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Extraterritorial Obligations in a  
Warming World –  
An International Human Rights  
Perspective on Climate Change  
in Maldives

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# Summary

With the scientific evidence for extensive anthropogenic climate change continuously growing stronger, the human dimension of its projected impacts is getting more and more attention. The perhaps clearest example of this is the growing interest in human rights aspects of climate change. Within the United Nations, Maldives – a small island developing country in the Indian Ocean and home to 386,000 people – has been in the vanguard of a movement calling for a human rights-based approach to climate change.

Maldives is one of the countries of the world which is most vulnerable to the predicted impacts of global warming on the climate system, particularly sea-level rise. The Maldivian islands are small and low-lying, making retreat inland or to higher ground impossible in cases of sea surges or other extreme weather events. As 80 percent of the land area of Maldives is less than one meter above mean sea level, already the predicted and seemingly unavoidable sea-level rise of between 0.2 and 0.6 m in this decade presents a serious threat to life on Maldives. Adding to this threat is the problem of increasing coral bleaching, loss of marine biodiversity, escalating beach erosion, and increasing frequency of flooding.

With the help of a human rights-based approach, Maldives hopes that the international community will succeed in striking an equitable new global deal on climate change that takes fully into account its particular situation. The question is what relevance international human rights law has at the table of negotiations, as States' human rights obligations are understood as principally domestic. In contrast to a State's obligations towards people on its territory, the nature and content of States' extraterritorial obligations for human rights are vague and controversial. With the particular vulnerability of Maldives as a backdrop, this thesis explores possible intersections between the guiding principles of the international regulation of climate change and extraterritorial obligations for human rights. It draws the conclusion that some aspects of the extraterritorial human rights obligations of rich countries and the specific obligations of the 'most developed' countries under the United Nations Framework Convention on Climate Change are mutually reinforcing. For this reason, just as the human dimension of projected climate change impacts should be regarded as a crucial human rights concern, so should the demands of human rights, and especially States' extraterritorial obligations for human rights, be regarded as a crucial component of a new global deal on climate change.

# Sammanfattning

I och med att de vetenskapliga beläggen för omfattande mänsklig påverkan av klimatet blir allt fler och alltmer kända så har även den humanitära dimensionen av klimatförändringar hamnat i fokus. Det kanske tydligaste exemplet på detta är det ökande intresset för sambandet mellan klimatförändringar och mänskliga rättigheter. Maldiverna, ett litet utvecklingsland i Indiska oceanen bestående av några tusen öar och hem åt 386 000 människor, tillhör den frontlinje inom Förenta Nationerna som kräver att det i de internationella förhandlingarna tas en människorättsbaserad ansats att lösa klimatkrisen.

Maldiverna är ett av de mest sårbara länderna i världen när det kommer till de förväntade effekterna av den globala uppvärmningen, detta gäller framförallt den förväntade höjningen av havsnivån. 80 procent av Maldivernas landyta ligger mindre än en meter över den genomsnittliga havsnivån. Då de maldiviska öarna är små och platta saknas det möjligheter för befolkningen att vid förhöjt vattenstånd fly inåt land eller till högre höjd. Den förutspådda havsnivåhöjningen på någonstans mellan två och sex decimeter under det här århundradet utgör därför ett mycket stort hot mot landets välstånd. Utöver problemen med höjd havsnivå kommer Maldiverna även att lida av ökad korallblekning, minskad biodiversitet, eskalerande stranderosion och oftare återkommande översvämningar.

Med hjälp av en människorättsbaserad ansats hoppas Maldiverna att det internationella samfundet kommer att lyckas att ingå ett nytt, rättvist och effektivt globalt klimatavtal som tar full hänsyn till dess särskilda situation. Frågan är vilken roll och relevans folkrättslig lagstiftning om mänskliga rättigheter kan och borde ha vid förhandlingsbordet. En stat har historiskt ansetts ha skyldigheter endast, eller åtminstone framförallt, gentemot sin egen befolkning och andra människor på sitt territorium. Denna uppfattning gör sig gällande i flera viktiga internationella människorättskonventioner, vilka uttryckligen är territoriellt begränsade. Till skillnad från en stats skyldigheter inrikes är det både oklart och kontroversiellt vilka extraterritoriella skyldigheter stater har för mänskliga rättigheter. Mot bakgrund av Maldivernas särskilda sårbarhet utforskar den här uppsatsen möjliga skärningspunkter mellan de vägledande principerna inom den internationella regleringen av klimatförändringar och extraterritoriellt ansvar för mänskliga rättigheter. Slutsatsen är att flera aspekter av välsituerade staters skyldighet att värna om upprätthållandet av grundläggande mänskliga rättigheter utanför sina egna gränser, och de specifika skyldigheterna för OECD-länder i Förenta Nationernas ramkonvention om klimatförändringar, är ömsesidigt förstärkande. Av denna anledning är aspekter av extraterritoriellt ansvar för mänskliga rättigheter precis lika relevanta för ett nytt globalt klimatavtal, som det avtalet av allt fler anses vara för framtida möjligheter att upprätthålla grundläggande mänskliga rättigheter.

# Preface

I wish to thank my supervisor Carl Söderbergh for introducing me to this area of contemporary international law and for his enthusiasm and support throughout my thesis writing. I further wish to thank Amjad Abdulla, Ali Lishan, Hussain Naeem and Shafina Aishath at the Department of Climate Change and Energy in Male' for sharing their concerns and providing invaluable insight into not only the situation in Maldives, but also the ongoing international climate change negotiations. I am grateful to them for involving me in the daily work of the new department and in the setting up of a roadmap to the Copenhagen summit. Finally, I wish to express my gratitude to the Forskraft Foundation for providing the necessary funding for my recent two-month stay in Maldives.

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# Abbreviations

AR4	Fourth Assessment Report of the IPCC
AWG-KP	Ad-hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol
AWG-LCA	Ad-hoc Working Group on Long-term Cooperative Action under the Convention
BAP	Bali Action Plan
CET	Countries with economies in transition
CMP	Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol
CO <sub>2</sub>	Carbon dioxide
CO <sub>2</sub> e	Carbon dioxide equivalents
COP	Conference of the Parties to the UNFCCC
CSR51	1951 Convention Relating to the Status of Refugees
Doc.	Document
DRD	Declaration on the Right to Development
DRIP	Declaration on the Rights of Indigenous Peoples
EEC	European Economic Community
ENSO	El Niño Southern Oscillation
Esc	Economic, social and cultural
EU	European Union
GA	General Assembly
GEF	Global Environment Facility
GHGs	Greenhouse gases
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ICJ	International Court of Justice
ICHRP	International Council on Human Rights Policy
IPCC	Intergovernmental Panel on Climate Change
NAPA	National Adaptation Plan/Programme of Action
NGOs	Non-governmental Organisations
OCHA	Office for the Coordination of Humanitarian Affairs
ODA	Official Development Assistance
OHCHR	Office of the High Commissioner for Human Rights
OP	Optional Protocol
R2P	Responsibility to Protect
Res.	Resolution
SIDS	Small Island Developing States
SPM	Summary for Policymakers

TAR	Third Assessment Report of the IPCC
TWN	Third World Network
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNDAF	United Nations Development Assistance Framework
UNDP	United Nations Development Programme
UNEP	United Nations Environmental Programme
Unesco	United Nations Educational, Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
UNTS	United Nations Treaty System
USA	United States of America
USSR	Union of Soviet Socialist Republics
WG	Working group
WMO	World Meteorological Organization

# 1 Introduction

## 1.1 Subject and purpose

With the scientific evidence for extensive anthropogenic climate change continuously growing stronger, the human dimension of its projected impacts is getting more and more attention. The perhaps clearest example of this is the growing interest in human rights aspects of climate change. As the Office of the High Commissioner on Human Rights (OHCHR) concludes in a recent report, there is both a national and an international level of human rights obligations.<sup>1</sup> Yet, in contrast to obligations of States towards people in their territory or under their jurisdiction, the nature and content of States' extraterritorial obligations for human rights are vague and controversial.

With the particular vulnerability of Maldives as a backdrop, this thesis explores possible intersections between the guiding principles of the international regulation of climate change and extraterritorial obligations for human rights. The purpose is to provide Maldives and other stakeholders with a coherent legal analysis of what 'international level' human rights obligations to make use of at the table of negotiations in Copenhagen in December 2009 as well as in the future.

## 1.2 Scope

This thesis is subject to a number of limitations. Firstly, it is limited to the projected impacts of climate change in Maldives. It does not aspire to give a comprehensive picture of the threat of climate change to human rights.<sup>2</sup> Secondly, it is limited to the 'international level' of human rights obligations. It will not examine the appropriate nature and merits of a human rights-based approach in the planning and execution of adaptation and mitigation measures at national level. Although references are made to the right to life, health, food, water and housing, this thesis will not go into details on the content of such rights.<sup>3</sup> Finally, in relation to extraterritorial responsibility for civil and political rights, this thesis will not address the responsibility to protect people from genocide, ethnic cleansing, war crimes

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<sup>1</sup> Office of the United Nations High Commissioner for Human Rights, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights* (hereinafter *The Relationship between Climate Change and Human Rights*), 15 January 2009 (UN Doc. A/HRC/10/61).

<sup>2</sup> For a comprehensive introduction to the relationship between climate change human rights, see International Council on Human Rights Policy, *Climate Change and Human Rights: A Rough Guide* (ICHRP, Versoix, Switzerland, 2008); Office of the United Nations High Commissioner for Human Rights, *The Relationship between Climate Change and Human Rights*, *supra* n. 1.

<sup>3</sup> For a concise outline of the nature and content of these rights, see Office of the United Nations High Commissioner for Human Rights, *The Relationship between Climate Change and Human Rights*, *supra* n. 1.

or crimes against humanity, nor will it address issues of international criminal law such as universal jurisdiction and the principle *aut dedere aut judicare* (the duty to extradite or prosecute).

## 1.3 Structure

Chapter 2 outlines the observed and projected impacts of global climate change in Maldives. Chapter 3 outlines the relevant provisions of the United Nations Framework Convention on Climate Change (UNFCCC)<sup>4</sup> and related documents, including the Kyoto Protocol.<sup>5</sup> Further, it describes the international co-operation under the UNFCCC to date and identifies some key areas of divergence between states. Chapter 4 examines the bases for and status of extraterritorial obligations for human rights in international law. Chapter 5 summarizes the findings and draws conclusions the intersections between the guiding principles of the international regulation of climate change and extraterritorial obligations for human rights.

## 1.4 Method and material

The groundwork of this thesis was done in Male' while working at the newly established Department of Climate Change and Energy at the Maldivian Ministry of Environment. The experiences from everyday work at the Department and from discussions and debates with Maldives' climate change negotiators have contributed dearly to the author's understanding of the perspective and particular needs of Maldives.

The research method of this thesis is traditional legal method with an emphasis on qualitative doctrinal research. Questions of law are determined by relying firstly on primary legal sources, i.e. treaties and jurisprudence of international courts, and secondly on secondary legal sources, including views of international adjudicating bodies, general comments and recommendations of treaty monitoring bodies, 'soft-law' instruments such as UN General Assembly declarations and resolutions, treaty drafting history, and academic writing.

The presentation of the threat of climate change to Maldives in the second chapter builds on a vast range of material, including (i) assessment reports of the Intergovernmental Panel on Climate Change (IPCC) and other authoritative scientific reports, (ii) national vulnerability assessment reports on *e.g.* beach erosion, human settlements, infrastructure, fisheries, and health, (iii) Maldives' National Adaptation Programme of Action (NAPA), (iv) national reports to different UN organs, such as *e.g.* the United Nations Development Programme (UNDP), (v) reports from different UN organs, such as *e.g.* the United Nations Environmental Programme (UNEP), (vi)

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<sup>4</sup> United Nations Framework Convention on Climate Change (hereinafter UNFCCC), concluded 9 May 1992, entered into force 21 March 1994 (UN Doc. A/AC.237/18 (Part II)/Add.1).

<sup>5</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change (hereinafter Kyoto Protocol), concluded 11 December 1997, entered into force 16 February 2005 (UN Doc. FCCC/CP/1997/7/Add.1).

national and group submissions to the UNFCCC, and (vii) reports of and submissions from international non-governmental organisations (NGOs).

## 1.5 Terminology

The terms ‘climate change’ and ‘global warming’ will both be used throughout this thesis. It is worth noting, however, that they have different meaning. While ‘global warming’ refers solely to the temperature increase caused by greenhouse gases, ‘climate change’ is broader and includes climate effects of such temperature increase, e.g. sea-level rise, ice melting, changes in precipitation, and increased frequency and intensity of extreme weather events.

This thesis will throughout use the terms ‘international level’ and ‘extraterritorial’ when referring to the human rights obligations and responsibilities of a state to individuals or peoples who are not within the jurisdiction or territory of that state. Examples of other terms that are sometimes used to address the same thing are ‘external’, ‘transnational’, ‘transboundary’ and ‘beyond borders’. The term ‘inter-state’ expresses something different than ‘extraterritorial’ and will be used in this thesis with regard to obligations between states.

Throughout, the Republic of Maldives will be referred to as solely ‘Maldives’, without the definite article. Additionally, the spelling of the capital of Maldives will be ‘Male’, as this is locally the most common Latin spelling.

Finally, where appropriate, the definite article will be used before abbreviation such as e.g. the IPCC and the UNFCCC, but not before acronyms such as e.g. COP and Unesco.

## 2 The threat of climate change to Maldives

The leading authority on global climate change is the Intergovernmental Panel on Climate Change (IPCC). It was established in 1988 as a scientific body made up of the majority of the world's governments and leading climate change scientists.<sup>6</sup> The governments participate in plenary sessions, where main decisions on the IPCC work programme are taken and where final reports are accepted, adopted and approved. It is widely considered that the IPCC assessment reports represent the scientific consensus of their time. To date, the IPCC has issued four such reports: in 1990, 1995, 2001, and 2007. With each report, the evidential basis for extensive anthropogenic climate change has grown stronger.<sup>7</sup> In its fourth assessment report (AR4), the IPCC declares global warming to be unequivocal and concludes that, with more than 90 percent certainty, most of the observed increase in global average temperatures since the mid-20<sup>th</sup> century is due to the observed increase in man-made greenhouse gas concentrations.<sup>8</sup>

This chapter will identify the threat of global climate change to Maldives. It consists of two parts. The first part strives to provide a comprehensive summary of the predicted impacts of global warming on the climate system. The second part describes the particular vulnerability of Maldives and the threat of climate change to human lives and livelihoods on this small island state. Some of the historical hazards used to exemplify the potential impacts of climate change-induced weather extremes are not (or have not been shown to be) related to anthropogenic global warming, including the 2004 tsunami and the 1998 El Niño Southern Oscillation (ENSO). These events are referred to because their economic and human costs are relevant to the analysis.

### 2.1 Predicted impacts

This section begins with summarising the IPCC's latest estimations of future global temperature increase and sea-level rise under different emissions scenarios. Focus will then shift to Maldives and to what climate related hazards Maldives is predicted to suffer.

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<sup>6</sup> Intergovernmental Panel on Climate Change, *16 Years of Scientific Assessment in Support of the Climate Convention* (IPCC Secretariat, Geneva, 2004), <<http://www.ipcc.ch/pdf/10th-anniversary/anniversary-brochure.pdf>>, visited on 20 May 2009.

<sup>7</sup> A fifth assessment report is due 2014.

<sup>8</sup> Intergovernmental Panel on Climate Change, *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change. Summary for Policymakers* (hereinafter *AR4 WGI SPM*), S. Solomon *et al.* (eds.) (Cambridge University Press, Cambridge, 2007), pp. 72, 10.

## 2.1.1 Temperature increase and sea-level rise

The scope of the impacts of climate change depend on future greenhouse gas emissions. The IPCC has outlined a number of different emissions scenarios.<sup>9</sup> The impact assessment in AR4 builds on a selection of six scenarios.<sup>10</sup> None of these assume implementation of the UNFCCC or the emissions targets of the Kyoto Protocol. The following presentation builds on three of these: B1, A1B and A1FI. This selection is intended to give a balanced overview of the relationship between global development and potential impacts of climate change.

Under what is referred to as the B1 scenario, world population peaks around mid-century and then declines. There is an introduction of clean and resource efficient technologies and a general change in economic structures towards a service and information economy. Additionally, there is an emphasis on global solutions to economic, social and environmental sustainability, including improved equity.<sup>11</sup> The second scenario, A1B, is in some ways reminiscent to B1. It too envisages a world of rapid economic growth, with a global population peaking around mid-century and then declining. There is a rapid introduction of new and more efficient technologies, increased social and cultural interactions, and a substantial reduction in regional differences in per capita income. The energy system is balanced between fossil and non-fossil energy sources. Yet, in contrast to the B1 scenario, there is no general change in economic structures and only half-hearted attempts at reaching global solutions.<sup>12</sup> The final scenario, A1FI, corresponds to a ‘business as usual’ approach to climate change. It is identical to A1B, except from a lack of a gradual technological change to non-fossil fuels in the energy system. It is the most fossil-intensive scenario used in AR4 and its long-term consequences are highly uncertain.<sup>13</sup>

Table 1 outlines the temperature increase and sea-level rise in this century under the different scenarios, as projected by the IPCC. It is a modification of table 3.1 in the AR4 Synthesis Report,<sup>14</sup> which is provided complete with notes in Appendix 1.

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<sup>9</sup> Intergovernmental Panel on Climate Change, *Special Report on Emissions Scenarios*, N. Nakicenovic and R. Swart (eds.) (Cambridge University Press, Cambridge, 2000).

<sup>10</sup> These are A1B, A1FI, A1T, A2, B1 and B2. Intergovernmental Panel on Climate Change, *AR4 WGI SPM*, , *supra* n. 8, p. 13; Intergovernmental Panel on Climate Change, *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change. Summary for Policymakers* (hereinafter *AR4 WGII SPM*), M. L. Parry *et al.* (eds.) (Cambridge University Press, Cambridge, 2007), p. 22.

<sup>11</sup> Intergovernmental Panel on Climate Change, *AR4 WGI SPM*, *supra* n. 8, p. 18.

<sup>12</sup> *Ibid.*, p. 18.

<sup>13</sup> *Ibid.*, p. 18.

<sup>14</sup> Intergovernmental Panel on Climate Change, *Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (hereinafter *AR4 Synthesis Report*), Core Writing Team *et al.* (eds.) (IPCC, Geneva, 2008), p. 45.

