility of another in accordance with paragraph 2 if:

- (c) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
- (d) the obligation breached is owed to the international community as a whole.”

The second paragraph in this Article deals with obligations *erga omnes*, a concept which has been clarified in earlier chapters.

Cases concerning environmental damage can in general be said to be of three different natures, where the first is damage to its own territory. The other two where State permission is given to activities that cause damage to the territory of another State, or in an area beyond national jurisdiction.<sup>108</sup> Thus the later two are of greater interest in this work since global warming is a matter of transboundary concern.

## **7.1 Damage to the environment of another state**

The *Trail Smelter* case is the portal case for environmental damage in the territory of a State caused by another State. There are several other cases of the same nature where States have suffered environmental damages due to activities permitted by other States. The most important to mention are the *Lac Lanoux* case, *Gabcikovo-Nagymaros* case and the *Nuclear Tests* case.

It is not difficult for a State to claim that it has suffered damage and is in fact an “injured state” after suffering environmental damage, since the spectra of possible damages is extremely broad. Possible injuries that can follow as a consequence from environmental damage may be injuries to its citizens, economic loss or property damage.<sup>109</sup> In general this is not particularly complex at all. As the *Trail Smelter* case showed, a State may not use its territory in a manner that would damage interest outside its jurisdiction. No damages are tolerated.

### **7.1.1 Environmental damage in areas beyond national jurisdiction**

Whilst the *Trail Smelter* case was fairly straight forward, not all cases are as simple as that. More complicated legal considerations were needed in the

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<sup>108</sup> Ibid, p.183

<sup>109</sup> P. Sands, *Principles of International Law 2 nd ed.*, p. 184

*Nuclear Tests* case. Australia and New Zealand called upon France to halt its atmospheric nuclear testing in the South Pacific. However the case was more complicated than the allegation of an infringement of their sovereignty by nuclear deposit of fallout in its territory. Could Australia and New Zealand bring a claim based on the breach of an *erga omnes* obligation, not only for them but for the whole international community to be free from nuclear tests generally, before the ICJ. The issue became whether the states had legal standing to bring an environmental claim before the court, for damages beyond their national jurisdiction, despite not suffering any material damage. This raises the possibility of instigating procedures due to violations of *erga omnes* obligations. Generally a party to a treaty has the right to seek an enforcement of the counterparts obligations if it believes the other party is in violation of them, regardless of any material damages suffered or not. For instance, a failure by a state party to the 1987 Montreal Protocol to fulfill its obligations under the treaty, entitles other parties to enforce this obligation by either invoking the dispute or non-compliance settlement mechanisms of the Protocol, where no damage has to have been suffered. Most of other environmental treaties are not as explicit establishing dispute settlement mechanisms that will settle the question of enforcement right in accordance with the provisions available under that treaty. Some treaties even preclude their application to the global commons, such as the 1991 Espoo Convention which precludes parties from requesting environmental impact assessments or similar in respect to the global commons.



## 8 Human Rights Litigation as an option

Another potential option for bringing legal action against a state not in conformity with its international obligations could be to file a petition in a human rights forum. With the recent alarming temperature rise in the Arctic many indigenous peoples in the United States, Canada, Russia or Greenland face problems as severe as the peoples of the Pacific do. Their fundamental human rights are threatened, among those perhaps even the right to life itself. The effects of global warming become especially problematic for indigenous peoples due to their close connection to nature and their surroundings.

If a human rights approach could be used to defend the rights of indigenous peoples in Arctic regions in order to protect them from global warming, the question could be elevated from being an environmental issue into also becoming one of human rights.<sup>110</sup> It would also show on the possibilities for other entities than states in international law to “receive” their justice.

The damages suffered by the Pacific States are part of a large environmental circle. The sea level rise partly due to the melting of the Arctic ice, but the Arctic and its inhabitants also suffer from thawing of the permafrost and damaged forests and tundra.<sup>111</sup> Populations of marine mammals are affected and hence also the livelihood of the inhabitants in the region. Hunters in the area have based their hunting seasons on environmental cycles such as the freezing or melting of the sea and ice respectively. These cycles have now become disrupted, causing the environment to become less reliable and more dangerous for these hunters earning their livelihood on the ice. Houses, roads pipelines and other infrastructure have been damaged by the thawing of permafrost that causes erosion, landslides and slope instability. Shoreline erosion of up to 100 feet a year have been observed in some locations of the Canadian, Siberian and Alaskan Arctic, which obviously threatens local communities in these coastal areas<sup>112</sup>.

