



FACULTY OF LAW  
Lund University

Lana Goral

# Climate Change and State Responsibility – Migration as a Remedy?

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Supervisor: Gregor Noll

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# Summary

The consequences of climate change are becoming increasingly clear and there is broad agreement on the fact that it will affect small island developing states to a large extent, to which it may force entire populations to relocate. As the issue of climate induced migration is largely unregulated, this thesis therefore seeks to examine if states could claim state responsibility for climate change, if a migration scheme could be awarded as a form of remedy and if a state could succeed in bringing forward such a case.

As a small island developing state located in the Pacific Ocean, the Republic of Kiribati is used as a case example in the assessment. Its topographical conditions makes the state particularly vulnerable to climate change. As adaptation measures, both on an international and national level, are criticised for the lack of funding and for their inefficiencies, they might not suffice to mitigate the effects of climate change on Kiribati whose government has foreseen the risk of a total relocation of the population.

The topic of climate induced migration is largely discussed among scholars, debating on, inter alia, the causes of migration and the number of migrants. Several different solutions are proposed to enhance the protection of the category of migrants, facing various challenges, and currently there is no solution to the increasingly imminent issue. Establishing state responsibility for climate change and claiming a migration scheme as a remedy, could thereby be a viable solution to increase the protection of climate induced migrants.

The case of Kiribati is based upon two claims. Firstly, the state seeks compensation for adaptation measures due to the rise in sea level. Secondly, as a consequence of the need to relocate its entire population, the state seeks a migration scheme to do so. The international obligations examined in the thesis is the climate change regime, consisting of the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol, as well as, international customary law, in the form of the no-harm rule.

In order to establish state responsibility, the breach must firstly be attributable to the state. In the present case it can be argued that states have an obligation to ensure that their international obligations are adhered to, and that they thereby must legislate and ensure compliance with certain emission targets.

Secondly, a breach of the primary rules must be established. As climate change is a consequences of cumulative actions by multiple states this might pose as a legal hurdle. Several different states are examined and possible respondent states are argued to be the ones who either have not ratified the Kyoto Protocol, and could be examined under the rules of the UNFCCC, or the ones which failed to meet their QELRO's which could then be in breach of the Kyoto Protocol or under the no-harm rule.

Moreover, in order to claim a remedy there must be a chain of causation. Public international law proposes different approaches to how causality should be established. The specific characteristics of climate change call for an approach where the chain of causation is based upon states' contributions to the adverse effects to the environment.

The financial damage occurred through increased adaptation and damage to infrastructure could be remedied through compensation. Relocation could be implemented through the

purchase of uninhabited land for resettlement and thereby compensated. Thus, if claimed that the citizens of the state should be awarded protection in the respondent state, such a claim would entail difficulties. However, it is argued that it could be remedied through restitution or as a form of compensation. Moreover, if Kiribati was to launch a contentious case at the ICJ, several jurisdictional issues would arise and an advisory opinion could thereby be a viable solution.

It can thereby be concluded that as the protection for climate induced migrants at present is insufficient and that there is a need for a larger inclusion. Thus, establishing state responsibility for greenhouse gas emissions and claiming remedies would prove difficult, mainly due to the issue of causation and the uncertainties regarding the binding force of the primary obligations. However, if established, it could form an important precedent in negotiations on the protection of climate induced migrants. The thesis thereby highlights the many inefficiencies of public international law, of which the most important one is the fact that it is based on the consent of states. As climate change is a result of industries, which play an important economic purpose, the incentives of states to mitigate the issue can be questioned.

# Sammanfattning

Konsekvenserna av klimatförändringarna blir allt tydligare och det finns en bred enighet om att det kommer att påverka små östater i en så stor utsträckning att det kan tvinga hela befolkningar att migrera. Då frågan om klimatbetingad migration till stor är del oreglerad, syftar denna uppsats till att undersöka om stater skulle kunna utkräva statsansvar för bristande åtgärder för att bromsa växthuseffekten, om ett migrationsprogram skulle kunna beviljas som en form av åtgärd, samt om en stat praktiskt skulle kunna utkräva sådant ansvar.

Republiken Kiribati, en utvecklingsstat vilken utgörs av ett antal öar i Stilla havet, används i uppsatsen som fallstudie i bedömningen. De topografiska förhållandena gör staten särskilt utsatt för klimatförändringar. I takt med att anpassningsåtgärder, både på internationell och nationell nivå, kritiseras för bristande finansiering och för deras ineffektivitet, är det möjligt att de inte räcker för att mildra effekterna av en ökad havsnivå till följd av klimatförändringar, något som Kiribatis regering har förutsett, vilket har lett till att staten förbereder sig på en total omlokalisering av befolkningen.

Doktrin har föreslagit ett flertal olika förslag på hur klimatbetingad migration kan regleras och ett flertal olika lösningar finns för att förbättra skyddet för denna kategori av migranter. Var förslag står inför ett flertal svåra utmaningar och för närvarande finns det ingen lösning på denna alltmer överhängande fråga. Att fastslå statsansvar för växthusgasutsläpp och kräva skydd för migranter som en åtgärd skulle därmed kunna vara en potentiell lösning på bristen på skydd för klimatbetingad migration.

Fallet Kiribati är baserad på två yrkanden. För det första, yrkar staten på ersättning för anpassningsåtgärder till följd av den stigande havsnivån. För det andra, som en följd av att behöva förflytta hela sin befolkning, eftersträvar staten ett migrationsprogram. De internationella förpliktelser som undersökts består i FN:s ramkonvention om klimatförändringar (UNFCCC) och det tillhörande Kyotoprotokollet, liksom, internationell sedvanerätt i form av no-harm principen.

För att fastställa statsansvar måste överträdelsen hänföras till staten. I förevarande fall kan det bestå i att stater har en skyldighet att se till att deras internationella åtaganden följs, och att de därmed har förpliktelser gällande nationella utsläppsmål.

Vidare, måste en överträdelse av primärreglerna kunna fastställas. Då klimatförändringen är en konsekvens av ett flertal staters kumulativa handlingar är fastställandet av en sådan överträdelse problematisk. I denna utredning har ett flertal stater undersöks och de mest lämpliga svaranden utgörs av de stater som antingen inte har ratificerat Kyotoprotokollet, och kan hållas ansvariga för att ha brutit mot sina UNFCCC åtaganden, eller de som inte uppfyllt sina QUELRO s och därmed agerat i strid med Kyotoprotokollet, eller under no-harm regeln.

Vidare, för att yrka på åtgärder, måste det finnas ett kausalitetssamband mellan skadan och den yrkade åtgärden. Doktrin föreslår ett flertal olika metoder för hur kausalitet bör fastställas. De specifika egenskaperna av klimatförändringarna kräver ett tillvägagångssätt där orsakskedjan bygger på ländernas bidrag till de negativa effekterna på miljön snarare än ett direkt orsakssamband.

Den ekonomiska skada som orsakats av behovet av ökade anpassning och skador på infrastruktur skulle kunna avhjälpas genom kompensation. Omlokalisering skulle kunna genomföras genom köp av obebodd mark för vidarebosättning och i ett sådant fall skulle en lämplig åtgärd vara kompensation. Dock är det mer problematiskt om staten yrkar på att dess medborgare bör tilldelas skydd i den svarande staten. Detta skulle dock kunna avhjälpas genom restitution eller som en form av kompensation. Vidare bör de jurisdiktionsfrågor som uppstår om Kiribati drar en stat inför rätta i en internationell domstol, beaktas. Därmed skulle ett rådgivande yttrande i ICJ vara en potentiell lösning för Kiribati.

Slutsatsen kan därmed dras att skyddet för klimatbetingade migranter för närvarande är otillräckligt och att detta bör åtgärdas. Dock vilar statsansvarsreglerna på en grund som inte är väl anpassad för klimatförändringars specifika karaktär, främst gällande svårigheterna att fastställa ett orsakssamband och oklarheterna gällande UNFCCC:s bindande verkan. Dock skulle ett etablerande av statsansvar utverka en viktig prejudicerande effekt i förhandlingarna om skyddet av klimatbetingade migranter. Avhandlingen belyser därmed en problematisk aspekt i folkrätten, det vill säga, det faktum att den är begränsad till staters samtycke. Då klimatförändringen är ett resultat av industrier som fyller en viktig ekonomisk funktion, kan staters incitament att bromsa växthusgasutsläppen ifrågasättas.

# Abbreviations

AOSIS	Alliance of Small Island States
AR	Assessment Report
ASR	Draft Articles on Responsibility of State for Internationally Wrongful Acts
CDM	Clean Development Mechanism
COP	Conference of Parties of the United Nations Framework Convention on Climate Change
CSIR	Council for Scientific and Industrial Research
ENSO	El Niño-Southern Oscillation
EU	European Union
GCF	Green Climate Fund
GDP	Gross domestic product
GEF	Green Environment Facility
GHG	Greenhouse gas
ICJ	International Court of Justice
ILC	International Law Commission
IOM	International Organization for Migration
IPCC	Intergovernmental Panel on Climate Change
KAP	Kiribati Adaptation Programme
KP	Kyoto Protocol to the United Nations Framework Convention on Climate Change
MBIE	Ministry of Business Innovation and Employment
NAPCC	National Action Program on Climate Change
NGO	Non-governmental organisation
NOU	Norges Offentlige Utredninger
OECD	Organisation for Economic Co-operation and Development
OPEC	Organization of the Petroleum Exporting Countries
PAC	Pacific Access Category
PCIJ	Permanent Court of International Justice



QUELRO	Quantified emission limitation and reduction objective
RSE	Recognised Seasonal Employer
SC	United Nations Security Council
SIDS	Small Island Developing States
SSE	Supplementary Seasonal Employment
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNCC	United Nations Compensation Commission
UNCLOS	United Nations Convention on the Law of the Sea
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNRIAA	United Nations Reports of International Arbitral Awards
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties
WWF	World Wide Fund for Nature

# 1 Introduction

*The science [...] together with our individual experiences in our own countries provide ample evidence that something is terribly wrong. Yet we continue to procrastinate, we continue to ignore what the science is telling us and indeed what we are witnessing with our own eyes.*

- Anote Tong, President of the Republic of Kiribati  
UNSG Climate Summit, September 2014

There is broad agreement among scientist that human activities are contributing to changing the concentrations of greenhouse gases (GHG) in the atmosphere, consequently leading to fluctuations in the climate.<sup>1</sup> In 1992, the United Nations Framework Convention on Climate Change<sup>2</sup> (UNFCCC) was adopted as the first major Convention on the mitigation of climate change. However, albeit the two-decade long existence of the Convention, not enough has been done to mitigate greenhouse gas emissions and it is unlikely that the process of climate change can be brought to a halt.<sup>3</sup> As the temperature rises, the oceans expand and the coats of ice melt with consequences that may be beyond our comprehension. The world is facing an imminent environment threat, likely to have consequences for the social order and economy. At worst, hundreds of millions people will be forced to migrate.<sup>4</sup> Thus, it is not the major emitters of anthropogenic GHG-emissions, which are likely to suffer most.<sup>5</sup> A majority of the effects will hit developing states with little capacity to adapt.<sup>6</sup> Small island developing states, such as Kiribati, plead for the world to recognise that they might be forced to relocate the whole population. Albeit, the emissions continue to increase, and climate induced migration is unregulated, thereby constituting a protection gap in the international migration and refugee protection regime. The question is therefore if the rules on state responsibility can be used to fill the legal gap at hand, and if a state could claim a migration scheme through adjudication.

## 1.1 Subject and Purpose

The discourse on the protection of climate-induced migrants is currently formed within the field of international migration law and human rights. However, this thesis seeks to examine if the protection could be awarded through the establishment of state responsibility for the

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<sup>1</sup>Intergovernmental Panel on Climate Change (IPCC), Stocker, F; Qin, D; Plattner, GK; Tignor, MMB et al. *Climate Change 2014: The Physical Science Basis: Working Group I Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge, Cambridge University Press, 2014), p. 53f.

<sup>2</sup>United Nations Framework Convention on Climate Change, 1771 UNTS 107; S. Treaty Doc No. 102-38; U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 ILM 849 (1992).

<sup>3</sup>Solomon, S et al, 'Irreversible Climate Change due to Carbon Dioxide Emissions' (2008) 106 *Proceedings of the National Academy of Sciences* 6 pp. 1704-1709, p. 1705.

<sup>4</sup>Myers, N, *Environmental Refugees: An Emergent Security Issue* (Paper given at the 13<sup>th</sup> Economic Forum of the Organization for Security and Cooperation in Europe (OSCE), EF.NGO/4/05, 2005), p. 11; Stern, N, *The Economics of Climate Change: The Stern Review* (Cambridge University Press: Cambridge, 2006), p. 3.

<sup>5</sup>Burkett, M, 'Climate Reparations' (2009) 10 *Melbourne Journal of International Law* 2 pp. 509-542, p. 510

<sup>6</sup>Ibid, p. 511.

failure to mitigate climate change, where facilitating migration would be a form of remedy. The examination is done from the perspective of the Republic of Kiribati, a small state located on 32 islands in the Pacific Ocean which is argued to be specifically vulnerable to climate change. The issue is thereby put in a practical context in order to assess the legal avenues available at the international level for vulnerable states. The thesis will seek to answer three questions, i.e.: (1) Is there a need for an alternative resolution to the issue of climate induced migration? (2) Can state responsibility be established under the international climate change framework, under the no-harm rule, or both, and could Kiribati succeed in bringing forward such a claim?; and (3) Could a migration scheme and compensation for adaptation be claimed as a remedy if state responsibility was established?

## 1.2 Scope and Limitations

The thesis is based on the climate change regime as well as the no-harm rule. Firstly, as the scientific community is reaching increased certainty on the correlation between GHG emissions and climate change the thesis will not examine the scientific findings of the relationship in-depth. Secondly, other potential legal sources of state responsibility for climate change are available, e.g. UNCLOS or environmental customary law in the form of e.g. the precautionary principle. The climate change regime and the no-harm rule were chosen due to their specific importance to mitigation of GHG-emissions. Furthermore, the thesis examines inter-state claims and does therefore not elaborate on individuals' potential claims.

Moreover, the thesis only examines developed states, i.e. Annex I<sup>7</sup> states, as potential respondents. Although developing states are increasingly responsible for the global emissions, e.g. China is at present the world's largest GHG-emitter, the historical emissions, which are causing the adverse effects of climate change at present, are largely attributable to developed states. It is recognised under the climate change regime, as only developed states have mitigation targets under the Kyoto Protocol (KP).<sup>8</sup> Furthermore, the discussions of the effects climate change concerning SIDS include a broad range of consequences such as the disappearance of nation-states, causing statelessness. However, it does not fall within the scope of the present thesis.

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<sup>7</sup> Annex I Parties are all the Parties included in Annex I to the Convention (as amended in 1998). This includes all the OECD states as well as states with a transitional economy. The following states and intergovernmental organisations are Annex I parties: Australia, Austria, Belarus, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, European Union, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, the Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland and United States of America.

<sup>8</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, U.N. Doc FCCC/CP/1997/7/Add.1, 37 I.L.M. 22 (1998).

## 1.3 Method, Materials and Literature Review

The thesis uses a legal dogmatic method as a foundation, i.e. to establish *lex lata*, using sources such as Conventions, international customary law as well as judgements and advisory opinions from the international dispute mechanisms.<sup>9</sup> More specifically, the UNFCCC, KP, no-harm rule, as well as, the International Law Commission's (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts<sup>10</sup> (ASR). However, in some instances national regulations as well as judgements are used to examine how the issues of environmentally induced migration is regulated on a domestic level.

Literature, reports, books and articles are core components. Reports of the Intergovernmental Panel on Climate Change (IPCC) have been the central source of information on the effects of climate change as these constitute the most recognised sources on the topic of climate change. The chapter on migration is largely based on the works of McAdam, Biermann and Boas, Docherty and Giannini and Kälin, all notable academic scholars and well known within the field of climate induced migration. On the topic of state responsibility, ILC's commentaries and Crawford's work are essential in the assessment as they provide an in-depth commentary to the Articles on State Responsibility. With regards to environmental law, the work of Birnie and Boyle is used for an understanding of the basic principles of environmental law, whereas Verheyen, Boom and Voigt are of fundamental importance for the assessment of state responsibility and climate change.

Regarding climate induced migration, a common denominator is the agreement on the lack of legal protection for those forced to migrate due to climate change. Several solutions are proposed, all with different advantages and disadvantages, and within the scope of the regular procedures of the creation of obligations in public international law, e.g. through state-to-state negotiations and by concluding treaties.

Two doctoral theses explore the concept of state responsibility and climate change. Verheyen, who completed her work in 2005 and Boom, who published her thesis in 2012. Assessments from other perspectives than the climate change regime and the no-harm rule are also undertaken. Boom, examines if responsibility could be established under UNCLOS and its own mechanism for dispute settlement. Furthermore, Strauss assesses the possibilities of climate change adjudication in the ICJ and concludes that albeit such an approach could be successful, it is challenged by procedural issues.

As noted, the issue of climate induced migration and the topic of state responsibility for climate change are considered two separate discourses in international law. As the current framework for protection of migrants could prove insufficient, this thesis seeks to examine if a different approach, namely through the establishment of state responsibility, could prove a more efficient tool for protection. The thesis thereby uses the current research on climate change and state responsibility as a stepping stone and merges the two discourses in order to examine if state responsibility could function as a viable approach for the protection of migrants.

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<sup>9</sup> Sandgren, C, 'Är rättsdogmatiken dogmatisk?' (2005) 04/05 *Tidskrift for Rettsvitenskap*, pp. 648-656, p. 649.

<sup>10</sup> International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.

# 2 Kiribati and Adaptation to Climate Change

## 2.1 Kiribati

The around 100 000 inhabitants of Kiribati live on the 32 atolls<sup>11</sup> and coral islands the state comprises of. Its land area stretches over 726 km<sup>2</sup> and is situated approximately 1.5 metres above sea level.<sup>12</sup> The state is regarded as one of the poorest in the region with a gross domestic income of less than \$2000 per capita and is largely economically dependent on foreign investments in the form of foreign fishing licenses as well as international aid and remittances. In the past decades, flows of inhabitants have relocated to the main island, which has led to a situation of over-crowding, water pollution and a decline in public health and life expectancy.<sup>13</sup>

Low-lying reef islands such as the Kiribati islands are often considered particularly vulnerable to climate change.<sup>14</sup> According to the IPCC, atoll islands are especially vulnerable as the population settlements are coastal and have built-in vulnerabilities by typically being extremely low lying, with a lack of soil, surface water, biodiversity and a comparatively fragile groundwater system, which increases the potential detriment effects of climate change.<sup>15</sup> The IPCC mentions pre-existing issues such as ‘severe over-crowding, proliferation of informal housing, unplanned settlements, inadequate water supply, poor sanitation and solid waste disposal, pollution and conflict over land ownership’<sup>16</sup> creating an additional vulnerability to climate change.<sup>17</sup> The IPCC notes that many of the health effects climate change are predicted to cause will be indirect. They will not be directly linked to the climate change, but will rather rise out of the increased anxiety and decline in welfare caused by property damage, loss of livelihood and threatened communities.<sup>18</sup> Furthermore, climate change is having an impact on the Pacific Island economies. The economies are vulnerable due to the geographical features of the states, and a high dependence on environmental

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<sup>11</sup> Campbell, JR, ‘Climate-Change Migration in the Pacific’ (2014) 43 *The Contemporary Pacific* 1, pp. 1-28, p. 4.

<sup>12</sup> Republic of Kiribati, Ministry of Finance, National Statistics Office, *Report on the 2010 Kiribati Census of Population and Housing – Vol. 1 Basic Information and Tables* (2012), p. 31; Australian Government, Bureau of Meteorology, ‘Monthly sea levels for Kiribati’ <<http://www.bom.gov.au/ntc/IDO70060/IDO70060SLI.shtml>> accessed 20-12-2014.

<sup>13</sup> Donner, S, ‘Obstacles to climate change adaptation decisions: a case study of sea-level rise and coastal protection measures in Kiribati’ (2014) 9 *Sustainability Science* 3, pp. 331-345, p. 334.

<sup>14</sup> Woodroffe, CD, ‘Reef-island topography and the vulnerability of atolls to sea-level rise’ (2008) 62 *Global and Planetary Change* 1-2, pp. 77-96, p. 77.

<sup>15</sup> Campbell, 2014, p. 4.

<sup>16</sup> Intergovernmental Panel on Climate Change (IPCC), Nurse, L; Mclean, R et al. ‘Chapter 29. Small Islands’ in: Intergovernmental Panel on Climate Change (IPCC), Barros, VR; Field, CB; Dokken, DJ; Mastrandrea MD et al, *Climate Change 2014: Impacts, Adaption and Vulnerability. Part B Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge, Cambridge University Press, 2014), p. 10.

<sup>17</sup> Ibid.