**Table 1**

	Global average temperature increase (°C) above pre-industrial levels		Global average sea level rise (m) at 2090-2099 relative to 1980-1999
	<i>Best estimate</i>	<i>Likely range</i>	<i>Model-based range excluding future rapid dynamical changes in ice flow</i>
B1 scenario	2.3	1.6 – 3.4	0.18 – 0.38
A1B scenario	3.3	2.2 – 4.9	0.21 – 0.48
A1FI scenario	4.5	2.9 – 6.9	0.26 – 0.59

From this table even the worst-case scenario of sea-level rise might seem manageable. Unfortunately, so is not the case. Firstly, as clarified by the IPCC,

The sea level projections do not include uncertainties in climate-carbon cycle feedbacks nor do they include the full effects of changes in ice sheet flow, because a basis in published literature is lacking. Therefore the upper values of the ranges given are not to be considered upper bounds for sea level rise. The projections include a contribution due to increased ice flow from Greenland and Antarctica at the rates observed for 1993-2003, but these flow rates could increase or decrease in the future. If this contribution were to grow linearly with global average temperature change, the upper ranges of sea level rise for SRES scenarios shown in Table 3.1 would increase by 0.1 to 0.2 m.<sup>15</sup>

Secondly, the IPCC emphasises that even if greenhouse gas concentrations were to be stabilised, the cumulated emissions will continue to contribute to warming and sea-level rise for more than a millennium, due to the time it takes for such gases to disappear from the atmosphere and the time it takes for the oceans to assimilate the temperature increase.<sup>16</sup>

Table 2 adds to the complexity of assessing the threat of climate change by providing the IPCC's estimates of long-term temperature increase and sea-level rise. It describes six different categories, representing six different levels of CO<sub>2</sub> concentration stabilisation. The B1 scenario correspond to the lower range of category IV.<sup>17</sup> The A1B scenario correspond the upper range of category V.<sup>18</sup> The potential long-term consequences of climate change under the A1FI scenario is not represented, as it goes beyond category VI.<sup>19</sup> The table is a summary of table 5.1 of the AR4 Synthesis Report, which is provided complete with notes in Appendix 2.<sup>20</sup>

<sup>15</sup> *Ibid.*, p. 45.

<sup>16</sup> *Ibid.*, p. 47.

<sup>17</sup> The approximate CO<sub>2</sub>e concentration, including gases and aerosols, in 2100 for the B1 scenario is estimated to 600 ppm. Intergovernmental Panel on Climate Change, *AR4 WGI SPM*, *supra* n. 8, p. 12, n. 14.

<sup>18</sup> The approximate CO<sub>2</sub>e concentration, including gases and aerosols, in 2100 for the A1B scenario is estimated to 850 ppm. *Ibid.*

<sup>19</sup> The approximate CO<sub>2</sub>e concentration, including gases and aerosols, in 2100 for the A1FI scenario is estimated to 1,550 ppm. *Ibid.*

<sup>20</sup> Intergovernmental Panel on Climate Change, *AR4 Synthesis Report*, *supra* n. 14, p. 67.

**Table 2**

	CO <sub>2</sub> concentration (ppm) at stabilisation (2005 = 379)	CO <sub>2</sub> e concentration (ppm) at stabilisation (2005 = 375 ppm)	Peaking year for CO <sub>2</sub> emissions	Change in global CO <sub>2</sub> emissions in 2050 (percent of 2000 emissions)	Global average temperature increase (°C) above pre-industrial at equilibrium	Global average sea level rise (m) above pre-industrial at equilibrium from thermal expansion only
I	350 – 400	445 – 490	2000 – 2015	-85 – -50	2.0 – 2.4	0.4 – 1.4
II	400 – 440	490 – 535	2000 – 2020	-60 – -30	2.4 – 2.8	0.5 – 1.7
III	440 – 485	535 – 590	2010 – 2030	-30 – +5	2.8 – 3.2	0.6 – 1.9
IV	485 – 570	590 – 710	2020 – 2060	+10 – +60	3.2 – 4.0	0.6 – 2.4
V	570 – 660	710 – 855	2050 – 2080	+25 – +85	4.0 – 4.9	0.8 – 2.9
VI	660 – 790	855 – 1130	2060 – 2090	+90 – +140	4.9 – 6.1	1.0 – 3.7

The sea-level rise outlined for the different emissions scenarios in table 2 only include thermal expansion.<sup>21</sup> Thus, in reality sea-level rise is likely to be even worse. According to the IPCC, one reason for leaving out the contribution of melting ice in its long-term assessment is that there is a lack of understanding of dynamical processes related to ice flow and that there is no consensus on their magnitude.<sup>22</sup> Nonetheless, the IPCC gives account for a number of concerns, such as that the last time the polar regions were around 3-5°C warmer than present for an extended period, global average sea level was likely 4-6 m higher than during the 20<sup>th</sup> century.<sup>23</sup> Further, the Greenland ice sheet is projected to continue to contribute to sea-level rise after 2100, irrespective of emissions scenario.<sup>24</sup> The IPCC estimates that “[t]he eventual contributions from Greenland ice sheet loss could be several metres, and larger than from thermal expansion, should warming in excess of 1.9 to 4.6°C above pre-industrial be sustained over many centuries.”<sup>25</sup> A complete elimination of the Greenland ice sheet would, according to the IPCC, lead to a contribution to a sea level rise of about 7 m relative to 1980-1999 levels.<sup>26</sup> It is thus not surprising that one of the overall conclusions in AR4 is that “[u]nmitigated climate change would, in the long term, be likely to exceed the capacity of natural, managed and human systems to adapt.”<sup>27</sup>

## 2.1.2 Other climate related hazards

Global warming will not only result in sea-level rise, but also increased frequency and intensity of extreme weather events, such as e.g. sea surges and tropical cyclones, precipitation extremes, droughts, and heat waves.<sup>28</sup>

<sup>21</sup> I.e. the physical expansion of water when it gets warmer than 4°C.

<sup>22</sup> Intergovernmental Panel on Climate Change, *AR4 WGI SPM*, *supra* n. 8, p. 17.

<sup>23</sup> *Ibid.*, p. 9.

<sup>24</sup> *Ibid.*, p. 17.

<sup>25</sup> Intergovernmental Panel on Climate Change, *AR4 Synthesis Report*, *supra* n. 14, p. 67.

<sup>26</sup> Intergovernmental Panel on Climate Change, *AR4 WGI SPM*, *supra* n. 8, p. 17.

<sup>27</sup> Intergovernmental Panel on Climate Change, *AR4 Synthesis Report*, *supra* n. 14, p. 73 (emphasis omitted).

<sup>28</sup> Intergovernmental Panel on Climate Change, *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the*

According to a 2006 climate-risk profile based on observed data for Hulhule,<sup>29</sup> IPCC emissions scenarios,<sup>30</sup> and internationally well recognised global climate models, Maldives will suffer seriously from a number of these.<sup>31</sup>

According to the IPCC, over the last 50 years, it is very likely that cold days and cold nights have become less frequent over most land areas, while hot days and hot nights have become more frequent.<sup>32</sup> Additionally, the IPCC asserts that it is likely that heat waves have become more frequent over most land areas.<sup>33</sup> In 2006, a maximum temperature of 33.5°C was a 20-year event in Maldives.<sup>34</sup> According to model-based projections, this is likely to have a return period of three years already by 2025.<sup>35</sup>

In AR4, the IPCC concludes that it is likely that the frequency of heavy precipitation events has increased over most areas over the last 50 years.<sup>36</sup> According to Maldives' climate-risk profile, an extreme daily rainfall of 180 mm was a 100-year event in 2006. The estimated average recurrence interval in 2050 is 56 years.<sup>37</sup> Additionally, an extreme three-hourly rainfall of 100 mm was a 25-year event in 2006. In 2050, the best estimate is that it is at least twice as common.<sup>38</sup>

According to the IPCC, it is likely that the incidence of extreme high sea level (excluding tsunamis) has increased at a broad range of sites worldwide since 1975.<sup>39</sup> In 2006, the observed return period of an hourly sea level of 70 cm above mean sea level at Hulhule was 115 years. It will likely be an annual event already by 2050.<sup>40</sup> In addition to this, an extreme wind gust of 60 knots had a return period of 16 years in 2006. The estimate is that this recur on average around every 3 years by the end of this century.<sup>41</sup>

## 2.2 Particular vulnerabilities and adaptation needs

Maldives is a small island developing state (SIDS) in the Indian Ocean home to 386,000 people.<sup>42</sup> It consists of an 860 km long chain of about

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*Intergovernmental Panel on Climate Change (hereinafter AR4 WGI), S. Solomon et al. (eds.) (Cambridge University Press, Cambridge, 2007), p. 747 et seq.*

<sup>29</sup> Hulhule is the airport island close to Male'.

<sup>30</sup> See ch. 2.1.1 above.

<sup>31</sup> J. E. Hay, *Climate Risk Profile for the Maldives* (Ministry of Environment, Energy and Water, Male', 2006).

<sup>32</sup> Intergovernmental Panel on Climate Change, *AR4 Synthesis Report*, *supra* n. 14, p. 30.

<sup>33</sup> *Ibid.*

<sup>34</sup> Hay, *Climate Risk Profile for the Maldives*, *supra* n. 31, table 10, p. 20.

<sup>35</sup> *Ibid.*

<sup>36</sup> Intergovernmental Panel on Climate Change, *AR4 Synthesis Report*, *supra* n. 14, p. 30.

<sup>37</sup> Hay, *Climate Risk Profile for the Maldives*, *supra* n. 31, table 4, p. 10.

<sup>38</sup> *Ibid.*, table 7, p. 14.

<sup>39</sup> Intergovernmental Panel on Climate Change, *AR4 Synthesis Report*, *supra* n. 14, p. 30.

<sup>40</sup> Hay, *Climate Risk Profile for the Maldives*, *supra* n. 31, table 2, p. 6.

<sup>41</sup> *Ibid.*, table 8, p. 16.

<sup>42</sup> This figure includes foreign workers. 'Maldives', *Encyclopædia Britannica* (2009).

1,200 coral islands, covering an area of ca 235 km<sup>2</sup>.<sup>43</sup> The islands are part of a series of coral atolls that have gradually built up from the crowns of ancient volcanoes that are now submerged.<sup>44</sup> A great number of the islands are desert; only 203 islands are inhabited, 87 are resorts and some 90 islands are utilized for other ends such as e.g. agriculture, fisheries, recreation, national defence, and as waste-disposal sites.<sup>45</sup> Maldives is currently on the UN General Assembly's list of least developed countries (LDCs), but will graduate in January 2011.<sup>46</sup>

This section outlines how climate change may affect human lives and livelihoods in Maldives. The presentation is divided into six separate but interconnected parts. At the end of each part, references are made to Maldives' National Adaptation Programme of Action (NAPA). The NAPA identifies twelve top prioritised projects and the following presentation covers each of these.<sup>47</sup>

## 2.2.1 Land and human settlements

Land is one of the scarcest resources in Maldives; 96 percent of the islands are estimated to be less than 1 km<sup>2</sup> in area.<sup>48</sup> In addition to this, the islands are extremely low-lying; over 80 percent of the total land area is less than 1 m above mean sea level.<sup>49</sup> A vulnerability assessment done in relation to the development of the NAPA shows that nearly half of all housing structures begin within 100 m of the coastline.<sup>50</sup> These particular characteristics make Maldives extremely vulnerable to long-term sea-level rise as well as sea surges and extreme weather events. The islands' limited area and low elevation makes retreat inland or to higher ground impossible. Between 2000 and 2006, more than 90 inhabited islands were flooded at least once, and 37 islands were flooded regularly or at least once a year.<sup>51</sup> During a series of 10-15 feet swells on 15-17 May 2007, causing inundation up to

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<sup>43</sup> This according to the latest satellite and aerial imagery. The previous official figure was 300 km<sup>2</sup>. Republic of Maldives, *First National Communication of the Republic of Maldives to the United Nations Framework Convention on Climate Change* (Ministry of Home Affairs, Housing and Environment, Male', 2001), p. 12; Ministry of Environment and Construction, *State of the Environment* (Ministry of Environment and Construction, Male', 2004), p. 13.

<sup>44</sup> 'Maldives', *supra* n. 42.

<sup>45</sup> A. Shaig, *Climate Change Vulnerability and Adaptation Assessment of Land and Beaches of Maldives* (Ministry of Environment, Energy and Water, Male', 2006).

<sup>46</sup> United Nations General Assembly, *Deferral of the Smooth Transition Period for the Graduation of Maldives from the List of Least Developed Countries*, General Assembly res. 60/33, 17 March 2006 (UN Doc. A/RES/60/33).

<sup>47</sup> Republic of Maldives, *National Adaptation Programme of Action* (hereinafter NAPA) (Ministry of Environment, Energy and Water, Male', 2007).

<sup>48</sup> Republic of Maldives, *National Adaptation to Climate Change: A Background Paper for the Maldives Partnership Forum III* (Ministry of Housing, Transport and Environment, Government of Maldives, Male', 2009), p. 6.

<sup>49</sup> Republic of Maldives, *First National Communication of the Republic of Maldives to the United Nations Framework Convention on Climate Change*, *supra* n. 43, p. 5.

<sup>50</sup> Shaig, *Climate Change Vulnerability and Adaptation Assessment of Land and Beaches of Maldives*, *supra* n. 45.

<sup>51</sup> *Ibid.*, p. 6.

600 m from the shoreline, more than 1,600 people were evacuated from their homes.<sup>52</sup>

Following the 2004 tsunami, which caused around 100 deaths and displaced around 20,000 people,<sup>53</sup> the Government of Maldives reviewed its strategies on population consolidation and developed what is referred to as the 'safer island strategy'. Four out of the twelve prioritized projects in the NAPA relates to this strategy. The aims of these projects are *inter alia* to undertake coastal-protection pilot projects including the construction of sea-defence systems, to reduce the vulnerability of islands from heavy rain, and to suggest pilot projects on flood-control measures. The total cost of these planned adaptation actions exceed USD 78 million.<sup>54</sup>

Population consolidation through increasing voluntary migration to larger and/or safer islands is not, however, necessarily positive from a human rights perspective. In a recent report, the Human Rights Commission of Maldives identifies the lack of adequate housing as one of the country's most pressing human rights issues. The Commission estimates that some 12,000 families lack their own housing, living either as roomers or in makeshift arrangements. It further draws attention to the fact that the over 30,000 migrant construction workers resident in Male' typically live under deplorable conditions.<sup>55</sup> In Male', the staggering inflation of rates,<sup>56</sup> together with increasing population density,<sup>57</sup> has resulted in that people spend up to 85 percent of their income on housing. The lack of adequate housing is not only considered to be a human rights problem *per se*, but also a key cause of a number of growing social problems, including health issues, the breakdown of families, domestic violence, drug abuse, and crime.<sup>58</sup>

## 2.2.2 Infrastructure

Just as with human settlements, the infrastructure in Maldives is highly vulnerable to sea surges. The country has three major commercial sea ports, more than 128 island harbours, and five airports, two of which are international.<sup>59</sup> As much as 30 percent of the infrastructure of Male' International Airport lies within 50 m of the coastline.<sup>60</sup> This airport is vital for the tourism industry, which in turn is vital for the Maldivian economy,

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<sup>52</sup> United Nations Office for the Coordination of Humanitarian Affairs, *Maldives - Coastal Flooding - May 2007*, OCHA Situation Report no. 3 (OCHA Regional Office for Asia and the Pacific, Bangkok, 2007), p. 1.

<sup>53</sup> World Bank *et al.*, *Republic of Maldives. Tsunami: Impact and Recovery. Joint Needs Assessment* (United Nations Development Programme, Male', 2005), p. 4.

<sup>54</sup> Republic of Maldives, *NAPA*, *supra* n. 47, p. 47 *et seq.*

<sup>55</sup> As many as 30 migrant workers are reported to have shared a three times three meters flat without running water or sanitation facilities, sleeping in shifts.

<sup>56</sup> In 2008 around ten to twelve percent.

<sup>57</sup> Ca 40 percent between 2000 and 2006.

<sup>58</sup> Human Rights Commission of Maldives, *Rapid Assessment of the Housing Situation in the Maldives* (Human Rights Commission of Maldives, Male', 2009).

<sup>59</sup> Republic of Maldives, *NAPA*, *supra* n. 47, p. 23.

<sup>60</sup> A. Shaig, *Climate Change Vulnerability and Adaptation Assessment of the Coastal Infrastructure of Maldives* (Ministry of Environment, Energy and Water, Male', 2006) cited in Republic of Maldives, *NAPA*, *supra* n. 47, p. 23.

contributing with 27 percent of GDP and one third of the government revenue in 2006.<sup>61</sup>

Other critical infrastructure includes environmental services and utilities, such as *inter alia* waste-management systems, sewerage systems, near-shore breakwaters, powerhouses, desalination plants, and different distribution systems. On inhabited islands, 80 percent of the powerhouses and 75 percent of the communications infrastructure are located within 100 m of the coastline.<sup>62</sup> In case of extreme weather events, the break down of such facilities could have disastrous effects.

The NAPA identifies coastal protection of the airport as a top priority project. In addition to protecting the tourism industry, to climate secure the airport is described as very important for Maldives for the following reasons: (i) to secure access to food, as the country to a large extent is dependent on imports, (ii) to protect the export industry, mainly the fisheries, and (iii) to protect the main distribution point of emergency aid and the main evacuation point at major disasters. The total estimated cost of the planned project is USD 18.5 million.<sup>63</sup>

### 2.2.3 Freshwater and sanitation

The people of Maldives depended traditionally on shallow wells to provide access to the thin groundwater lens for drinking water. The groundwater lens is highly susceptible to pollution and for that reason priority has been given to the construction of rainwater tanks and the development of rainwater collection schemes. According to data from 2006, 76 percent of the atoll households use rainwater for cooking. Rainwater is considered the most sustainable water source for the atolls. There are no measures of the quality of stored rainwater, yet 90 percent of the atoll population do not use any method of treatment before drinking. In Male', 100 percent of the population has access to piped desalinated water.<sup>64</sup> Following the tsunami, an additional 38 islands have been provided with desalination plants operated daily or on an emergency basis.<sup>65</sup> Water resources and quality affects numerous aspects of human livelihood. Despite improvements in the public health sector, diarrhoea and acute respiratory infections continue to cause morbidity among children and adults in Maldives, indicating inadequate access to safe water and sanitation.<sup>66</sup>

In the NAPA, there are two projects relating to fresh water availability and sanitation. First, the objective of project no. 4 is to “[e]nhance adaptive capacity to manage climate change related risks to fresh water availability by appropriate technologies and improved storage facilities” through

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<sup>61</sup> Ministry of Planning and National Development, *Seventh National Development Plan 2006-2010: Creating New Opportunities* (Ministry of Planning and National Development, Male', 2007), p. 55.