As severe as these impacts of global warming are for the indigenous people of the Arctic, this is only a foretaste of what is still to come. The damages described above are only part of a much larger destruction of the Arctic environment and its ecosystems.

Human rights law presents an opportunity to hold states accountable for action or inactions that have caused harm to these groups. Claims in this

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<sup>110</sup> W. C. G. Burns, D. Goldberg, M. Wagner, *Climate Justice: The Prospects For Climate Change Litigation*, American Society Of International Law, Proceedings of the Annual Meeting, 2004, p.228.

<sup>111</sup> *ibid*

<sup>112</sup> *ibid*

fields covers a wider scope than that of conventional legal systems in the way that a wider range of claims can be considered and they will be less constrained by procedural hurdles.<sup>113</sup> Human rights law tends to push the boundaries of international law and helps create public opinion through declarations of aspirations which paves way for binding and enforceable legal strategies.<sup>114</sup>

## 8.1 Possible forum

While there are many possible forums where procedures against human rights violations can be instigated, the Inter-American Commission on Human Rights (IACHR) is one of the most promising. The IACHR, situated in Washington D.C, is one of two bodies in the inter-American system for the promotion and protection of human rights, whereas the other is the Inter-American Court Of Human Rights, with its seat in San Jose, Costa Rica. The IACHR is an autonomous organ of the Organization of American States (OAS). Its mandate is found in the OAS Charter and the American Convention on Human Rights. The IACHR represents all of the member States of the OAS. It has seven members who act independently, without representing any particular country. The members of the IACHR are elected by the General Assembly of the OAS. It is a permanent body, which meets in ordinary and special sessions several times a year. The Executive Secretariat of the IACHR carries out the tasks delegated to it by the IACHR and provides legal and administrative support to the IACHR as it carries out its work.<sup>115</sup>

In the end of 2005 the Inuit of Alaska filed a petition against the United States in front of the IACHR. The petition sought relief for violations of the human rights of the Inuit resulting from United States greenhouse gas emissions causing global warming. It alleges that the United States by failing to control its greenhouse gas emissions has caused the Earths climate to change. As described earlier the impacts for the Inuit and their lifestyle have been devastating. Also resources on which the Inuit depend are at risk. Polar bears, walrus and seals are on the brink of extinction due to the loss of sea-ice.<sup>116</sup>

The petition handed in contains testimony from sixtythree Inuit from northern Canada and Alaska, and uses sources such as traditional knowledge

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<sup>113</sup> *ibid*

<sup>114</sup> W. C. G. Burns, D. Goldberg, M. Wagner, *Climate Justice: The Prospects For Climate Change Litigation*, American Society Of International Law, Proceedings of the Annual Meeting, 2004, p.228.

<sup>115</sup> <http://www.cidh.oas.org/what.htm>, (Accessed 2007/10/06, 14.00 pm)

<sup>116</sup> CIEL, "Inuit File Petition with Inter-American Commission on Human Rights, Claiming Global Warming Caused by United States Is Destroying Their Culture and Livelihoods", CIEL, [http://www.ciel.org/Climate/ICC\\_Petition\\_7Dec05.html](http://www.ciel.org/Climate/ICC_Petition_7Dec05.html), (accessed 2007/10/06, 15.30 pm)

from hunters and elders wide ranging peer reviewed science, and the ongoing and future destruction of the environment of the Arctic as well as the culture and hunting-based Inuit economy. The reason why it focuses on the United States, is because it is by far the largest emitter of greenhouse gases, and yet it refuses to adopt any effective domestic measures or join any international measures such as the Kyoto Protocol. Legally the petition asks the Commission to declare the United States in violation of the Inuit rights affirmed in the 1948 American Declaration of the Rights and Duties of Man and other instruments of international law.<sup>117</sup> The Inuit petition also urges the Commission to recommend the United States, a member of the OAS, to adopt mandatory limits to its emissions of greenhouse gases and cooperate with the community of nations to prevent dangerous anthropogenic interference with the climate system. The recommendations of the IACHR are not of a mandatory nature, but the IACHR can take non-complying OAS members to the Inter-American Court of Human Rights. This mechanism where the IACHR may take members to the Inter-American Court of Human Rights makes the IACHR a suitable option for addressing injustices from climate change and puts pressure on large greenhouse gas emitters. Besides a report by the IACHR finding that the rights of the Inuit have been violated by the United States could have a moral as well as political force that may motivate political changes and, could if necessary, serve as support to future litigation.