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

resources. The states often have a narrow scope of exportable resources and are to a great extent dependant on imports of e.g. food and fuel. The size of the islands also lead to an economic volatility, as well as high costs for infrastructure, if estimated per capita. The states also have an increased vulnerability regarding extreme events such as hurricanes and droughts.<sup>19</sup>

Furthermore, the most common impact due to the rise in sea level is shoreline erosion.<sup>20</sup> The consequences are vast, as a rise in sea level may not only lead to shoreline erosion but also to salt water intrusion in the freshwater supplies which poses a threat to the population.<sup>21</sup> Moreover, the rise in sea level also poses a real danger of the islands disappearing. Two uninhabited islands of Kiribati, Tebua and Bikeman, have already disappeared completely due to rising sea levels.<sup>22</sup> The dangers of the rising sea-level have been confirmed by the President of Kiribati, Anote Tong, who states that due to rising sea-levels and salination, Kiribati may become uninhabitable by 2050.<sup>23</sup> In the case *Teitiota v. MBIE*<sup>24</sup>, which shall be further elaborated on below, the High Court of New Zealand noted the vast amount of claims by nationals from Kiribati, Tuvalu, Tonga, Bangladesh, and Fiji seeking refugee status based on environmental problems attributable to climate change in their home states.<sup>25</sup>

## 2.2 Adaptation to Climate Change

In 2010, the parties to the UNFCCC, recognised adaptation to climate change equally as important as mitigation under the Cancun Adaptation Framework, adopted as part of the Cancun Agreements at the 2010 Climate Conference in Cancun, Mexico. The objective of the Framework is to enhance action on adaptation in order to reduce vulnerability and building resilience in developing state parties.<sup>26</sup> Recognising the parties' common but differentiated responsibilities the Framework stipulates a number of areas in which the parties are invited to enhance their measures and take action.<sup>27</sup>

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<sup>19</sup> Intergovernmental Panel on Climate Change (IPCC), Nurse, L; Mclean, R et al. 'Chapter 29. Small Islands' in: Intergovernmental Panel on Climate Change (IPCC), Barros, VR; Field, CB; Dokken, DJ; Mastrandrea MD et al, *Climate Change 2014: Impacts, Adaption and Vulnerability. Part B Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge, Cambridge University Press, 2014), p. 13.

<sup>20</sup> Woodroffe 2008, p. 89.

<sup>21</sup> Donner 2014, p. 333.

<sup>22</sup> Lange, HD, 'Climate Refugees Require Relocation Assistance: Guaranteeing Adequate Land Assets Through Treaties Based on the National Adaptation Programmes of Action' (2010) 19 *Pacific Rim Law & Policy Journal* 3, pp. 613-640, p. 618.

<sup>23</sup> ABC, 'Kiribati hold national hearings on climate change' (19 April 2013), <<http://www.abc.net.au/news/2013-04-19/an-kiribati-national-hearings-on-climate-change/4638512>> accessed 11-10-2014.

<sup>24</sup> *Ioane Teitiota v. The Chief Executive of the Ministry of Business Innovation and Employment*, CIV-2013-404-3528 [2013] NZHC 3125, 26 November 2013.

<sup>25</sup> *Ibid*, para 45.

<sup>26</sup> United Nations Framework Convention for Climate Change, Conference of the Parties, *Decisions adopted by the Conference of the Parties* ((Decision 1/CP.16, FCCC/CP/2010/7/Add.1, 2011), para. 11.

<sup>27</sup> The areas include planning, prioritizing and implementing adaption actions, conduct impact and vulnerability assessments, strengthen institutional capacities, building resilience of socio-economic and ecological systems, enhancing climate change related disaster risk reduction strategies, take measures with regards to climate induced displacement, promote access to technologies, strengthening knowledge systems as well as education and improve climate related research. Cf. *Ibid*, para 14.

Neither the UNFCCC, nor the Kyoto Protocol considers, or addresses, the issue of migration in the respective Treaty. The topic of human mobility as a consequence of climate change was first recognised by the Conference of Parties of the UNFCCC (COP) on its 16<sup>th</sup> session in 2010. The parties to the UNFCCC were invited to enhance action on adaptation by undertaking measures to enhance understanding, coordination and cooperation concerning climate-induced migration, both in the forms of displacement and planned relocation.<sup>28</sup> However, it is argued that the Convention is not an appropriate forum for the regulation of environmental migrants due to its structure and institutions are not designed to protect migrants.<sup>29</sup>

## 2.3 Adaptation Funding

The costs of adaptation between 2010 and 2050 to an approximate average temperature rise of 2°C, have been estimated to stand at \$70 billion to \$100 billion a year.<sup>30</sup> Article 4(3) UNFCCC stipulates an obligation to provide finance resources that are distinct from official development assistance. However, the practical importance of the distinction is small seeing that few states have met the international development assistance target of 0.7 per cent of GDP and due to the fact that very little adaptation funding has actually been distributed.<sup>31</sup>

Adaptation funding has only existed for a few years and its main existing sources of funding are international donors, channelled through either multilateral institutions or bilateral agencies.<sup>32</sup> One of the multilateral institutions managing the adaptation funds is the Global Environment Facility (GEF). Its purpose is to channel the funding for projects relating to the main multilateral environmental treaties, of which the UNFCCC is one.<sup>33</sup> The funding has however not been as successful as planned and the expenditure is described as “excruciatingly slow, application procedures are complex and many eligible states are not aware of what is on offer or how to access these funds”.<sup>34</sup>

The latest initiative, the Green Climate Fund (GCF), was officially adopted at the 2010 Conference of Parties (COP) in Cancun, Mexico.<sup>35</sup> The GCF is intended to function as the

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<sup>28</sup> Ibid, para. 14(f).

<sup>29</sup> Hodgkinson, D and Young, L, “In the Face of Looming Catastrophe” – A Convention for Climate-Change-Displaced Persons’ in: Gerrard, MB and Wannier, GE (eds) *Threatened Island Nations* (Cambridge: Cambridge University Press, 2013), p. 305; Docherty, B and Giannini, T, ‘Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees’ (2009) 33 *Harvard Environmental Law Review* 2, pp. 349-404, p. 358.

<sup>30</sup> World Bank, *Economics of adaptation to climate change - Synthesis report* (2010), p. 19.

<sup>31</sup> Humphreys, S ‘Introduction’ in: Humphreys, S (ed) *Human Rights and Climate Change* (Cambridge: Cambridge University Press, 2009), p. 17.

<sup>32</sup> World Bank, *World Development Report 2010: Development and Climate Change* (Washington D.C.: Eurospan, 2009), p. 262.

<sup>33</sup> Humphreys 2009, p. 18.

<sup>34</sup> Ibid, p. 17.

<sup>35</sup> United Nations Framework Convention for Climate Change, Conference of the Parties, *The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention* (Decision 1/CP.16, FCCC/CP/2010/7/Add.1, 2011), para. 102. The governing instrument of the Fund was albeit adopted at the following COP.

operating entity of the financial mechanism of the Convention under article 11 UNFCCC.<sup>36</sup> The objectives of the Fund are to “make a significant and ambitious contribution to the global efforts towards attaining the goal set by the international community to combat climate change”.<sup>37</sup> The financing of the efforts comes in the form of grants and concessional lending as well as through other modalities and instruments.<sup>38</sup> The distribution of the funds to the GCF are divided between adaptation and mitigation activities.<sup>39</sup> As the GCF has not yet started to distribute any of its financial resources but is rather in the allocation stage, it is difficult to assess the potential success of the fund.

The existing climate funds have by the World Bank been described as having “clear limits and inefficiencies” and efforts to allocate funding for both mitigation and adaptation are described as being “woefully inadequate” as they in 2010 stood at 5 per cent of the amount needed.<sup>40</sup> Furthermore, the critique points to the fact that the proliferation of funds threatens to reduce overall effectiveness of the climate finance. The funds are inefficient vis-à-vis allocating funds, an issue that is more prominent the narrower the scope of the fund is. However, the most prominent critique of the funding system is that it is dependent on the fragmentation and the whims of political and fiscal cycles.<sup>41</sup>

## 2.4 Warsaw Loss and Damage Mechanism

For the 2008 COP 14 meeting in Poznan, Poland, the Alliance of Small Island States (AOSIS) put forward a proposal for a post-2012 agreement on climate change. In light of the Bali Action Plan, which requires the parties to enhance action on adaptation, the states proposed a multi-window mechanism to address loss and damage from climate change impacts.<sup>42</sup> At the 2013 COP19 in Warsaw the Warsaw Loss and Damage Mechanism was adopted. The mechanism is expected to form a part of the post-2020 UN Climate regime and has yet to see an ultimate purpose and objective.<sup>43</sup> As the Mechanism is in its initialising stage and is to be reviewed in 2016 it is difficult to determine its future importance as a tool to claim liability. It should be noted that no such function is indicated in the COP19 decision and as Doelle notes, the “door is now open on loss & damage, but [...] the discussions are still some distance from taking a serious look at the issue of liability for unmitigated climate change.”<sup>44</sup>

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<sup>36</sup> United Nations Framework Convention for Climate Change, Conference of the Parties, *Report of the Conference of the Parties on its seventeenth session, held in Durban from 28 November to 11 December 2011, Launching the Green Climate Fund* (Decision 3/CP.17, FCCC/CP/2011/9/Add.1, 2011), paras. 3-4 and 102.

<sup>37</sup> United Nations Framework Convention for Climate Change, Conference of the Parties, *Governing instrument for the Green Climate Fund* (Annex 1 to Decision 3/CP.17, FCCC/CP/2011/9/Add.1, 2011), para. 1.

<sup>38</sup> *Ibid.*, para. 54.

<sup>39</sup> *Ibid.*, para. 8.

<sup>40</sup> World Bank, *World Development Report 2010: Development and Climate Change* (Washington D.C.: Eurospan, 2009), p. 257.

<sup>41</sup> *Ibid.*, p. 257.

<sup>42</sup> Alliance of Small Island States, *Multi-Window Mechanism to Address Loss and Damage from Climate Change Impacts, Proposal to the Ad Hoc Working Group on Long-term Cooperative Action under the Convention* (2008), p.1-2.

<sup>43</sup> Doelle, M ‘The Birth of the Warsaw Loss & Damage Mechanism – Planting a Seed to Grow Ambition’ (2014) 8 *Carbon & Climate Law Review* 1 pp. 35-45, p. 35.

<sup>44</sup> *Ibid.*, p. 37.



## 2.5 Kiribati Adaptation Programme

### 2.5.1 In situ adaptation

In 2003, the World Bank, together with the Government of Kiribati initialised an adaptation programme (KAP) which aims to reduce Kiribati's vulnerability to climate change through mainstreaming adaptation into national economic planning.<sup>45</sup> The programme consists of three phases; firstly, the preparation phase conducted in 2003-2005 aimed at mainstreaming adaptation into the national economic planning, national consultation with the relevant stakeholders and identify priority pilot investments to be implemented in the second phase which was implemented in 2006-2011.<sup>46</sup> The World Bank approved the third phase in 2011, running from 2012 to 2016. It aims to improve the resilience of Kiribati to climate change with specific focus on freshwater supply and coastal infrastructure.<sup>47</sup> The KAP and its cooperation with the World Bank and other aid institutions has been criticised both by representatives from the Government of Kiribati as well as by scholars. The Permanent Representative of the Republic of Kiribati to the United Nations, stated in 2013 in a speech to the Second Committee of the United Nations General Assembly, that the delivery of international adaptation finance has taken too long. Furthermore, she emphasized that all reports and research reach the same conclusion, namely, that all recommended adaptation measures remain recommendations due to the lack of resources and adaptation funds.<sup>48</sup> Donner notes three problems concerning the KAP experience. Firstly, it is noted that aid competition, i.e. competition for resources available from international donors, have led to inefficiencies in the programme. Secondly, due to the small percentage of the population having completed higher education, the state's human resources are strained when these persons are often recruited to work on new government projects.<sup>49</sup> Thirdly, it is argued that implementation and long-term maintenance is limited by the short-term, and volatility of aid flows which can also be attributed to the multifaceted nature of these projects that include different donors, ministries and consultants.<sup>50</sup>

### 2.5.2 Adaptation through migration

The Government of Kiribati has taken the position that it would be irresponsible not to acknowledge the fact that the islands constituting the Republic of Kiribati might not be able

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<sup>45</sup> World Bank, *Kiribati - Adaptation Project. Project Information Document* (Report No. PID11622, 2003), p. 3.

<sup>46</sup> Ibid, p. 4; World Bank, *Kiribati - Adaptation Project - Implementation Phase (KAP II), Project Information Document* (Report No. AB1138, 2004), p. 3.

<sup>47</sup> World Bank, *Kiribati - Third Phase of the Adaptation of the Least Developed Country Fund Project, Project Information Document* (Report No. AB5841, 2010), p. 2.

<sup>48</sup> Her Excellency Makurita Baaro, Permanent Representative of Kiribati to the United Nations, 'Means of Implementation towards the strengthening of SIDS resilience' (Presentation to the Second Committee of the United Nations General Assembly 68<sup>th</sup> Session, Panel Discussion on Strengthening the resilience of Small Island Developing States within the context of sustainable development, 1 November 2013).

<sup>49</sup> Donner 2014, p. 341; This was the case in phase II of the KAP, which faced "severe human resources and logistical problems". Cf. World Bank, *Kiribati - Adaptation Project: restructuring. Project Paper* (Report No. 50029, 2009), p. 1.

<sup>50</sup> Donner 2014, p. 341.

to sustain life in the future, and has thereby included relocation as the second part of its adaptation strategy.<sup>51</sup> It consists of two key components. Firstly, it includes creating opportunities for those who want to relocate now and in the near future. These migrants are anticipated to create expatriate communities that could absorb a larger amount of migrants in the longer term. Secondly, the Government of Kiribati aims to raise the qualifications of its inhabitants in order to meet the requirements of the Australian and New Zealand labour markets with the aim of making the i-Kiribati more attractive as migrants.<sup>52</sup> However, it can be questioned if such a strategy is viable in practice. Finding employment outside Kiribati is not impossible, it is not practicable for the majority of the population, especially concerning the status of the global economy where employment opportunities are limited within a state, thereby making it unlikely that states will provide jobs without giving preference to its own nationals.<sup>53</sup>

The relocation can be done by acquiring uninhabited land from another state. Lange argues that the purchasing of land through market-based mechanisms is the preferred solution seeing that it decreases the risk of territorial conflicts.<sup>54</sup> In 2012, the Government of Kiribati entered into negotiations with the Republic of Fiji and finalised the acquisition of 20km<sup>2</sup> of land from Fiji for the sum of \$8.77 million in 2014. The land will initially be used to grow crops but the President of Kiribati has stated that the aim of the state is to avoid relocating the whole population to the acquired land, however he does not exclude the possibility of doing so if it became “absolutely necessary”.<sup>55</sup>

In conclusion, as the adaptation measures are currently not sufficient to prevent a relocation from Kiribati, the population might be forced to relocate. As the Government has stated, such a relocation can be part of an adaptation framework but it is not unlikely that many of the I-Kiribati will be subject to involuntary relocation. The following chapter therefore seeks to examine the scope of protection under international law.

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<sup>51</sup> Office of the President, the Republic of Kiribati ‘Relocation’ <<http://www.climate.gov.ki/category/action/relocation/>> accessed 20-10-2014.

<sup>52</sup> Ibid.

<sup>53</sup> Smith, R, ‘Should they stay or should they go? A discourse analysis of factors influencing relocation decisions among the outer islands of Tuvalu and Kiribati’ (2013) 1 *Journal of New Zealand & Pacific Studies* 1, pp. 23-39, p. 33; See e.g. New Zealand, mentioned above, and stating a criterion giving preference to nationals of New Zealand. Department of Immigration New Zealand, ‘Recognised Seasonal Employers’ <<http://www.immigration.govt.nz/employers/employ/temp/rse/default.htm>> accessed 12-10-2014.

<sup>54</sup> Lange 2010, p. 620-621.

<sup>55</sup> The Guardian, ‘Besieged by the rising tides of climate change, Kiribati buys land in Fiji’ (1 July 2014) <<http://www.theguardian.com/environment/2014/jul/01/kiribati-climate-change-fiji-vanua-levu>> accessed 12-10-2014.

### 3 Protection of Climate Induced Migrants

There is no accepted legal definition of climate change refugees and some legal scholars make a distinction between different categories of migrants (“environmentally motivated migrants, environmentally forced migrants, and environmental refugees”). The distinction is drawn between migrants who respond to push and pull factors of which the effects of climate change is one, and “environmental refugees” which have no option but to migrate.<sup>56</sup> While no international definition of environmental migrant exists, the International Organization for Migration (IOM) has put forward a working definition and defines environmental migrants as:

Environmental migrants are persons or groups of persons who, for reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to have to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their territory or abroad.<sup>57</sup>

Migration is a common human adaptation strategy, and has for thousands of years been a way for humans to escape danger and improve their current situation, movement in response to climate change will therefore be likely.<sup>58</sup> The complexity of the issue can however not be underestimated and legal answers will have to vary depending on the scenarios on to which they intend to apply.<sup>59</sup>

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<sup>56</sup> Burson, B ‘Environmentally Induced Displacement and the 1951 Refugee Convention: Pathways to Recognition’ in: Afifi, T and Jäger, J (eds) *Environment, Forced Migration and Social Vulnerability* (Berlin: Springer, 2010), p. 4.

<sup>57</sup> International Organization for Migration, ‘Migration, Climate Change and the Environment’ <<http://www.iom.int/cms/en/sites/iom/home/what-we-do/migration-and-climate-change/definitional-issues.html>> accessed 11-10-2014.

<sup>58</sup> Barnett and Webber argue that no clear line can be drawn between forced migration and involuntary migration in the context of climate change. In the cases of migration to developed states, the migration is thought to be more of a voluntary action, exclusive to the inhabitants who can afford it. However, all cases are similar in the way that they consist of a risk assessment where an evaluation of the value added and the risks of versus the risk of migrating. This further problematizes the question of climate change as a cause of migration seeing that it moves the question from a clear involuntary act to an act where there is space for personal preference which then naturally includes other factors in the circumstances of life of the person. Cf. Barnett, J and Webber, M, *Policy Brief: Accommodating Migration to Promote Adaptation to Climate Change* (The Commission on Climate Change and Development, 2009), p. 6.

<sup>59</sup> Kälin has divided the possible scenarios into five subgroups: (1) sudden-onset disasters; (2) slow-onset environmental degradation; (3) ‘sinking’ small islands; (4) areas as high-risk zones; (5) unrest seriously disturbing public order, violence or even armed conflict. Each one of the different scenarios will have different consequences on migration and will also affect the time, speed and size of movement. Cf. Kälin, W ‘Conceptualising Climate-Induced Displacement’ in McAdam, J (ed) *Climate Change and Displacement – Multidisciplinary Perspectives* (Portland: Hart Publishing, 2010), p. 85-86. Barnett and Webber create a similar type of typology which is divided between internal/international and temporary/permanent migration. Cf. Barnett, J and Webber, M 2009; McAdam, J, *Climate Change, Forced Migration, and International Law*, (Oxford: Oxford University Press, 2012), p. 19.

It is concluded with high confidence that climate change will have “significant consequences for migration flows at particular times and places” and the IPCC notes “the potential for negative outcomes from migration in such complex, interactive situations is an emergent risk of climate change, with the potential to become a key risk”.<sup>60</sup> Moreover, sea level rise is one of the most likely causes of possibly permanent displacement from low-lying coastal areas and in particular Small Island Developing States (SIDS).<sup>61</sup> The IPCC has not pursued a quantification of an estimated number but recognises that the scope of such displacement is contingent upon two factors. Firstly, it depends on government relocation strategies and secondly, on the success in which adaptation programmes are implemented.<sup>62</sup> Two different discourses can be seen regarding the number of climate induced migrants. Firstly, the maximalist school of thought, consisting of researchers who tend to see migration in a negative light,<sup>63</sup> predicts a very large number of people being ‘environmental refugees’ or otherwise displaced due to climate change. Myers, estimates that the number may be as much as two hundred million environmental refugees by 2050, an estimation that has gained increased acceptance among scholars and that has been cited in publications from the IPCC.<sup>64</sup> Although, in some instances the estimations rise up to a billion migrants.<sup>65</sup> The minimalist school of thought, argues that the decision to migrate cannot be conferred to a single factor but rather to multiple causes of which climate change will be one and that it is difficult to estimate the number of climate change induced migrants.<sup>66</sup>

Currently, the majority of migrants migrate within the borders of the state and fall under the definition of ‘internally displaced’ and that this will be the case regarding migrants which move in response to climate change.<sup>67</sup> However, in cases for the Pacific Islands, including Kiribati, this might not be possible seeing that there is a threat to the existence of the state and due to the fact that the situation of over-crowding is already severe. Half of the state’s population lives on the main land of Tarawa, a number that is increasing as more people

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<sup>60</sup> Intergovernmental Panel on Climate Change (IPCC), Oppenheimer, M; Campos, M; Warren, R et al. ‘Chapter 19. Emergent Risks and Key Vulnerabilities’ in: Intergovernmental Panel on Climate Change (IPCC), Barros, VR; Field, CB; Dokken, DJ; Mastrandrea MD et al, *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge, Cambridge University Press, 2014), p. 1060.

<sup>61</sup> Ibid; Docherty, B and Giannini, T 2009, p. 355.

<sup>62</sup> Intergovernmental Panel on Climate Change (IPCC), Oppenheimer, M; Campos, M; Warren, R et al. ‘Chapter 19. Emergent Risks and Key Vulnerabilities’ in: Intergovernmental Panel on Climate Change (IPCC), Barros, VR; Field, CB; Dokken, DJ; Mastrandrea MD et al, *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge, Cambridge University Press, 2014), p. 14.

<sup>63</sup> Campbell, JR, ‘Climate-Change Migration in the Pacific’ (2014) 43 *The Contemporary Pacific* 1, pp. 1-28, p. 1.

<sup>64</sup> Myers, N, *Environmental Refugees: An Emergent Security Issue* (Paper given at the 13<sup>th</sup> Economic Forum of the Organization for Security and Cooperation in Europe (OSCE), EF.NGO/4/05, 2005), p. 1; Stern, N, *The Economics of Climate Change: The Stern Review* (Cambridge University Press: Cambridge, 2006), p. 3.

<sup>65</sup> Campbell, JR, ‘Climate-Change Migration in the Pacific’ (2014) 43 *The Contemporary Pacific* 1, pp. 1-28, p. 1.