<sup>62</sup> Shaig, *Climate Change Vulnerability and Adaptation Assessment of the Coastal Infrastructure of Maldives*, cited in Republic of Maldives, *NAPA*, *supra* n. 60, p. 23 *et seq.*

<sup>63</sup> Republic of Maldives, *NAPA*, *supra* n. 47, p. 53 *et seq.*

<sup>64</sup> Republic of Maldives, *Millennium Development Goals Country Report 2007* (Ministry of Planning and National Development, Male', 2007), p. 41 *et seq.*

<sup>65</sup> Republic of Maldives, *NAPA*, *supra* n. 47, p. 33 *et seq.*

<sup>66</sup> *Ibid.*, p. 31.

increased rainwater harvesting and the further establishment of emergency backup desalination systems. The total cost of the project is estimated to USD 900,000.<sup>67</sup> Second, project no. 5 aims to “[e]nhance adaptive capacity to manage climate change related risks to fresh water availability by appropriate wastewater treatment technologies.” The total cost of this project is estimated to USD 1.5 million.

## 2.2.4 Infectious diseases

In addition to the health issues related to lack of safe water, the IPCC projects that climate change will affect human health through *inter alia* (i) increased burden of diarrhoeal diseases, such as salmonella, shigella and e-coli, and (ii) the altered incidence and geographical range of malaria, dengue and other infectious diseases.<sup>68</sup> Already today, dengue outbreaks are becoming more frequent in Maldives. In addition to this, a number of other infectious diseases are of great public health concern. Scrub typhus re-emerged in 2002 with mortality rates as high as 10 percent. Chikungunya, a form of viral fever which spreads with mosquitoes, was diagnosed for the first time in December 2006 and later reached epidemic proportions.<sup>69</sup>

A serious human rights problem in Maldives is that the population living in remote islands, where diagnostic and treatment facilities are lacking, are particularly vulnerable to the above mentioned infectious diseases. This is recognised in the NAPA, the seventh project of which is to “[i]mprove the health status of the population by the prevention and management of vector-borne diseases caused by changes in temperature and flooding due to extreme rainfall.” The project aims to protect community health through improved management and surveillance of vector-borne and other climate-sensitive diseases at a total cost of USD 1,775,000.<sup>70</sup>

## 2.2.5 Coral reefs and marine biodiversity

The Maldivian coral reef system is said to be the seventh largest in the world and one of the richest in terms of species diversity. According to official figures, close to 200 species of stony corals, more than 1,000 species of fish, over 400 species of molluscs (such as e.g. clams), and around 350 species of marine crustaceans (such as e.g. crabs, lobsters and crayfish) have been identified.<sup>71</sup> In addition, nine species of whales, 15-20 species of sharks, seven species of dolphins, and five species of turtles have been observed.<sup>72</sup>

Many species are at high risk of extinction due to climate change. According to the IPCC, approximately 20 to 30 percent of all plant and

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<sup>67</sup> *Ibid.*, p. 55 *et seq.*

<sup>68</sup> Intergovernmental Panel on Climate Change, *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (hereinafter *AR4 WGII*), M. L. Parry *et al.* (eds.) (Cambridge University Press, Cambridge, 2007), ch. 8.4.1, p. 407 *et seq.*

<sup>69</sup> Republic of Maldives, *NAPA*, *supra* n. 47, p. 31 *et seq.*

<sup>70</sup> *Ibid.*, p. 63 *et seq.*

<sup>71</sup> Ministry of Environment and Construction, *State of the Environment*, *supra* n. 43, p. 18.

<sup>72</sup> *Ibid.*; Republic of Maldives, *NAPA*, *supra* n. 47, p. 38.

animal species assessed globally so far are likely to be at increased risk of extinction if increases in global average temperature exceed 1.5 to 2.5°C.<sup>73</sup> The corresponding figures cited in the Stern Review is that 15-40 percent of species face extinction with 2°C warming.<sup>74</sup> Corals and the marine life surrounding them are particularly vulnerable to changes in temperature, as some species of corals live at or near their thermal limits. The 1998 El Niño Southern Oscillation stands out as the clearest demonstration of what increased sea water temperature can do with coral reefs. The greatest sea surface temperature anomaly recorded in Maldives that year was +2.1°C in May.<sup>75</sup> This resulted in 80-90 percent of shallow coral reefs (on less than 10 m depth) dying from bleaching. At reefs on more than 20 m depth, 30-40 percent of the corals were bleached.<sup>76</sup> On average, the coral cover in the central atolls was reduced from 42 percent to only two percent.<sup>77</sup> Since then, the reefs have gradually recovered.<sup>78</sup> These historical facts clearly show that a global average temperature increase of 2°C will have potentially devastating effects on coral reefs. Yet, according to the scientific estimations put forward in the Stern Review, already a permanent 1°C temperature increase is likely to result in around 80 percent bleaching, with slow recovery.<sup>79</sup>

The IPCC asserts that “[f]or increases in global average temperature exceeding 1.5 to 2.5°C and in concomitant atmospheric CO<sub>2</sub> concentrations, there are projected to be major changes in ecosystem structure and function, species’ ecological interactions and shifts in species’ geographical ranges, with predominantly negative consequences for biodiversity and ecosystem goods and services, e.g. water and food supply.”<sup>80</sup> One of the greatest concerns with regard to such changes in Maldives is that there will be a downturn in the tuna fishery. Fish is the primary source of dietary protein for the people of Maldives, and tuna is served daily in every meal. Tuna provided USD 97 million in export revenue in 2005.<sup>81</sup> An additional concern is that the tuna fishery is dependent on reef fish as live bait. As coral reefs are bleached and die, the reef fish stock is projected to gradually decline to a point where it no longer can meet these needs.<sup>82</sup>

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<sup>73</sup> Intergovernmental Panel on Climate Change, *AR4 Synthesis Report*, *supra* n. 14, p. 48.

<sup>74</sup> N. Stern, *The Economics of Climate Change: The Stern Review* (Cambridge University Press, Cambridge, 2007), ch. 3.7, p. 93.

<sup>75</sup> A. J. Edwards *et al.*, 'Coral Bleaching and Mortality on Artificial and Natural Reefs in Maldives in 1998, Sea Surface Temperature Anomalies and Initial Recovery', 42 *Marine Pollution Bulletin* 7 (2001), p. 7.

<sup>76</sup> C. Wilkinson *et al.*, 'Ecological and Socioeconomic Impacts of 1998 Coral Mortality in the Indian Ocean: An ENSO Impact and a Warning of Future Change?', 28 *Ambio* 188 (1999), table 1, p. 189.

<sup>77</sup> Edwards *et al.*, 'Coral Bleaching and Mortality on Artificial and Natural Reefs in Maldives in 1998, Sea Surface Temperature Anomalies and Initial Recovery', *supra* n. 75, p. 7.

<sup>78</sup> Ministry of Environment and Construction, *State of the Environment*, *supra* n. 43, p. 38 *et seq.*

<sup>79</sup> Stern, *The Economics of Climate Change: The Stern Review*, *supra* n. 74, ch. 3, table 3.1, pp. 66, 94.

<sup>80</sup> Intergovernmental Panel on Climate Change, *AR4 Synthesis Report*, *supra* n. 14, p. 48.

<sup>81</sup> Republic of Maldives, *NAPA*, *supra* n. 47, p. 28.

<sup>82</sup> M. S. Adam, *Vulnerability and Adaptation Assessment of the Fisheries Sector in the Maldives* (Ministry of Environment, Energy and Water, Male', 2006).

As the coral reefs function as a natural sea defence for the islands, massive coral bleaching will also result in increased beach erosion and greater exposure to sea surges. Furthermore, the gradual loss of beaches, coral cover, and marine biodiversity will have long-term affect the tourism industry. Maldives is famous for its beach environment, its rich marine biological diversity, and its pleasant and stable tropical climate. As already mentioned, the tourism industry is vital for Maldives, contributing with 27 percent of GDP and 33 percent of the government revenue in 2006.<sup>83</sup>

The importance of the coral reefs to Maldives is recognised in the NAPA. The aim of project no. 11 is to “[i]ncrease resilience of coral reefs to reduce the vulnerability of islands, communities and reef dependant economic activities to predicted climate change.” This project suggests research on two areas: how coral reefs adapt to climate change, and how human induced stress affect coral growth. The total estimated cost is around USD 1 million. The NAPA further recognises the importance of the tuna fishery. Project no. 9 suggests the investigation of the catch and management of live bait in order to reduce the vulnerability of the tuna fishery sector to the predicted decrease in reef-fish stocks. The total cost of this project is also estimated to around USD one million.<sup>84</sup>

## 2.2.6 Agriculture and food security

Climate change is predicted to affect agriculture through heat stress on plants, changes in soil moisture, changes in air temperature and precipitation, inundation, loss of soil fertility through erosion of top soil, salination of groundwater, and loss of land through beach erosion and sea-level rise.<sup>85</sup> Although limited, agriculture is vital to the food security, nutritional status, and livelihoods of the atoll population.<sup>86</sup> The sixth project identified in the NAPA is to “[i]ncrease the resilience of local food production through enhancing the capacity of local farmers and communities to address food security issues caused by climate change and climate variability.”<sup>87</sup> The agricultural sector is considered to be constrained by “the abundance of cheap imports of vegetables and fruits.”<sup>88</sup> The focus of the adaptation project is therefore to introduce sustainable commercial-scale food production. The total estimated cost is USD 825,000.<sup>89</sup>

The NAPA further recognises that heavy import dependency, limited food storage, and ad-hoc food distribution pose severe food security risks. The vast majority of islands lack adequate emergency food storage. Because of this, and since imported food is distributed mostly by boat from Male’, an extreme weather event could in a short time have far-reaching effects on the availability of food in these islands.<sup>90</sup>

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<sup>83</sup> Ministry of Planning and National Development, *Seventh National Development Plan 2006-2010: Creating New Opportunities*, *supra* n. 61, p. 55.

<sup>84</sup> Republic of Maldives, *NAPA*, *supra* n. 47, p. 69 *et seq.*

<sup>85</sup> *Ibid.*, p. 36.

<sup>86</sup> *Ibid.*, p. 35.

<sup>87</sup> *Ibid.*, p. 60 *et seq.*

<sup>88</sup> *Ibid.*, p. 35.

<sup>89</sup> *Ibid.*, p. 60 *et seq.*

<sup>90</sup> *Ibid.*

## 2.3 Conclusion

Maldives is highly vulnerable to the predicted impacts of global warming on the climate system. The Maldivian islands are small and low-lying and retreat inland or to higher grounds is not an option in cases of sea surges or other extreme weather events. As 80 percent of the land area is less than one meter above mean sea level, already the predicted and seemingly unavoidable sea-level rise of somewhere between 0.2 and 0.6 m in this decade presents a serious threat to the sustainability of Maldives. Adding to the threat from rising sea levels is the problem of increasing coral bleaching. As coral reefs serve as a natural sea defence, the death of such makes the islands even more vulnerable to sea surges. To conclude, without effective global mitigation of climate change through extensive greenhouse gas emissions reductions by 2050, human life on Maldives might no longer be feasible already in some generations time.

# 3 International climate change regulation

This chapter begins with a presentation of the UNFCCC, its objective and guiding principles, and the commitments of different groups of States Parties under it. Then follows a similar presentation of the Kyoto Protocol. The third part of the chapter accounts for the Bali Road Map, with focus on the Bali Action Plan (BAP) and its role in the ongoing negotiations. The final part of the chapter identifies and briefly explores some key negotiating issues leading up to the 15<sup>th</sup> Conference of the Parties (COP-15) in Copenhagen December 2009.

## 3.1 The UNFCCC

The basis for the international regulation of and the ongoing negotiations on climate change is the UNFCCC.<sup>91</sup> The Convention entered into force on 21 March 1994 and enjoys near universal membership, with 192 ratifications.<sup>92</sup> Inspired by the way the international community had effectively managed to deal with the threat of ozone depleting substances through the Vienna Ozone Convention and the Montreal Protocol, it was early on decided that the climate change convention should be a so-called 'framework convention', laying the ground for future action.<sup>93</sup> As pointed out by Bodansky, this serves two basic functions:

First, it allows work to proceed in an incremental manner. States can begin to address a problem without waiting for a consensus to emerge on appropriate response measures, or even before there is agreement that a problem exists. Lawmaking can thus proceed 'amidst great uncertainty'. [...] Second, the framework convention approach can produce positive feedback loops, making the adoption of specific substantive commitments more likely. Scientific research and assessments carried out under the convention help reduce uncertainties and lay a basis for action. The institutions established by the framework convention play a

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<sup>91</sup> UNFCCC, *supra* n. 4.

<sup>92</sup> Status of ratification as of 22 August 2007, <[http://unfccc.int/essential\\_background/convention/status\\_of\\_ratification/items/2631.php](http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php)>, visited on 19 April 2009. States that have not ratified the UNFCCC include Andorra, the Holy See (Vatican), Iraq, and Somalia.

<sup>93</sup> The Vienna Ozone Convention established a conference of the parties, a secretariat, and general obligations relating to research and systematic observations; dictated general principles of international cooperation in the legal, scientific, and technical fields, as well as in relation to transmission and exchange of information. Adopted less than three years later, the Montreal Protocol required 50 percent cuts in specified ozone-depleting substances from 1986 levels by 1993-94. The Convention for the Protection of the Ozone Layer (hereinafter Vienna Ozone Convention), concluded 22 March 1985, entered into force 22 September 1988, 1513 UNTS 323; Montreal Protocol on Substances that Deplete the Ozone Layer (hereinafter Montreal Protocol), concluded 16 September 1987, entered into force 1 January 1989, 26 ILM 1550; D. Bodansky, 'The United Nations Framework Convention on Climate Change: A Commentary' (hereinafter UNFCCC Commentary), 18 *Yale Journal of International Law* 451 (1993), p. 494.

catalytic role by collecting data, providing technical assistance, and issuing reports.<sup>94</sup>

The UNFCCC recognises that climate change must be addressed with two different sets of actions: mitigation and adaptation. While mitigation aims at minimizing the extent of climate change by reducing emissions levels, adaptation aims to strengthen the resistance and resilience of societies and ecosystems to climate change. According to the Convention, mitigation and adaptation actions should be supported through cross-border cooperation in a number of areas including technology transfer and the provision of financial resources and investment.

The ultimate authority of the UNFCCC is COP, which comprises all states that have ratified the Convention.<sup>95</sup> COP is mandated to periodically review States Parties' commitments in light of the Convention's objective and new scientific findings, and to adopt new commitments through amendments and protocols.<sup>96</sup> An additional protocol on emissions reduction targets for developed countries was adopted at COP-3 in Kyoto.<sup>97</sup> To date, there has been in total 14 conferences, the latest in Poznan 2008. As already mentioned, the next conference, COP-15, will be held in Copenhagen 7-18 December 2009.

The following parts of this section will examine first the objective and guiding principles of the UNFCCC, and second, the nature and scope of the commitments of different groups of States Parties under the Convention.

### 3.1.1 Objective and guiding principles

According to Article 2 of the UNFCCC, the ultimate objective of the Convention and any other legal instrument that COP may adopt is “to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”<sup>98</sup> The Convention thus sets a *threshold*: pollution in the form of greenhouse gas emissions is permitted up to this point and no further. Yet, what constitutes ‘dangerous anthropogenic interference’ is one of the value-laden questions which are still negotiated. Although this term is not among the terms defined in the Convention, the set objective in Article 2 gives some clues to its meaning, declaring that “[s]uch a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.”<sup>99</sup>

The guiding principles of the UNFCCC are set out in Article 3. Because of its centrality to this thesis, it follows in full:

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<sup>94</sup> Bodansky, 'UNFCCC Commentary', *supra* n. 93, p. 494 *et seq.*

<sup>95</sup> UNFCCC, *supra* n. 4, art. 7(2).

<sup>96</sup> *Ibid.*, arts. 7, 15-17.

<sup>97</sup> Kyoto Protocol, *supra* n. 5.

<sup>98</sup> UNFCCC, *supra* n. 4, art. 2.

<sup>99</sup> *Ibid.*

## PRINCIPLES

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.
2. The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a *disproportionate or abnormal burden* under the Convention, should be given full consideration.
3. The Parties should take *precautionary measures* to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties.
4. The Parties have a right to, and should, promote *sustainable development*. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change.
5. The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.<sup>100</sup>

Article 3(1) stresses on the principles of equity and of common but differentiated responsibilities. It declares that developed countries should take a lead, yet not why this is so. According to Bodansky, during the drafting process, developing countries based this understanding on the view that developed countries bear the main responsibility for climate change. Developed countries, on the other hand, opposed this as a basis for differential commitments but nonetheless agreed to take a lead because of their greater financial and technical capabilities.<sup>101</sup> Instead of trying to define what constitutes a developed country, the Convention includes a list of all of them (Annex I).<sup>102</sup> In addition to these two broad categories of

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<sup>100</sup> *Ibid.*, art. 3 (emphases added).

<sup>101</sup> Bodansky, 'UNFCCC Commentary', *supra* n. 93, p. 503.

<sup>102</sup> In relation to this it is worth noting that e.g. Article 4(2) of the UNFCCC refers to "developed country Parties and other Parties included in annex I". The reason for this is apparently that a number of Eastern European countries with economies in transition (see further fn. 103 below). *Ibid.*, p. 507 *et seq.*

countries, the Convention recognises the OECD (or the ‘most developed’) countries as a specific group (Annex II). The countries in Annex I which are not included in Annex II are recognised as countries that are undergoing the process of transition to a market economy, otherwise known as countries with economies in transition (CET).<sup>103</sup> The final group of countries recognised in the Convention are the LDCs. What constitutes a ‘least developed’ country is not defined in the Convention, but is likely to be interpreted in accordance with the UN General Assembly’s list of LDCs.<sup>104</sup>

Article 3(2) addresses the discriminatory impacts of climate change on different countries and regions. It is a recognition that very often the poorest and hence the most vulnerable countries will be hit first and hardest.<sup>105</sup> Yet, it does also recognise that some countries will have to bear a disproportionate or abnormal burden, seemingly referring to *inter alia* low-lying island states.

Article 3(3) refers to the precautionary principle and is reminiscent to Principle 15 of the Rio Declaration.<sup>106</sup> This is a general principle of international law; according to Sands, “there is a strong argument to be made that it reflects a principle of customary law”.<sup>107</sup> The precautionary principle generally serves the purpose to encourage or oblige decision makers to consider the likely harmful effects of their activities on the environment before they pursue such activities.<sup>108</sup> The inclusion of the principle in the UNFCCC was vigorously advocated by the Alliance of Small Island States (AOSIS).<sup>109</sup>

Article 3(4) lays down at the same time a right and a duty to promote sustainable development. The answer to this curious formulation seems to

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<sup>103</sup> Interestingly, Article 4(2) of the UNFCCC refers to “the developed country Parties and other Parties included in annex I,” allowing for at least some CET to argue that they are not to be considered developed. According to Bodansky, the background to this is that “[s]everal eastern European states (Romania and Poland in particular) objected to being characterized as ‘developed’, fearing that such a label might subject them to financial or other additional obligations in the future.” *Ibid.*, p. 507.