## 8.2 Other Optional Forums

Yet another promising forum for litigation would be the 1982 UNCLOS. The Convention mainly applies to the marine environment, however it can be argued that the impacts of climate change are likely to alter the effectiveness and function of treaties such as the 1982 UNCLOS.<sup>118</sup> The Convention, which has been in force since 1994, has provisions which arguably prohibit uncontrolled greenhouse gas emissions. Article 194(2) of the Convention provides that:

” States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.”<sup>119</sup>

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<sup>117</sup> *ibid*

<sup>118</sup> N. Rinnerberger, *Drowning Islands: Social Justice Through Litigation?*

<sup>119</sup> United Nations Convention on the Law of the Sea, [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/part12.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/part12.htm), Article 194(2).

Even though UNCLOS is mainly applicable to the marine environment of the earth it may be possible to argue that the adverse effects of climate change alter the functions and the effectiveness of treaties such as UNCLOS.<sup>120</sup> But as the IPCC has predicted the rise of the sea level to be between 0.2-0.9<sup>121</sup> meters during this century and varying changes in oceanic temperature, this may make the UNCLOS applicable. With this and the increase of greenhouse gas emissions come other potentially harmful effects to the marine environment. Hence if these effects on the marine environment are caused by greenhouse gas emissions and global warming, States emitting have an obligation to limit these to more appropriate levels as will be seen. Parts of the Convention and its principles, and certainly Article 194(2)<sup>122</sup>, are part of customary international law and binding as such, non-signatories such as the United States, are hence obliged to adhere to those principles. An advisory opinion under the Convention could even according to Strauss “implicate the legality of US global warming emissions.”<sup>123</sup> Putting pressure on a State not adhering to its obligations could over time force the State to cease these activities, but time is running out and waiting for such a State to find it lost conscience may not be an option. State responsibility within UNCLOS is for instance activated when a State is not living up to its environmental obligations, this can be seen in Article 235 of UNCLOS which states that:

“States are responsible for the fulfillment of their obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law”

And the different mechanisms available within the Conventions to resolve disputes between members are listed in Article 287 (1) of the UNCLOS, but as the United States is not member to the Convention this does not have to be investigated.

A last route that may be usable and is worth mentioning, since it is strongly related to UNCLOS, is the Straddling Fish Stocks Agreement.<sup>124</sup> The agreement has included the existing binding dispute resolution mechanism from UNCLOS<sup>125</sup>, and in contrast to UNCLOS, the United States adheres to the agreement. The problem with this agreement as was the problem with the FCN treaties described above, is that it was not intended as a combatant of climate change and global warming. The agreement is an mechanism to

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<sup>120</sup> N. Rinnerberger, Drowning Islands: Social Justice Through Litigation?

<sup>121</sup> Climate Change Synthesis Report 2001, p.4

<sup>122</sup> Andrew L. Strauss, The Legal Option, 10188

<sup>123</sup> Ibid.

<sup>124</sup> The Agreement for the Implementation of the Provisions of the U.N. Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, August 4, 1995, U. N. Doc. A/CONF.164/37.

<sup>125</sup> Straddling Fish Stocks Agreement, Part VIII provides that disputes arising under it be settled through the Law of the Sea’s Dispute Settlement provisions in Part XV, art. 30.

protect certain species of fish. However, if it can be shown that greenhouse gas emissions are a danger to the fish, a creative or liberal interpretation of the protective provisions<sup>126</sup> could be seen as covering these emissions.

## **8.3 Other Options for Damaged States or private entities**

Even if the opening of procedures against a State in violation of any obligations owed towards the damaged State fails, either on jurisdictional grounds or others, perhaps other routes will be open.

As tropical storms and hurricanes have increased both in intensity and frequency around the Gulf and the Atlantic coast over the last years, federal courts across the United States have received lawsuits resulting from what is claimed to be impacts of global warming. The cases filed have involved alleged noncompliance with statutory mandates, such as the National Environmental Policy Act of 1969<sup>127</sup>, and tort claims. Considering our present situation, it is highly probable, that there are more to come. Private companies in sectors working with potentially environmental hazardous activities should be aware of the current development and anticipate eventual future lawsuits and try preventing them by tracking the relevant developments in the environmental field. Shifting focus from States towards companies and other private entities may prove easier when it comes to proving of guilt, it is harder for a company to hide behind a reasoning of having acted due diligently while it may be easier for a State. Domestic pressure on the United States as well as Australia to reduce their greenhouse gas emissions has increased in recent years as these lawsuits by environmental organizations and other groups have been filed against them. Environmental organizations in Argentina and Germany have also started legal action to combat climate change.<sup>128</sup>

### **8.3.1 What could a damaged State ask for**

The complete or partial loss of territory caused by global warming results in different consequences for the affected States. Firstly, when it comes to the

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<sup>126</sup> Straddling Fish Stocks Agreement, art. 5-6.