<sup>66</sup> Kälén, W ‘Conceptualising Climate-Induced Displacement’ in McAdam, J (ed) *Climate Change and Displacement – Multidisciplinary Perspectives* (Portland: Hart Publishing, 2010), p. 81.

<sup>67</sup> McAdam, J ‘Swimming Against the Tide: Why a Climate Change Displacement Treaty is Not the Answer’ (2011) 23 *International Journal of Refugee Law* 1, pp. 2-27, p. 8.

move from the remote islands of the state. This has caused a population density, which in 2011 was higher than in Hong Kong.<sup>68</sup>

## 3.1 Current Standpoints in International Law

### 3.1.1 Inclusion in the 1951 Refugee Convention

Firstly, it is important to note that the discussion on the applicability of the Refugee Convention<sup>69</sup> is only revolving the application on so called ‘environmental refugees’. As noted environmentally induced migration may be conducted on a voluntary basis on which the Convention would certainly not apply.

The purpose of the protection of refugees is to serve as a complementary protection to the protection an individual should receive from the state of which he or she is a national. In cases where the state fails to protect its nationals, they are entitled to invoke rights of protection in any other state party to the Convention.<sup>70</sup>

The Refugee Convention is not applicable to climate refugees for a number of reasons. Firstly, the consequences of climate or other environmental factors are not generally considered ‘persecution’ within the meaning of the provision seeing that the serious violations of human rights are not perpetrated by a concrete identifiable entity, i.e. by the deliberate policy or practice by a government or by non-state entities such as rebel groups.

Secondly, the fear of persecution must be for reasons relating to one of the five convention grounds (race, nationality, religion, and membership of a particular social group or political opinion). The effects of climate change do not discriminate between any of the identified groups specified in the Refugee Convention.<sup>71</sup>

Moreover, the effects of climate change are argued to collide with “issues such as poverty, inequality, discriminatory modes of government, and human rights violations”, thereby making it difficult to discriminate between the real cause of migration.<sup>72</sup> McAdam argues that such an approach would likely contribute to the misunderstanding of the likely patterns, timescale and nature of climate induced migration and that it could therefore be counterproductive to the objectives it seeks to protect.<sup>73</sup> Furthermore it is argued that the term ‘refugee’ entails a specific legal meaning which could be uncomfortably stretched or even undermine the refugee protection regime.<sup>74</sup>

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<sup>68</sup> Ibid, p. 9.

<sup>69</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

<sup>70</sup> Hathaway, J, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005), p. 4-5.

<sup>71</sup> Klein Solomon, M and Warner, K, ‘Protection of Persons Displaced as a Result of Climate Change: Existing Tools and Emerging Frameworks’ in Gerrard, MB and Wannier, GE (eds) *Threatened Island Nations* (Cambridge: Cambridge University Press, 2013), p. 256.

<sup>72</sup> Burson, B ‘Environmentally Induced Displacement and the 1951 Refugee Convention: Pathways to Recognition’ in: Afifi, T and Jäger, J (eds) *Environment, Forced Migration and Social Vulnerability* (Berlin: Springer, 2010), p. 6.

<sup>73</sup> McAdam, J, *Climate Change, Forced Migration, and International Law*, (Oxford: Oxford University Press, 2012), p. 40.

<sup>74</sup> Klein Solomon, M and Warner, K 2013, p. 257.

The applicability of the Refugee Convention was examined in the case *Teitiota v. MBIE*<sup>75</sup> by the High Court of New Zealand. The applicant, a Kiribati national, had lived unlawfully in New Zealand for six years and claimed that he could not return to Kiribati due to the fact that climate change would make Kiribati uninhabitable due to rising sea-levels and environmental degradation.<sup>76</sup> The Court rejected the applicants claim and stated that if such a claim was approved it would broaden the scope of the Refugee Convention to millions of people suffering under the hardships of natural disasters, and that it was not for the Court to broaden the Convention to such an extent.<sup>77</sup>

Furthermore, the label of “refugees” is rejected by Kiribatian officials. As cited in McAdam, the President of Kiribati explains that by labelling people as refugees, a stigma is put on the victims rather than on the offenders. The President explains:

We don't want to lose our dignity. We're sacrificing much by being displaced, in any case. So we don't want to lose that, whatever dignity is left. So the last thing we want to be called is 'refugee'. We're going to be given as a matter of right something that we deserve, because they've taken away what we have.<sup>78</sup>

### 3.1.2 Amending the Refugee Convention

One option to regulate climate induced migration has been to bringing persons who relocate due to environmental degradation within the scope of the current refugee protection by amending the Refugee Convention to include such persons. This was suggested by the Government of the Maldives who called for an amendment of the Refugee Convention.<sup>79</sup> Biermann and Boas question the political feasibility of such an amendment by arguing that it is unlikely seeing that industrialised states already press to seek restrictive interpretations of the Convention and that it thereby is highly unlikely that they would agree to extend the protection further.<sup>80</sup> Additionally, climate induced migration differs from the current definition of a refugee to such an extent and for reasons that does not make the UNHCR an ideal body to deal with climate induced migrants. It is rather an issue of development, which requires “large-scale, long-term planned resettlement programs for groups of affected people”<sup>81</sup>, thereby making it an issue falling within the competence of the United Nations Development Programme (UNDP) or the World Bank.<sup>82</sup> Furthermore, some scholars, as in the case with an inclusion of the term in the Refugee Convention, fear that the inclusion would devalue the current protection for refugees as it would broaden the scope of the

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<sup>75</sup> *Ioane Teitiota v. The Chief Executive of the Ministry of Business Innovation and Employment*, CIV-2013-404-3528 [2013] NZHC 3125, 26 November 2013.

<sup>76</sup> *Ibid*, para. 15.

<sup>77</sup> *Ibid*, para. 51.

<sup>78</sup> McAdam, J 2012, p. 41. The quote stems from an interview by McAdam with President Anote Tong (Tarawa, Kiribati, May 2009).

<sup>79</sup> Republic of the Maldives, Ministry of Environment, Energy and Water, *Report on the First Meeting on Protocol on Environmental Refugees: Recognition of Environmental Refugees in the 1951 Convention and 1967 Protocol Relating to the Status of Refugees* (2006).

<sup>80</sup> Biermann, F and Boas, I, ‘Protecting Climate Refugees: The Case for a Global Protocol’ (2008) November-December, *Environment*, p. 8.

<sup>81</sup> *Ibid*.

<sup>82</sup> *Ibid*.

protection to millions and such a proposal would thereby entail more disadvantages than possible advantages.<sup>83</sup>

### 3.1.3 New Convention

Some academics argue that a new Convention, awarding protection to climate refugees is the preferred solution.<sup>84</sup> A new Convention could function either as an independent treaty or as a protocol to the Refugee Convention or the UNFCCC. The latter is though dismissed by Docherty and Giannini who argue that neither the Refugee Convention's nor the UNFCCC's object and purpose would fit well with the required essential characteristics of a treaty regulating climate refugees. Therefore, an independent treaty would, according to Docherty and Giannini, be the preferred option.<sup>85</sup> The opinion is concurred by Hodgkinson et al. who proposes that such a Convention should not only include trans-border migration, but also internal displacement.<sup>86</sup>

However, some scholars also oppose the idea of a new treaty. McAdam puts forward three arguments for why a treaty would not serve the best solution to climate-induced migration.<sup>87</sup> Firstly, in the case of sea-level rise and the threat to the Pacific Islands, the threat is in the form of slow-onset climate processes that do not go hand in hand with the existing framework of refugee law. As refugee law requires a certain seriousness of harm, the timing in when the slow process amounts to fulfilling the criterion would be vital.<sup>88</sup> Secondly, it would be impossible to differentiate between the previously mentioned conceptual issues, i.e. between forced migration due to climate change and those who have chosen to relocate due to other push-and-pull factors. McAdam and Williams thereby argues that addressing one of the causal factors in a multicausal situation, would be ambiguous.<sup>89</sup> Thirdly, and perhaps most importantly, McAdam notes the political obstacles to the drafting of a new treaty. As McAdam puts it: "states presently lack the political will to negotiate a new instrument requiring them to provide international protection to additional groups of people."<sup>90</sup> The argument is similar to the one of Biermann and Boas regarding the amendment of the Refugee Convention.<sup>91</sup> Moreover, Williams argues that the issue of climate change is controversial and that it is unlikely that governments would make binding commitments concerning climate-induced migration seeing as it could indicate state accepting responsibility for climate change. In conclusion, as a new convention would be preferred in theory, it is unlikely that it would be realised in practice.<sup>92</sup>

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<sup>83</sup> Williams, A 'Turning the tide: Recognizing Climate Refugees in International Law' (2008) 30 *Law and Policy* 4, pp. 502-529, p. 509; Appave, G 'Emerging issues in international migration' in: Opeskin, B, Perruchoud, R and Redpath-Cross, J (eds) *Foundations of International Migration Law* (Cambridge: Cambridge University Press, 2012), p. 407.

<sup>84</sup> Hodgkinson, D and Young, L 2013.

<sup>85</sup> Docherty, B and Giannini, T, 2009, p. 350.

<sup>86</sup> Hodgkinson, D and Young, L 2013, p. 308.

<sup>87</sup> McAdam, J 2011, p. 7.

<sup>88</sup> *Ibid*, p. 8-12.

<sup>89</sup> *Ibid*, p. 15-16; Williams, A 2008, p. 517.

<sup>90</sup> McAdam, J 2011, p. 12-15.

<sup>91</sup> Biermann, F and Boas, I 2008, p. 8.

<sup>92</sup> Williams, A 2008, p. 517.

### 3.1.4 Bilateral and National Arrangements

Williams calls for regional cooperation on climate induced migration under the auspices of the UNFCCC. Williams argues that in the recent discourse on complementary protection within the field of refugee law, regional agreements could offer protection for climate-induced migrants. Williams refers to practices of complementary protection in, *inter alia*, the European Union (EU) but also notes that such agreements have been adopted based on diluted decisions and at the lowest common level.<sup>93</sup> It is suggested that a regional arrangement, functioning under the auspices of the UNFCCC could develop displacement agreements and action plans that would best reflect individual regional capacities.<sup>94</sup>

Some states have offered complementary protection based on environmental degradation.<sup>95</sup>

Regarding the states in the Pacific region, neither the immigration regulations of Australia nor New Zealand has a protection provision for persons seeking protection due to environmental disasters. The newly elected government in Australia has pledged to reduce migration intakes and the inclusion of such a provision in the near future is thereby unlikely.<sup>96</sup> New Zealand has adopted an immigration policy which is more positive towards immigrant from the Pacific region. Under New Zealand's Pacific Access Category (PAC) the State awards residence to 75 inhabitants from Kiribati each year to be chosen by ballot. The persons must be between 18-45 years old and be able to prove an offer of employment in New Zealand, fulfil minimum income requirements, undergo health check, have no history of illegal entrances, and have an acceptable level of spoken and written English.<sup>97</sup> Furthermore, in 2007 the Recognized Seasonal Employer policy was launched by the New Zealand

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<sup>93</sup> Williams, A 2008, p. 513.

<sup>94</sup> *Ibid*, p. 521.

<sup>95</sup> Sweden, for instance, has in its Aliens Act included a provision on the protection of persons who cannot return to their home state due to an environmental disaster. However, the protection only stretches to persons who flee from sudden disasters where it would be inhuman to send the person back. Furthermore, the protection does not apply in cases where the person has the possibility to relocate within his or hers home state. Cf. Chapter 4, Article 2a(2) Aliens Act (2005:716); Government Bill, Svensk migrationspolitik i globalt perspektiv, 1996/79:25, p. 100-101; Similar provisions can be found in the US Immigrations and Nationalities Act where temporary protection status (TPS) is granted in the cases of a "earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected". As noted such protection is only awarded temporarily and only if the immigrant is present in the US and if the state of origin has requested the designation of temporary protection status for its nationals. This results in protection only being awarded to situations that are temporary in nature, if the environmental disaster has permanent consequences the designation of protection is not available. Furthermore, the protection is up to the discretion of the Secretary of Homeland Security who has the authority to designate states whose nationals are eligible to apply for temporary protection. Currently, only citizens of Haiti, Honduras, Nicaragua and El Salvador hold TPS status on the basis of environmental disasters. Cf. Immigrations and Nationalities Act § 244.b(B)(i); Immigrations and Nationalities Act § 244.b. and §244.c; Martin, S, *Climate Change and International Migration* (International Organization for Migration, Background Paper WMR, 2010), p. 8-9; Migration Policy Institute 'Temporary Protection Status in the United States: A Grant of Humanitarian Relief that is Less than Permanent' 2 July 2014, <<http://www.migrationpolicy.org/article/temporary-protected-status-United-states-grant-humanitarian-relief-less-permanent>> accessed 12-10-2014.

<sup>96</sup> Al Jazeera, 'Australia's new PM talks tough on foreign aid and immigration' (8 September 2013) <<http://america.aljazeera.com/articles/2013/9/8/australia-s-new-primeministervowstocutforeignaid.html>> accessed 12-10-2014.

<sup>97</sup> Martin, S, *Climate Change and International Migration* (International Organization for Migration, Background Paper WMR, 2010), p. 12.



government, which entered into inter-agency understandings with six Pacific states, including Kiribati.<sup>98</sup> The visas are issued for a specific period and require the immigrant to have secured an employment in New Zealand.<sup>99</sup> The quota of places stands at 8000 persons eligible to apply per year and the employments can only be awarded in cases where the employer has failed to find a resident or citizen of New Zealand to employ.<sup>100</sup> Nevertheless, the common denominator concerning the immigration policies is the requirement of already having an employment offer that does limit the scope of possible applicants and thereby makes both programmes based primarily on employment and not environmental factors.<sup>101</sup>

It can therefore be concluded that at current the protection of climate induced migrants is insufficient and that states are seemingly reluctant to award protection to the category of migrants in the near future. Thus, as the climate is changing there is an imminent need to expand the protection. The following chapter thereby seeks to examine if the establishment of state responsibility could function as a method of action.

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<sup>98</sup> Department of Labour of New Zealand and the Ministry of Labour and Human Resource Development of the Republic of Kiribati, *Inter-Agency Understanding between the Department of Labour of New Zealand and the Ministry of Labour and Human Resource Development of the Republic of Kiribati in support of New Zealand's Recognised Seasonal Employer Work Policy*, (2007).

<sup>99</sup> Department of Immigration, 'Supplementary Seasonal Employment (SSE) Work Policy' <<http://www.immigration.govt.nz/migrant/stream/work/hortandvit/sse/>> accessed 12-10-2014.

<sup>100</sup> Department of Immigration New Zealand, 'Recognised Seasonal Employer (RSE) Work Policy' <<http://www.immigration.govt.nz/migrant/general/generalinformation/media/rse.htm>> accessed 12-10-2014; Department of Immigration New Zealand, 'Recognised Seasonal Employers' <<http://www.immigration.govt.nz/employers/employ/temp/rse/default.htm>> accessed 12-10-2014.

<sup>101</sup> Martin, S 2010, p. 12.

## 4 Accountability and Climate Change

In the same pace as the efforts of adopting decisions have failed to mitigate climate change, developing states have called for measures to claim climate change accountability. Twenty years have passed since the UN General Assembly initiated negotiations on climate change and we are yet to see a legally binding instrument with overarching legal obligations that limit GHG-emissions or addresses the consequences of climate change.<sup>102</sup> Furthermore, the US and China have both indicated that neither state would accept a treaty regime that includes penalties for non-compliance with mitigation commitments.<sup>103</sup>

The threat of demanding climate change liability through litigation does however have a realistic potential to be examined. In 2002, the state of Tuvalu threatened to sue both the United States of America as well as Australia in the International Court of Justice (ICJ) for the states' refusal to sign the Kyoto Protocol as well as for their contributions to global climate change.<sup>104</sup> Furthermore, in September 2011, Palau and the Republic of the Marshall Islands announced their decision to seek and Advisory Opinion from the ICJ on climate change.<sup>105</sup> Such an opinion can however only be asked by the United Nations General Assembly in accordance with Article 96 of the UN Charter.<sup>106</sup> In the past years, the process to request an Advisory Opinion has thus slowed down as former President of the state stepped down. Moreover, the threat of an Advisory Opinion was faced with diplomatic pressure from large emitters such as the United States of America, which lead to the fear that the state would withdraw its foreign aid to Palau. From there on, any significant progress in the process has not been reached.<sup>107</sup> The main goal of these cases might not be to seek concrete remedies or a binding verdict for one state, but rather to provide both an incentive for states at the negotiating table as well as an alternation of the dynamics of the interstate negotiations. A ruling would not only make the mitigation of GHG-emissions a moral claim based on the protection of the planet and its inhabitants, but a claim supported by the weight of a respected

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<sup>102</sup> Werksman, JD, 'Could a Small Island Successfully Sue a Big Emitter? – Pursuing Legal Theory and a Venue for Climate Justice' in Gerrard, MB and Wannier, GE (eds) *Threatened Island Nations* (Cambridge: Cambridge University Press, 2013), p. 431, p. 409.

<sup>103</sup> Drexhage, J, *A Victory for Multilateralism? A commentary on the UNFCCC negotiations in Cancun, Mexico, November 29- December 11, 2010* (International Institute for Sustainable Development, 2010), p. 2.

<sup>104</sup> Okamatsu, A., *Problems and Prospects of International Legal Disputes on Climate Change* (Ocean Policy Research Foundation, Research paper, 2006; Jacobs, RE, 'Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice' (2005) 14 *Pacific Rim Law & Policy Journal* 103, pp. 103-128, p. 105; However, the Prime Minister of the Republic of Tuvalu, Koloa Talake, who was the main force behind such a lawsuit was not re-elected in August 2002 and the subsequent government did not pursue the actions initiated by the previous administration, see Strauss, A 'Climate Change Litigation: Opening the Door to the International Court of Justice' in: Burns, WCG (ed) *Adjudicating Climate Change – State, National and International Approaches* (Cambridge: Cambridge University Press, 2009), p. 339.

<sup>105</sup> Honorable Johnson Toribiong, President of the Republic of Palau to the 66<sup>th</sup> Regular Session of the United Nations General Assembly, Palau Mission to the United Nations (22 September 2011).

<sup>106</sup> United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

<sup>107</sup> Beck, S and Burleason, E, 'Inside the System, Outside the Box: Palau's Pursuit of Climate Justice and Security at the United Nations (2014) 3 *Transnational Environment Law*, p. 27.

legal authority with a high normative value. Doing so beyond the UNFCCC but still within the UN system could circumvent the issues visible already at the UNFCCC discussions, i.e. reaching consensus among 200 different states with different interests and objectives.<sup>108</sup>

## 4.1 State Responsibility and Climate Change

The International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts<sup>109</sup> (ASR) stipulates a division between primary and secondary rules of state responsibility. The primary rules relate to the content and duration of the state responsibilities as determined by a treaty or by customary law. The secondary rules on the other hand, as articulated in ASR, determine the consequences of a breach of the applicable primary obligation.<sup>110</sup> The examination of climate change liability does therefore naturally start with the obligations entailed in climate change and environmental law.

International law distinguishes between *lex generalis* and *lex specialis*, in cases where two different regulations are applicable to the same factual circumstance, giving primacy to the latter in cases where it regulates a specific subject matter.<sup>111</sup> In the present case, it could be discussed if the rules of the Refugee Convention constitute *lex specialis* and thereby precludes rewarding protection to migrants based on state responsibility under the climate change regime. In relation to the various provisions regulating the principle of *non-refoulement*, McAdam argues that the Refugee Convention functions as a *lex specialis* in all cases regarding complementary protection of refugees, no matter the source of protection and no matter whether the migrant falls under the scope of the Convention.<sup>112</sup> Applied in the present case, such an approach would imply that the Refugee Convention has primacy with regards to the protection of climate induced migrants. Thus, the approach is not uncontested. Hathaway argues that such a conclusion would constitute a wrongful interpretation of *lex specialis* as the norm presupposes a conflict of rules. In cases where both norms can be applied without the one infringing the other, the principle does not apply.<sup>113</sup> As concluded, the Refugee Convention is not considered applicable to climate induced migrants. An examination of state responsibility and if the protection of migrants could be awarded as a remedy is thereby not precluded by the Convention.

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<sup>108</sup> Beck, S and Burleason, E, 'Inside the System, Outside the Box: Palau's Pursuit of Climate Justice and Security at the United Nations (2014) 3 *Transnational Environment Law*, p. 21; Strauss, A 'Climate Change Litigation: Opening the Door to the International Court of Justice' in: Burns, WCG (ed) *Adjudicating Climate Change – State, National and International Approaches* (Cambridge: Cambridge University Press, 2009), p. 337.

<sup>109</sup> International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.

<sup>110</sup> Crawford, J, *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries*, (Cambridge: Cambridge University Press, 2002), p. 16. The distinction was also made in by the ICJ in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, p. 7.

<sup>111</sup> International Law Commission, Koskeniemi, M, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission (Fifty-eight session, A/CN.4/L.682, 13 2006), p. 34-35.

<sup>112</sup> McAdam, J, *Complementary Protection in International Refugee Law*, (Oxford: Oxford University Press, 2007), p. 33.

<sup>113</sup> Hathaway, J, 'Leveraging Asylum' (2010) 3 *Texas International Law Journal* 43, pp. 503-536, p. 532-533.