<sup>104</sup> Available at <[http://www.un.org/esa/policy/devplan/profile/ldc\\_list08.pdf](http://www.un.org/esa/policy/devplan/profile/ldc_list08.pdf)>, visited on 25 May 2009.

<sup>105</sup> Stern, *The Economics of Climate Change: The Stern Review*, *supra* n. 74, p. 104 *et seq.*

<sup>106</sup> Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, adopted 3-14 June 1992 (UN Doc. A/CONF.151/26 (Vol. I)), Principle 15: “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>107</sup> P. Sands, *Principles of International Environmental Law*, 2<sup>nd</sup> ed. (Cambridge University Press, Cambridge, 2003), p. 279.

<sup>108</sup> J. Cameron and J. Abouchar, ‘The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment’, 14 *Boston College International and Comparative Law Review* 1 (1991).

<sup>109</sup> One representative of AOSIS stated in the drafting process that “[f]or us the precautionary principle is much more than a semantic or theoretical exercise. It is an ecological and moral imperative. We trust the world understands our concerns by now. We do not have the luxury of waiting for conclusive proof, as some have suggested in the past. The proof, we fear, will kill us.” R. Van Lierop, Permanent Representative to the United Nations and Chairman of the Delegation of Vanuatu, Statement to the Plenary Session of the INC/FCCC, 5 February 1991, para. 3, cited in Bodansky, ‘UNFCCC Commentary’, *supra* n. 93, p. 503, fn. 317.

lie in the tension between the right to development and the concept of sustainable development. On the one hand, the developing states wanted Article 3 to recognise the right to development as set forth in the UN Declaration on the Right to Development,<sup>110</sup> which is not recognised by *inter alia* the US. On the other hand, some developed countries wanted Article 3 to include a duty to aim at sustainable development, which developing countries perceived as a new conditionality on financial and technical assistance that would risk impede their economic progress.<sup>111</sup>

The last principle of Article 3 concerns the need for a supportive and open international economic system. It implicitly refers to Article XX of the General Agreement on Tariffs and Trade (GATT),<sup>112</sup> and neither approves of nor forbids the use trade measures to enforce the Convention.

### 3.1.2 General commitments

Turning now to the duties of States Parties to the Convention, Article 4(1) provides a number of commitments that are general in nature, i.e. in their application to all Parties, as well as in content. Here follows a brief summary of Article 4(1) subparagraphs (a) to (j):

- a) To develop, periodically update, publish and make available to COP national inventories of greenhouse gases;
- b) To formulate, implement, publish, and regularly update national or regional mitigation and adaptation programmes;
- c) To promote and cooperate in the development, deployment, and diffusion, including transfer, of technologies, practices and processes that control, reduce or prevent greenhouse gas emissions;
- d) To promote sustainable management, as well as to promote and cooperate in the conservation and enhancement of greenhouse gas sinks and reservoirs;
- e) To cooperate in preparing for adaptation to the impacts of climate change, including developing appropriate and integrated plans for coastal zone management, water resources, agriculture, and the protection and rehabilitation of areas ... affected by drought, desertification and floods;

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<sup>110</sup> Declaration on the Right to Development (hereinafter DRD), General Assembly res. 41/128, adopted 4 December 1986 (UN Doc. A/RES/41/128), art. 1: "The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."

<sup>111</sup> Bodansky, 'UNFCCC Commentary', *supra* n. 93, p. 504.

<sup>112</sup> General Agreement on Tariffs and Trade (hereinafter GATT), concluded 30 October 1947, entered into force 1 January 1948, 55 UNTS 194, art. XX: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: ... (b) necessary to protect human, animal or plant life or health; ... (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;"

- f) To take climate change considerations into account, to the extent feasible, in relevant social, economic, and environmental policies and actions;
- g) To promote and cooperate in scientific, technological and social-economic research;
- h) To promote and cooperate in the full, open and prompt exchange of relevant information;
- i) To promote and cooperate in education, training and public awareness raising; and finally
- j) To communicate to COP information related to the implementation of the Convention.

Out of all these general comments, the most striking in the context of the subject of this thesis is arguably Article 4(1) subparagraph (e), which demands that all States Parties cooperate in the development of plans for the protection and rehabilitation of *inter alia* flood-prone areas.

### 3.1.3 Specific commitments on mitigation

As already stated, different groups of countries have different responsibilities under the UNFCCC. While developing countries do not have further mitigation obligations, Article 4(2) subparagraphs (a) and (b) set a greenhouse gas emissions reduction target and timetable for all developed countries (including CET). In order to demonstrate that they are taking the lead in modifying longer-term trends in anthropogenic emissions, Annex-I countries shall adopt national policies and take corresponding mitigation measures with the aim of returning individually or jointly to their 1990 levels of greenhouse gas emissions by year 2000. From the way the provisions are framed, this target is clearly not an obligation of result, but rather an obligation of conduct.<sup>113</sup>

According to Article 4(2) subparagraph (d),

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<sup>113</sup> UNFCCC, *supra* n. 4, art. 4(2) stipulates: “The developed country Parties and other Parties included in Annex I commit themselves specifically as provided for in the following: (a) Each of these Parties shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs. These policies and measures will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions consistent with the objective of the Convention, recognizing that the return by the end of the present decade to earlier levels of anthropogenic emissions of carbon dioxide and other greenhouse gases not controlled by the Montreal Protocol would contribute to such modification, and taking into account the differences in these Parties’ starting points and approaches, economic structures and resource bases, the need to maintain strong and sustainable economic growth, available technologies and other individual circumstances, as well as the need for equitable and appropriate contributions by each of these Parties to the global effort regarding that objective. [...] (b) In order to promote progress to this end, each of these Parties shall communicate ... detailed information on its policies and measures referred to in subparagraph (a) above, as well as on its resulting projected anthropogenic emissions by sources and removals by sinks of greenhouse gases not controlled by the Montreal Protocol for the period referred to in subparagraph (a), with the aim of returning individually or jointly to their 1990 levels these anthropogenic emissions of carbon dioxide and other greenhouse gases not controlled by the Montreal Protocol...”

The Conference of the Parties shall, at its first session, review the adequacy of subparagraphs (a) and (b) above. Such review shall be carried out in the light of the best available scientific information and assessment on climate change and its impacts, as well as relevant technical, social and economic information. Based on this review, the Conference of the Parties shall take appropriate action, which may include the adoption of amendments to the commitments in subparagraphs (a) and (b) above.

Such an amendment to the Convention was made in Kyoto in 1997, an issue dealt with further in section 2 of this chapter.

While developing countries do not have any specific commitments relating to mitigation to date, they might have so after the next amendment, or at least at some point in the future. Any such future deal must take into consideration in Article 4(7), which states:

The extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties.

The Convention explicitly recognises that the extent to which developing countries take part in the mitigation of climate change depends on how well the rich countries (Annex-II Parties) implement their commitments relating to the allocation of financial resources and technology. Again, the wording of the provision is curious. According to Bodansky, “although developing countries had sought to make their commitments legally contingent on the provision of adequate financial resources and technology, the Convention adopts a more neutral formulation, which makes the factual observation that developing country performance ‘will depend’ on the fulfillment of developed country commitments.”<sup>114</sup>

### **3.1.4 Specific commitments on financial resources and technology transfer**

Among the developed countries, the OECD members, otherwise known as the ‘most developed’ countries, have additional responsibilities to provide the poorer states with economic and technological assistance. In accordance with Article 4(3), Annex-II countries are required to provide *new and additional* financial resources to meet the *full* costs developing countries have in complying with their general commitment to communicate to COP information related to their implementation of the Convention; it does not include costs related to planning and implementation of mitigation or adaptation actions.

Article 4(3) further stipulates that such countries are also obliged to provide such financial resources, including for the transfer of technology, needed by the developing country Parties to meet the agreed full *incremental* costs of implementing measures covered by any of the general

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<sup>114</sup> Bodansky, 'UNFCCC Commentary', *supra* n. 93, p. 511 (footnote omitted).

commitments covered by Article 4(1). For such claims to be admissible, they must have agreed upon with the Global Environmental Facility (GEF).<sup>115</sup> According to the GEF Operational Strategy,

GEF funding should be used only for incremental costs. Actions by individual countries to achieve sustainable development at the national level can be complemented and supplemented by other efforts aimed at securing global environmental benefits. Efforts to secure global environmental benefits may impose additional costs (i.e., incremental costs) on countries beyond the costs of achieving national development goals.<sup>116</sup>

The term ‘incremental costs’ is thus understood to refer to the cost differential between a baseline action to address a national need and the additional cost of an action that in addition to addressing this need at the same time generates global environmental benefits.<sup>117</sup> For example, at the construction of a new coal power plant in a developing country, Annex-II countries are seemingly obliged to cover the additional costs of making this power plant more climate friendly than would usually be the case.

The purposes with the provisions of Article 4(3), as set out above, is to offset various costs in developing countries of implementing the general commitments of the UNFCCC. Article 4(4), on the other hand, serves the purpose to aid developing countries in adapting to climate change. It stipulates a concise and unqualified obligation of Annex-II countries to “assist those developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects.” To what extent this provision gives rise to an obligation for a *particular* state to provide *specific* assistance to any other state in highly uncertain.

## 3.2 The Kyoto Protocol

The Kyoto Protocol, an outcome of COP-3 in 1997, came into force on 16 February 2005. The detailed rules for the implementation of the Protocol were adopted at COP-7 in Marrakech in 2001, and are known as the Marrakech Accords. The Kyoto Protocol is an optional protocol to the UNFCCC and to date 183 States have ratified it.<sup>118</sup>

The Protocol sets a quantitative cap on greenhouse gas emissions for Annex-I countries of the UNFCCC. According to Article 3(1), such countries commit themselves to decrease their aggregate emissions by at

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<sup>115</sup> Which is the international entity referred to in Article 11. UNFCCC, *supra* n. 4, art. 4(3).

<sup>116</sup> Global Environment Facility, *Operational Strategy* (GEF Secretariat, Washington, DC, 1995).

<sup>117</sup> M. J. Mace, 'Funding for Adaptation to Climate Change: UNFCCC and GEF Developments since COP-7', 14 *Review of European Community and International Environmental Law* 225 (2005), p. 227.

<sup>118</sup> In addition to these, one regional economic integration organisation, the European Economic Community (EEC), is a Party to the Protocol. The USA stands out as the only developed country that has not ratified it. Status of ratification as of 14 January 2009, <[http://unfccc.int/kyoto\\_protocol/status\\_of\\_ratification/items/2613.php](http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php)>, visited on 20 May 2009.

least five percent below 1990 levels in the commitment period 2008 to 2012. Countries with economies in transition (non-Annex II countries) have the possibility to choose another base year.<sup>119</sup> The meagre commitments made by Annex-I countries in the Protocol should not be confused with the ultimate objective of the UNFCCC to prevent dangerous anthropogenic interference with the climate system.<sup>120</sup> The Protocol also introduces some mechanisms to facilitate the achieving of mitigation commitments: joint implementation, emission trading, and the clean development mechanism (CDM).

In its very first decision, the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP) initiated a process to consider further commitments for Annex-I Parties for the period beyond 2012.<sup>121</sup> This was done with reference to Article 3(9) of the Protocol, according to which commitments for subsequent periods for Annex-I Parties shall be established in amendments to Annex B of the Protocol.<sup>122</sup> The CMP further decided that this process should be conducted in an open-ended ad-hoc working group, whereby it established the Ad-hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP). It was agreed that this working group should aim to complete its work and have its results adopted in time to ensure that there is no gap between the first and the second commitment period.<sup>123</sup>

### 3.3 The Bali Road Map

In Bali in December 2007, COP-13 and CMP-3 succeeded in establishing a new framework for the negotiations. COP-13 adopted the Bali Action Plan (BAP),<sup>124</sup> which together with a number of decisions adopted by CMP-3 constitute what is commonly referred to as the Bali Road Map. The roadmap establishes a two-track process aiming at the identification of and agreement on a comprehensive post-2012 international climate change agreement at COP-15 and CMP-5 in Copenhagen in December 2009. The negotiations under the first track take place in the Ad-hoc Working Group on Long-Term Cooperative Action (AWG-LCA), established as part of the BAP for

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<sup>119</sup> Kyoto Protocol, *supra* n. 5, art. 3(5).

<sup>120</sup> UNFCCC, *supra* n. 4, art. 2.

<sup>121</sup> United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its first session, held at Montreal from 28 November to 10 December 2005. Addendum. Part Two: Action taken by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol at its first session* (hereinafter *CMP-1 Decisions*), 30 March 2006 (UN Doc. FCCC/KP/CMP/2005/8/Add.1), decision 1/CMP.1.

<sup>122</sup> Kyoto Protocol, *supra* n. 5, art. 3(9).

<sup>123</sup> United Nations Framework Convention on Climate Change, *CMP-1 Decisions*, *supra* n. 121, decision 1/CMP.1.

<sup>124</sup> United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007. Addendum. Part Two: Action taken by the Conference of the Parties at its thirteenth session* (hereinafter *COP-13 Decisions*), 14 March 2008 (UN Doc. FCCC/CP/2007/6/Add.1), 1/CP.13.

continued negotiations under the Convention.<sup>125</sup> The second track sets out the continuation of the work of the AWG-KP, which is required to provide recommendations to CMP-5 for adoption of further quantified emissions reduction commitments for Annex-I Parties in accordance with Article 3(9) of the Kyoto Protocol.

With the BAP, COP aimed to launch “a comprehensive process to enable the full, effective and sustained implementation of the Convention through long-term cooperative action, now, up to and beyond 2012, in order to reach an agreed outcome and adopt a decision at its fifteenth session.”<sup>126</sup> The BAP outlines five focus areas for the AWG-LCA. The first of these is,

*A shared vision for long-term cooperative action, including a long-term global goal for emission reductions, to achieve the ultimate objective of the Convention, in accordance with the provisions and principles of the Convention, in particular the principle of common but differentiated responsibilities and respective capabilities, and taking into account social and economic conditions and other relevant factors;*<sup>127</sup>

Although there is convergence among states on the necessary global goal for mitigation, the second part of this provision is of major controversy. As already mentioned, the understanding of the full implication of the principle of common but differentiated responsibilities differs between developed and developing countries, something the next section will address in more detail. From a human-rights perspective, the reference to “social and economic conditions and other relevant factors” is interesting, as it arguably opens for such considerations.

The second key issue identified in the BAP is enhanced action on mitigation, including consideration of *inter alia*

- nationally appropriate quantified emission limitation commitments by developed country Parties (Annex I),
- nationally appropriate mitigation actions by developing country Parties (non-Annex I) in the context of sustainable development,
- the use of sectoral approaches,
- approaches to enhance the cost-effectiveness of mitigation actions, including market mechanisms, and
- reducing emission from deforestation and forest degradation in developing countries.

The third and fourth focus areas for the AWG-LCA is enhanced action on adaptation. The particular focus here is on *inter alia*

- international cooperation to support urgent adaptation actions in developing countries that are particularly vulnerable, especially LDCs and SIDS, including vulnerability assessments, prioritization of actions, financial needs assessment, capacity building etc.,
- risk management and risk reduction strategies, with particular focus on insurance,

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<sup>125</sup> *Ibid.*, art. 2.

<sup>126</sup> *Ibid.*, art. 1.

<sup>127</sup> *Ibid.*, art. 1(a) (emphasis added).

- disaster reduction strategies, and
- economic diversification as an important way to build resilience.

The fourth area is enhanced action on the development, deployment, diffusion and transfer of environmentally sound technologies to support action on mitigation and adaptation in developing countries.

The fifth and final focus area in the BAP, which is also the most controversial, is enhanced action on the provision of financial resources and investment to support action on mitigation and adaptation. The main issue here is “[i]mproved access to adequate, predictable and sustainable financial resources and financial and technical support, and the provision of new and additional resources, including official and concessional funding for developing country Parties.”<sup>128</sup>

## 3.4 Gridlocks on the way to Copenhagen

This section will present three key issues of the international negotiations leading to COP-15 and CMP-5 in Copenhagen in December 2009. The aim is to help the unfamiliar reader to get a deeper understanding of the conflicting views on the operationalisation of the guiding principles of the UNFCCC.

### 3.4.1 Long-term goal for emissions reductions

Scientific studies and policy considerations have over the last years converged towards a threshold for dangerous climate change of a maximum rise in global average temperature of 2°C above the pre-industrial level.<sup>129</sup> AOSIS and the LDCs have repeatedly claimed that such a threshold is inappropriate, as it would have devastating consequences in many of these states due to sea level rise, coral bleaching, coastal erosion, changing precipitation patterns and the impacts of increasingly frequent and severe weather events. It is the standpoint of Maldives and AOSIS that the avoidance of climate change impacts on SIDS must be one of the key benchmarks for assessing the appropriateness of any long-term goal. They contend that the appropriate threshold is stabilisation of greenhouse gas concentrations in the atmosphere at less than 350 ppm CO<sub>2</sub>e, corresponding to an expected average global temperature increase around 1.5°C above pre-industrial level.<sup>130</sup> To reach this target, total world emissions would need to be reduced with more than 80 percent by 2050.

The general understanding among politicians in developed countries is

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<sup>128</sup> *Ibid.*, art. 1(e)(i).

<sup>129</sup> See e.g. Commission of the European Communities, *Towards a Comprehensive Climate Change Agreement in Copenhagen*, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (Commission of the European Communities, Brussels, 2009).