<sup>127</sup> The National Environmental Policy Act requires government agencies to conduct environmental assessments prior to taking actions that may significantly affect the environment.

<sup>128</sup> <http://www.climatelaw.org/cases/elaw/litigation.summary.doc>, (accessed 2007/10/10)

question of Statehood, the Montevideo Convention on the Rights and Duties of States (signed in Montevideo 1933) has defined what constitutes a State. Article 1 of the Convention, which is the most well known one, sets out the criteria of statehood and has been recognized as part of customary law.

The state as a person of international law should possess the following qualifications:

- a) a permanent population;
- b) a defined territory;
- c) government; and
- d) capacity to enter into relations with the other states.

Given that the population of a State loses all or parts of its territory and first of all survives, either by still residing on the remaining land or by migrating to other States. Then the first criteria is still fulfilled. It is the second that may cause a larger problem. What if no territory exists? The second criterion, a defined territory, has been described as any bits of land above water. From this follows that if a State loses its territory it can no longer be considered a State, at least not according to the definition in the Montevideo Convention. With the IPCC in its earlier report from 2001 suggesting that the sea levels will rise between 0.2-0.9 meters by the years 2100, these problems are at our doorstep.

The first solution that comes to mind and that could be demanded is certainly help with resettlement of the population. This should preferably be to land similar but more secure than their current abodes, technically this may prove difficult since most low lying coastal areas or islands would suffer from similar problems.

Another option would be to re-establish sovereign states elsewhere, meaning that other sovereign States would need to cede territory. With the same preferences as in the first option above, Australia or New Zealand, due to proximity and affluence could be suggested as candidates, regardless of their willingness. It seems unlikely that any State regardless of its geographical position would be positive towards ceding parts of its territory. But if some State would, problems could arise with regards to the rights of natural resources and the stretching of the internal waters and exclusive economic zones.

A third and maybe more radical solution would be the re-creation of islands elsewhere. A problem with this solution is that many potential island candidates for re-creating islands are protected as environmental, tourist and/or scientific havens – for example Australia's Great Barrier Reef or the Kermadec Islands of New Zealand.<sup>129</sup> In spite of this, the same problems as above would arise.

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<sup>129</sup> Iain Kelman, 2006, "Island Security and Disaster Diplomacy in the Context of Climate Change", National Center for Atmospheric Research.

Common for these last two models is also the problems that would arise with governance. Perhaps a redefinition of “state” or “territory” could be helpful, however any such suggestion would probably meet a strong reluctance from the international community. Several different governance models such as provinces, sovereign states, free associations or overseas territories already exist though they will not be further investigated here.

Having shown three different possible solutions as to what a future plaintiff might want to demand, the first option of resettlement seems to be the most feasible. Everywhere around us there is a constant flow of people leaving their countries of origin looking for a better place to live elsewhere, but the need for a resettlement from these areas is somewhat different. While Australia has shown little interest in resettling people living in threatened areas in their proximity, New Zealand has already created a special immigration category, the Pacific Access Category<sup>130</sup>. It is a ballot system that each year allows up to 250 people from Tonga, 75 people from Tuvalu and 75 people from Kiribati to gain residence if certain criteria are met by the applicants. However this scheme is designed for integration of the foreigners and not a re-establishment of island communities or States. Even with this newly created immigration scheme the sea level might just be rising too rapidly for it to have any effect.

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<sup>130</sup> <http://www.immigration.govt.nz/migrant/stream/live/pacificaccess/> , (Accessed 2007-08-20)

## 9 Conclusion

The general rule in international law is that States, as sovereigns over their own territory, have the possibility to use their lands, as they seem fit, if the actions meet the international legal standards. Any action by a State within its own borders is limited by implications this action may have on areas beyond the limits of national jurisdiction. This obligation has been manifested in Principle 21 of the Stockholm Declaration as well as in Principle 2 of the Rio Declaration. The principle has also been taken up in the preamble of the UNFCCC giving it even more strength. Even though declarations per se are not legally binding under the concept of international law, there can be no doubt that this obligation is part of customary international law and hence is also binding under international law. This is supported by jurisprudence in the *Corfu Channel* case and the *Trail Smelter* case, but also by scholars and from its inclusion in several international instruments. Harmful spillover effects onto areas beyond national jurisdiction, from activities within national jurisdiction are not tolerated in international law. This is succinctly described by the latin maxim “Sic utere tuo, ut alienum non laedas”<sup>131</sup>, the maxim itself is of no legal value but merely describes this principle of international law.