Furthermore, it is important to note that the existence of a specified treaty law could result in an exclusion of more general customary law. In international law, it is referred to as a “self-contained regime”. If the UNFCCC together with the Kyoto Protocol was to be regarded as a self-contained regime, it would exclude the applicability of the rules on state responsibility seeing that the regime in itself stipulated both the primary and secondary obligations in the provisions.<sup>114</sup> Nevertheless, currently that is not the case. The UNFCCC and its Protocol does not contain clear primary obligations, which in themselves could be sufficient to exclude general international law, neither do they stipulate secondary obligations.<sup>115</sup> Furthermore, it has been rejected by several state parties to the Convention who at the ratification made declarations specifically stating that the Convention “shall in no way constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change”.<sup>116</sup> Thus, the legal effect of such declarations are not clarified by general principles.<sup>117</sup> The declarations read in conjunction with the lack of clarity of the primary obligations as well as the non-existence of secondary obligations applicable to damages caused by states to the territory of other states indicate that the provisions on state responsibility are not precluded.

## 4.2 Primary Obligations

The second condition in order to determine the existence of an internationally wrongful act of the state is the breach of an international obligation of that state. It includes both treaty and non-treaty obligations and has been considered equivalent as to the state’s conduct being contrary to the rights of other states.<sup>118</sup> In order to determine the breach of an international obligation an assessment of the obligations needs to be undertaken.

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<sup>114</sup> *United States Diplomatic and Consular Staff in Tehran* case (USA v. Iran), Judgment, I.C.J. Reports 1980, p. 3, para. 86.

<sup>115</sup> Voigt, C, ‘State Responsibility for Climate Change Damages’ (2008) 77 *Nordic Journal of International Law* 1/2, pp. 1-20, p. 3; UNFCCC does include a provision on a “multilateral consultative process” in Article 13, however such a process has never been adopted by the COP. The Kyoto Protocol on the other hand does have its on specific rules on enforcement. Compliance is supervised by the Compliance Committee. Thus, the Compliance system of the Protocol is “only concerned with the integrity of the treaty itself and does not foresee any remedies for States claiming that the unlawful behavior of other States has caused damage to the climate system and to their territory”; Verheyen, R, *Climate Change Damage and International Law – Prevention Duties and State Responsibility* (Leiden: M. Nijhoff Publishers, 2005), p. 118; Cf. Happold, M, *The Relationship between the United Nations Framework Convention on Climate Change and other rules of public international law, in particular on States’ responsibility for the adverse effects of climate change* (Legal Response Initiative, Working Paper, 2013).

<sup>116</sup> See Declarations made by the Governments of Kiribati, Nauru, Tuvalu, Fiji, and Papua New Guinea to the UNFCCC.

<sup>117</sup> Sands, P and Peel, J et al., *Principles of International Environmental Law* (3<sup>rd</sup> ed), (Cambridge: Cambridge University Press, 2012), p. 104-105.

<sup>118</sup> Crawford, J 2002, p. 83.

## 4.2.1 UNFCCC

Initiated by the United Nations General Assembly in 1990 and adopted at the Rio Conference in 1992, the UNFCCC currently has 195 parties.<sup>119</sup> The text of the Convention mirrors its intention to draw upon universal participation.<sup>120</sup> Some developed states had already undertaken voluntary commitments<sup>121</sup> whereas other states such as the US, refused to make commitments to quantified targets. The divisions between the major groups of states participating in the negotiations are of importance for the assessment and interpretation of the Convention.<sup>122</sup> The negotiations resulted in a framework agreement which was supposed to serve the purpose of establishing a process for reaching further agreements on measures tackling climate change.<sup>123</sup> The guiding principle is one of “common but differentiated responsibilities and respective capacities”.<sup>124</sup> Yet, the parties to the Convention can be argued to have left the Convention with a significant amount of discretion regarding specific rights and obligations.<sup>125</sup>

### 4.2.1.1 Objectives and Commitments

The ultimate objective of the Convention, as specified in its second article, is to achieve a stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Furthermore, the article stipulates that such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, without further specifying the period.<sup>126</sup> An assessment of “dangerous anthropogenic interference” requires value judgments, where science plays an important role. Currently, the scientific community argues that limiting a global temperature increase relative to pre-industrial times to below 2°C is necessary to meet the objective.<sup>127</sup> The limit of 2°C was in the IPCC Assessment Report (AR) in 2007 argued to

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<sup>119</sup> United Nations Framework Convention on Climate Change ‘Background on the UNFCCC: The international response to climate change’ <[http://unfccc.int/essential\\_background/items/6031.php](http://unfccc.int/essential_background/items/6031.php)> accessed 03-12-2014.

<sup>120</sup> This includes meeting the needs of both members of AOSIS, which were negotiating with the fear of representing states that might disappear, as well as the members of the Organization of the Petroleum Exporting Countries (OPEC), whose income could suffer serious damage in the case the Convention would lead to a decreased fuel demand. Moreover, larger developing states such as China, Brazil and India strived for a Convention which would not put bounds to their own economic progress and urged developed states to take the lead. Neither the members of the Organization for Economic Co-operation and Development (OECD) could agree upon the measures which needed to be taken in order to address climate change. Cf. Birnie, P, Boyle, A and Redgewell, C, *International Law & the Environment* (3<sup>rd</sup> ed), (Oxford: Oxford University Press, 2009), p. 357, p. 356-357.

<sup>121</sup> Australia, Belgium, Canada, Denmark, France, Germany, Italy, Japan, the Netherlands, New Zealand, Norway, Sweden, Switzerland and the United Kingdom.

<sup>122</sup> Birnie, P, Boyle, A and Redgewell, C 2009, p. 356-357.

<sup>123</sup> Ibid, p. 357.

<sup>124</sup> The principle consists of three components. Firstly, it recognizes the common responsibility for all states to protect the global environment and the importance of preventing global climate change through global cooperation. Secondly, it recognizes the fact that the largest share of historical emissions are attributable to developed states and that these thereby have a larger financial responsibility towards the mitigation of climate change. Thirdly, the principle adheres to the different capabilities of states and thereby requires them to see that wealthier and more capable states take a larger financial responsibility. Cf. Articles 3(1) and 4(1) UNFCCC.

<sup>125</sup> Voigt, C, 2008, p. 5.

<sup>126</sup> Article 2 UNFCCC.

<sup>127</sup> Intergovernmental Panel on Climate Change (IPCC), Stocker, F; Qin, D; Plattner, GK; Tignor, MMB et al. *Climate Change 2014: The Physical Science Basis: Working Group I Contribution to the Fifth Assessment*

be “an upper limit beyond which the risks of grave damage to ecosystems, and of non-linear responses, are expected to increase rapidly”.<sup>128</sup> Acknowledged by governments, which at various summits recognised the 2°C target, it is the guiding position in the post-2015 negotiations.<sup>129</sup>

The objective reflects the concern that the planet’s ecosystem is threatened by increased anthropogenic GHG-emissions. The objective has been interpreted in several different ways. Birnie et al stressed that the objective is to *stabilise* the emissions rather than reversing them and that the wording of the article leads to the assumption that the parties agreed to the fact that some degree of climate change would be inevitable and tolerable as long as the process was slow enough to allow for natural adaptation.<sup>130</sup> On the other hand, academics argue that the Convention shall be interpreted as meaning that there is a *duty of prevention of climate change* enshrined in the objectives.<sup>131</sup> The IPCC notes that the mere stabilisation of the current levels of anthropogenic GHG-emissions would not suffice in order to keep the current level of GHG concentrations in the atmosphere. As GHGs remain in the atmosphere for, on average, a century or more, a rapid decrease in emissions is needed to stabilise current levels to a level that would prevent an average temperature rise of 2°C.<sup>132</sup> According to the IPCC, a decrease in anthropogenic GHG-emissions with 40 to 70 per cent from the 2010 levels needs to be met by the year 2050, in order to not exceed the targeted temperature rise.<sup>133</sup> In conclusion, an interpretation of the wording of the Article indicates that the latter interpretation is correct seeing that the word *stabilise* refers to a certain level.

Article 3 sets out a number of guiding principles. These include references to the climate system as an intergenerational benefit, the principle of common but differentiated responsibilities, the specific needs and vulnerabilities of developing states which would be particularly vulnerable to the effects of climate change, the precautionary principle, the right

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*Report of the Intergovernmental Panel on Climate Change* (Cambridge, Cambridge University Press, 2014), p. 1107.

<sup>128</sup> Intergovernmental Panel on Climate Change (IPCC), Edenhofer, O, Pichs-Madruga, R, Sokona, Y et al. ‘Summary for Policymakers’ in: Edenhofer, O, Pichs-Madruga, R, Sokona, Y et al. (eds.) *Climate Change 2014: Mitigation of Climate Change: Working Group III Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge, Cambridge University Press, 2014), p. 99.

<sup>129</sup> Intergovernmental Panel on Climate Change (IPCC), Victor, D, Zhou, D, et al. ‘Introductory Chapter’ in: Intergovernmental Panel on Climate Change (IPCC), Edenhofer, O, Pichs-Madruga, R, Sokona, Y et al. ‘Summary for Policymakers’ in: Edenhofer, O, Pichs-Madruga, R, Sokona, Y et al. (eds.) *Climate Change 2014: Mitigation of Climate Change: Working Group III Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge, Cambridge University Press, 2014), p. 18-19; See e.g. European Commission, ‘Lima climate change conference (COP 20/ CMP 10)’ <[http://ec.europa.eu/clima/events/articles/0098\\_en.htm](http://ec.europa.eu/clima/events/articles/0098_en.htm)> accessed 06-12-2014.

<sup>130</sup> Birnie, P, Boyle, A and Redgewell, C 2009, p. 358.

<sup>131</sup> Voigt, C, 2008, p. 5; Sands, P and Peel, J et al. 2012, p. 277; The opinion is also concurred by Verheyen. See Verheyen 2005, p. 56.

<sup>132</sup> Intergovernmental and Legal Affairs, Climate Change Secretariat, *United Nations Framework Convention on Climate Change – Handbook* (Bonn: Climate Change Secretariat, 2006), p. 21.

<sup>133</sup> Intergovernmental Panel on Climate Change (IPCC), Edenhofer, O, Pichs-Madruga, R, Sokona, Y et al. ‘Summary for Policymakers’ in: Intergovernmental Panel on Climate Change (IPCC), Victor, D, Zhou, D, Ahmed, EHM, et al. *Climate Change 2014: Mitigation of Climate Change, Working Group III Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge, Cambridge University Press, 2014), p. 13.

of all to sustainable development and the promotion of a supportive and open international economic system.<sup>134</sup>

Article 4 UNFCCC lays down certain commitments which the parties to the Convention, taking into account their common but differentiated responsibilities, shall undertake. Article 4(2) UNFCCC is of particular value in the context. The provision is directed towards developed and Annex I states, and obliges them to, inter alia, “[...] adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases [...]”.<sup>135</sup> Furthermore, the Article stipulates a commitment of Annex I parties to the aim of reducing their levels of GHG-emissions to earlier levels by the year 2000.<sup>136</sup> In paragraph (b) of the Article, the parties’ 1990 levels are mentioned as a target to which the parties should aim to reduce their emissions to the levels of GHG-emissions they emitted before 1990.<sup>137</sup> Seen together, these two paragraphs could constitute an obligation to reduce the levels of GHG-emissions to the 1990 levels, before the year 2000. However, this is contested by Boom who argues that it would lead to “an inappropriate interpretation of the text”<sup>138</sup> as the language of the Articles does not clearly provide that they should be read together.<sup>139</sup> Secondly, the negotiating history of the UNFCCC indicates that although efforts were made to create specific targets and time-limit for the implementation, such efforts were unsuccessful. Thirdly, as close to all parties to the UNFCCC are parties to the Kyoto Protocol, the commitment period was established to 2008-2012, which is inconsistent with Article 4.2(a)-(b) of the UNFCCC. This could indicate that the latter provision was not intended to function as a specific target with a time-limit.<sup>140</sup>

Voigt argues that a teleological interpretation of the Article establishes an *obligation of conduct* to reverse the increasing GHG-emissions. This could especially be the case when the Article is read in conjunction with Article 2 of the Convention. When interpreted in such a way both Voigt and Verheyen argue that the two articles in conjunction may create a binding obligation.<sup>141</sup> In the interpretative declarations to the UNFCCC, the states have different approaches to the matter and no coherent approach can be derived.<sup>142</sup> Moreover, such an interpretation has been revoked e.g. by President Bush’s domestic policy advisor who stated that the wording of the Convention cannot in any way constitute legally binding obligations.<sup>143</sup> In conclusion, there are arguments both for and against the binding effect of the provision. Nevertheless, there is indeed scope to argue the binding effect of the provisions.

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<sup>134</sup> Article 3 UNFCCC.

<sup>135</sup> Article 4.2(a) UNFCCC.

<sup>136</sup> Article 4.2(a) UNFCCC.

<sup>137</sup> Article 4.2(b) UNFCCC.

<sup>138</sup> Boom, K, *Exposure to legal risk for climate change damage under the UNFCCC, Kyoto Protocol and LOSC: a case study of Tuvalu and Australia*, Doctor of Philosophy Thesis, (Faculty of Law, University of Wollongong, 2012), p. 112.

<sup>139</sup> Ibid, p. 112-113.

<sup>140</sup> Ibid, p. 116.

<sup>141</sup> Voigt, C 2008, p. 6. Verheyen, R 2005, p. 95.

<sup>142</sup> United Nations Framework Convention on Climate Change ‘Declarations by Parties – United Nations Framework Convention on Climate Change’

<[https://unfccc.int/essential\\_background/convention/items/5410.php](https://unfccc.int/essential_background/convention/items/5410.php)> accessed 11-11-14.

<sup>143</sup> Letter from Mr. Clayton Yeutter to Representative John Dingell, Chair of the House Energy and Commerce Committee, quoted in Happold, M, 2013, p.4.

#### 4.2.1.1.1 Good faith and Article 18 VCLT

The principle of good faith is deeply enshrined in international law.<sup>144</sup> Furthermore, Article 18 VCLT stipulates that states have an obligation to refrain from acts which would defeat the objective and purpose of a Treaty. The Article constitutes international customary law and does thereby apply to states, which have not ratified the VCLT.<sup>145</sup> In the present case, the objective of the Convention is, as mentioned, to stabilise anthropogenic GHG-emissions at a level preventing dangerous anthropogenic interference with the climate.<sup>146</sup> Furthermore, Article 4 (2) UNFCCC imposes specific commitments on Annex I parties to “commit themselves specifically” to such stabilisation, and recognizes that the mitigation of such emissions are necessary to reach the objective of the Convention. Seen together, the *duty to prevent* and Annex I parties specific commitments under Article 4 of the Convention, as well as the recognition that a reduction of emissions is necessary to fulfil the Convention’s objectives. This does imply that there is an obligation of conduct to reverse the trend of increasing GHG-emissions in order to fulfil the Convention’s object and purpose, and that measures contrary to the obligation are measures, which would breach the principle of good faith as well as the obligations stipulated in Article 18 VCLT.<sup>147</sup>

#### 4.2.2 The Kyoto Protocol

In 1995 at the first COP in Berlin, the parties to the Convention agreed upon the Berlin Mandate<sup>148</sup>. After reviewing Article 4(2) UNFCCC and deeming the subparagraph of the Article inadequate to fulfil the objectives of the UNFCCC, the parties decided on enabling a process in order to take action post 2000 and strengthen the commitments enshrined in the Article through the adoption of a protocol.<sup>149</sup> The Mandate specified that the new protocol would entail stronger policies and measures for developed parties and set quantified emission limits and removal of sinks, within a specific timescale.<sup>150</sup>

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<sup>144</sup> It is general law for the purposes of Article 38.1(c) of the Statute of the International Court of Justice and a fundamental principle in the Vienna Convention on the Law of Treaties (VCLT). Furthermore, it is one of the principles of the United Nations as enshrined in Article 2(2) of the UN Charter. The Article is clarified in the Declaration on Principles Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations as not only referring to obligations arising from the Charter, but also to all its obligations “under the generally recognized principles and rules of international law” as well as obligations arising under “international agreements valid under the generally recognized principles and rules of international law”. This has also been interpreted by the ICJ in the case of the *Gabčíkovo-Nagymaros Project*. The Court affirmed that in order to abide the principle of good faith with regards to the application of a treaty, the Parties must apply the treaty in a reasonable way and in a “manner that its purpose can be realized”. Furthermore, it includes abstaining from conduct which would preclude the fulfilment of the treaty’s object and purpose. Cf. United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331. See articles 18, 26 and 31(1) VCLT; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, p. 7, para. 142.

<sup>145</sup> Villiger, ME, *Commentary to the 1969 Vienna Convention on the Law of Treaties* (Leiden: Martin Nijhoff Publishers, 2009), p. 252.

<sup>146</sup> Article 2 UNFCCC.

<sup>147</sup> Verheyen, R 2005, p. 82-83.

<sup>148</sup> United Nations Framework Convention for Climate Change, Conference of the Parties, *Report of the Conference of the Parties on its First Session (Decision 1/CP.1, FCCC/CP/1995/7/Add.1., 1995)*.

<sup>149</sup> *Ibid*, preamble.

<sup>150</sup> *Ibid*, para 2.



The negotiations leading up to what finally became the Kyoto Protocol, started out on similar positions as to the UNFCCC.<sup>151</sup> However, science on the topic had reached greater certainty, and for the first time a majority of developing states agreed to the fact that climate change was a severe issue. The EU, which was the only group whose GHG-emissions had stabilised since the Rio Conference, remained the most proactive. The United States of America, on the other hand, was continuously cautious and was specifically reluctant regarding creating commitments to reduction levels below the 1990 levels.<sup>152</sup>

The Protocol was adopted in 1997 yet it could not enter into force due to rules regulating its entry into force, until 16 February 2005.<sup>153</sup> The Protocol fulfils most of the objectives set out in the Mandate and its most notable feature was its quantified emissions limitation and reduction obligations (QUELRO) imposed on industrialised states. The restrictions are set out in Article 3(1) of the Protocol and obliges the parties included in Annex I to, jointly or individually, ensure that they do not exceed the awarded amount of the GHG-emissions listed in Annex A to the Protocol within the commitment period of 2008-2012. The allowed emissions were counted from a specific base year, which in the case of most states was 1990.<sup>154</sup> The general reduction target was a minimum of five per cent.<sup>155</sup> The individual limits were set based on the individual states' circumstances, e.g. ability to reduce emissions, access to clean technology and use of energy. However all parties listed in Annex I had to show demonstrable progress by 2005 in achieving their commitments.<sup>156</sup>

Apart from its binding commitments, the Protocol contains various flexible mechanisms that aid the implementation of the obligations. For instance, the Clean Development Mechanism (CDM) allows Annex I parties to instigate projects in developing states reducing anthropogenic GHG-emissions. The reductions generated from such projects can in turn be used by the Annex I party to help meet its own GHG-emission target.<sup>157</sup>

### 4.2.3 The No-Harm Rule

One of the core principles in environmental law is the no-harm rule. It was first elaborated on in the *Trail Smelter* case in 1935 where the arbitration tribunal ruled that:

[N]o State has the right to use *or* permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons

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<sup>151</sup> The OPEC states were still concerned about how the Protocol would influence their major source of income and the AOSIS were still pleading for their survival and had before the Conference proposed a Protocol including a 20 per cent reduction of GHG-emissions by 2005. Cf. Grubb, M, Vrolijk, C and Brack, D, *The Kyoto Protocol – A Guide and Assessment*, (London: Royal Institute of International Affairs, 1999), p. 53.

<sup>152</sup> Grubb, M, Vrolijk, C and Brack, D 1999, p. 49-50.

<sup>153</sup> Article 25 stipulates that “[t]his Protocol shall enter into force [...] [when] no less than 55 Parties to the Convention, incorporating Parties included in Annex I which accounted in total for at least 55 per cent of the total carbon dioxide emissions for 1990”. The US refusal to ratify the Protocol the Protocol could only enter into force upon a Russian ratification which was the case in 2005.

<sup>154</sup> However, some states, referred to a transitional economies of Central Europe were allowed different base years. Cf. Grubb, M, Vrolijk, C and Brack, D 1999, p. 116.

<sup>155</sup> Article 3(1) Kyoto Protocol to the UNFCCC.

<sup>156</sup> Article 3(2) Kyoto Protocol to the UNFCCC. Cf. Birnie, P, Boyle, A and Redgewell, C 2009, p. 360ff.

<sup>157</sup> Birnie, P, Boyle, A and Redgewell, C 2009, p. 364.

therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.<sup>158</sup>

The principle has thereafter been reinstated in several international documents relating to international environmental law, among others, in the normative Principle 21 of the Stockholm Declaration<sup>159</sup> from 1972 and Principle 2 in the Rio Declaration<sup>160</sup> from 1992, in the preamble to the UNFCCC<sup>161</sup>, as well as by international courts.<sup>162</sup> It reflects the view that although states are sovereign within their own territorial jurisdiction, the sovereignty is narrowed by the limitation that such sovereignty must be exercised without violating the rights of other states.

The no-harm rule has been elaborated on in the *ILC's Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*.<sup>163</sup> The Articles can be used as a recent tool to interpret international customary law seeing that it codifies core international environmental principles.<sup>164</sup> The core duties of the no-harm rule is the obligation of the state to both prevent damage and minimise risk which thereby creates obligations for states before the harm has occurred. The rule is not contingent upon the intent of states, and neither are all acts, e.g. all GHG-emissions, subject of the rule. Rather, the rule stipulates that only certain harm where states have not acted within their obliged standard of care, are in breach of the no-harm rule.<sup>165</sup>

#### 4.2.3.1 Standard of care

In order to determine the scope of the state's duty to control regarding the no-harm rule, the standard of care needs to be examined to evaluate the necessary conduct of the state. The discussions on which standard should be adhered to are continuous. Some legal scholars argue that there is a *strict liability* for transboundary harm whereas others argue that the applicable standard is one of *due diligence*. In the work of the ILC, the obligation of *due diligence* rather than strict liability prevails, and the Commission conceptualised the standard as manifested in:

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<sup>158</sup> *Trail Smelter arbitration (Canada v. United States of America)*, UNRIAA III, 1938, pp. 1906-1982, p. 1965.