<sup>130</sup> United Nations Framework Convention on Climate Change, *Dialogue Working Paper 14. Submission from AOSIS*, Dialogue on Long Term Cooperative Action to Address Climate Change by Enhancing Implementation of the Convention, Fourth Workshop, Vienna, 27-31 August 2007, 24 August 2007.

that this is an impossible target. The current concentration of greenhouse gases in the atmosphere is 430 ppm CO<sub>2</sub>e [sic], a figure which is growing with about 2.5 ppm per year.<sup>131</sup> Stern finds 500 ppm CO<sub>2</sub>e concentration by 2050 a reasonable target, taking into account the mobilisation and action necessary to achieve it. At the same time, he admits that this target “with its high probability of exceeding the 2°C above pre-industrial times (96%) and a 44% probability of being above 3°C would indeed be a risky place to be.”<sup>132</sup> Stern’s view is confirmed by a recent poll by *The Guardian*, which reveals that while generally putting on a brave face in public, a majority of climate change researchers view the 2°C threshold as increasingly unrealistic. Out of 261 respondents, all of which are scientists that attended the climate change conference hosted by Copenhagen University in March 2009, 86 percent thought it would not be achieved. Over 100 of them believed the 2°C threshold to be technically and economically impossible. Only 18 scientists believed that the international community would succeed in keeping the global average temperature increase at 2°C or under.<sup>133</sup>

### 3.4.2 Nationally appropriate commitments and actions

It is clear that, in order to stay below 2°C, substantial mitigation efforts have to be made already by 2020. The IPCC has made some estimates of what emissions reductions are required to meet this target. From their place in the report, these estimates go under the name of ‘Box 13.7’.<sup>134</sup> Table 3 summarises this box. The original box is provided in Appendix 3. The three different levels of CO<sub>2</sub>e concentrations at stabilisation correspond to category I, III and IV in Table 2, respectively. When studying table 3, it is worth recalling that neither the UNFCCC, nor the Kyoto Protocol stipulate emissions reduction targets for developing countries.

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<sup>131</sup> N. Stern, *A Blueprint for a Safer Planet* (The Bodley Head, London, 2009), p. 150.

<sup>132</sup> *Ibid.*

<sup>133</sup> D. Adam, ‘World will not meet 2C warming target, climate change experts agree’, *The Guardian*, 14 April 2009, Main section, p. 1.

<sup>134</sup> Intergovernmental Panel on Climate Change, *Climate Change 2007: Mitigation. Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (hereinafter *AR4 WGIII*), B. Metz *et al.* (eds.) (Cambridge University Press, Cambridge, 2007), box 13.7, p. 776.

**Table 3**

CO <sub>2</sub> e concentration at stabilisation	Group of countries under UNFCCC	Emissions reductions needed in 2020	Emissions reductions needed in 2050
450 ppm	<i>Annex I</i>	-25% to -40% from 1990 levels	-80% to -95% from 1990 levels
	<i>Non-Annex I</i>	Substantial deviation from baseline in Latin America, Middle East, East Asia and Centrally-Planned Asia	Substantial deviation from baseline in all regions
550 ppm	<i>Annex I</i>	-10% to -30% from 1990 levels	-40% to -90% from 1990 levels
	<i>Non-Annex I</i>	Deviation from baseline in Latin America and Middle East, East Asia	Deviation from baseline in most regions, especially in Latin America and Middle East
650 ppm	<i>Annex I</i>	0% to -25% from 1990 levels	-30% to -80% from 1990 levels
	<i>Non-Annex I</i>	Baseline	Deviation from baseline in Latin America and Middle East, East Asia

With regard to the construction of mitigation commitments, there is a variety of different approaches to the quantification of emissions reductions. Three prominent approaches are:

- *Fixed base-year relative targets.* This is the approach adopted in the Kyoto Protocol for the first commitment period 2008-2012. The target is a percentage reduction from the national emissions of a certain base year. In this way, one can calculate the absolute number of tonnes of CO<sub>2</sub> to be reduced by an individual country. The strength of this approach has proven to be that it is grandfathering; it favours large per capita emitters, as it effectively gives them a right to continue to emit more greenhouse gases per capita than relatively low emitting Annex-I countries. Yet, this is at the same time its great weakness; in the light of the principle of equity, the model is arguably not suitable if developing countries too are to take on emissions reductions, an issue addressed further below.
- *Per-capita emission entitlements.* The starting point here is that ‘equity’ in the UNFCCC should be understood as an equal right of each person to the atmosphere. It is an approach that favours population-intensive countries like China and India. At the fifth session of the AWG-KP, India reportedly declared that it found it curious that Parties that are vocal on the equality of all human beings seems to suffer from amnesia when it comes to rights over the global environment. The EU reportedly replied that although the

<sup>135</sup> Already

in the drafting of the Convention, India proposed that it should promote the convergence of greenhouse gas emissions at common per capita level, yet this proposal was reduced to the noting in the Preamble that “per capita emissions in developing countries are still relatively low” and that “the share of global emissions originating in developing countries will grow to meet their social and development needs.”<sup>136</sup>

- *Historical responsibility/polluter pays.* Originally put forward by Brazil in 1997, this approach is often referred to as the Brazilian proposal.<sup>137</sup> It suggests that reductions towards an overall emission-reduction goal for Annex-I Parties (in 1997 the suggestion was 30 percent below 1990 levels by 2020) is to be shared among individual Annex-I Parties proportional to their relative share of responsibility for climate change. In many ways, this approach is a direct application of the polluter-pays principle, as it uses the cumulative historical emissions of a (developed) state as the basis for calculating the appropriate mitigation commitment of that state.

In relation to possible future mitigation commitments for developing countries, it is well worth recalling Article 4(7) of the UNFCCC: “The extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties.” In line with this, the BAP declares that nationally appropriate mitigation actions in developing countries should be “supported and enabled by technology, financing and capacity-building, in a measurable, reportable and verifiable manner.”<sup>138</sup> Developed countries like the USA and Japan want large emitters like China, India and Brazil to also take on commitments. Yet, there is a concern among these developing countries that this would constrain their development and leave them without possibility to eventually catch up with the developed states. For this reason, they are adamantly against any for them binding emissions reduction commitments. India has summarized its standpoint as follows:

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<sup>135</sup> H. Jhamtani, 'Strong Debate in AWG-KP but No Clear Direction in Emission Reductions', *TWN Bonn News Updates*, No. 6, 31 March to 1 April 2009.

<sup>136</sup> See Bodansky, 'UNFCCC Commentary', *supra* n. 93, p. 498; UNFCCC, *supra* n. 4, Preamble, para. 3.

<sup>137</sup> United Nations Framework Convention on Climate Change, *Ad hoc Group on the Berlin Mandate 7. Implementation of the Berlin Mandate. Additional proposals from Parties. Addendum 3*, 30 May 1997 (UN Doc. FCCC/AGBM/1997/MISC.1/Add.3).

<sup>138</sup> United Nations Framework Convention on Climate Change, *COP-13 Decisions*, *supra* n. 124, decision 1/CP.13, art. 1(b)(ii).

It is inevitable that the pursuit of social and economic development by developing countries, will result in an increase in their GHG emissions, for the foreseeable future. This is recognized in the UNFCCC itself. Despite this, India has already declared that even as it pursues its social and economic development objectives, it will not allow its per capita GHG emissions to exceed the average per capita emissions of the developed countries. This effectively puts a cap on our emissions, which will be lower if our developed country partners choose to be more ambitious in reducing their own emissions.<sup>139</sup>

At the meetings in Bonn in April 2009, there surfaced a fear among developing countries that some developed countries are seeking to introduce non-Annex I Party commitments by the back-stairs. The concern raised is that if the AWG-LCA establishes a global goal at the same time as the AWG-KP decides on relatively low national emissions reduction targets for Annex-I Parties, then developing countries will be asked to take on responsibility for what remains.<sup>140</sup> If the developing countries for this reason refuse to agree on a global goal in the AWG-LCA, this could potentially lead to a deadlock.

### 3.4.3 Adaptation finance

A crucial issue for developing countries is that of adaptation finance. There seems to be convergence among the States Parties on that resources should be “new and additional, adequate, predictable and sustainable” and that the generation of resources should be based on the principles of equity and common but differentiated responsibilities.<sup>141</sup> Proposals put forward by States for the generation of financial resources include:

- an assessed contribution from developed countries as a percentage of GDP;
- an assessed contribution from all Parties, except LDCs, based on a predefined set of criteria, including greenhouse gas emissions, capacity and population;<sup>142</sup>
- auctioning of assigned amounts or emission allowances;
- a uniform levy on CO<sub>2</sub> emissions, with exemptions for LDCs;<sup>143</sup>

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<sup>139</sup> Republic of India, *The Road to Copenhagen: India's Position on Climate Change Issues* (Public Diplomacy Division, Ministry of External Affairs, New Delhi, 2009), p. 5.

<sup>140</sup> Third World Network, 'TWN Intervention AWG-LCA Workshop on 1(b)(ii) of the Bali Action Plan', *TWN Bonn News Updates*, No. 7, 1 April 2009.

<sup>141</sup> United Nations Framework Convention on Climate Change, *AWG-LCA 5. Fulfilment of the Bali Action Plan and Components of the Agreed Outcome. Note by the Chair. Part II*, 18 March 2009 (UN Doc. FCCC/AWGLCA/2009/4 (PartII)), p. 17.

<sup>142</sup> Comp. P. Baer et al., *The Right to Development in a Climate Constrained World: The Greenhouse Development Rights Framework. Second Edition Executive Summary* (Heinrich Böll Stiftung, Berlin, 2008); Oxfam International, *Adapting to Climate Change: What's Needed in Poor Countries, and Who Should Pay*, K. Raworth (ed.), Oxfam Briefing Paper no. 104 (Oxfam International, Oxford, 2007).

<sup>143</sup> Comp. Swiss Confederation, *Funding Scheme for Bali Action Plan: A Swiss Proposal for Global Solidarity in Financing Adaptation. "Bali Paper" updated for SB28 Bonn. Final draft* (hereinafter *Swiss Funding Scheme for Bali Action Plan*) (Federal Office for the Environment, Federal Department of the Environment, Transport, Energy and Communications, Swiss Confederation, Berne, 2008).

- a tax on air travel; and
- a global levy on international monetary transactions (otherwise known as the Tobin tax).<sup>144</sup>

The view of G77 and China is that OECD countries are obliged, in accordance with Article 4(3) of the UNFCCC, to provide them with resources to meet not only the costs of mitigation actions, but also the costs of adaptation.<sup>145</sup> This is not in line with GEF's understanding of 'incremental costs', according to which a country can only be compensated for such extra costs that are due to the fulfilment of a global environmental objective.<sup>146</sup>

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<sup>144</sup> United Nations Framework Convention on Climate Change, *AWG-LCA 5. Fulfilment of the Bali Action Plan and Components of the Agreed Outcome. Note by the Chair. Part II*, *supra* n. 141, p. 17.

<sup>145</sup> United Nations Framework Convention on Climate Change, *AWG-LCA 3. Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan. Submissions from Parties. Addendum* (hereinafter *AWG-LCA 3, Submissions from Parties, Add.1*), 27 August 2008 (UN Doc. FCCC/AWGLCA/2008/MISC.2/Add.1), p. 36.

<sup>146</sup> See ch. 3.1.4 above.

## 4 Extraterritorial obligations in international human rights law

Over the past decade, there has been an increasing number of calls for a human rights approach to climate change. Within the UN, Maldives has long been in the vanguard of this movement, most prominently as the initiator of the Human Rights Council resolutions 7/23 of March 2008 and 10/4 of March 2009, both on human rights and climate change.<sup>147</sup> The former of these resolutions requested the OHCHR to conduct a detailed analytical study on the relationship between climate change and human rights. The OHCHR found that projected climate change impacts will have significant direct effects on a great number of human rights such as *inter alia* the right to life, food, water, health, and housing.<sup>148</sup> Building on the report, the latter of the resolutions recognises that “effective international cooperation to enable the full, effective and sustained implementation of [the UNFCCC] in accordance with [its] provisions and principles ... is important in order to *support national efforts* for the realization of human rights implicated by climate change-related impacts.”<sup>149</sup> In this resolution, the Human Rights Council further affirms that “human rights obligations and commitments have the potential to inform and strengthen international and national policy-making in the area of climate change, promoting policy coherence, legitimacy and sustainable outcomes.”<sup>150</sup>

The implications of these carefully worded statements do not necessarily answer to the expectations developing countries have in a human rights approach to climate change. Although the entire premise behind international human rights law is arguably that “Swedes are not only concerned with the wellbeing of Swedes, and Nigerians are not solely concerned with the wellbeing of Nigerians,” history clearly shows that States’ human rights obligations are understood as principally domestic.<sup>151</sup>

What the LDCs and AOSIS, under the lead of Maldives, seek to achieve by their increasing use of human rights language in the international negotiations on climate change is global equity. According to their understanding, this requires drastic greenhouse gas emissions reductions by

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<sup>147</sup> United Nations Human Rights Council, *Resolution 7/23 on Human Rights and Climate Change*, 28 March 2008 (UN Doc. A/HRC/RES/7/23); United Nations Human Rights Council, *Resolution 10/4 on Human Rights and Climate Change*, 25 March 2009 (UN Doc. A/HRC/RES/10/4).

<sup>148</sup> Office of the United Nations High Commissioner for Human Rights, *The Relationship between Climate Change and Human Rights*, *supra* n. 1.

<sup>149</sup> United Nations Human Rights Council, *Resolution 10/4 on Human Rights and Climate Change*, *supra* n. 147, para. 9.

<sup>150</sup> *Ibid.*, para. 10 (emphasis added).

<sup>151</sup> S. I. Skogly and M. Gibney, 'Economic Rights and Extraterritorial Obligations', in S. Hertel and L. Minkler (eds.), *Economic Rights: Conceptual, Measurement, and Policy Issues* (Cambridge University Press, Cambridge, 2008), p. 273.

developed states and redistribution of economic and technical resources in relation to adaptation need. Extraterritorial rights talk in relation to the environment has been identified as “frequently confused and inconclusive, not least because the theoretical considerations which should underpin argument on such important legal and moral questions are often ignored or taken for granted.”<sup>152</sup> Although this is unfortunately still very much the case in the climate change negotiations, it is not surprising, as extraterritorial obligations for human rights is a notoriously obscure area of international law.

Against this backdrop, the following chapter analyses States’ extraterritorial obligations for human rights. It begins by outlining some general obligations of international co-operation. It then turns to the international bill of rights and the important difference in this respect between the two 1966 Covenants. While each part it includes a brief outline of what individual human rights are potentially affected by climate change, the focus is on the extraterritorial aspects of the nature and scope of States’ obligations. The third part describes in some detail the concept of peoples’ rights, and analyses the current status of three such rights in international law.

## **4.1 General obligations of international co-operation**

### **4.1.1 The Purposes of the United Nations**

For obvious reasons, the natural starting point for an analysis of general obligations of international cooperation is the Charter of the United Nations (UN Charter).<sup>153</sup> It was with the Charter that human rights ideals for the first time were elevated to the area of international law, declared as a necessary element in the foundation of a peaceful and prosperous international order.<sup>154</sup> The four purposes of the organisation, which the members are obliged to pursue in good faith,<sup>155</sup> are set out in the first article of the Charter:

- to maintain international peace and security by *inter alia* taking effective collective measures for the prevention and removal of threats to the peace,
- to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples,

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<sup>152</sup> J. G. Merrills, 'Environmental Protection and Human Rights: Conceptual Aspects', in A. Boyle and M. Anderson (eds.), *Human Rights Approaches to Environmental Protection* (Oxford University Press, New York, 1998), p. 25.

<sup>153</sup> Charter of the United Nations (hereinafter UN Charter), concluded 26 June 1945, entered into force 24 October 1945, 3 Bevens 1153.

<sup>154</sup> M. E. Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford University Press, Oxford, 2007), p. 66.

<sup>155</sup> Vienna Convention on the Law of Treaties (hereinafter VCLT), concluded 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331, art. 26.

- to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all, and
- to be a centre for harmonizing the actions of nations in the attainment of these common ends.

As an unprecedented threat to our common environment, and thereby to economic, social and cultural prosperity worldwide, as well as a serious threat to peace and security,<sup>156</sup> climate change could very well turn out the ultimate test for the UN.

Chapter IX of the UN Charter, titled ‘International Economic and Social Cooperation’, includes provisions that elaborate further on the purposes of the organisation. In the drafting process, Article 55 in that chapter was regarded as “the provision that would implement Art. 1, stressing necessity of UN action.”<sup>157</sup> Article 55 stipulates that,

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.<sup>158</sup>

Although the term promote might seem to suggest otherwise, the pursuit of a, b and c is a hard obligation for the Member States; according to Article 56 of the Charter, “[a]ll Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.” This reference to the purposes of Article 55 must be understood as a, b, and c *per se*, and not the promotion of these through the work of UN. Such an understanding is affirmed by the explicit proviso in Article 56 that States should take action *in cooperation* with the UN.

#### **4.1.2 Articles 22 and 28 of the Universal Declaration on Human Rights**

The Universal Declaration on Human Rights (UDHR) was adopted by vote in the General Assembly on 10 December 1948.<sup>159</sup> It reaffirms and

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<sup>156</sup> See e.g. D. Smith and J. Vivekananda, *A Climate of Conflict: The Links between Climate Change, Peace and War*, International Alert (International Alert, London, 2007).

<sup>157</sup> R. Wolfrum, ‘Chapter IX: International Economic and Social Co-operation, Article 55(a) and 55(b)’, in B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 2<sup>nd</sup> ed., vol. 2 (Oxford University Press, Oxford, 2002), p. 898 (footnote omitted).

<sup>158</sup> UN Charter, *supra* n. 153, art. 55.

strengthens the understanding in the UN Charter that cooperation between states is necessary for the achievement of economic, social and cultural (esc) rights. To begin with, Article 22 of the UDHR stipulates that,

Everyone, as a member of society, has the right to social security and is entitled to realization, *through national effort and international co-operation* and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.<sup>160</sup>

A second important provision is Article 28, which declares that “[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.” Its rationale lies close to that behind the establishment of the UN, the purpose of which in many ways is to form the institutional framework of the fulfilment of this right.<sup>161</sup> Article 28 has been said to reflect a general concern of the post-World War II period: “the need actively to restructure society, at the national and international levels, in such a way that the equality and dignity of the human being can be transformed from rhetoric to reality.”<sup>162</sup>

While phrased in vague terms, Article 28 should by no means be considered as void of value. Even if construed in its strictest sense, it gives rise to a fundamental universal obligation of all States: to cooperate at least to a degree that secures the *possibility* of everyone to have his or her rights fully realized. This implies that all States have a joint obligation to change the existing international order if it fails to effectively address a situation in which an individual State with the best of intentions can no longer ensure the human rights of its citizens. In a business as usual scenario, climate change risks putting a number of States in such situations. Regarding the status of this particular right in international customary law, it is enough for this thesis to conclude that, as the following sections of this chapter will show, the wording of Article 28 recur in several subsequent human rights treaties and documents.

## 4.2 The 1966 Covenants

The International Covenant on Civil and Political Rights (ICCPR)<sup>163</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>164</sup> together form the legally binding counterpart of the UDHR.