Global warming is according to the IPCC attributable to man-made emissions of carbon dioxide and other anthropogenic gases. States now have an obligation to prohibit unlimited emissions of greenhouse gases if they are to aggravate the effects of global warming. This is an obligation that can be found in implicitly in UNCLOS, as well as in other instruments. The UNFCCC itself does not set any specific limitations upon States to reduce their emissions of these gases. In the UNFCCC the signatories have recognized the need to reduce their emission in Article 4, however the reductions aimed at are non specific and somewhat vague to their nature. It is not specified how climate change is to be mitigated only that it should be so through national measures. It has left these obligations to the optional Kyoto Protocol, where States oblige themselves to reduce their emissions to individually set targets during a specific period. Neither UNCLOS nor the Kyoto Protocol is universally applicable, rather they are both subject to ratification. Larger parts of the UNCLOS are however considered part of customary international law, meaning that any State (except persistent objectors), including the United States, is bound by these parts. Through the UNCLOS, states could ask for an advisory opinion to be issued on whether the emissions by the United States are meeting the legal requirements of the codified customary international law in the resolution.

This could put more pressure on the United States to reconsider its environmental policies. Since neither the Kyoto Protocol has been ratified

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<sup>131</sup> Translation, “One should use his own property in such a manner as not to injure that of another.”, <http://www.lawyerviews.com/lawsite/basicinfo/nuisance.html>, (Accessed 2007-11-02)



by the United States government, which has even expressed that they never will sign it, there are no specific reduction goals set out for the United States to meet. However the United States have recognized the need for mitigation against climate change but does not see the Kyoto Protocol as the most appropriate option for themselves. As a matter of fact, the United States reaffirmed its commitment to the UNFCCC when it presented the Clear Skies Initiative. But despite all this, there is still an obligation to reduce its emissions of greenhouse gases and carbon dioxide. This obligation exists in the UNFCCC where the signature counts as much as the ratification, and the United States have signed the UNFCCC. The Vienna Convention on the Law of Treaties (VCLT) article 18 states the following with respect the signing of treaties:

“A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.”<sup>132</sup>

Hence it is under the obligation not to take actions that would be contrary to the object and purpose of the treaty at hand. The UNFCCC’s object and purpose is to stabilize the emission of greenhouse gases “at a level that would prevent dangerous anthropogenic interference with the climate system”<sup>133</sup>. Thus the United States is obliged to keep their emissions below a level that would be harmful to the climate, which is the Conventions object and purpose. Most likely even the failure to ratify the Kyoto Protocol can be seen as a violation of the obligations in the UNFCCC. A signatory State to the UNFCCC, which does not ratify the Kyoto Protocol, cannot be said to fulfill its obligations to mitigate against global warming, to the extent the UNFCCC requires.

Neither the Kyoto Protocol nor the UNFCCC can be said to be part of customary international law. This is not related to their recent adoption but is due to the rejection of the United States along with others, though there is also a clear lack in the state practice element. Some states, all of them considered as developing states, are exempt from the obligations.

Looking at the six different principles previously described three of them

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<sup>132</sup> Vienna Convention on the Law of Treaties 1969, article 18.

<sup>133</sup> UNFCCC. Article 2, [http://unfccc.int/essential\\_background/convention/background/items/2853.php](http://unfccc.int/essential_background/convention/background/items/2853.php) (Accessed 2007-11-21)

appear to be of more importance in this case. They are the principle of sustainable development, the polluter pays principle and the precautionary principle. The legal status of not merely these three, instead of all six principles can be contested and is somewhat unsure. In summation the value of these principles increases but as of today it cannot be said that they are legally binding by themselves or together unless they are incorporated into treaties.

Obligations to mitigate against global warming and its adverse effects on the environment exist. They exist as principles in treaties, as customary international law, as general principles of international law, though perhaps even more importantly they exist as an obligation *erga omnes*. Due their connection with the concept of *jus cogens*, from which no derogations are allowed, there cannot be any derogation from obligations *erga omnes*. As far as the obligations to mitigate against climate change and global warming comes they exist and they may exist in the form of obligations *erga omnes*.