<sup>159</sup> Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/Conf.48/14/Rev. 1(1973); 11 ILM 1416 (1972). Principle 21 states: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

<sup>160</sup> Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992). Principle 2 states: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

<sup>161</sup> Para 9, Preamble, UNFCCC.

<sup>162</sup> See for instance, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, p. 7; *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, I.C.J. Reports 1996, p. 226, para. 29.

<sup>163</sup> International Law Commission, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities – with commentaries - Report of the ILC on the Work of its Fifty-Third Session* (Yearbook of the International Law Commission, vol. II, Part Two, 2001).

<sup>164</sup> Verheyen, R 2005, p. 154.

<sup>165</sup> Verheyen, R and Roderick, P, *Beyond Adaptation: The Legal Duty to Pay Compensation for Climate Change Damage* (Paper presented to WWF-UK, November 2008), p. 15-16.

[R]easonable efforts by a State to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures, in timely fashion, to address them.<sup>166</sup>

Moreover, the Commission exemplifies a number of unilateral measures the states are obliged to undertake in order to prevent or minimise the risk of transboundary harm, inter alia, by formulating and implementing policies designed to prevent or minimise the risk of such harm. Furthermore, it should be noted that the standard of care, i.e. the due diligence obligation, varies depending on the risk of harm at hand. Activities considered more hazardous require a higher standard of care.<sup>167</sup>

Three key criteria are used to determine compliance with *due diligence*: (1) an opportunity to act; (2) foreseeability of harm; and (3) proportionality of measures taken to prevent harm or minimise risk.<sup>168</sup>

In the present case, the latest IPCC reports have continuously showed that anthropogenic GHG-emissions contribute to climate change. In line with its due diligence obligations every state is obliged to mitigate its GHG-emissions, i.e. every state is obliged to take effective measures on the basis of the best available technologies in order to reduce its emissions in order to fulfil the first criterion.<sup>169</sup> The second criterion, whether the “state should have known”, does not stipulate that the state must have been aware of all the consequences relating to the harm, awareness of the general consequences of the act or omission are sufficient.<sup>170</sup> The last criterion of proportionality states that a state must only act within proportional limits. In such an assessment characteristics such as the state’s ability to minimise the harm, the extent to which the state has contributed to the harm, as well as, the state’s capacity to mitigate the harm would have to be examined on a case-to-case basis.<sup>171</sup>

## 4.3 Breach of International Obligations

### 4.3.1 Attribution

Article 2 ASR specifies two conditions for an international wrongful act of a state. Firstly, the act or omission in question must be attributable to the state. Secondly, the act or omission must constitute a breach of an international legal obligation in force for the state at the time.<sup>172</sup> Concerning the conduct, it relates to the permission of GHG-emissions in the case of

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<sup>166</sup> International Law Commission, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities – with commentaries - Report of the ILC on the Work of its Fifty-Third Session* (Yearbook of the International Law Commission, vol. II, Part Two, 2001), p. 154.

<sup>167</sup> Ibid.

<sup>168</sup> Verheyen, R and Roderick, P 2008, p. 18.

<sup>169</sup> Voigt, C 2008, p. 10.

<sup>170</sup> Verheyen, R and Roderick, P 2008, p. 19-20.

<sup>171</sup> Ibid, p. 20-21.

<sup>172</sup> Article 2 ASR. The two elements have been specified and reinstated by the ICJ in several cases. See for instance, *United States Diplomatic and Consular Staff in Tehran* case (USA v. Iran), Judgment, I.C.J. Reports 1980, p. 3, para. 56; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, I.C.J. Reports 1986, p. 14, para. 226; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, p. 7, para. 78.

climate change. The conduct can consist of the state either not implementing laws or policies regulating it, or by the state actually proclaiming the wrongful behaviour.<sup>173</sup> In the present case, the anthropogenic GHG-emissions may be emitted by entities controlled by the state but in many industrialised states with a strong private sector, such emissions are mainly emitted by private entities.<sup>174</sup> It should therefore be noted that a breach of an international treaty such as the UNFCCC or the Kyoto Protocol due to the state's failure to implement legislation, complying with its obligations, or failure to implement proper compliance mechanisms, is attributable to the state. The source of emissions is thereby irrelevant as a state has an obligation to ensure compliance with its international obligations.<sup>175</sup>

International law normally avoids an approach that attributes actions or omissions of private actors to the state.<sup>176</sup> However, in Chapter II ASR, some exceptions are stated and states can, as will be elaborated on below, be held responsible for actions committed by private actors. Article 8 ASR prescribes that when an activity is “under the control of” the state, the activity shall be attributed to the state. In *Nicaragua v. US*<sup>177</sup> the Court stated that it needs to be shown that “effective control” is exercised by the state over the activities conducted by private persons.<sup>178</sup> A state could thereby be held responsible for activities conducted by private entities or persons, if it in fact directed or approved the actions.<sup>179</sup> That could perhaps be the case when the state has failed to ensure compliance with national legislation implementing its international obligations to mitigate GHG-emissions. Moreover, Article 11, states that any conduct of private entities or persons will be attributable to the state as soon as the conduct is recognised by the state as its own. According to the *Tehran Hostages*<sup>180</sup> case, such conduct can be entirely committed by private entities but if the state retrospectively expressly approves and maintains the situation, it is attributed to the state.<sup>181</sup> Regarding environmental damage it has been argued by Judge Shahabuddeen in his dissenting opinion to the *Certain Phosphates in Nauru*<sup>182</sup> case.

Secondly, it is argued that if GHG-emissions emitted by private entities were not attributable to the state it would lead to inconsistencies seeing that public international law would create a controversial distinction between private and state entities. Such a distinction could lead to increased support for privatisation, in order to make the emitting activities private.<sup>183</sup>

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<sup>173</sup> Tol, R and Verheyen, R, ‘State responsibility and compensation for climate change damages – a legal and economic assessment’ (2004) 32 *Energy Policy* pp. 1109-1130, p. 1111.

<sup>174</sup> Kälin, W and Schrepfer, N, *Protecting People Crossing Borders in the Context of Climate Change – Normative Gaps and Possible Approaches* (United Nations High Commissioner for Refugees, Research Paper, PPLA/2012/01, 2012), p. 8.

<sup>175</sup> Tol, R and Verheyen, R 2004, p. 1111.

<sup>176</sup> Crawford, J, 2002, p. 91.

<sup>177</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, I.C.J. Reports 1986, p. 14.

<sup>178</sup> *Ibid*, para 115.

<sup>179</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, I.C.J. Reports 1986, p. 14, para 110.

<sup>180</sup> *United States Diplomatic and Consular Staff in Tehran case (USA v. Iran)*, Judgment, I.C.J. Reports 1980, p. 3.

<sup>181</sup> *Ibid*, para. 74.

<sup>182</sup> *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 240, p. 282-283.

<sup>183</sup> Tol, R and Verheyen, R 2004, p. 1111f.

In conclusion, it can be seen that the matter is not clear but that there is support of the view that actions to the detriment of the environment shall be attributed to the state.

### 4.3.2 Breach of obligations

Firstly, it should be noted that a breach of obligation is contingent upon the primary rules. To that regards, the terms of the obligation, its interpretation and application, taking into account its objective and purpose and the factors in the case.<sup>184</sup>

The provisions on the breach of obligations are specified in Articles 12-15 ASR. As noted the rules on state responsibility do not define the primary rules and the obligation at hand can be of any origin or of any nature as long as it is of an international juridical standard.<sup>185</sup> Furthermore, it is important to note that there is no need to prove damage in order for the act to constitute a breach of an international obligation.<sup>186</sup> However, the obligation needs to be binding upon the state, which corresponds to Article 64 VCLT stipulating that retrospective assumption of responsibility cannot be applied.<sup>187</sup>

The emissions of GHG as a breach of an international obligation cannot be denoted to consisting of a single act. It cannot be said that specific emissions cause climate change, as it is the cumulative effect of the emissions, which are contributing to climate change.<sup>188</sup> Such breaches are regulated by Article 15 ASR and are defined as occurring at the time of the last action or omission making it sufficient to constitute the wrongful act. The number of acts or omissions which must occur before an international wrongful act is at hand is albeit determined by the primary rules, in this case the climate change regime and when the cumulative actions of a state are in breach of the due diligence obligation stipulated in the no-harm rule.<sup>189</sup> Verheyen argues the importance of differentiating between anthropogenic GHG-emissions that are damaging and those that constitute a breach within the scope of Article 15. However, such a breach is not contingent upon actual damage, it is sufficient that the emissions have increased the risk of damage.<sup>190</sup>

It is important to note the legal issues arising out of climate change being a result of the cumulative emissions of several states. The Articles in ASR do not preclude state responsibility in such a case. As prescribed in Article 47 (1) ASR, responsibility of one state may be invoked albeit several states are responsible for the same internationally wrongful act. Each state is thereby separately responsible for the conduct attributable to it and the responsibility of that state is not affected by the fact that other states acted in the same malicious way.<sup>191</sup>

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<sup>184</sup> Report of the ILC of its 53<sup>rd</sup> session, UN doc. A/56/10 (2001), p.54.

<sup>185</sup> *Rainbow Warrior (New Zealand/ France)*, R.I.A.A., Vol. XX, 1990, p. 217, para. 251; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, p. 7, para. 47.

<sup>186</sup> Verdier, PH, 'Cooperative States: International Relations, State Responsibility and the Problem of Custom' (2002) 42(3) *Virginia Journal of International Law*, p. 839-867, p. 858.

<sup>187</sup> Article 13, ASR. The Article is supported by state practice and can therefore be seen as a rule of international customary law. Cf. Crawford, J 2002, p. 132.

<sup>188</sup> Intergovernmental Panel on Climate Change (IPCC), Stocker, F; Qin, D; Plattner, GK; Tignor, MMB et al. *Climate Change 2014: Synthesis Report, Headline Statements from the Summary for Policymakers* (Cambridge, Cambridge University Press, 2014), p. 1.

<sup>189</sup> Crawford, J 2002, p. 143; Verheyen, R 2005, p. 236.

<sup>190</sup> *Ibid*, p. 236f.

<sup>191</sup> Crawford, J 2002, p. 273ff.

Furthermore, it is important to note that the Articles on State Responsibility do not set forward a standard of fault. Contrary to what is often the case in national law, there is neither a *dolus* nor a *culpa* requirement. This is a consequence of the division of the rules into primary and secondary rules. If there is a subjective element stipulated in the primary rules, it is guiding for the application of the fault requirement, i.e. such an assessment would be made to examine if the primary rules are breached.<sup>192</sup> In the climate change regime and in the customary international law applicable to climate change, that is however not the case. It should be thus be noted that the no-harm rule does contain the requirement to show negligence.<sup>193</sup>

## 4.4 Damage and Causation

### 4.4.1 Damage

In the present case, some of the Kiribati islands have already disappeared. Nevertheless, most of the damages will occur in the future and it is thereby of importance to assess if future damages could form part of a claim.

The injuries included by the ILC comprise of both material and moral damages, including environmental damages.<sup>194</sup> Material damage is defined as damages that are assessable in financial terms whereas moral damages include “individual pain and suffering, loss of loved ones or personal affront associated with the intrusion on one’s home and private life”.<sup>195</sup>

In cases regarding prospective losses such as in the present case, Garcia-Amador stated two criterions that need to be fulfilled. Firstly, there must be an unequivocal chain of causation linking the prospective loss with the imputable act, and secondly, the prospective loss “must not be too remote or speculative”.<sup>196</sup> Okowa concurs and argues, “there is no reason why prospective damage cannot be the basis of responsibility if it is reasonably anticipated”.<sup>197</sup> In the *Nuclear Tests case* between Australia and France, Australia’s argumentation was founded on future damage and the state argued that it could be calculated with a reasonable degree to which extent the Australian population would be exposed to the dangers of the exposure to radiation.<sup>198</sup>

### 4.4.2 Causation

In a claim for reparation for damages incurred by climate change, causation plays a core part. The ILC has addressed the issue in Article 32.2 ASR. The Article states that an injury comprises of a damage *caused* by a wrongful act.<sup>199</sup> However, under international law there is

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<sup>192</sup> Ibid, p. 82.

<sup>193</sup> Verheyen, R 2005, p. 240-241.

<sup>194</sup> Article 31 ASR.

<sup>195</sup> Report of the ILC of its 53<sup>rd</sup> session, UN doc. A/56/10 (2001), p. 92.

<sup>196</sup> International Law Commission, Garcia-Amador, FV, *Sixth Report on State Responsibility* (UN Doc. A/CN.4/134, 1961), p. 41-42.

<sup>197</sup> Okowa, P, *State Responsibility for Transboundary Air Pollution in International Law*, (New York: Oxford University Press, 2000), p. 190.

<sup>198</sup> *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, Judgement of 8 July 1974, p. 253.

<sup>199</sup> Report of the ILC of its 53<sup>rd</sup> session, UN doc. A/56/10 (2001), p. 91.

no established formula to assess whether a particular act has caused the specific injury or damage.<sup>200</sup>

Thus, in domestic tort law, and to some extent in international law, a distinction can be made between general and specific causation, where general causation refers to the establishment of a causal link between the legally relevant activities, e.g. GHG-emissions, and a general outcome, e.g. climate change. Specific causation refers to the establishment of such a causal link between a specific activity and the specific outcome.<sup>201</sup>

The establishment of a causal relationship between a legally relevant behaviour and a loss or injury is naturally difficult regarding climate change due to the notion of causation being based upon a linear chain of event whereas damage incurred by climate change is not.<sup>202</sup> On the contrary, climate change comprises of several different factors, relating to both historical and current emissions. It is thereby difficult to make a distinction between what qualifies as a natural climate change process in comparison to the general contribution of anthropogenic GHG-emissions as well as the specific contribution of the respondent state.<sup>203</sup> In conclusion, it is thereby impossible to prove that the emissions from a coal plant in one state which cause the sea-level to rise, thereby incurring damage in another state.

Additionally, a distinction is made between causation in fact and proximate causation.<sup>204</sup> Causation in fact refers to whether the wrongful act is the factual cause of the injured state's damage. This approach can furthermore be divided into three different approaches, stretching from an approach arguing that the circumstances must be necessary for the outcome, to one where the conduct forms a necessary part of several conditions leading to the outcome and finally, an approach where the conduct is contributing to the outcome.<sup>205</sup>

The first approach includes the “but for test” or the “sine qua non” formula to establish causality, i.e. the act is the condition of the result or “*but for* the act, there would be no loss”.<sup>206</sup> General causation can be established by using the approach as the scientific community continues to conclude the consequences of anthropogenic GHG-emissions with greater certainty. For instance, the IPCC has concluded with “high confidence” in its Fifth Assessment Report that the rise in sea level has increased with a rate higher than in the two previous millennia, and that 75 per cent of the observed rise is due to global warming.<sup>207</sup> However, concerning specific causality the issue becomes increasingly more difficult. As previously mentioned, climate change is a matter of cumulative acts. A test which requires

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<sup>200</sup> Boom, K, 'The rising tide of international climate litigation: an illustrative hypothetical of Tuvalu v Australia' in Abate, RS and Kronk, EA (eds), *Climate Change and Indigenous People – The Search for Legal Remedies* (Cheltenham: Edward Elgar Publishing Limited, 2013), p. 432.

<sup>201</sup> Tol, R and Verheyen, R 2004, p. 1112.

<sup>202</sup> Verheyen, R 2005, p. 249.

<sup>203</sup> Boom, K 2012, p. 252.

<sup>204</sup> Honoré, A, 'Causation in the Law' (The Stanford Encyclopedia of Philosophy, Winter 2010 Edition), <<http://plato.stanford.edu/archives/win2010/entries/causation-law/>> accessed 27-11-2014.

<sup>205</sup> Castellanos-Jankiewicz, L, *Causation and International State Responsibility* (SHARES Research Paper 07, ACIL 2012-07, 2012), p. 9

<sup>206</sup> Honoré, A, 'Causation in the Law' (The Stanford Encyclopedia of Philosophy, Winter 2010 Edition), <<http://plato.stanford.edu/archives/win2010/entries/causation-law/>> accessed 27-11-2014.

<sup>207</sup> Intergovernmental Panel on Climate Change (IPCC), Stocker, F; Qin, D; Plattner, GK; Tignor, MMB et al. *Climate Change 2014: The Physical Science Basis: Working Group I Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge, Cambridge University Press, 2014), p. 25.

states to show that without the respondent's acts the damage would not have occurred, is thereby ill suited to determine the causal link between anthropogenic GHG-emissions and damage incurred to Kiribati.<sup>208</sup>

Therefore, the approach where causation can be established through contribution might be better suited for the task. The approach stipulates that if the act has caused a 'material increase in risk' or 'contributed to' the injury, causality can be established between the act and the injury irrespective of other factors contributing to the injury.<sup>209</sup> The approach was argued by the Australian Government in the *Nuclear Tests case*.<sup>210</sup> Australia argued that any additional exposure to radioactive contamination, regardless of the amount, substantially contributed to an increased risk of radiation-related injuries. In conclusion, any material contribution to increasing the risk could impose responsibility.<sup>211</sup>

Moreover, the criteria of proximate causation must be fulfilled. The criteria entail that the respondent state must only make good those injuries that were foreseeable, i.e. "normal", "natural" or "necessary or inevitable" consequences of the act or omission by the respondent state.<sup>212</sup> The test must be fulfilled both on the basis of its objective criteria, i.e. that anthropogenic GHG-emissions cause climate change and that this is a normal and natural consequence thereof, as well as, on the basis of the subjective criteria, i.e. that it can be reasonably foreseen that anthropogenic GHG-emissions would cause climate change and the injuries incurred by Kiribati.<sup>213</sup> However, it should be noted that the foreseeability test does not refer to the state at hand. In the *Corfu Channel case*, the Court found Albania responsible independent of their knowledge or ability to foresee which ships could be damaged, Albania was held responsible on the fact that the state knew and thereby could foresee that the mines could cause damage to ships.<sup>214</sup>

## 4.5 Defences

There are six different circumstances precluding wrongfulness as stipulated in ASR. These are consent (Article 20), self-defence (Article 21), countermeasures (Article 22), force majeure (Article 23), distress (Article 24) and necessity (Article 25).

Consent of the injured state precludes wrongfulness in relation to the consenting state. Though the consent must be valid. What constitutes a valid consent is outside the scope of the rules on state responsibility, thus it includes issues such as the authority of the agent or person giving the consent. Furthermore, the consent must be expressly awarded and cannot be merely presumed from the actions of the state.<sup>215</sup> Self-defence precludes wrongfulness if the respondent state's actions were caused by an attack and the respondent state acted in self-defence in conformity with the United Nations Charter.<sup>216</sup> Countermeasures refers to cases

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<sup>208</sup> Okowa, P 2000, p. 185.

<sup>209</sup> Castellanos-Jankiewicz, L 2012, p. 10.

<sup>210</sup> *Nuclear Tests (Australia v. France)*, Judgement, I.C.J. Reports 1974, p. 253

<sup>211</sup> *Nuclear Tests (Australia v. France)*, Judgement, I.C.J. Reports 1974, Judgement of 8 July 1974, p. 253.

<sup>212</sup> Garcia-Amador, FV 1961, p. 6.

<sup>213</sup> Ibid.

<sup>214</sup> *Corfu Channel Case (United Kingdom v. Albania)*, Merits, I.C.J Reports, 9 April 1949, p. 22.

<sup>215</sup> Report of the ILC of its 53<sup>rd</sup> session, UN doc. A/56/10 (2001), p. 73.

<sup>216</sup> Ibid, p. 74.



where the claimant state has breached its obligations and the respondent state has responded with acts not in conformity with its obligations. In such cases, the wrongfulness of the act is precluded.<sup>217</sup> The fourth circumstance precluding wrongfulness is force majeure, which refers to situations where the state is precluded to act in conformity with its international obligations due to “the occurrence of an irresistible force or an unforeseen event”.<sup>218</sup> The state cannot have any other ways to act and have no real possibility of escaping its effects.<sup>219</sup> Furthermore, the circumstance of distress precludes wrongfulness in cases where peoples’ lives are at stake and if the agent has no other reasonable way of saving lives but by not acting in conformity with the states obligations.<sup>220</sup> The final situation precluding wrongfulness is necessity, which is applicable when the state is facing a grave and imminent peril and the conduct is the only way for the state to safeguard an essential interest. The wording of the title reflects the exceptional cases in which the circumstance can preclude wrongfulness. Furthermore, ILC’s commentary stresses the strict limitations imposed on its use.<sup>221</sup>

In conclusion, many of the defences are ill suited for a case of climate change. However, as will be elaborated on below, consent and necessity might for part of a respondent states defence.

## 4.6 Remedies

The main obligation of a state responsible for an international wrongful act is stipulated in Article 30 ASR, namely cessation.<sup>222</sup> The Article prescribes that the state must cease the act and if circumstances so require, offer appropriate assurances of non-repetition.<sup>223</sup> Moreover, it is of relevance to note that the obligation refers to the primary obligations, and the obligation of cessation is thereby determined by reference to the obligations stipulated in the UNFCCC, the Kyoto Protocol or the no-harm rule. It can thereby be distinguished from the similar rule of restitution by the fact that the obligation of cessation always applies whereas restitution is subject to a proportionality test and furthermore, is not always viable.<sup>224</sup> This exemplifies the issues regarding cessation concerning climate change, where cessation of dangerous levels of anthropogenic GHG-emissions would be difficult. However, it would be in line with the rules on state responsibility.<sup>225</sup>

Article 31 ASR states the obligation to make reparation and is a well-established principle in international law. In the *Chorzów Factory case*, the PCIJ stated that “it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation”.<sup>226</sup> Furthermore, the Court stated that reparations

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<sup>217</sup> Ibid, p. 75.