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<sup>159</sup> 48 out of 56 UN members voted in favour, none voted against, and eight abstained. Abstentions were lodged by Belarus, Czechoslovakia, Poland, Saudi Arabia, South Africa, Ukraine, the USSR, and Yugoslavia. Universal Declaration on Human Rights (hereinafter UDHR), General Assembly res. 217A (III), adopted 10 December 1948 (UN Doc. A/810 at 71).

<sup>160</sup> Emphasis added.

<sup>161</sup> A. Eide, 'Article 28', in A. Eide *et al.* (eds.), *The Universal Declaration of Human Rights: A Commentary*, 2<sup>nd</sup> ed. (Scandinavian University Press, Oslo, 1993), p. 438 *et seq.*

<sup>162</sup> *Ibid.*, p. 439.

<sup>163</sup> International Covenant on Civil and Political Rights (hereinafter ICCPR), concluded 16 December 1966, entered into force 23 March 1976, 999 UNTS 171.

<sup>164</sup> International Covenant on Economic, Social, and Cultural Rights (hereinafter ICESCR), concluded 16 December 1966, entered into force 3 January 1976, 993 UNTS 3.

The three instruments together make up what is commonly referred to as ‘the international bill of rights’. The rights therein are frequently referred to as “universal, indivisible and interdependent and interrelated.”<sup>165</sup> Yet, as the analysis will show, there are important differences in the nature and scope of states’ obligations under the two Covenants.

Human rights obligations are generally divided into three classes: to respect, to protect and to fulfil.<sup>166</sup> This classification is particularly helpful when navigating the complex area of extraterritorial responsibility for human rights. While the obligation to respect is negative in nature, the obligations to protect and to fulfil are positive in nature. The obligation to respect relates merely to the behaviour and actions of a State: the State must ensure that its own actions do not violate human rights. The obligation to protect deals instead with the actions of third parties: the State must ensure that enterprises or individuals do not deprive people of their human rights. Finally, the obligation to fulfil demands that the State pro-actively engages in activities that aim either to maintain, establish or improve standards. An obligation to fulfil is either absolute or programmatic. A prominent example of an absolute obligation to fulfil is the right to a fair trial.<sup>167</sup> In contrast to civil and political rights, esc rights are generally programmatic and subject to progressive realisation.<sup>168</sup>

## 4.2.1 The International Covenant on Civil and Political Rights

As shown in chapter 2, climate change risk having catastrophic effects in Maldives. As people risk to die from direct as well as indirect consequences of global warming, climate change ultimately threatens ‘the inherent right to life’ as protected under Article 6(1) of the ICCPR.<sup>169</sup> According to the Human Rights Committee (HRC), this right cannot be construed

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<sup>165</sup> Vienna Declaration and Programme of Action, World Conference on Human Rights, adopted 25 June 1993 (UN Doc. A/CONF.157/23), para. 5.

<sup>166</sup> See Committee on Economic Social and Cultural Rights, *General Comment 12: The Right to Adequate Food* (hereinafter GC 12), 12 May 1999 (UN Doc. E/C.12/1999/5), para. 15; A. Eide, ‘Economic, Social and Cultural Rights as Human Rights’, in A. Eide *et al.* (eds.), *Economic, Social and Cultural Rights* (Kluwer Law International, The Hague, 2001), p. 23 *et seq.*

<sup>167</sup> ICCPR, *supra* n. 163, art. 9(3).

<sup>168</sup> On the meaning of this term, the Committee has stated that “[t]he concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. [...] It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d’être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.” Committee on Economic Social and Cultural Rights, *General Comment 3: The Nature of States Parties Obligations* (hereinafter GC 3), 14 December 1990 (UN Doc. E/1991/23), para. 9.

<sup>169</sup> ICCPR, *supra* n. 163, art. 6: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

narrowly.<sup>170</sup> This is apparently also the view of the European Court of Human Rights, which has found that it includes an obligation to protect individuals from potential hazards by taking appropriate measures to reduce known risks.<sup>171</sup>

To what extent does the obligation to protect the lives of individuals extend beyond the borders of a State Party to the Covenant? The jurisdictional and territorial scope of the ICCPR is of some controversy. According to Article 2(1) of the ICCPR,

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant...<sup>172</sup>

Already at an early stage, commentators held that a literal interpretation of this provision would lead to a manifestly absurd result. With reference to the supplementary means of treaty interpretation,<sup>173</sup> it was suggested that ‘within its territory *and* subject to its jurisdiction’ should be construed as ‘within its territory *or* subject to its jurisdiction’.<sup>174</sup> A similar interpretation has been endorsed by the HRC. In the case in *Lopez Burgos v. Uruguay*, the Committee held that Article 2(1) “does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it.”<sup>175</sup> It justified this view by stating that “it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.”<sup>176</sup> This standpoint was later confirmed by the Committee in a general comment, in which it held that,

States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory *and* to all persons subject to their jurisdiction [...] This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained...<sup>177</sup>

In relation to this, it is worth noting that the notion of ‘effective control’ in relation to jurisdiction (individuals under the effective control of State

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<sup>170</sup> Human Rights Committee, *General Comment 6: The Right to Life* (hereinafter *GC 6*) (UN Doc. HRI/GEN/1/Rev.6 at 127).

<sup>171</sup> *Comp. Öneriyildiz v. Turkey*, Grand Chamber Judgment, 30 November 2004, European Court of Human Rights, no. 48939/99.

<sup>172</sup> ICCPR, *supra* n. 163, art. 2(1).

<sup>173</sup> *Comp. VCLT, supra* n. 155, art. 32.

<sup>174</sup> M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2<sup>nd</sup> rev. ed. (Engel, Kehl am Rhein, Germany, 2005), p. 44.

<sup>175</sup> *Burgos v. Uruguay*, Views, 29 July 1981, Human Rights Committee, no. 52/1979, para. 12(3).

<sup>176</sup> *Ibid.*

<sup>177</sup> Human Rights Committee, *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (hereinafter *GC 31*), 29 March 2004 (UN Doc. CCPR/C/21/Rev.1/Add.13), para. 10 (emphasis added).

actors) should not be confused with ‘effective control’ as the key criterion of attribution of actions or omissions to a State (whether the actors are really under the control of the State).<sup>178</sup> Unfortunately, these concepts are frequently confused in academic writing.

It has been suggested that an extraterritorial duty to at least respect human rights is a corollary of the very essence of human rights.<sup>179</sup> It is not surprising therefore that – in addition to the arguably innovative interpretation of the HRC – there are other suggestions on how to construe Article 2(1) of the ICCPR. For example, according to Künnemann, it is only the positive obligation ‘to ensure’, and not the negative obligation ‘to respect’, that is jurisdictionally limited. If the obligation ‘to respect’ too is to be considered limited, he argues, the text should have read “to respect and ensure to all individuals...” and not, as is the case, “to respect and to ensure to all individuals...”.<sup>180</sup> Such a construal is arguably not only coherently appealing, but also closer to the original text than that of the HRC. Looking at the regional human rights conventions, the wording of the American Convention on Human Rights seemingly recognise this difference between the obligation to respect and that to ensure.<sup>181</sup> The relevant provision of the European Convention on Human Rights, on the other hand, does not allow for a similar interpretation.<sup>182</sup> Finally, the African Charter on Human and Peoples’ Rights does not at all bring up the issue of territorial limitations, but is truly universal in its language.<sup>183</sup> Be it as it may, to date no

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<sup>178</sup> In the case *Nicaragua v. the United States of America*, the International Court of Justice (ICJ) held that the acts of a paramilitary group called the *contras* were not attributable to the US, although the US were responsible for equipping and training them. According to the Court, for the conduct of the *contras* to give rise to legal responsibility of the US, it would have to be shown that the US had effective control of their operations. *Nicaragua v. United States of America*, Merits, 27 June 1986, International Court of Justice, para. 115; see also International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries thereto* (hereinafter Draft Articles on State Responsibility), Report of the International Law Commission: Fifty-third session, 23 April-1 June and 2 July-10 August 2001 (UN Doc. A/56/10 pp. 59-365), art 2.

<sup>179</sup> Skogly and Gibney, ‘Economic Rights and Extraterritorial Obligations’, *supra* n. 151, p. 274 *et seq.*

<sup>180</sup> R. Künnemann, ‘Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights’, in F. Coomans and M. T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp, 2004), p. 228.

<sup>181</sup> American Convention on Human Rights (hereinafter ACHR), concluded 22 November 1969, entered into force 18 July 1978, 1144 UNTS 123, art. 1(1): “The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”

<sup>182</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos 3, 5, 8 and 11 (hereinafter ECHR), concluded 4 November 1950, entered into force 3 September 1953, 213 UNTS 222, art. 1: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”

<sup>183</sup> African Charter on Human and Peoples’ Rights (hereinafter ACHPR), concluded 27 June 1981, entered into force 21 October 1986 (OAU Doc. CAB/LEG/67/3 Rev. 5), art. 1: “The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.”

international adjudicating body has explicitly held the obligation to respect human rights territorially and jurisdictionally unlimited. For this reason, Künnemann's interpretation cannot be said to have a firm basis in international law.

## 4.2.2 The International Covenant on Economic, Social and Cultural Rights

Rights under the ICESCR that are at risk from climate change include the right to work,<sup>184</sup> the right to an adequate standard of living including adequate food, housing, and water,<sup>185</sup> the right to freedom from hunger,<sup>186</sup> and the right to the highest attainable standard of health.<sup>187</sup> The question of concern here is what extraterritorial obligations in relation to these rights that the Covenant gives rise to.

To begin with, the third paragraph of the Preamble of the ICESCR declares that “in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if *conditions are created* whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.”<sup>188</sup> In addition to the clear reference to Article 28 and the right of everyone to a particular international order, this is a recognition of the understanding set out in Article 22 of the UDHR that everyone is “entitled to realization, *through national effort and international co-operation* and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.” The importance of international cooperation is reiterated in Article 2(1), which sets out the nature and scope of States' obligations under the Covenant:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.<sup>189</sup>

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<sup>184</sup> ICESCR, *supra* n. 164, art. 6(1): “The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.”

<sup>185</sup> *Ibid.*, art. 11(1) first sentence: “The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.” The Committee on Economic, Social and Cultural Rights has interpreted this provision as non-exhaustive and has declared that an adequate amount of safe water also is covered by this umbrella right. Committee on Economic Social and Cultural Rights, *General Comment 15: The Right to Water* (hereinafter GC 15) (UN Doc. E/C.12/2002/11).

<sup>186</sup> ICESCR, *supra* n. 164, art. 11(2), cited in full below.

<sup>187</sup> *Ibid.*, art. 12(1): “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”

<sup>188</sup> *Ibid.*, Preamble, para. 3 *et seq.*

<sup>189</sup> *Ibid.*, art. 2(1).

In relation to the notion of progressive realisation of esc rights, it is worth noting that the Committee has declared that, irrespective of available resources, “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party.”<sup>190</sup>

Notably, in contrast to the ICCPR, Article 2(1) of the ICESCR does not mention jurisdiction as a delimiting criterion for the scope of States’ obligations. Yet, as the Committee on Economic, Social and Cultural Rights has made clear, this does not mean that the obligations therein are equally owed to everyone in the world. For example, with regard to the Israeli occupation of the Palestinian Territories, the Committee has stated that “the Covenant applies to all areas where Israel maintains geographical, functional or personal jurisdiction”, and that “the State’s obligations under the Covenant apply to all territories and populations under its effective control.”<sup>191</sup> Although similar in this respect, there is an important conclusion to be drawn on the difference of the two sets of rights. As Skogly and Gibney points out,

Many have commented on the division of the Covenants into two instruments and argue that this was a result of the different nature of the rights ... that civil and political rights could be implemented immediately, whereas economic, social and cultural rights are more of a long-term/programmatic aspiration. Be that as it may ... few, if any, have commented on the fact that the need for international assistance and cooperation was seen as essential for the realization of economic, social and cultural rights...<sup>192</sup>

As already noted in the introduction of this thesis, there is scarcity of legal doctrine on the meaning and content of obligations of international cooperation and extraterritorial responsibility for esc rights. That this area has not been researched further may be a result of a general wish among human rights scholars to downplay any differences between the two sets of rights in order to strengthen the position of economic, social and cultural rights, something which in that case may very well have been counterproductive.

In the general comments of the Committee, substantive examples of how States are obliged to respect the rights of the Covenant in their international relations are very limited. With regard to the imposition of sanctions, the Committee has held that “the international community itself [must] do everything to protect at least the core content of the economic, social and cultural rights of the affected people of the [targeted] State.”<sup>193</sup> The notion of ‘protect’ here should arguably not be understood as protection from actions of third parties, but to make sure that the sanctions do not result in

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<sup>190</sup> Committee on Economic Social and Cultural Rights, *GC 3*, *supra* n. 168, para. 10.

<sup>191</sup> Committee on Economic Social and Cultural Rights, *Concluding Observations on Israel*, Report on the Eighteenth and Nineteenth Sessions, 27 April-15 May 1998 and 16 November-4 December 1998 (UN Doc. E/1999/22), paras. 232, 234, p. 43 *et seq.*

<sup>192</sup> Skogly and Gibney, ‘Economic Rights and Extraterritorial Obligations’, *supra* n. 151, p. 273.

<sup>193</sup> Committee on Economic Social and Cultural Rights, *General Comment 8: The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights* (hereinafter GC 8), 12 December 1997 (UN Doc. E/C.12/1997/8), para. 7.

the breach of the minimum standard acceptable (an obligation to respect) and seemingly, if they do so, to remedy this by re-establishing such standard (an obligation to correct or possibly to fulfil). Additionally, the Committee has declared that States must refrain from embargoes that either (i) endanger the food production and access to food in other countries,<sup>194</sup> or (ii) that restrict the supply of another State with adequate medicines and medical equipment.<sup>195</sup>

Turning to the extraterritorial obligation to protect, this implies, as already mentioned, regulating the behaviour of private parties, primarily multi- and transnational corporations. In relation to the right to health, the Committee has declared that,

To comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law.<sup>196</sup>

In other words, States Parties to the ICESCR are under an obligation to exercise due diligence to ensure, by means of effective regulation and remedies, that companies with headquarters in their jurisdiction do not abuse esc rights abroad. This is also the understanding of the Committee in general comment no. 15 on the right to water.<sup>197</sup>

Turning finally to the third category of human rights obligations – to fulfil – this is where the obligation of international assistance and cooperation has its most important implications. Many of these implications relate to the right to development, which is dealt with in chapter 4.3.3 below. In its general comment on the nature of States Parties obligations, the Committee declares that all States have an obligation – in accordance with the UN Charter, general principles of international law, as well as provisions of the Covenant itself – to cooperate for development and thus for the realisation of esc rights. Although it might seem so, the obligation to cooperate for the realisation of esc rights should not be seen as an outflow of, and because of this somehow dependent on, the right to development *per se*. Rather, the term ‘development’ should be understood as an alternative way to express the notion of progressive realisation. The Committee adds that this obligation of cooperation is “particularly incumbent upon those States which are in a position to assist others in this regard.”<sup>198</sup> This notion

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<sup>194</sup> Committee on Economic Social and Cultural Rights, *GC 12*, *supra* n. 166, para. 37.

<sup>195</sup> Committee on Economic Social and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health* (hereinafter *GC 14*), 11 August 2000 (UN Doc. E/C.12/2000/4), para. 41.

<sup>196</sup> *Ibid.*, para. 39.

<sup>197</sup> Committee on Economic Social and Cultural Rights, *GC 15*, *supra* n. 185, para. 33: “Steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries. Where States parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations Charter and applicable international law.”

<sup>198</sup> Committee on Economic Social and Cultural Rights, *GC 3*, *supra* n. 168, para. 14.

of common but differentiated responsibilities is repeated in the general comment on the right to water:

For the avoidance of any doubt, the Committee wishes to emphasize that it is particularly incumbent on States parties, and other actors in a position to assist, to provide ‘international assistance and cooperation, especially economic and technical’ which enables developing countries to fulfil their core obligations...<sup>199</sup>

The term ‘enable’, in contrast to e.g. ‘assist’, suggests that the quantity and quality of international assistance must be enough to give developing countries the *necessary means* to establish minimum standards.

In addition to Article 2(1), Article 11 on the right to adequate food also contain references to international cooperation important for the full understanding of the extraterritorial obligation to fulfil. While the first paragraph of Article 11 merely reiterates the importance of cooperation for the realisation of this right,<sup>200</sup> the second paragraph stipulates that,

The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.<sup>201</sup>

It is not the repetition of the obligation to cooperate as a means to ensure this right that is striking with Article 11(2), but the implications of its last paragraph: the Covenant requires States Parties to take the measures needed to ensure an *equitable* distribution of world food supplies *in relation to need*. This is a type of obligation that stands in sharp contrast to the traditional understanding of human rights as regulating the relationship between a State and its citizens. Arguably, the corresponding right is not an individual human right, but rather a right of a group, a people or maybe even an individual state. As such, it bears many similarities with the concept of peoples’ rights, which is dealt with below in section 4.3. Although controversial, it is not surprising in the light of the clear wording of Article 11(2) that the Committee has concluded that States Parties are obliged to “take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and *to provide the necessary*

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<sup>199</sup> Committee on Economic Social and Cultural Rights, *GC 15*, *supra* n. 185, para. 38.

<sup>200</sup> ICESCR, *supra* n. 164, art. 11(1): “The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.”

<sup>201</sup> *Ibid.*, art. 11(2).

*aid* when required.”<sup>202</sup> According to the Committee, this responsibility is joint and individual, and each State should contribute in accordance with its ability.<sup>203</sup>

Finally, the analysis would not be complete without the mentioning of Article 23, according to which the States Parties agree that international action for the achievement of the rights of the Covenant includes *inter alia* (i) the conclusion of conventions, (ii) the adoption of recommendations, (iii) the furnishing of technical assistance, and (iv) the holding of regional meetings and technical meetings for the purpose of consultation and study.<sup>204</sup>

To conclude, States Parties to the ICESCR have extraterritorial obligations to respect, protect and fulfil the rights therein. For example, there is duty of states in a position to do so to provide economic and technological assistance to other states that are in need of this in order to fulfil minimum essential levels esc rights. Although there is no legal obstacle for doing so, this duty has so far never been translated by any UN body into a legal obligation for a *particular* state to provide *specific* assistance to any other state.<sup>205</sup>

### 4.3 The rights of peoples

In the analysis above of the extraterritorial responsibility of States under the international bill of rights, the right of peoples to self-determination was intentionally omitted. From its position – common Article 1 of the ICCPR and the ICESCR – it follows that it is not subject to Article 2(1) of the Covenants, which set out the nature of States Parties obligations in relation to individual human rights. Rather, it is an overarching principle that sets the playing field of international law, recalling that sovereign states are the building blocks of the international legal order.