The ILC Draft Articles on State Responsibility contains rules claiming that any internationally wrongful act of a State should be followed by responsibility for the State in question. It is enough that this act can be attributable to the State, it can for instance come from activities by industries within their jurisdiction.

A breach of any in the above described obligations is, if it can be attributable to the State, to be seen as a breach of an international obligation. The obligation not to emit greenhouse gases and carbon dioxide at levels that may harm the environment is the one in question. It is irrelevant whether these activities are carried out by private entities since States cannot hide behind such a veil of ignorance. In that case the State should have regulated these activities. Jurisprudence supports this view. In the *Trail Smelter* case the court came to the conclusion that emissions from a private entity on Canadian soil were attributable to Canada as a State. While it would be more or less impossible to prove what emission has caused what effect, the IPCC has concluded that greenhouse gases and carbon dioxide cause these climate changes. The difficulties of pointing at a casual link may call for changes in the evaluation of proof instead of letting the perpetrators go “unpunished” as this would weaken the entire climate change regime.

Generally Tuvalu can invoke state responsibility of any State, which has not reduced their stipulated emissions. It is easier against countries which are bound to oblige to the Kyoto Protocol as specified goals are set up. It can however do the same against States that have only signed the UNFCCC, such as the United States, as they are obliged not to defeat the object and purpose of the UNFCCC. The claims would be for breaching the Kyoto Protocol, or that a State have not efficiently enough mitigated against climate change through internal regulation.

Claims within the human right framework does not seem to have any real chance of success. There exists no universal human right to a healthy

environment, it only exists on a regional basis in Latin America and Africa. Besides this, a violation of any such hypothetical right would preclude that the State had control over the effects which harmed the right to a healthy environment, and the effects of pollution cannot be said to be within the control a State.

As Tuvalu at present has no FCN treaty in force with the United States, the option of trying to use any in such a treaty existing clause is ruled out. I have not either been able to find any other treaty or agreement between the two where the ICJ is set out as a dispute solutor. It seems very unlikely that the United States would ever agree for any proceedings to start in front of the ICJ and any argumentation around this would be hypothetical. Treaties in force with other States with such provisions have earlier been interpreted in a broad sense but it seems very unlikely that the language in the clauses should allow for any broader interpretations than the one made in the *The Case Concerning Oil Platforms* and the *Nicaragua* case. In fact, the ICJ rejected any future interpretations that would require any such broad interpretation of these clauses as to include environmental harm. Difficulties with acquiring ICJ jurisdiction is one of the main problems for Tuvalu at this point, another is the evaluation of proof. A casual link between one States emission and the effects of rising sea levels at Tuvalu, would be difficult if not impossible to prove.

Whilst it would not be possible to instigate procedures under the UNCLOS adjudicatory system since the United States do not adhere to it, there are other options within this Convention. One option would be to obtain an advisory opinion on the request of one of the Conventions political organs (the Assembly and the Council). This could be used to investigate whether or not the emissions are legal, this would then bind the United States, as it has to adhere to the Conventions environmental regulations, which are part of customary international law.

One possible path to try could be to let another State speak for them. This on the other hand would require, that the violations committed by the United States can be seen as violations of *erga omnes* obligations. Presently this it is somewhat disputed, but perhaps future environmental law might develop in this direction. Without regarding an eventual development of environmental law, political considerations of States are likely to play a big role. Would States be prepared to instigate procedures against another member of the international community on behalf of an “insignificant” State such as Tuvalu? The question remains open for discussion. In any case the FCN treaties entered by the United States with Denmark and the Netherlands could allow for such procedures. Given the geographical of Denmark and the Netherlands it is not bold to say that even they are in great danger of at least partially being engulfed by the sea, and who knows, they may in the future want to use this option for themselves?

Other countries that contribute largely to global warming through emissions of anthropogenic substances might be in another position and Tuvalu could

shift focus onto these States instead. Where treaties with provisions referring disputes to the ICJ exist, the difficulties of jurisdiction would not arise. The question of proving the link between the caused damages and emissions would however still be at hand. If the problems of jurisdiction were to be overcome, Tuvalu would still have to, if it is to have any chance of success, show that the United States have wrongfully caused or will cause harm to its interest. According to Gupta such argumentation is academic and few of the small island States are actually contemplating such procedures due to the technical difficulties, however future development may change this.<sup>134</sup>

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<sup>134</sup> J. Gupta, *Legal Steps Outside the Climate Convention: Litigation as a Tool to Address Climate Change*, p. 3

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