<sup>218</sup> Article 23 ASR.

<sup>219</sup> Report of the ILC of its 53<sup>rd</sup> session, UN doc. A/56/10 (2001), p. 76.

<sup>220</sup> Ibid, p. 78.

<sup>221</sup> Report of the ILC of its 53<sup>rd</sup> session, UN doc. A/56/10 (2001), p. 80.

<sup>222</sup> Cf. Corten, O, ‘The Obligation of Cessation’ in: Crawford, J, Pellet, A and Olleson, S (eds.) Oxford Commentaries on International Law - The Law of International Responsibility (Oxford: Oxford University Press, 2010), p. 546.

<sup>223</sup> Article 30 ASR.

<sup>224</sup> Corten, O 2010, p. 548.

<sup>225</sup> Boom, K 2012, p. 281.

<sup>226</sup> *Factory at Chorzów case*, Merits, Judgment, 1928, PCIJ, Ser. A, No. 17, p. 4, p. 47.

musts “as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed”.<sup>227</sup>

Reparations in ASR are stipulated in a hierarchical manner. Preference is given to restitution, followed by compensation and satisfaction in cases where compensation is not possible.<sup>228</sup>

Restitution as stipulated in Article 35 ASR requires the state to re-establish the situation that existed prior to the wrongful act.<sup>229</sup> It is based upon a proportionality test and can thereby be partially precluded if it is materially impossible or involves a disproportional burden upon the respondent state.<sup>230</sup> The ILC noted that despite the primacy of the rule of restitution, it is frequently not applicable or inadequate and the gaps are thereby often filled by compensation.<sup>231</sup>

The remedy applicable when restitution is not available or applicable is compensation. The state is under an obligation to compensate and such compensation shall cover any financially assessable damage.<sup>232</sup> This does however not exclude moral damages.<sup>233</sup> It generally consist of monetary payments but may take the forms of other values.<sup>234</sup> Damages relating to pollution include both pecuniary such as adaption costs and loss of revenue as well as non-pecuniary damages in the forms of long-term impacts on the environment, which are difficult to measure in monetary terms.<sup>235</sup> However, they are considered to be “no less real and compensable than damage to property”.<sup>236</sup>

The United Nations Compensation Commission (UNCC) dealt with claims for compensation regarding environmental damage in respect of the damage and depletion of natural resources in Kuwait due to Iraq’s unlawful invasion and occupation of Kuwait. The Commission awarded compensation for environmental damage and costs relating to, *inter alia*, abatement and prevention of environmental damage, reasonable measures to restore and clean the environment, depletion of or damage to natural resources, as well as expenses for monitoring and assessing environmental damage and public health for the purpose of investigating and combating increased health risks as a result of the environmental damage.<sup>237</sup> As a result the UNCC awarded approximately US\$ 5.2 billion distributed on over 100 claims based on environmental damage.<sup>238</sup> It is important to note that the Security

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<sup>227</sup> Ibid. Restitution aims at re-establishing the situation which existed prior to the wrongful act, i.e. status quo ante. Cf. Report of the ILC of its 53<sup>rd</sup> session, UN doc. A/56/10 (2001), p. 96.

<sup>228</sup> The primacy of restitution as a general principle was stated in the *Chorzów Factory* where the PCIJ stated that “restitution in kind, or if that is not possible, payment of a sum corresponding to the value which restitution in kind would bear [...]”. Cf. *Factory at Chorzów* case, Merits, Judgment, 1928, PCIJ, Ser. A, No. 17, p. 4, p. 47.

<sup>229</sup> Report of the ILC of its 53<sup>rd</sup> session, UN doc. A/56/10 (2001), p. 96.

<sup>230</sup> Article 35 ASR. However, it is important to note that the obligation is only excluded to the extent that it is disproportionate. Cf. Report of the ILC of its 53<sup>rd</sup> session, UN doc. A/56/10 (2001), p. 98.

<sup>231</sup> Report of the ILC of its 53<sup>rd</sup> session, UN doc. A/56/10 (2001), p. 99.

<sup>232</sup> Article 36 ASR.

<sup>233</sup> Report of the ILC of its 53<sup>rd</sup> session, UN doc. A/56/10 (2001), p. 101.

<sup>234</sup> Ibid, p. 99.

<sup>235</sup> Barker, J ‘The Different Forms of Reparation: Compensation’ in: Crawford, J, Pellet, A and Olleson, S (eds) *Oxford Commentaries on International Law - The Law of International Responsibility* (Oxford: Oxford University Press, 2010), p. 604.

<sup>236</sup> Report of the ILC of its 53<sup>rd</sup> session, UN doc. A/56/10 (2001), p. 101.

<sup>237</sup> *United Nations Compensation Commission*, Gov. Council, Decision 7, revised 16 March 1992, para. 35.

<sup>238</sup> Barker, J 2010, p. 604.

Council had already found Iraq liable for loss and damages resulting from the invasion in Kuwait.<sup>239</sup> The case thereby differs from one relating to climate change as the question of responsibility had already been established. However, it could be used as a precedent for the specification of the various categories compensable of damages.<sup>240</sup>

In cases where restitution and compensation are not sufficient to rectify the injury caused by the international wrongful conduct, Article 37 ASR stipulates an obligation of satisfaction. The Article puts forward some examples of satisfaction and states that it could e.g., consist of an acknowledgement of the breach or an apology. ILC considered it the appropriate remedy for moral damage that is not financially assessable or in cases of non-material injury.<sup>241</sup> Satisfaction could be an appropriate remedy in cases of climate change damage and could include measures such as policy shifts that guarantee non-repetition. Furthermore, a formal apology as well as the formal recognition of the state's contribution to climate change would raise the awareness necessary for the effort to mitigate climate change.<sup>242</sup>

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<sup>239</sup> UN Security Council, Resolution 687 (1991) Adopted by the Security Council at its 2981th meeting on 3 April 1991, 3 April 1991, S/RES/687 (1991), para 16.

<sup>240</sup> Report of the ILC of its 53<sup>rd</sup> session, UN doc. A/56/10 (2001), p. 101.

<sup>241</sup> Ibid, p. 106.

<sup>242</sup> Burkett, M (2009), p. 534; Boom, K 2012, p. 290.

# 5 Can State Responsibility be Established in Practice?

## 5.1 The Case

This chapter seeks to examine and apply the findings in the previous chapters regarding state responsibility in a hypothetical case study. As previously mentioned it is likely that an increased sea-level rise will cause damage to the Republic of Kiribati. In a low emissions scenario the rise is expected to amount to up to 45 cm, whereas in a high emissions scenario the forecasts estimate a rise up to 60 cm by 2100.<sup>243</sup> However, the rise could be larger as it is difficult to predict the extent to which the melting of large ice-sheets in Greenland and Antarctica will contribute to the rise in sea level.<sup>244</sup> The IPCC has already estimated that the built-in vulnerabilities of the low-lying islands will increase the potential detriments of the state and lead to damages in form of loss of land, as well as through saltwater intrusion and shoreline erosion.<sup>245</sup> These increased vulnerabilities will make the state particularly vulnerable to extreme weather events.<sup>246</sup> Thus, most importantly, the increased vulnerabilities and the ecological damages may over time lead to the land being uninhabitable, effects, which are already visible within the state.<sup>247</sup> The state would thereby need to relocate its entire population due to the effects of climate change.

The damages are financially assessable on two grounds. Firstly, they would amount to a need for adaption measures and increase the costs of infrastructure. Secondly, the consequences would amount to a loss of the state's GDP, e.g. through the loss of land.

In this hypothetical claim, the Republic of Kiribati therefore claims: (1) compensation for adaptation costs due to sea-level rise; and (2) a migration scheme allowing for a Kiribati relocation.

The selection of an appropriate respondent state reflects the difficulties in establishing state responsibility in practice. Concerning any potential respondent state great legal hurdles arise in form of, *inter alia*, jurisdictional issues or regarding the primary or secondary rules. This chapter does therefore not seek to pose a single state as the appropriate respondent but rather examine the advantages and disadvantages of bringing a case against different respondent states.

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<sup>243</sup> Office of the President, Republic of Kiribati 'Future Climate' <<http://www.climate.gov.ki/future-climate/>> accessed 27-11-2014

<sup>244</sup> Kiribati Meteorology Service, Australian Bureau of Meteorology, CSIR, *Current and future climate of Kiribati* (Pacific Climate Change Science Program, 2011), p. 7

<sup>245</sup> Woodroffe 2008, p. 89; Donner 2014, p. 333.

<sup>246</sup> Campbell, 2014, p. 4.

<sup>247</sup> Lange, HD 2010, p. 618.

## 5.2 Attribution

As previously mentioned, the acts or omissions in question must be attributable to the state for state responsibility to be established.<sup>248</sup> Assuming that there are binding obligations under the UNFCCC for the states not bound by the Kyoto Protocol, and under the Kyoto Protocol for the states that are parties. A situation where the state approves of GHG-emissions above set targets, either through permitting policies or in any other way by which it implicitly or explicitly approves the conduct, it is attributable and could incur state responsibility.<sup>249</sup> This is founded on the assumption that there are binding obligations under the UNFCCC regarding the states not bound by the Kyoto Protocol. As a state therefore has the obligation to ensure that they are implemented nationally.<sup>250</sup>

However, in the case that such an assumption would not bear ground. Kiribati would have to demonstrate that the activities emitting GHG are either governed by the state or under the state's control, either by the corporation exercising government authority under Article 4 ASR or concerning private corporations, through the state exercising effective control or by the state recognising the conduct as its own.<sup>251</sup>

It could be difficult to argue that the state-owned corporations exercise elements of government authority within the scope of Article 4 ASR precluding attribution. However, as Boom notes, it could also be argued that e.g. the provision of electricity is the core function of the state.<sup>252</sup> Concerning Articles 8 proving attribution under the said provision would mean that Kiribati would have to show that the government in question exercised effective control and that the corporations were under the explicit control and direction of the government, which would prove evidential difficulties.<sup>253</sup> Under Article 11 ASR, Kiribati could though argue that the government has recognised the conduct as its own. Such an argument could be based on a situation where the state approves of GHG-emissions above set targets, either through permitting policies or in any other way implicitly or explicitly approves of the conduct.<sup>254</sup>

## 5.3 Breach of Obligations

### 5.3.1 The Climate Change Regime

As mentioned, Article 4.2 in conjunction with Article 2 UNFCCC could create a legal obligation of conduct to reverse emission trends to a level that would “prevent dangerous anthropogenic interference with the climate system” and thereby stabilise global warming.<sup>255</sup> If Kiribati was to launch a contentious case it is of importance to note that the Berlin Mandate

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<sup>248</sup> Article 2 ASR.

<sup>249</sup> Verheyen, R 2005, p. 239.

<sup>250</sup> Tol, R and Verheyen, R 2004, p. 1111.

<sup>251</sup> Articles 8 and 11 ASR.

<sup>252</sup> Boom, K 2012, p. 313.

<sup>253</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, I.C.J. Reports 1986, p. 14, para 110.

<sup>254</sup> Verheyen, R 2005, p. 239.

<sup>255</sup> Voigt, C 2008, p. 6; Verheyen, R 2005, p. 95.

stipulated that the provisions in Article 4.2(a) and (b) were deemed inadequate and that the Protocol should enforce stronger obligations.<sup>256</sup> Thereby a conflict between the two treaties could be at hand concerning the commitments under Article 4.2(a) and (b). Seeing there are no conflict rules stipulated in neither the UNFCCC nor the Kyoto Protocol, neither are all parties to the UNFCCC parties to the Protocol, Article 30.4 VCLT applies. The provisions provide that in cases where the parties are parties to both treaties, the earlier only applies to such extent that its provisions are compatible with the latter treaty. In cases where one of the parties are only parties to one of the treaties, the treaty that both parties are party to governs their mutual rights and obligations.<sup>257</sup> Seeing that Kiribati is a party to the Kyoto Protocol, a dispute against another party therefore leads to the application of the said protocol. In cases where the respondent is not a party to the Protocol, the UNFCCC therefore applies seeing that it is the Treaty in force for both parties.

The states who could be potential respondents would thereby be the ones who either have not ratified the Kyoto Protocol, and could be examined under the rules of the UNFCCC, or the ones which failed to meet their QUELRO's which could then be in breach of the Kyoto Protocol. In 2011, the states falling into one of the categories were Iceland, Spain, Australia, Portugal, Japan, New Zealand, Canada, Greece, Ireland, United States of America (USA), Liechtenstein, Austria, and Norway.<sup>258</sup> It is important to note that the European Union (EU) has, in accordance with Article 4 of the Kyoto Protocol chosen to count its emissions together, rather than individually and combined the EU has met its targets.<sup>259</sup> Furthermore, Australia, Japan, Liechtenstein, New Zealand and Norway met their targets, some of the states due to the flexibility mechanism the Protocol provides.<sup>260</sup> Therefore, only Iceland, Canada and the United States of America could be in breach of its climate regime obligations. According to current data, Iceland has increased its emissions with 25 per cent since 1990.<sup>261</sup> However, in comparison to the total emissions of Annex I states, Iceland only emitted 0.02 per cent of the total GHG-emissions in 2011.<sup>262</sup> Canada and

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<sup>256</sup> United Nations Framework Convention for Climate Change, Conference of the Parties, *Report of the Conference of the Parties on its First Session* (Decision 1/CP.1, FCCC/CP/1995/7/Add.1., 1995), preamble.

<sup>257</sup> Article 30.4 VCLT referring to Article 30.3 VCLT; Cf. Odendahl, K, 'Article 30 – Application of successive treaties relating to the same subject matter' in: Dörr, O and Schmalenbach, K (eds) *Vienna Convention on the Law of Treaties – A Commentary* (Berlin Heidelberg: Springer-Verlag, 2012), p. 509-516.

<sup>258</sup> Haita, C, *The State of Compliance in the Kyoto Protocol* (International Center for Climate Governance, Reflection No. 12, 2012), p. 4.

<sup>259</sup> Intergovernmental and Legal Affairs, Climate Change Secretariat, *United Nations Framework Convention on Climate Change – Handbook* (Bonn: Climate Change Secretariat, 2006), p. 86; Haita, C 2012, p. 3.

<sup>260</sup> For Australia see: National Inventory Report 2012, *Vol. 1. – The Australian Government Submissions to the United Nations Framework Convention on Climate Change* (April 2014), p. 3; For Liechtenstein see: *Liechtenstein's Sixth National Communication under the UNFCCC and the Kyoto Protocol*, (2014), p. 15-16; For New Zealand see: Ministry for the Environment, 'United Nations Framework Convention on Climate Change' <<http://www.mfe.govt.nz/climate-change/international-forums-and-agreements/united-nations-framework-convention-climate>> accessed 27-11-2014; For Norway see Ministry of Finance, *Cost-benefit Analysis* (Official Norwegian Reports, NOU 2012:16), p. 129; For Japan see: Ministry of Environment, 'Kyoto Mechanisms Information Platform' <<http://www.kyomecha.org/e/info/index.html>> accessed 27-11-2014.

<sup>261</sup> United Nations Framework Convention on Climate Change, Conference of the Parties, *Information on national greenhouse gas inventory data from Parties included in Annex I to the Convention for the period 1990-2002, including the status of reporting. Executive Summary* (Decision 1/CP.16, FCCC/CP/2004/5, 2004), figure 4 and 5.

<sup>262</sup> *Ibid.*

the US on the other hand have increased their emissions with 18.7 and 8 per cent since 1990, however the states amount for 3.22 and 30 per cent of the total Annex I emissions.<sup>263</sup>

In 1999, Iceland refused to ratify the Kyoto Protocol arguing that it would be impossible for the state to meet the obligations mainly due to mitigating action taken before 1990, which would make further reductions difficult. Furthermore, Iceland argues that due to the small economical size a single heavy industry would lead to a high increase in percentage, an increase that would be unnoticeable in a larger economy.<sup>264</sup> However, the state ratified the Protocol in 2002 with a QUELRO of an emission increase of 10 per cent.<sup>265</sup> The state had a significant 25.8 per cent increase in emissions in 1990 to 2011 which is largely due to the expansion of heavy industry in Iceland. In 2009, the state reported that it would decrease its emissions of -15 per cent relative to 1990 by 2020. Thus, climate change NGOs claim that with the current legislation implemented, Iceland is expected to increase its emissions within 25-92 per cent by 2020.<sup>266</sup> Overall, the increase in emissions, as well as the lack of efficient legislation in place to mitigate the state's emissions, it could be argued that the state does not fulfil its obligation of conduct to reverse emissions trends.

Canada ratified the Kyoto Protocol in December 2002 but decided to withdraw its ratification in 2011, as the first state to do so. It was officially not a party to the protocol in December 2012.<sup>267</sup> As Article 27 of the Protocol does not stipulate any guidance on the consequences of a withdrawal, recourse must be taken to general law as stipulated in the chapeau of Article 70 VCLT. According to Article 70.1(a) VCLT, Canada no longer has any obligation to further perform the treaty.

Canada became a party to the UNFCCC in 1992 and has been bound by its provisions since 1994 when the Convention entered into force.<sup>268</sup> Although the Kyoto Protocol no longer binds the state, the UNFCCC is still in force. On a national level, Canada enacted its National Action Program on Climate Change (NAPCC) in 1995. The NAPCC functioned as a flexible instrument including voluntary mechanisms that could function as a platform between stakeholders.<sup>269</sup> However, in 2005, almost ten years after the entry into force of the Convention, Canada's GHG-emissions had continued to increase with almost 25 per cent.<sup>270</sup> This could indicate that although the state has regulated GHG-emissions, the measures had not been sufficient to mitigate the emissions. Secondly, a compelling reason for Canada breaching its UNFCCC obligation is the fact that the state chose to withdraw from Kyoto

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<sup>263</sup> Ibid.

<sup>264</sup> Ministry for Foreign Affairs Iceland, 'The Kyoto Protocol' (Press release, 2 March 1999) <<http://www.mfa.is/news-and-publications/nr/1862>> accessed 28-11-2014.

<sup>265</sup> Annex B to Kyoto Protocol to the United Nations Framework Convention on Climate Change, UN Doc FCCC/CP/1997/7/Add.1, Dec. 10, 1997; 37 ILM 22 (1998).

<sup>266</sup> Climate Action Tracker, 'Iceland' (20 November 2013) <<http://climateactiontracker.org/countries/developed/iceland.html>> accessed 28-11-2014.

<sup>267</sup> United Nations Framework Convention 'Canada' <<http://maindb.unfccc.int/public/country.pl?country=CA>> accessed 27-11-2014.

<sup>268</sup> Ibid.

<sup>269</sup> United Nations Framework Convention on Climate Change, *Summary of the In-Depth Review of the National Communication of Canada* (FCCC/IDR.1(SUM)/CAN, 1996), p. 3.

<sup>270</sup> United Nations Framework Convention on Climate Change, Conference of the Parties, *Information on national greenhouse gas inventory data from Parties included in Annex I to the Convention for the period 1990-2002, including the status of reporting. Executive Summary* (Decision 1/CP.16, FCCC/CP/2004/5, 2004), figure 4 and 5.

Protocol seeing that displays the state's inaction concerning reversing emission trends. This could therefore imply that Canada had not fulfilled its obligations to prevent dangerous anthropogenic interference.

At present, the USA is the second largest emitter of GHG and the largest cumulative contributor to global emissions.<sup>271</sup> The US never ratified the Protocol and will be assessed based on its UNFCCC obligations. Similarly to Canada, the US emissions have continued to increase since the ratification of the UNFCCC in 1992.<sup>272</sup> Furthermore, the state's emissions grew faster after the entry into force of the Convention, which could be an indication of a lack of action in mitigating GHG-emissions.<sup>273</sup> The state implemented the national Climate Change Action Plan in 1993 and in its reports to the UNFCCC declared that it would be able to reverse its emissions to the 1990s levels by the year 2000, a statement that was reaffirmed by President Clinton in a public announcement.<sup>274</sup> However, the state failed to meet its own targets and emissions increased with 14 per cent in the period 1990-2000.<sup>275</sup> This could, according to Verheyen indicate that the state's own action plans were not sufficiently implemented.<sup>276</sup> Furthermore, the state's rejection of the binding commitments of the Kyoto Protocol could be seen as a breach of its UNFCCC obligations. As previously stipulated, the negotiators of the Berlin Mandate stated that the commitments in the UNFCCC were not sufficient in order to meet the objective of the UNFCCC, as stipulated in Article 2 UNFCCC.<sup>277</sup> Failing to participate in the Protocol could therefore indicate that the state's commitment to achieve the objective of the Convention was not sufficient. In November 2014, the US pledged, in a non-binding agreement with China, to decrease its emissions with 25 per cent before the year 2030.<sup>278</sup> The US pledge is a step in the right direction, although it should be noted that the state has previously made commitments it had not been able to fulfil and that the political and institutional system of the state makes the legislation process difficult, which has resulted in climate policies on a federal level remaining voluntary.<sup>279</sup>

In conclusion, it is noted that all states may argue that the obligations enshrined in the UNFCCC are non-binding. However, a counter-argument of Kiribati could be based on the good faith and Article 18 VCLT. The US has not ratified the VCLT but as previously noted the provision reflects international customary law.<sup>280</sup> Based on such an argument Kiribati

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<sup>271</sup> Ibid.