The following analysis begins with setting out the theoretical underpinnings and nature of the concept of peoples’ rights. It then examines the status and scope of a selection of peoples’ rights: the right of self-determination, the right to subsistence, the right to development, and the right to a healthy environment. This will be done in the light of the particular threat of global climate change. The chapter concludes with some brief comments on the overall merits and status of the concept of peoples’ rights in international law.

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<sup>202</sup> Committee on Economic Social and Cultural Rights, *GC 12*, *supra* n. 166, para. 36 (emphasis added).

<sup>203</sup> *Ibid.*, para. 36 *et seq.*

<sup>204</sup> ICESCR, *supra* n. 164, art. 23.

<sup>205</sup> P. Alston and G. Quinn, 'The Nature of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', *9 Human Rights Quarterly* 156 (1987), p. 191; P. Alston, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals', *27 Human Rights Quarterly* 755 (2005), p. 777.

### 4.3.1 Background

In the postcolonial era there was a strong sense of need to elevate and operationalise the vague and open-ended obligation of States to cooperate.<sup>206</sup> In the light of the imperative role in the era of decolonisation of the right of peoples to self-determination, it is not surprising that other rights of peoples were soon formulated and found their way into international soft-law.<sup>207</sup>

While the rights of the ICCPR and the ICESCR are commonly known as the first and the second generation of human rights respectively, peoples' rights, otherwise known as solidarity rights, have been seen as a 'third generation' of human rights. It was Karel Vasak, former legal advisor at Unesco, who popularised the concept of peoples' rights.<sup>208</sup> He argued that there is an important parallel to be drawn between the evolution of human rights and the tripartite motto of the French Revolution: *liberté, égalité, fraternité*; liberty, equality and fraternity (brotherhood).<sup>209</sup>

According to Vasak's line of reasoning, the first generation rights are the civil and political rights which emerged from the American and French revolutions, calling for restraints from the State. The second generation rights emerged with the socialist revolution in Russia, and later echoed in the West through the concept of the welfare state. Finally, the third generation rights is a response to increasing global interdependence of states and the recognition that the realisation of human rights require cooperation and solidarity between States.<sup>210</sup> Responsibility for peoples' rights is understood as lying jointly with the individual state and the international community.<sup>211</sup> Although the tripartite motto of the French Revolution is a memorable historical parallel, a more relevant ground for philosophical differentiation between the three generations is that they respond roughly to the intrinsic values of liberalism, socialism and cosmopolitanism respectively.<sup>212</sup>

Before turning to the analysis of three specific rights of peoples, this concept in itself begs the question: who is a holder of such rights? This has proven a controversial issue; while some commentators argue that peoples' rights are human rights and that the rights holders therefore are individual human beings, others argue that peoples in themselves can be rights holders,

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<sup>206</sup> P. Alston, 'Introduction', in P. Alston (ed.), *Peoples' Rights* (Oxford University Press, New York, 2001).

<sup>207</sup> For the reader unfamiliar with international legal jargon, soft-law is a term used to refer to multilateral declarations and other international legal documents which are not treaties, and thus not legally binding, but which still may influence customary international law.

<sup>208</sup> K. Vasak, 'A 30-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights', *UNESCO Courier*, November 1977, p. 29.

<sup>209</sup> *Ibid.*

<sup>210</sup> *Ibid.*; R. Rich, 'Right to Development: A Right of Peoples?', in J. Crawford (ed.), *The Rights of Peoples* (Oxford University Press, Oxford, 1988), p. 41.

<sup>211</sup> Unesco, *Unesco and Peoples' Rights*, Conclusions of the International Symposium of Experts on 'Rights of Solidarity and Peoples' Rights', Republic of San Marino, 8 October 1982, para 46.

<sup>212</sup> On cosmopolitan concerns in relation to climate change, see e.g. S. Caney, 'Cosmopolitan Justice, Rights and Global Climate Change', 19 *Canadian Journal of Law and Jurisprudence* 255 (2006).

and others still that the State itself is the effective rights holder.<sup>213</sup> For the purpose of this thesis, the term ‘peoples’ is best understood as the citizens of an individual State, and peoples’ rights are best understood as collective rights of the citizens of that State. This thesis will not address the issues of indigenous peoples’ rights or minority rights, concepts which are understood as inherently different from that studied herein.

### 4.3.2 The right of self-determination

While Article 1(2) of the UN Charter somewhat vaguely mentions “the principle of equal rights and self-determination of peoples” as one of the purposes of the organisation, there is no reference to self-determination in the UDHR. It was elevated from a status as vague principle to that of a right in three steps: (i) the development of principles governing decolonisation,<sup>214</sup> (ii) the drafting of the 1966 Covenants, and (iii) the codification of the obligation of cooperation in international customary law.<sup>215</sup> Common Article 1 of the 1966 Covenants prescribes,

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.<sup>216</sup>

As already stated above, the right of self-determination can be seen as an overarching principle of international law that sets the playing field for *inter alia* human rights protection. This is recognised by the Human Rights Committee, according to which,

The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that

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<sup>213</sup> See J. Crawford, "The Rights of Peoples: "Peoples" or "Governments"?", in J. Crawford (ed.), *The Rights of Peoples* (Oxford University Press, Oxford, 1988); C. Tomuschat, *The Rights of Peoples and Human Rights: Their Relationship within the Context of Western Europe*, Unesco International Symposium, Canberra, Australia, 24-28 August 1987 (Unesco, Paris, 1987); G. Kardos, 'Right to Peace, Right to Development, Right to a Healthy Environment: Part of the Solution or Part of the Problem?', in A. Rosas and J. Helgesen (eds.), *Human Rights in a Changing East-West Perspective* (Pinter Publishers, London, 1990).

<sup>214</sup> Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly res. 1514 (XV) (UN Doc. A/4684).

<sup>215</sup> Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (hereinafter Friendly Relations Declaration), General Assembly res. 2625, adopted 24 October 1970 (UN Doc. A/5217 at 121).

<sup>216</sup> ICCPR, *supra* n. 163, art 1; ICESCR, *supra* n. 164, art. 1.

reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all other rights in the two Covenants.<sup>217</sup>

The right of self-determination is not subject to the territorial and jurisdictional limitations of Article 2(1) of the ICCPR, nor the specification of the nature of States' obligation under Article 2(1) of the ICESCR. In its general comment on the right to self-determination, the Committee further asserts that "all States Parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination" and that this is an obligation "not only in relation to their own peoples but vis-à-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination."<sup>218</sup>

What substantial obligations arise under this right is uncertain and highly controversial. It is clear from paragraph 1 of common Article 1 that there are two aspects of the right: (i) to freely determine political status, and (ii) to freely pursue economic, social and cultural development. Out of these two variations of the right, it is predominately aspects of political self-determination – such as decolonisation, the ending of foreign occupation, secession, and democratic governance – that have been given scholarly attention. As these issues are of little or no relevance to the topic of this thesis, they will not be addressed further herein.

As prescribed in paragraph 2 of common Article 1, economic self-determination include the right of peoples to freely dispose of their natural wealth and resources and the prohibition to deprive a people of its own means of subsistence. According to the HRC, this aspect of the right to self-determination "entails corresponding duties for all States and the international community."<sup>219</sup> The Committee requests States to indicate in their periodic reports "any factors or difficulties which prevent the free disposal of their natural wealth and resources contrary to the provisions of this paragraph and to what extent that affects the enjoyment of other rights set forth in the Covenant."<sup>220</sup>

One aspect of economic self-determination is the right of peoples to their natural wealth, such as a fair part of the revenues from e.g. oil extraction and mining for minerals.<sup>221</sup> Whenever such resources are exploited either by corrupt authorities, or by third parties under the auspices of such authorities, this is arguably in violation of the 'national-level' human rights obligations of that State.<sup>222</sup> This is also the understanding of the right put forward in General Assembly resolution 17/1803 on Permanent Sovereignty over Natural Resources: "[t]he right of peoples and nations to permanent

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<sup>217</sup> Human Rights Committee, *General Comment 12: The Right to Self-Determination of Peoples* (hereinafter GC 12) (UN Doc. HRI/GEN/1/Rev.6 at 134), para. 12.

<sup>218</sup> *Ibid.*, para. 6.

<sup>219</sup> *Ibid.*, para 5.

<sup>220</sup> *Ibid.*

<sup>221</sup> See e.g. A. Farmer, 'Towards a Meaningful Rebirth of Economic Self-Determination: Human Rights Realization in Resource-Rich Countries', 39 *New York University Journal of International Law and Politics* 417 (2006).

<sup>222</sup> See also United Nations Declaration on the Rights of Indigenous Peoples (hereinafter DRIP), General Assembly res. 61/295, adopted 13 September 2007 (UN Doc. A/61/295).

sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.”<sup>223</sup> Another aspect of economic self-determination is the right of peoples to pursue their own economic, social and cultural development. This right has been assimilated into the right to development,<sup>224</sup> which will be addressed further below.<sup>225</sup> Finally, the right to economic self-determination explicitly includes a right to subsistence and a corresponding obligation of States not to deprive peoples of their means of subsistence. For developing countries, the most important means for survival are their natural resources. For this reason, the pollution or destruction of such resources to a degree where peoples can no longer live from what their territory has to offer is arguably a violation of the right to self-determination.

### 4.3.3 The right to a healthy environment

Although frequently referred to as a right of peoples, the right to an environment of a particular quality (herein mainly referred to as ‘healthy’) is rarely framed as a peoples’ right. Human rights was recognised as an approach to environmental protection at the UN Conference on the Human Environment in Stockholm 1972. Principle 1 of the Stockholm Declaration on the Human Environment declares that,

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, and he bears a solemn responsibility to protect and improve the environment for present and future generations.<sup>226</sup>

This principle can be seen as the first attempt to introduce a right to a healthy environment in international law.

The main push for such a right came some 20 years later with the final report of the UN Special Rapporteur on Human Rights and the Environment, otherwise known as the Ksentiti Report.<sup>227</sup> The report concludes that,

At the regional and universal level, recognition of the right to a satisfactory environment as a human right is reflected both in the related normative developments and in the ‘environmental’ concern that informs the activities of human rights bodies. Although only a few instruments of a binding legal character have established a direct link between the environment and human rights, the regional and international human rights bodies are developing a practice whereby the procedural bases for enforcing the right to a satisfactory environment are

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<sup>223</sup> Permanent Sovereignty over Natural Resources, General Assembly res. 1803 (XVII), adopted 14 December 1962 (UN Doc. A/5217), art. 1.

<sup>224</sup> R. K. M. Smith, *Textbook on International Human Rights*, 3rd ed. (Oxford University Press, Oxford, 2007), p. 262.

<sup>225</sup> See ch. 4.3.4.

<sup>226</sup> Declaration of the United Nations Conference on the Human Environment (hereinafter 1972 Stockholm Declaration), adopted 16 June 1972, principle 1.

<sup>227</sup> F. Z. Ksentini, *Human Rights and the Environment: Final Report*, UN Special Rapporteur on Human Rights and the Environment, 6 July 1994 (UN Doc. E/CN.4/Sub.2/1994/9).

becoming more firmly established ... These bodies do not dismiss out of hand the idea that ecological factors may hinder the enjoyment of the human rights enshrined in the instruments in their care.<sup>228</sup>

The conclusion that there exists a right to an environment of a particular quality in international customary law has been heavily criticised by Alston as based upon “a loose amalgam” of *inter alia* non-binding documents and aspirational NGO analyses.<sup>229</sup>

The Ksentini Report includes a set of draft principles on human rights and the environment. While explicitly referred to as “a set of norms consolidating the right to a *satisfactory* environment”,<sup>230</sup> Article 2 of the Draft Principles proclaims that “[a]ll persons have the right to a secure, healthy and ecologically sound environment.” The incoherent language of the Ksentini report serves to question even further the basis for the conclusion that such a right is part of international customary law. Additionally, at about the same time as Ksentini compiled her report, the UN Conference on Environment and Development in Rio de Janeiro chose to significantly change the wording of its Principle 1 compared with that of the Stockholm Declaration. The new wording does arguably not imply a separate right to an environment of a particular quality, as it declares that “[human beings] are entitled to a healthy and productive life in harmony with nature.”<sup>231</sup> To conclude, there is no firm basis for the conclusion that there exists in international law a freestanding right to a healthy environment.

Turning briefly to the possible merits of such a right, the great majority of scholarly work have not addressed specifically its peoples’ rights dimensions.<sup>232</sup> Not even the chapter on environmental rights included in Alston’s comprehensive textbook on the status of peoples rights in international law addresses this dimension, something which Alston in his introduction points out as noteworthy and typical for this so-called right.<sup>233</sup> Instead, most analyses focus either on how environmental concerns can be incorporated in already existing ‘national level’ obligations, such as the right to life, the right to respect for one’s home and family life, and the right to property,<sup>234</sup> or on how human rights and environmental protection relate more generally. The latter issue deals primarily with whether human rights and environmental protection at all share agenda and/or if they should do so. Human rights have been criticised for being a too anthropocentric approach

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<sup>228</sup> *Ibid.*, para. 242.

<sup>229</sup> P. Alston, 'Peoples' Rights: Their Rise and Fall', in P. Alston (ed.), *Peoples' Rights* (Oxford University Press, New York, 2001), p. 282.

<sup>230</sup> Ksentini, *Human Rights and the Environment: Final Report*, *supra* n. 227, para. 261.

<sup>231</sup> Rio Declaration on Environment and Development, *supra* n. 106, principle 1.

<sup>232</sup> E.g. Ksentini, *Human Rights and the Environment: Final Report*, *supra* n. 227.

<sup>233</sup> D. Shelton, 'Environmental Rights', in P. Alston (ed.), *Peoples' Rights* (Oxford University Press, New York, 2001); Alston, 'Introduction', *supra* n. 206, p. 4.

<sup>234</sup> See e.g. R. R. Churchill, 'Environmental Rights in Existing Human Rights Treaties', in A. Boyle and M. Anderson (eds.), *Human Rights Approaches to Environmental Protection* (Oxford University Press, New York, 1998); S. Douglas-Scott, 'Environmental Rights in the European Union - Participatory Democracy or Democratic Deficit?', in A. Boyle and M. Anderson (eds.), *Human Rights Approaches to Environmental Protection* (Oxford University Press, New York, 1998); Shelton, 'Environmental Rights', *supra* n. 233.

to environmental protection that seriously risks to downplay what environmentalists see as the intrinsic value of biodiversity etc.<sup>235</sup> Although both of these issues are highly interesting, they are beyond the scope of this thesis.

Finally, it should be noted that the notion of a right of peoples' to a healthy environment has several aspects in common with that of the later concept of sustainable development. According to the Rio Declaration on Environment and Development, sustainable development demands, *inter alia*, that environmental protection constitutes an integral part of the development process,<sup>236</sup> that states cooperate in eradicating poverty,<sup>237</sup> and that developing countries, particularly the least developed and those most environmentally vulnerable, are given special priority.<sup>238</sup> In addition to this, principle 7 of the Rio Declaration stipulates that,

States shall cooperate 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.<sup>239</sup>

Rather than being a right *per se*, the principle of sustainable development expresses an international cooperation policy.<sup>240</sup> As such it cuts across international environmental law, international human rights law, and international trade law.<sup>241</sup> The UNFCCC seemingly recognises a right of States to promote sustainable development.<sup>242</sup> As already mentioned, the reason for this wording is reported to be that while the developing States wanted a provision on right to development, which is not recognised by *inter alia* the USA, some developed countries wanted the Convention to include a duty to aim at sustainable development, which developing countries perceived as a new conditionality on financial and technical assistance that would risk impede their economic progress.<sup>243</sup>

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<sup>235</sup> C. Redgwell, 'Life, the Universe and Everything: A Critique of Anthropocentric Rights', in A. Boyle and M. Anderson (eds.), *Human Rights Approaches to Environmental Protection* (Oxford University Press, New York, 1998), p. 85 *et seq.*

<sup>236</sup> Rio Declaration on Environment and Development, *supra* n. 106, principle 4.

<sup>237</sup> *Ibid.*, principle 5.

<sup>238</sup> *Ibid.*, principle 6.

<sup>239</sup> *Ibid.*, principle 7.

<sup>240</sup> D. McGoldrick, 'Sustainable Development and Human Rights: An Integrated Conception', 4 *International and Comparative Law Quarterly* 796 (1996).

<sup>241</sup> These regimes have been referred to as the three pillars on which the concept of sustainable development rests. *Ibid.*

<sup>242</sup> UNFCCC, *supra* n. 4, art. 3(4): "The Parties have a right to, and should, promote sustainable development." The punctuation is ambiguous, seemingly limiting the content of right to *to promote* sustainable development.

<sup>243</sup> Bodansky, 'UNFCCC Commentary', *supra* n. 93, p. 504.

### 4.3.4 The right to development

The notion of a right to development emerged during the postcolonial period in the 1960s and 1970s, concurring with the demands by the newly independent States for an international economic order in which they were equals with their former colonisers.<sup>244</sup> In 1974, the UN General Assembly adopted two ambitious resolutions to this end: the Declaration on the Establishment of a New International Economic Order and the Charter of Economic Rights and Duties of States.<sup>245</sup> The latter of these stipulate *inter alia* that “[s]tates should co-operate in facilitating more rational and equitable international economic relations and in encouraging structural changes in the context of a balanced world economy in harmony with the needs and interests of all countries, especially developing countries, and should take appropriate measures to this end.”<sup>246</sup>

The right to development was proclaimed by the General Assembly in 1986 through the adoption of resolution 41/128: the Declaration on the Right to Development (DRD).<sup>247</sup> The resolution was adopted by vote of 146 in favour to 1 against, with 8 abstentions. The USA voted against, while the four Nordic countries, Germany, the United Kingdom, and Japan abstained. According to Rich, two major preoccupations emerges from the explanations of vote of these States: (i) that priority should be given to individual human rights rather than the concept of peoples’ rights, and (ii) that the provision of development assistance cannot be seen as an obligation under international law.<sup>248</sup>

In the preamble of the DRD, development is defined as “a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.”<sup>249</sup> Article 1 of the DRD declares that the right to development is “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”<sup>250</sup> This wording mirrors that of Article 28 of the UDHR and was reaffirmed by the World Conference on Human Rights in Vienna in 1993.<sup>251</sup> Article 1 further proclaims that the

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<sup>244</sup> A. Orford, 'Globalization and the Right to Development', in P. Alston (ed.), *Peoples' Rights* (Oxford University Press, New York, 2001), p. 127 *et seq.*

<sup>245</sup> Declaration on the Establishment of a New International Economic Order, General Assembly res. 3201 (S-VI), adopted 1 May 1974 (UN Doc. A/RES/S-6/3201); Charter of Economic Rights and Duties of States, General Assembly res. 3281 (XXIX), adopted 12 December 1974 (UN Doc. A/RES/29/3281).