<sup>272</sup> Ibid.

<sup>273</sup> Ibid.

<sup>274</sup> United Nations Framework Convention on Climate Change, *Executive Summary of the First National Communication of the USA*, (FCCC/NC/7, July 1995), p. 3.

<sup>275</sup> United Nations Framework Convention on Climate Change, Conference of the Parties, *Information on national greenhouse gas inventory data from Parties included in Annex I to the Convention for the period 1990-2002, including the status of reporting. Executive Summary* (Decision 1/CP.16, FCCC/CP/2004/5, 2004), figure 4 and 5.

<sup>276</sup> Verheyen, R 2005, p. 284.

<sup>277</sup> United Nations Framework Convention for Climate Change, Conference of the Parties, *Report of the Conference of the Parties on its First Session* (Decision 1/CP.1, FCCC/CP/1995/7/Add.1., 1995), preamble.

<sup>278</sup> Office of the White House, *U.S. – China Joint Announcement on Climate Change*, Press release, 11 November 2014.

<sup>279</sup> United Nations Framework Convention on Climate Change, *Report of the in-depth review of the fourth national communication of the United States of America* (FCCC/IDR.4/USA, 2009), p. 6.

<sup>280</sup> Villiger, ME 2009, p. 252.



could state that the increased emissions of the states are contrary to the object and purpose of the Convention and thereby constitute an international breach on such grounds.

Although, it should also be noted that Article 4.10 UNFCCC stipulates that consideration shall be given to states that are highly dependent on income generated from the production, processing or consumption of fossil fuels when assessing their implementation of the Convention. In a contentious case, it is thereby likely that the states at hand will argue that they fall under the category and that there cannot be a breach of obligations concerning the Convention.

### 5.3.2 The No-Harm Rule

As mentioned, the no-harm rule stipulates that states have a due diligence obligation to prevent or minimise the risk of transboundary harm. In this case it must be shown that the state has had an opportunity to act, foreseen the harm as well as taken proportionate measures to mitigate the risk.<sup>281</sup> Under the no-harm rule members of the EU could be held responsible individually, which could make it possible to examine states such as Spain, which has increased its emissions with 25 per cent or Malta and Cyprus, which have increased their emissions with 50 percent respectively, but do not have obligations under the Kyoto Protocol. States such as Portugal, Greece, Austria, Norway, Ireland and Japan could also be subjects under the no-harm rule as they have increased their emissions.<sup>282</sup> Turkey who has increased its emissions with 125 per cent as well as both Iceland, Canada and the USA could be held responsible.<sup>283</sup> In such a case, Kiribati would have to show that each state had an opportunity to act. All mentioned states, except for the USA are minor emitters as compared to the global emissions.<sup>284</sup> However, as stated, previously, states are obliged to act to take effective measures based on the best available technologies in order to fulfil the criterion and it could be argued that with the number of states that have decreased their GHG-emissions, of which some substantially, the efforts these states have undertaken are not sufficient. Although, regarding the states which have increased their emissions, yet only to all small extent, it could be argued they have fulfilled their opportunity to act as such a small increase could indicate that efforts are taken to mitigate emissions.

Secondly, the 'foreseeability-test' must be undertaken. In the present case the relationship between anthropogenic GHG-emissions and climate change have been the subject of science since the 19<sup>th</sup> century. At the Stockholm Conference in 1972, it was recognised that increased anthropogenic GHG-emissions could lead to a rise in the Earth's temperature with a minimum of 0.5°C. Furthermore, in the first IPCC report in 1990, the Committee established with certainty that the increase in anthropogenic GHG-emissions leads to an increase in the GHG-concentrations in the atmosphere which results in the warming of the Earth. Sea-level rise was one of the first impacts discussed in the first IPCC assessment report, making states

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<sup>281</sup> Verheyen, R and Roderick, P 2008, p. 18.

<sup>282</sup> United Nations Framework Convention on Climate Change, Conference of the Parties, *Information on national greenhouse gas inventory data from Parties included in Annex I to the Convention for the period 1990-2002, including the status of reporting. Executive Summary* (Decision 1/CP.16, FCCC/CP/2004/5, 2004), figure 4 and 5.

<sup>283</sup> Ibid.

<sup>284</sup> Ibid.

aware of the impacts for at least two decades.<sup>285</sup> It can therefore be argued that states, especially since the release of the first IPCC report, cannot argue that they could not foresee the risks of anthropogenic GHG-emissions.<sup>286</sup>

It is based on the last step, the proportionality test that difficulties arise. It must be shown that the state at hand has failed to take proportionate measures to reduce or minimise the risk posed to Kiribati. The assessment balances the sovereign interests of the emitting state with the interests of the injured state and the technical and economical abilities of the emitting state must be taken into consideration.<sup>287</sup> In the present case it could be argued that all Annex I states have the economical ability to mitigate their emissions, especially seeing that studies have shown that there are large economic benefits in mitigating climate change and that these outweigh the costs.<sup>288</sup> Furthermore, the potential damages incurred by Kiribati are large and it could be argued that only significant measures to reduce emissions could be considered proportionate.<sup>289</sup> However, in this regard states could argue that in accordance with the principle of *common but differentiated responsibilities*, states with well-developed economies and governance structures have a larger responsibility to mitigate emissions.<sup>290</sup> With respect to the mentioned states, USA, Canada, Spain and Turkey are among the top 20 states with the highest gross domestic product (GDP) in the world. Iceland, Cyprus and Malta fall lower on the scale.<sup>291</sup> However, that could arguably relate to the small sizes of the states rather than an indication of the development of their economies. Moreover, Iceland, Cyprus and Malta could argue that in a proportionality assessment the state's contribution to the damage must be taken into consideration and that the states' contributions to the harm in absolute terms is small.<sup>292</sup>

In conclusion, the mentioned states have had an opportunity to act to a foreseeable harm and regarding the potential damage at hand as well as the economic capabilities of the states, it is possible to argue that at least the larger emitters have breached their no-harm obligations. However, it should be noted that further examination of each state is necessary to establish such a breach.

## 5.4 Damage and Causation

As previously mentioned, proving causation could be one of the greatest hurdles in the launch of a contentious case due to the multicausal nature of climate change as well as the large number of different emitters.<sup>293</sup> In the present case, Kiribati argues that the GHG-emissions of one state has resulted in a sea-level rise causing economic damages. Kiribati

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<sup>285</sup> Verheyen, R 2005, p. 314.

<sup>286</sup> Verheyen, R and Roderick, P 2008, p. 19-20.

<sup>287</sup> Voigt, C 2008, p. 12-13.

<sup>288</sup> See e.g. Stern, N, 2006.

<sup>289</sup> Voigt, C 2008, p. 13.

<sup>290</sup> Ibid.

<sup>291</sup> World Bank, *Gross domestic product ranking table* (World Development Indicators, September 2014).

<sup>292</sup> United Nations Framework Convention on Climate Change, Conference of the Parties, *Information on national greenhouse gas inventory data from Parties included in Annex I to the Convention for the period 1990-2002, including the status of reporting. Executive Summary* (Decision 1/CP.16, FCCC/CP/2004/5, 2004), figure 4 and 5.

<sup>293</sup> Boom, K 2012, p. 252.

would thereby have to show both factual as well as proximate causation in order to claim reparations.<sup>294</sup> Furthermore, if Kiribati was to process the claim on the basis of future damages it would have to prove an unequivocal chain of causation linking the prospective loss with the imputable act and secondly, the prospective loss “must not be too remote or speculative”.<sup>295</sup> As the ‘but for’ test approach is not well suited for the case at hand, causation shall be examined under the probabilistic approach. In such a case, Kiribati could rely upon IPCC assessments of the future damage Kiribati will face. The scientific community is to a greater certainty reaching the conclusions on which Kiribati are basing its claim and COP has noted that the need to relocate is a damage that with great certainty can be established.<sup>296</sup> It can therefore be argued that a claim based on such damages would not be too remote or speculative.

### 5.4.1 Factual causation

As previously noted the “but for test” is ill suited to determine the causal link between anthropogenic GHG-emissions. Okowa argues that setting a standard for causation where the issue is dependent on evidentiary difficulties would undermine the objectives of the primary rules.<sup>297</sup> Therefore, she argues, tribunals should not only rule on direct and positive evidence, but also upon probable and inferential evidence. As Okowa notes, it is thus questionable if international tribunals would be prepared to act upon such evidence.<sup>298</sup> However, the current assessment will examine Kiribati’s potential to argue under the ‘contributing to’ approach.<sup>299</sup> The ICJ has not ruled upon the approach but as it has been argued previously it could be possible that the ICJ would accept the approach. In such a case, Kiribati would have to show that the emissions of the respondent state has caused a “material increase in risk” as argued by Australia in the *Nuclear Tests case*.<sup>300</sup>

Firstly, Kiribati would have to show that anthropogenic emissions have caused an increased risk for damage to property as well as moral damages. As mentioned IPCC has concluded that sea level rise is globally attributed to anthropogenic GHG-emissions.<sup>301</sup> Relating to Kiribati the average sea-level rise falls within the estimates of the global average. However, the data fluctuates to a greater extent than globally, which could relate to phenomena such as the El Niño-Southern Oscillation (ENSO).<sup>302</sup> In conclusion, as the data fall within the general

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<sup>294</sup> Report of the ILC of its 53<sup>rd</sup> session, UN doc. A/56/10 (2001), p. 92-93.

<sup>295</sup> International Law Commission, Garcia-Amador, FV, *Sixth Report on State Responsibility* (UN Doc. A/CN.4/134, 1961), p. 41-42.

<sup>296</sup> Campbell, JR 2014, p. 2;

United Nations Framework Convention for Climate Change, Conference of the Parties, *Decisions adopted by the Conference of the Parties* (Decision 1/CP.16, FCCC/CP/2010/7/Add.1, 2011), para. 14(f).

<sup>297</sup> Okowa, P 2000, p. 187.

<sup>298</sup> Ibid.

<sup>299</sup> Ibid, p. 185.

<sup>300</sup> *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, Judgement of 8 July 1974, p. 253.

<sup>301</sup> Intergovernmental Panel on Climate Change (IPCC), Stocker, F; Qin, D; Plattner, GK; Tignor, MMB et al. *Climate Change 2014: The Physical Science Basis: Working Group I Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge, Cambridge University Press, 2014), p. 25.

<sup>302</sup> Kiribati Meteorology Service, Australian Bureau of Meteorology, CSIR, *Current and future climate of Kiribati* (Pacific Climate Change Science Program, 2011), p. 4.

scope of the estimated global sea-level rise phenomena as ENSO could have less importance in an assessment and it could be argued that the sea-level rise in Kiribati is caused by anthropogenic GHG-emissions. As it has been noticed that the ecological damages and a need to relocate its population is a danger to states' vulnerable to sea-level rise, there is potential for a successful argument.<sup>303</sup>

Secondly, Kiribati would have to show that the respondent state's emissions have caused an increased material risk for damage. Concerning small emitters such as Iceland, Cyprus and Malta it would be difficult for Kiribati to prove that the states have increased the risk for Kiribati. Thus, for states such as the US, which is the largest cumulative emitter globally, such an argument could have bearing concerning the state. Moreover, it could be argued that one state's actions are a part of several states' collective wrongful acts by multiple states of which the single state's actions have caused an increased material risk with reference to property damage and the need to relocate.<sup>304</sup>

## 5.4.2 Proximate causation

Fulfilling proximate causation's objective test, in form of showing that the anthropogenic GHG-emissions cause sea-level rise and that this is the normal and natural consequence thereof could be done by referring to e.g. the IPCC which has constituted that sea-level rise is caused by global warming.<sup>305</sup> However, concerning a certain state this is, as with the factual causation-test, increasingly difficult especially regarding small emitters as their contribution to GHG in the atmosphere makes it problematic to establish a clear sequence between their emissions and the damage incurred by Kiribati.<sup>306</sup> However, a potential argument could also be that since anthropogenic GHG-emissions are cumulative and thereby indivisible, all emissions have contributed to sea-level rise. A natural sequence could therefore be shown to all emitters, including smaller emitters.<sup>307</sup>

The subjective element of proximate causation, i.e. the foreseeability test can, as noted, be fulfilled as the consequences of anthropogenic GHG-emissions have been known since 1990 when the first IPCC report stated that anthropogenic emissions could lead to an rise in the sea-level.<sup>308</sup> However, as GHG remains in the atmosphere for up to a century it is not the emissions which have occurred in the past two decades which are the main source of global warming.<sup>309</sup> As the proximate causation requires reasonable foreseeability, only the emissions

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<sup>303</sup> IPCC, Nurse, L; Mclean, R et al. 'Chapter 29. Small Islands' in: Intergovernmental Panel on Climate Change (IPCC), Barros, VR; Field, CB; Dokken, DJ; Mastrandrea MD et al, *Climate Change 2014: Impacts, Adaptation and Vulnerability. Part B Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge, Cambridge University Press, 2014), p. 12.

<sup>304</sup> Boom, K 2012, p. 319.

<sup>305</sup> Intergovernmental Panel on Climate Change (IPCC), Stocker, F; Qin, D; Plattner, GK; Tignor, MMB et al. *Climate Change 2013: The Physical Science Basis: Working Group I Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, (Cambridge, Cambridge University Press, 2014), p. 25.

<sup>306</sup> Boom, K 2012, p. 320.

<sup>307</sup> Ibid.

<sup>308</sup> Verheyen, R 2005, p. 314.

<sup>309</sup> Intergovernmental and Legal Affairs, Climate Change Secretariat, *United Nations Framework Convention on Climate Change – Handbook* (Bonn: Climate Change Secretariat, 2006), p. 21.

emitted in the last two decades are legally relevant which would prove a great legal hurdle for Kiribati.

## 5.5 Defences

Both Verheyen and Boom argue the difficulties in applying the defences to international wrongful acts causing climate change damage.<sup>310</sup> Boom analyses the circumstances precluding wrongfulness concerning consent and necessity and applies this in a climate change context. Regarding consent Boom envisages a scenario where it can be argued that states have consented to the targets within the limits stipulated in the Kyoto Protocol and that they thereby cannot claim responsibility for emissions within the Kyoto limits. However, this reasoning is according to Boom precluded by the fact that states such as Kiribati have made declarations stating that the ratification of the UNFCCC or Kyoto Protocol never shall constitute a renunciation of their rights under the rules on state responsibility.<sup>311</sup>

Relating to necessity, Boom argues that there are possibilities of such a defence being successful is more likely. This could be done with the state referring to that mitigation actions would affect the state's economy, environment and human rights protection. Such considerations are enshrined in the UNFCCC, especially in Article 4.10 UNFCCC that prescribes that the parties shall consider states that are especially reliant upon resources, which contribute to climate change, e.g. the OPEC-members.<sup>312</sup> However, such an argument is unlikely as necessity is based upon the condition that it cannot be argued if it seriously impairs the essential interests of the state toward which the obligation exists, or the international community as a whole.<sup>313</sup>

Moreover, the continued GHG-emissions of states, in breach of its climate change regime, and no-harm, obligations are unlikely to constitute the only means for a state to safeguard its interests against a grave and imminent peril.<sup>314</sup>

## 5.6 Remedies

If state responsibility is established it is likely that the Court would adhere to Kiribati's claim for remedies for the damages incurred by the state. As the damage would be financially assessable, compensation would be an appropriate remedy.<sup>315</sup> Burkett and Campbell argue that in the case of climate change damages compensation could include both compensation in form of money transfers as well as adaptation measures such as insurance plans or technology transfers.<sup>316</sup>

A migration scheme could take different forms. Firstly, relocation could be implemented through the purchase of uninhabited land for resettlement on e.g. nearby islands. In the

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<sup>310</sup> Verheyen, R 2005, p. 241; Boom, K 2012, p. 276-277.

<sup>311</sup> Ibid.

<sup>312</sup> Boom, K 2012, p. 324.

<sup>313</sup> Article 25.1(b) ASR.

<sup>314</sup> Report of the ILC of its 53<sup>rd</sup> session, UN doc. A/56/10 (2001), p. 80.

<sup>315</sup> Article 35 ASR.

<sup>316</sup> Burkett, M 2009, p. 532; Campbell, JR 2014, p. 22.

present case Kiribati has already purchased land in Fiji.<sup>317</sup> Campbell argues that it is appropriate that the compensation should cover such costs. Furthermore, he includes contributions for airfares, the purchase of land for resettlement and the building or purchase of homes as potential costs to be covered.<sup>318</sup> In such as case, the costs of relocation would be financially assessable and thereby fall under the scope of Article 35 ASR.

However, if Kiribati was to claim that the citizens of the state should be awarded protection as migrants in the respondent state, it becomes increasingly challenging for such a claim to fall under one of the three remedies stipulated in ASR.<sup>319</sup> The obligation that the remedy must commensurate with the loss could be regarded as a founding principle in the doctrine of remedies in international law.<sup>320</sup> In the case where a government is forced to relocate its population due to another state's wrongful acts, the question to be answered is how such an injury is remedied. As such, the question has never been brought forward in international adjudication, there is no clear answer and one is thereby forced to derive conclusions from the provisions in ASR and its commentary.

Firstly, as noted, claiming restitution in such a case would be difficult as climate change causes damages that cannot be subject to restitution without great effort and at a great cost.<sup>321</sup> It could possibly be argued that the respondent state has an obligation to artificially create new islands to which the I-Kiribati could relocate, or through an adaptation effort so vast that a relocation would be unnecessary. The responsible state would thereby making an effort to restore the *status quo ante*, or at least creating a result which would come as close to *status quo ante* as possible. The respondent state would likely argue that such an obligation would create a disproportionate burden.<sup>322</sup> However, the ILC commentary provides that the proportionality assessment shall be a balanced assessment between the burden on the responsible state and the benefit gained by the injured state. Such an assessment shall be based on equity and reasonableness but with an inclination towards the injured state. More importantly, the commentary provides that “[t]he balance will invariably favour the injured state in any case where the failure to provide restitution would jeopardize its political independence or economic stability”.<sup>323</sup> Thereby making it possible for Kiribati to argue that failure to provide restitution would jeopardize these characteristics of the state seeing that such a failure could lead to the non-existence to the state. It is probable that Kiribati would not have to prove that the threat to its political independence or economic stability is real or imminent but rather only show that it would “jeopardize” these elements. Such an argument could successfully be based on current scientific assessments.<sup>324</sup> However, the respondent

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<sup>317</sup> The Guardian, ‘Besieged by the rising tides of climate change, Kiribati buys land in Fiji’ (1 July 2014) <<http://www.theguardian.com/environment/2014/jul/01/kiribati-climate-change-fiji-vanua-levu>> accessed 12-10-2014.

<sup>318</sup> Campbell, JR, 2014, p. 22.

<sup>319</sup> Article 45 ASR provides that “Full reparation [...] shall take the form of restitution, compensation or satisfaction.

<sup>320</sup> *Factory at Chorzów* case, Merits, Judgment, 1928, PCIJ, Ser. A, No. 17, p. 4, p. 47.

<sup>321</sup> Burkett, M, 2009, p. 531.

<sup>322</sup> Article 35(b) ASR.

<sup>323</sup> Report of the ILC of its 53<sup>rd</sup> session, UN doc. A/56/10 (2001), p. 98.

<sup>324</sup> Burkett, M 2009, p. 531; Intergovernmental Panel on Climate Change (IPCC), Oppenheimer, M; Campos, M; Warren, R et al. ‘Chapter 19. Emergent Risks and Key Vulnerabilities’ in: Intergovernmental Panel on Climate Change (IPCC), Barros, VR; Field, CB; Dokken, DJ; Mastrandrea MD et al, *Climate Change 2014:*

state would only be accountable for a proportion of the damage, of which there is a causal link between its actions and the injury incurred by Kiribati. It could thereby be disproportional for it to bear the whole burden of restitution albeit the balance being in favour of Kiribati.<sup>325</sup>

Therefore, the question is, whether awarding protection to Kiribati migrants could constitute a form of compensation. The ILC notes that compensation, although most often consists of a monetary payment could also “take the form, as agreed, of other forms of value”.<sup>326</sup> Could an obligation to award protection constitute such an “other value”? Based on the meaning of the word “compensation”, which is said to constitute an award to someone in recognition of a loss, awarding protection of I-Kiribati could constitute a form of compensation.<sup>327</sup>

Furthermore, as the state is under an obligation to make “full reparation” for the damages it has caused, the respondent state must compensate for the loss of land and thereby the loss of territory for the state to inhabit its migrants. Such compensation cannot be awarded in another way but by compensating the state financially in order to purchase new territory, or by awarding protection to the citizens of that state. However, as the most common way of compensation is through monetary payments it is not certain that a Court would prescribe such a remedy. The difficulties points to the unique situation that international law is facing concerning disappearing states due to climate change.

## 5.7 Issues relating to climate change adjudication

### 5.7.1 Contentious case

Article 14 UNFCCC stipulates that the “parties concerned shall seek a settlement of the dispute through negotiation or any peaceful means of their own choice”. Parties are furthermore offered an option to declare the jurisdiction of the ICJ as compulsory or request the creation of a conciliation commission. Such as commission shall have the powers to render a recommendatory award, which the parties shall consider in good faith. To date the rules of procedure for establishing such a commission have not been adopted by the COP.<sup>328</sup> The question of whether recourse can be taken to the ICJ therefore arises. The advantages with launching a case at the ICJ are many. Firstly, the award would be binding upon the

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*Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge, Cambridge University Press, 2014), p. 1071.

<sup>325</sup>

Faure, MG and Nollkaemper, A, ‘International Liability as an Instrument to Prevent and Compensate for Climate Change, (2007) 43A *Stanford Journal of International Law* 1, pp. 123-179, p. 174.