<sup>246</sup> Charter of Economic Rights and Duties of States, *supra* n. 245, art. 8.

<sup>247</sup> DRD, *supra* n. 110.

<sup>248</sup> Rich, 'Right to Development: A Right of Peoples?', *supra* n. 210, p. 52.

<sup>249</sup> DRD, *supra* n. 110, para. 3 of the Preamble.

<sup>250</sup> *Ibid.*, art. 1(1).

<sup>251</sup> Vienna Declaration and Programme of Action, *supra* n. 165, para. 10.

right to development implies the full realization of the right to economic self-determination.<sup>252</sup>

The right to development, as set out in the DRD, is in many ways an ambiguous concept. Not only is its content straggling, but its different aspects have different rights holders and duty bearers. The main rights holder is said to be the individual human being; according to Article 2(1), “[t]he human person is the central subject of development and should be the active participant and beneficiary of the right to development.” Moving forward, Article 2(3) proclaims that,

States have *the right and the duty* to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.<sup>253</sup>

The duty here is clearly towards its own population.<sup>254</sup> The right, on the other hand, is seemingly a right against all other States and the international community to develop human rights-based policies in the interest of its population.<sup>255</sup> As such, it is a rephrased version of the right to self-determination, “[a]ll peoples have the right to [...] freely pursue their economic, social and cultural development.”<sup>256</sup> In defence of the right to development, Alston argues that the State should be seen as “the medium through which the rights of individuals are able to be effectively asserted vis-à-vis the international community.”<sup>257</sup> This understanding is consistent with the concept of peoples’ rights as set out above.

Turning to the issue of who is a duty bearer under the DRD, this ranges from the every human being in Article 2(2),<sup>258</sup> via the individual state,<sup>259</sup> to the international community. According to Article 3, “States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development” and should “co-operate with each other in ensuring development and eliminating

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<sup>252</sup> DRD, *supra* n. 110, art. 1(2).

<sup>253</sup> Emphasis added.

<sup>254</sup> Arguably, according to the nature of international law, the fulfilment of this duty is also owed by the State towards the international community, as a so-called obligation *erga omnes*.

<sup>255</sup> Orford, 'Globalization and the Right to Development', *supra* n. 244, p. 147.

<sup>256</sup> ICCPR and ICESCR, *supra* n. 163 and 164, common art. 1.

<sup>257</sup> P. Alston, 'The Shortcomings of a "Garfield the Cat" Approach to the Right to Development', 15 *California Western International Law Journal* 510 (1985), p. 512.

<sup>258</sup> Art. 2(2): “All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.”

<sup>259</sup> According to e.g. art. 8, “States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, *inter alia*, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.”

obstacles to development.” Additionally, Article 4(1) declares that “States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.”

The extraterritorial obligations of States under the DRD are not much more than a collection of what is already stated in *inter alia* the UN Charter, the UDHR, and the ICESCR.<sup>260</sup> The DRD fails to articulate any specific obligations of developed states to provide financial assistance to developing states. Just as with international cooperation under the ICESCR, in relation to the right to development, donor States frequently repeat that they do not consider it to be a legal obligation to provide development assistance, nor a legal entitlement of any State to receive such assistance.<sup>261</sup> What then is the utility of the right to development? According to the Committee on Economic, Social and Cultural Rights, in its comment on the United Nations Development Assistance Framework (UNDAF) process, the DRD “was not designed to be operational”;

Its great strength lies more in stating broad principles rather than identifying specific measures to be taken at the country level. The Declaration rightly emphasises the hitherto long-neglected international dimensions of human rights promotion. When addressing individual rights concerns and the matters that are of operational significance in the development process at the national level, the Declaration correctly relies upon the existing categories of rights, particularly those contained in the two International Covenants. Thus the UNDAF process should proceed on the basis of the broad principles contained in the Declaration and add to those the operational dimension to be found in the core human rights treaties.<sup>262</sup>

In other words, the utility of the right to development is (or has been effectively reduced) to point out human rights obligations which already exist in human rights treaties, particularly the ICESCR. While there was a strong need for a separate right to development before the explicit recognition of the extraterritorial nature and scope of the ICESCR by the Committee on Economic, Social and Cultural Rights in a number of general comments in the 1990s, it is uncertain what the right to development adds to the ‘international level’ human rights discourse today. In any case, the DRD was without doubt an important driving force in the establishment of the Millennium Development Goals (MDGs). In year 2000, the United Nations Millennium Declaration was unanimously adopted in the General Assembly by 147 present heads of State or Government.<sup>263</sup> In Article 2 of the Declaration, these leaders of the world recognised that,

in addition to our separate responsibilities to our individual societies, we have a collective responsibility to uphold *the principles of human dignity, equality and*

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<sup>260</sup> See ch. 4.1 and 4.2.2 above.

<sup>261</sup> Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law*, *supra* n. 154, p. 98 *et seq.*

<sup>262</sup> Committee on Economic Social and Cultural Rights, *The Incorporation of Economic, Social and Cultural Rights into the United Nations Development Assistance Framework (UNDAF) Process: Comments adopted by the Committee on Economic, Social and Cultural Rights*, 15 May 1998, para. 5.

<sup>263</sup> United Nations Millennium Declaration, General Assembly res. 55/2, adopted 8 September 2000 (UN Doc. A/RES/55/2).

*equity* at the global level. As leaders we have a duty therefore to all the world's people, especially the most vulnerable and, in particular, the children of the world, to whom the future belongs.<sup>264</sup>

From this declaration derive the eight MDGs: (i) to eradicate extreme poverty and hunger; (ii) to achieve universal primary education; (iii) to promote gender equality and empower women; (iv) to reduce child mortality; (v) to improve maternal health; (vi) to combat HIV/AIDS, malaria, and other diseases; (vii) to ensure environmental sustainability; and (viii) to develop a global partnership for development.<sup>265</sup> These goals are accompanied by 18 targets and 48 indicators, the content of which is beyond the scope of this thesis.

While the MDGs are framed in the mindset of economists, where e.g. the halving of hunger by 2015 is accepted as a respectable target, human rights lawyers generally think inherently different in that they do not accept settling for half measures but demand comprehensive solutions.<sup>266</sup> There is an extensive overlap between MDGs and esc rights; the States Parties to the ICESCR already have domestic obligations that extends beyond the MDGs. At the international level, the eight goal emphasises the imperative role of international cooperation and developed country assistance to developing countries. The goal is “to develop a global partnership for development” and its explicit targets are:

- Develop further an open, rule-based, predictable, non-discriminatory trading and financial system (includes a commitment to good governance, development, and poverty reduction both nationally and internationally);
- Address the special needs of the LDCs (includes tariff- and quota-free access for LDCs exports, enhanced program of debt relief for heavily indebted poor countries and cancellation of official bilateral debt, and more generous official development assistance for countries committed to poverty reduction);
- Address the special needs of landlocked developing countries and SIDS;
- Deal comprehensively with the debt problems of developing countries through national and international measures in order to make debt sustainable in the long term;
- In cooperation with developing countries, develop and implement strategies for decent and productive work for youth;
- In cooperation with pharmaceutical companies, provide access to affordable essential drugs in developing countries;

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<sup>264</sup> Emphasis added.

<sup>265</sup> Available at <<http://www.un.org/millenniumgoals/>>, visited on 20 May 2009.

<sup>266</sup> Alston, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals', *supra* n. 205, p. 765.

- In cooperation with the private sector, make available the benefits of new technologies, especially information and communications technologies.<sup>267</sup>

Although the above targets in their context should be seen as political aspirations rather than a legal obligations, the MDGs arguably add something important to the progressive realisation of esc rights which the peoples' rights doctrine has failed to do: substance in the form of clear targets and timetables.

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<sup>267</sup> Available at <<http://www.unmillenniumproject.org/goals/gti.htm#goal8>>, visited on 20 May 2009.

## 5 Conclusion

Maldives is one of the sovereign States most vulnerable to climate change. Its islands are small and low-lying; in cases of flooding, retreat inland or to higher ground is not an option for its people. The scientific predictions of the IPCC demonstrate a clear risk that this small island developing country will eventually be permanently inundated. In addition to this doomsday scenario, Maldives is likely to suffer heavily from *inter alia* increasing coral bleaching and loss of marine biodiversity, escalating beach erosion, and increasing frequency of flooding.

According to the UNFCCC, the international negotiations on how to address climate change shall be guided by the notion of equity, the understanding that States have common but differentiated responsibilities, and the precautionary principle. Although these principles are the pillars on which the international regulation of climate change rests, different States have different interests and therefore different understandings of their implications. What is explicit from the provisions of the UNFCCC, however, is that the specific needs and circumstances of Maldives, as a least developed country that is particularly vulnerable to the adverse effects of climate change, should be taken fully into account.

What then, may international law on human rights bring to the table of negotiations? Firstly, recalling Articles 55 and 56 of the UN Charter, as Members of the UN, the States Parties to the UNFCCC have pledged to take joint and separate action for the achievement of *inter alia* (i) conditions of economic and social progress and development, (ii) solutions of international economic, social, health and related problem, including climate change, and (iii) universal respect for, and observance of, human rights and fundamental freedoms for all. Secondly, since the very birth of international human rights law, it has been recognised that such rights involve claims on our global order; e.g. Article 28 of the UDHR declares that every human being is entitled to an international order in which his or her rights can be fully realised. Thirdly, although explicit recognition of specific extraterritorial obligations of States for human rights is scarce, it is widely recognised in international treaties and declarations that the realisation of esc rights is dependant on international assistance and cooperation. Article 22 of the UDHR proclaims that everyone is entitled to realisation, through national effort and international cooperation, of the esc rights indispensable for his or her dignity. Under the ICESCR, States are obliged to cooperate for the progressive fulfilment of esc rights. According to the Committee on Economic, Social and Cultural Rights, the international community has a joint obligation to ensure the minimum essential levels of esc rights worldwide. The Committee further recognises this obligation as particularly incumbent upon those countries that are in a position to assist. This understanding of the nature and scope of extraterritorial obligations under the ICESCR is analogous to the principle of common but differentiated responsibilities, which is central to the international regulation of climate change. Under the UNFCCC, developed countries are obliged to take the

lead in mitigating climate change. Furthermore, the ‘most developed’ countries, the members of the OECD, are obliged to provide economical and technological assistance to developing countries to enable them to take mitigation actions as well as to assist particularly vulnerable countries in meeting costs of adaptation to the adverse effects of climate change. Just as in international human rights law, the joint extraterritorial obligations under the international regulation of climate change have yet to be converted into obligations of particular States to provide specific assistance to other States.

To conclude, the extraterritorial obligations of rich countries under the ICESCR to respect, protect and help fulfil minimum essential levels of economic, social and cultural rights worldwide, and their obligations under the UNFCCC to take a lead in mitigation and to help particularly vulnerable countries to not only mitigate but also adapt to climate change, are mutually reinforcing. Just as the human dimension of projected climate change impacts should be regarded as a crucial human rights concern, so should the demands of human rights, and especially the ‘international level’ of human rights, be regarded as a crucial component of a new global deal on climate change. With well-grounded ‘international level’ human rights references at the table of negotiations, Maldives and other stakeholders may succeed in their aspirations to have human rights concerns guide the operationalisation of the notion of equity, the principle of common but differentiated responsibilities, and the precautionary principle in Article 3 of the UNFCCC.

# Appendix 1<sup>268</sup>

**Table 3.1. Projected global average surface warming and sea level rise at the end of the 21<sup>st</sup> century. [WGI 10.5, 10.6, Table 10.7, Table SPM.3]**

Case	Temperature change (°C at 2090-2099 relative to 1980-1999) <sup>a, d</sup>		Sea level rise (m at 2090-2099 relative to 1980-1999)
	Best estimate	Likely range	
Constant year 2000 concentrations <sup>b</sup>	0.6	0.3 – 0.9	Not available
B1 scenario	1.8	1.1 – 2.9	0.18 – 0.38
A1T scenario	2.4	1.4 – 3.8	0.20 – 0.45
B2 scenario	2.4	1.4 – 3.8	0.20 – 0.43
A1B scenario	2.8	1.7 – 4.4	0.21 – 0.48
A2 scenario	3.4	2.0 – 5.4	0.23 – 0.51
A1FI scenario	4.0	2.4 – 6.4	0.26 – 0.59

**Notes:**

- a) These estimates are assessed from a hierarchy of models that encompass a simple climate model, several Earth Models of Intermediate Complexity, and a large number of Atmosphere-Ocean General Circulation Models (AOGCMs) as well as observational constraints.
- b) Year 2000 constant composition is derived from AOGCMs only.
- c) All scenarios above are six SRES marker scenarios. Approximate CO<sub>2</sub>-eq concentrations corresponding to the computed radiative forcing due to anthropogenic GHGs and aerosols in 2100 (see p. 823 of the WGI TAR) for the SRES B1, A1T, B2, A1B, A2 and A1FI illustrative marker scenarios are about 600, 700, 800, 850, 1250 and 1550ppm, respectively.
- d) Temperature changes are expressed as the difference from the period 1980-1999. To express the change relative to the period 1850-1899 add 0.5°C.

<sup>268</sup> Intergovernmental Panel on Climate Change, *AR4 Synthesis Report*, *supra* n. 14, table 3.1, p. 45.

# Appendix 2<sup>269</sup>

**Table 5.1. Characteristics of post-TAR stabilisation scenarios and resulting long-term equilibrium global average temperature and the sea level rise component from thermal expansion only.<sup>a</sup> (WGI 10.7; WGII Table TS.2, Table 3.10; Table SPM.5)**

Category	CO <sub>2</sub> concentration at stabilisation (2005 = 379 ppm) <sup>b</sup>	CO <sub>2</sub> -equivalent concentration at stabilisation including GHGs and aerosols (2005 = 375 ppm) <sup>b</sup>	Peaking year for CO <sub>2</sub> emissions <sup>a,c</sup>	Change in global CO <sub>2</sub> emissions in 2050 (percent of 2000 emissions) <sup>a,c</sup>	Global average temperature increase above pre-industrial at equilibrium, using 'best estimate' climate sensitivity <sup>d,e</sup>	Global average sea level rise above pre-industrial at equilibrium from thermal expansion only <sup>f</sup>	Number of assessed scenarios
	ppm	ppm	year	percent	°C	metres	
I	350 – 400	445 – 490	2000 – 2015	-85 to -50	2.0 – 2.4	0.4 – 1.4	6
II	400 – 440	490 – 535	2000 – 2020	-60 to -30	2.4 – 2.8	0.5 – 1.7	18
III	440 – 485	535 – 590	2010 – 2030	-30 to +5	2.8 – 3.2	0.6 – 1.9	21
IV	485 – 570	590 – 710	2020 – 2060	+10 to +60	3.2 – 4.0	0.6 – 2.4	118
V	570 – 660	710 – 855	2050 – 2080	+25 to +85	4.0 – 4.9	0.8 – 2.9	9
VI	660 – 790	855 – 1130	2060 – 2090	+90 to +140	4.9 – 6.1	1.0 – 3.7	5

**Notes:**

- a) The emission reductions to meet a particular stabilisation level reported in the mitigation studies assessed here might be underestimated due to missing carbon cycle feedbacks (see also Topic 2.3).
- b) Atmospheric CO<sub>2</sub> concentrations were 379ppm in 2005. The best estimate of total CO<sub>2</sub>-eq concentration in 2005 for all long-lived GHGs is about 455ppm, while the corresponding value including the net effect of all anthropogenic forcing agents is 375ppm CO<sub>2</sub>-eq.
- c) Ranges correspond to the 15<sup>th</sup> to 85<sup>th</sup> percentile of the post-TAR scenario distribution. CO<sub>2</sub> emissions are shown so multi-gas scenarios can be compared with CO<sub>2</sub>-only scenarios (see Figure 2.1).
- d) The best estimate of climate sensitivity is 3°C.
- e) Note that global average temperature at equilibrium is different from expected global average temperature at the time of stabilisation of GHG concentrations due to the inertia of the climate system. For the majority of scenarios assessed, stabilisation of GHG concentrations occurs between 2100 and 2150 (see also Footnote 30).
- f) Equilibrium sea level rise is for the contribution from ocean thermal expansion only and does not reach equilibrium for at least many centuries. These values have been estimated using relatively simple climate models (one low-resolution AOGCM and several EMICs based on the best estimate of 3°C climate sensitivity) and do not include contributions from melting ice sheets, glaciers and ice caps. Long-term thermal expansion is projected to result in 0.2 to 0.6m per degree Celsius of global average warming above pre-industrial. (AOGCM refers to Atmosphere-Ocean General Circulation Model and EMICs to Earth System Models of Intermediate Complexity.)

<sup>269</sup> *Ibid.*, table 5.1, p. 67.

# Appendix 3<sup>270</sup>

**Box 13.7 The range of the difference between emissions in 1990 and emission allowances in 2020/2050 for various GHG concentration levels for Annex I and non-Annex I countries as a group<sup>a</sup>**

Scenario category	Region	2020	2050
A-450 ppm CO <sub>2</sub> -eq <sup>b</sup>	Annex I	-25% to -40%	-80% to -95%
	Non-Annex I	Substantial deviation from baseline in Latin America, Middle East, East Asia and Centrally-Planned Asia	Substantial deviation from baseline in all regions
B-550 ppm CO <sub>2</sub> -eq	Annex I	-10% to -30%	-40% to -90%
	Non-Annex I	Deviation from baseline in Latin America and Middle East, East Asia	Deviation from baseline in most regions, especially in Latin America and Middle East
C-650 ppm CO <sub>2</sub> -eq	Annex I	0% to -25%	-30% to -80%
	Non-Annex I	Baseline	Deviation from baseline in Latin America and Middle East, East Asia

**Notes:**

<sup>a</sup> The aggregate range is based on multiple approaches to apportion emissions between regions (contraction and convergence, multistage, Triptych and intensity targets, among others). Each approach makes different assumptions about the pathway, specific national efforts and other variables. Additional extreme cases – in which Annex I undertakes all reductions, or non-Annex I undertakes all reductions – are not included. The ranges presented here do not imply political feasibility, nor do the results reflect cost variances.

<sup>b</sup> Only the studies aiming at stabilization at 450 ppm CO<sub>2</sub>-eq assume a (temporary) overshoot of about 50 ppm (See Den Elzen and Meinshausen, 2006).

Source: See references listed in first paragraph of Section 13.3.3.3

<sup>270</sup> Intergovernmental Panel on Climate Change, *AR4 WGIII, supra* n. 134, box 13.7, p. 776.

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