<sup>326</sup> Report of the ILC of its 53<sup>rd</sup> session, UN doc. A/56/10 (2001), p. 99.

<sup>327</sup>

Oxford Dictionary, ‘compensation’  
<<http://www.oxforddictionaries.com/definition/english/compensation?q=compensation+&searchDictCode=all>>  
accessed 05-12-2014.

<sup>328</sup> Articles 14(2), 14(6) and 14(7) UNFCCC; Cf. Werksman, JD 2013, p. 431.

parties.<sup>329</sup> Secondly, the awards of the ICJ are recognised as the interpretations of the highest legal and moral authority and would thereby carry great weight.<sup>330</sup>

### 5.7.1.1 Standing

The ILC has identified five different situations where a state is entitled to invoke state responsibility for the breach of an obligation. Firstly, an injured state itself may invoke responsibility in accordance with Article 42 ASR. This can be done by the state individually or together with a group of states. Secondly, a state can have standing if the matter regards an obligation which is owed to the international community or a group of states in which the state is included. Thirdly, a state has legal standing if it has been injured and the alleged breach affects all the states concerned. The fourth and fifth categories involve public interest standing.<sup>331</sup>

In the present case, Kiribati would likely argue that the state has standing based on the second category recognised by the ILC. As the commitments stipulated in the UNFCCC as well as the obligations enshrined in the no-harm rule are owed towards all the parties to the Convention and the no-harm rule towards the whole international community, albeit Kiribati is specifically affected. The state would have to show that its rights under the UNFCCC and the no-harm rule have been violated and that the state has an individualised interest in bringing the case.<sup>332</sup>

Concerning the individualized interest Kiribati could argue that the state has such an interest based on its vulnerability. The vulnerability of SIDS such as Kiribati has been recognised in several instances by the UNFCCC.<sup>333</sup> Furthermore, as mentioned in previous chapters, Kiribati is specifically vulnerable regarding its low-lying topography, geographically small size, small economy and remoteness. There are thereby convincing arguments for Kiribati being able to establish standing.<sup>334</sup>

### 5.7.1.2 Jurisdiction

Jurisdiction at the ICJ is obtained through the consent of the parties to the dispute in three ways. Firstly, jurisdiction can be established through a special agreement between the parties.<sup>335</sup> Secondly, jurisdiction can be established through special Treaties or Conventions that specifically refer to the ICJ as the dispute settlement mechanism.<sup>336</sup> Thirdly, states can make unilateral declarations acknowledging the Court's compulsory jurisdiction *ipso facto* without a special agreement.<sup>337</sup>

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<sup>329</sup> Article 59 United Nations, Statute of the International Court of Justice, 18 April 1946.

<sup>330</sup> Strauss, A 'Climate Change Litigation: Opening the Door to the International Court of Justice' in: Burns, WCG (ed) *Adjudicating Climate Change – State, National and International Approaches* (Cambridge: Cambridge University Press, 2009), p. 337.

<sup>331</sup> Firstly, because of responsibilities which are owed to the whole international community, i.e. *erga omnes* obligations, which can be invoked by the whole international community, as well as obligations which concern the protection of the collective interests of a group of states, including the claimant. Cf. Report of the ILC of its 53<sup>rd</sup> session, UN doc. A/56/10 (2001), p. 116-119, 126-128.

<sup>332</sup> With regards to the violations see previous chapters; Boom, K 2013, p. 418.

<sup>333</sup> Preamble and Article 4(6) UNFCCC.

<sup>334</sup> Boom, K 2013, p. 419.

<sup>335</sup> Article 36 (1) ICJ Statute.

<sup>336</sup> Article 36 (1) ICJ Statute.

<sup>337</sup> Article 36 (2)-(5) ICJ Statute.



Regarding jurisdiction established through a special arrangement scholars argue that it is unlikely that it would be consented by the respondent party.<sup>338</sup> Jurisdiction based on a mutual agreement has previously mainly been concluded in cases concerning territorial disputes where both the parties have an interest in an independent body ruling on the dispute.<sup>339</sup> In the present case it is unlikely that the respondent state would willingly subject itself to such jurisdiction as the consequences of a ruling in favour of Kiribati would be vast.<sup>340</sup>

Secondly, jurisdiction could be established based on an independent Treaty. In the present case, UNFCCC refers to the ICJ as a mechanism for dispute settlement under Article 14 UNFCCC. However, such a referral is based upon both parties having deposited their consent to the compulsory jurisdiction of the ICJ under the UNFCCC.<sup>341</sup> At present, only the Netherlands has declared such consent, and only in relation to another party accepting the consent.<sup>342</sup>

Nevertheless, that does not preclude an ICJ ruling on climate change. As previously mentioned some states have consented to the compulsory jurisdiction of the ICJ. Kiribati is not one of them but has the possibility of making such a declaration. Currently, 70 states have declared their acceptance of the Court's compulsory jurisdiction.<sup>343</sup> Of the states, which could be at hand regarding the establishment of state responsibility for their emissions, only Austria, Portugal, Greece, Norway, Ireland, Japan, Canada, Spain, Malta and Cyprus have accepted the Court's compulsory jurisdiction. Greece, Norway and Ireland have done so without any relevant reservations and it would thereby be possible for Kiribati to establish jurisdiction if a case was brought against one of these states.

All other states, except for Cyprus, have done so with a reservation excepting disputes that the parties agree to settle by other means of peaceful settlement.<sup>344</sup> This could, if the case is based on the climate change regime indicate a recourse to the system under Articles 14 UNFCCC and 18 and 19 KP. Article 14 UNFCCC stipulates that parties shall take recourse to negotiation on "any other peaceful mechanism of their own choice" and opts for the possibility to declare the jurisdiction of either the ICJ and/or an arbitrary panel.<sup>345</sup> However, as mentioned, only one party has used the voluntary mechanism and it could thereby be

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<sup>338</sup> Strauss, A 2009, p. 340; Boom, K 2013, p. 421.

<sup>339</sup> The following cases were ruled on the basis on a jurisdiction established on the basis of a mutual agreement: *The Minquiers and Ecrehos case*, Judgment of November 17th, 1953 : I.C.J. Reports 1953, p. 47; *Case concerning Sovereignty over certain Frontier Land*, Judgment of 20 June 1959: I.C.J. Reports 1959, p. 209. *North Sea Continental Shelf, Judgment*, I.C.J. Reports 1969, p. 3; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I. C.J. Reports 1985, p. 13; *Frontier Dispute*, Judgment, I.C.J. Reports 1986, p. 554. *Territorial Dispute (Libyan Arab Jamuhiriyu/Chad)*, Judgment, I.C.J. Reports 1994, p. 6; *Kasikilili/Sedudu Island (Botswana/ Namibia)*, Judgment, I.C.J. Reports 1999, p. 104; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, 4, Judgment, I.C.J. Reports 2002, p. 625; *Frontier Dispute (Benin/Niger)*, Judgment, I.C.J. Reports 2005, p. 90; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 659.

<sup>340</sup> Strauss, A 2009, p. 340; Boom, K 2013, p. 421.

<sup>342</sup> International Court of Justice, 'Declarations Recognizing the Jurisdiction of the Court as Compulsory' <<http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3>> accessed 03-12-14.

<sup>343</sup> Ibid.

<sup>344</sup> For example, Canada's reservation states: "[...] over all disputes arising after the present declaration with regard to situations or facts subsequent to this declaration, other than: (a) disputes in regard to which the parties have agreed or shall agree to have recourse to some other method of peaceful settlement [...]". Cf. Ibid.

<sup>345</sup> Article 14.1-2 UNFCCC and 19 KP.

argued that there is no practical recourse to “other means of peaceful dispute settlement” as Article 19 refers to Article 14 UFCCC, the same conclusion is applicable. Furthermore, Article 18 Kyoto Protocol creates the Protocol’s own compliance mechanism, although as noted, the mechanism regulates the compliance within the Protocol and is a form of enforcement mechanism rather than a mechanism for inter-state disputes.<sup>346</sup>

Moreover, Japan, Portugal, Spain, Cyprus and Malta have included reservations stipulating that the other party cannot have declared compulsory jurisdiction only in relation to or for the purposes of the case at hand or that such a deposition was made less than 12 months prior to the commencement of the case.<sup>347</sup> It is outside the scope of the present thesis to examine which other reasons Kiribati might have to declare the jurisdiction of the ICJ compulsory, thus it should be noted that in such a case, Kiribati would have to bear the minimum period of time in mind.

As a member of the Commonwealth of Nations, an association of 53 independent states, Kiribati must take the reservations of Canada and Malta in mind seeing that these states are too members of the Commonwealth and have declared that disputes with any other member state shall be settled “in such manner as the parties have agreed or shall agree”.<sup>348</sup> As the Commonwealth does not stipulate any dispute settlement mechanism of its own, and rather sees itself as a forum of negotiations, this indicates that Kiribati, if the dispute is to be adjudicated, would have to take recourse to ICJ’s other ways of obtaining jurisdiction.<sup>349</sup>

In conclusion, as it is unlikely that the states which are not subject to ICJ’s compulsory jurisdiction would willingly subject themselves to the Court ruling on the legality of their emissions, the states which have accepted the compulsory jurisdiction would be a viable solution. However, as can be seen, the reservation of the various state parties does make the establishment of jurisdiction difficult.

Furthermore, in the event, that Kiribati was to establish jurisdiction in a contentious case it is likely that the respondent state would argue the indispensable party principle. The principle was first stated in the *Monetary Gold case*<sup>350</sup> and stipulates that the ICJ cannot rule on the lawfulness of the international conduct of one state, if it by doing so, it would rule on such conduct of another state, in the latter’s absence and without its consent.<sup>351</sup> However, the ICJ has applied the principle to a varying extent in its case law, depending on the question and the circumstances of the case. The principle is argued to only apply in “extreme cases where the interest of an absent state is so closely related to the subject-matter of a dispute that it makes it impossible to limit the adjudication to the rights and interests of the applicant and the

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<sup>346</sup> Article 18 KP.

<sup>347</sup> International Court of Justice, ‘Declarations Recognizing the Jurisdiction of the Court as Compulsory’ <<http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3>> accessed 03-12-14. Cf. The declarations of Spain, Cyprus and Malta.

<sup>348</sup> Commonwealth of Nations, Member Countries, <http://thecommonwealth.org/member-countries> (accessed 03-12-2014).

<sup>349</sup> Charter of the Commonwealth, adopted 12 December 2012, preamble; Cf. Slinn, P, ‘The Commonwealth and the peaceful settlement of disputes’ (1989) 15 Commonwealth Law Bulletin, pp. 573-585.

<sup>350</sup> *Case of the monetary gold removed from Rome in 1943 (Preliminary Question)*, Judgment of June 15th, 1954, I.C. J. Reports 1954, p. 19.

<sup>351</sup> Report of the ILC of its 53<sup>rd</sup> session, UN doc. A/56/10 (2001), p. 67.

respondent.”<sup>352</sup> In the present case, the state will likely argue that the question of the legality of GHG-emissions is a matter which is of relevance to all states, and that they thereby will be affected by the outcome of the case.

## 5.7.2 Advisory Opinion

Kiribati would have a choice between requesting the UNGA or the SC to seek an Advisory Opinion from the ICJ and engaging in contentious litigation. In several aspects, the Advisory route would have several benefits. Firstly, it is naturally less antagonistic which would reduce the risks of pointing fingers and creating political hardships. Secondly, it would circumvent several pressing procedural issues seeing that no specific defendants would be chosen and there would be no need to obtain jurisdiction over states. Furthermore, since the issue would be of a more general character, the need to establish causality between the actions or omissions and the damage would play a smaller part in the process.<sup>353</sup> Fourthly, it would have the advantage to set a clear legal standard applicable to all states.<sup>354</sup>

However, concerning Kiribati’s claim there are important disadvantages regarding an Advisory Opinion. Firstly, an Advisory Opinion on climate change would be of a general character and a claim for remedies would not be possible seeing that Advisory Opinions are not binding but rather a tool of interpreting current stands in international law. Adaptation measures are important and need to be specific for each state, an Advisory Opinion would therefore not lead to a direct migration scheme for Kiribati but could provide a tool to negotiate one. Furthermore, it would require the support of the UNGA. In the case of Palau’s call for an Advisory Opinion this has gained increased support by several nations and currently over 30 states worldwide have stated their support to the initiative. The supporting states are representing all continents from across Asia, Africa, South America and Europe. However, the increased support has also lead to diplomatic pressure from big emitters such as the US and China which have increasingly shown an aversion to the initiative.<sup>355</sup> It could be argued that many states may be reluctant to let the ICJ rule on the legality of their own emissions.

Furthermore, Strauss argues that vis-à-vis public value a contentious case between and identifiable applicant and defendant could function as a better tool in order to capture the public imagination and moral support.<sup>356</sup>

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<sup>352</sup> Orakhelashvili, A, ‘The Competence of the International Court of Justice and the Doctrine of the Indispensable Party: from Monetary Gold to East Timor and Beyond’ (2011) 2 *Journal of International Dispute Settlement* 2, pp. 373-392, p. 380.

<sup>353</sup> Beck, S and Burleason, E 2014, p. 24.

<sup>354</sup> Strauss, A 2009, p. 348-349.

<sup>355</sup> Beck, S and Burleason, E 2014, p. 26.

<sup>356</sup> Strauss, A 2009, p. 348-349.

# 6 Analysis and Conclusion

## 6.1 Current Protection of Climate Induced Migrants

The question on how climate induced migration shall be regulated is a difficult one as it relates to multifaceted issue. An international framework for protection must cover many different forms of migration, and an unclear number of migrants where the environmental factor is of varying importance. The topic of climate induced migration is furthermore a difficult issue to regulate as it depends upon the states' abilities to adapt to climate change, an endeavor in which some states will succeed better than others. As can be seen from the current adaptation measures, they are not sufficient and although it is a relatively new topic in the COP negotiations, the current climate change funds have proven inefficient, creating difficulties for states such as Kiribati in the forms of human resources as well as in relation to the allocation of funds.

Extending protection through the adoption of a new convention or through the amendment of the current Refugee Convention from 1951 is difficult on the same grounds as bilateral and regional arrangements are not a preferred solution, i.e. they are all subject to political will and public opinion. As McAdam notes, the states are currently pursuing to restrict the protection of the current refugee framework and it is thereby unlikely that they would extend the protection further in the near future. Thus, while the legislator in the developed states can choose whether to grant or not grant entry into a state, the choices of the Kiribati migrant will not be as multifaceted. The Government's proposal to "migrate with dignity" is of great importance, educating the I-Kiribati is a positive aspect, however, it does not alter fact that the decision still lies in the hands of the developed state. The I-Kiribati could all be well-educated, but if the labour market of the respective country is filled, their efforts would still not make them attractive migrants. They would not be able to migrate with dignity, despite the fact that they are migrating from an issue they did not cause upon themselves.

However, as can be seen in the case of *Teitiota v. MBIE* and the various statements made by IPCC and Kiribati government officials, the issue is becoming increasingly imminent. This thesis therefore pursued to examine whether the issue of climate induced migration, especially regarding Kiribati, could be solved within the current international framework. Establishing state responsibility would thereby not only be a way of migration, but an actual way of migrating with dignity by making the efforts of the developed states not a form of aid, but an actual obligation.

## 6.2 Can State Responsibility be Established in Practice?

As noted, the legal hurdles arising in the quest of establishing state responsibility are many. The discussion on whether the obligations in the UNFCCC are binding illustrates the negotiators' intentions to keep the provisions deliberately unclear. In the author's opinion it is questionable if the provisions in Article 4 stipulate binding obligations, however, concerning

the objects and purposes of the Convention, it is likely that a Court would accept an argument based on Article 2 and 4.2 UNFCCC in conjunction. Article 2 UNFCCC stipulates an obligation to stabilise greenhouse gas concentrations and if parties were continuously allowed to breach the objectives and purposes of a Treaty, the said treaty would be inoperative. However, it is likely that a party to the Kyoto Protocol, who has met its obligations, would argue that the UNFCCC has been superseded by the Protocol. In such a case it could be difficult to argue that obligations are breached on the basis of the UNFCCC.

Furthermore, the no-harm rule could form an important foundation for a prospective claim. Having the status of international customary law, it is binding upon all states which would create an arena for holding large emitters such as the US accountable. Moreover, it could be argued that states which are meeting their Kyoto obligations by means of the Protocol's flexibility mechanisms still breach the no-harm rule as they continue to increase the GHG-emissions in absolute numbers.

As the states have signed the UNFCCC and the Kyoto Protocol they have an obligation to ensure that the Conventions are complied with which thereby creates attribution. Thus, regarding the no-harm rule it could be argued that it in itself, stipulates a form of attribution requirement seeing that the states have an obligation to ensure that their territory is not used in a way that harms other states where the lack of overall control could be attributed to the state.

Furthermore, regarding both the UNFCCC and the no-harm rule the enshrined proportionality assessments makes it difficult for a state as Kiribati to argue that the obligations have been breached. As the obligation in the UNFCCC is one of conduct, and the no-harm rule is subject to a standard of care, a majority of states could argue that they have taken measures and that these fulfil both obligations. In such a case, large emitters such as the US, and states such as Canada, which withdrew their ratification of the Protocol, could be in breach of their obligations as their actions indicate non-compliance with the object and purpose of the Convention. Furthermore, and more specifically, states which have continued to increase their emissions since the entry into force of the Convention, and under the no-harm rule, e.g. Turkey could be potential respondents.

It has been argued that the greatest legal hurdles are posed in the criteria of causality. With regards to factual causation, greater scientific certainty will establish general causation and by using the 'contribute to' test, specific causation can be proved as states' individual actions contribute to the damage incurred by Kiribati or by any other state seeking to establish state responsibility. As noted, the issue lies in proving proximate causation. States cannot be responsible for actions they did not foresee and as climate change has only been known for the past two decades which proves to be an enormous obstacle. The foreseeability criteria are of great importance and if a court were to stretch causation beyond them, it would lead to enormous implications for international law and lead to a situation where states would be held responsible for their conduct beyond reason. It is thereby unlikely that a court would rule in Kiribati's favour on pre-1990 emissions and as these are the emissions which mainly have contributed to Kiribati's injury, it would be difficult to claim remedies. However, it should be noted that the issue of causation is only relevant regarding reparation claims. States can thereby still be found to be in breach of the climate change framework by not stabilising their

emissions or by not adhering to their QUELRO's, and such a case could form an important precedent for states at the negotiating table.

### **6.3 Could the Protection of Migrants be Awarded as a Remedy?**

Regarding the core question of the thesis, if protection to migrants could be awarded on the basis of state responsibility, that question also poses difficulties and mirrors the inefficiencies of current international law when applied to the climate change problem. As migration not being an actual remedy under ASR it is difficult to imagine how a Court would approach the matter if state responsibility was established. As noted, that imposes an important assumption, namely that state responsibility *is* established.

Furthermore, Kiribati would have difficulties with the establishment of state responsibility in practice, as the recognition of the compulsory jurisdiction of the ICJ is voluntary. This limits the scope of possible defendants and makes a contentious case difficult to instigate. Currently the Warsaw Loss and Damage Mechanism is under development and it is difficult to make any assumptions on if the Mechanism will function as a special mechanism for establishing accountability for climate change damages. However, it could prove an important component in the future. If it was developed into a mechanism establishing accountability and awarded remedies based on current emissions, thereby circumventing the causality issue, it could prove important.

### **6.4 Conclusion**

In conclusion, an advisory opinion would be the preferred option for Kiribati. It would not make it possible to claim relocation as a remedy, but if responsibility was established, it could form an important alteration of the dynamics at the negotiating table. State responsibility could thereby be used to claim migration, not through litigation, but at the negotiating table.

State responsibility will be difficult to establish as every step in the establishment is unclear. This is an imminent issue as climate change law with regards to mitigation has perfected the art of postponing. As can be seen from the UNFCCC, the Kyoto Protocol and the numerous negotiations in the COP's, pledges are made for the future and when breached, there is a tendency not to impose procedures to ensuring compliance or penalties in any way, but rather to look forward and say "post-2015, we will reach an agreement then". Such trends can be seen from the beginning of the UNFCCC which to date has not fulfilled its functions of mitigating absolute numbers of GHG-emissions to a level which is sustainable. With the exception of the Kyoto Protocol, the commitments might or might not be binding, thereby making them volatile. They are subject to changes of public opinion, changes of governments and numerous other factors. Keeping that in mind, the urgent matter does call for a more active approach, and especially a legally binding one.

However, state responsibility is contingent upon the primary rules, which must be breached. In the present case one can thereby note that public international law displays its

weaknesses, it does not have a larger scope, or more legally binding regulations, than the states want it to have. The provisions in the UNFCCC were deliberately weakened, as a result of the negotiations with various states with different incentives and backgrounds. Furthermore, states can choose to sign the Kyoto Protocol, and, as in the case of Canada, decide to withdraw the ratification when realising that it will not be able to meet the targets. Nevertheless, as the sea level continues to rise the I-Kiribati are becoming increasingly vulnerable.

This could lead to the supposition that international law is ill fitted as a tool to establish accountability for climate change. However, many of the tools stipulated in international law form valuable mechanisms for the establishment of accountability and the issue lies in the way they will be use by the state. A change, perhaps driven by public opinion, could form an incentive for states to create legally binding obligations, and more importantly, to create enforcement mechanisms ensuring compliance, thereby making mitigation of GHG-emissions an important factor in the decision-making process. However, it is not certain that the I-Kiribati will be aided by such efforts when forced to leave their birth land in the pursuit of a new home.

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