

RESCUING THE PEOPLE OF TUVALU:  
TOWARDS AN I.C.J. ADVISORY OPINION ON THE  
INTERNATIONAL LEGAL OBLIGATIONS TO  
PROTECT THE ENVIRONMENT AND HUMAN  
RIGHTS OF POPULATIONS AFFECTED BY  
CLIMATE CHANGE

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*Abstract*

2014 has been announced by the U.N. General Assembly as the “International Year of Small Island Developing States” with the goals of raising awareness of the Small Island Developing States’ (SIDS) unique developmental challenges in relation to a range of environmental problems including climate change, and of fostering the ambition to find solutions for these vulnerable States.<sup>1</sup> However, the way in which international law is constructed runs counter to the ambitions of the General Assembly.

The people of Tuvalu, one of the SIDS, are not to blame for climate change, yet they experience its most severe impacts. Regardless of the skepticism around the anticipated disappearance of the island, the islanders already require assistance from their own government and the international community, since both

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<sup>1</sup> *The International Year of Small Island Developing States*, UNITED NATIONS, <http://www.un.org/en/events/islands2014/index.shtml#&panel1-1> (last visited Aug. 20, 2014).

environmental stability and, consequently, the human rights of Tuvalu's population have been critically affected. In theory, international law, particularly climate and human rights law, entails relevant obligations of States towards their own territories and populations, as well as obligations of third States to assist. However, these obligations are formulated and interpreted in an unclear manner. This lack of clarity makes it hard to establish what actions must be taken and which actors are responsible for monitoring compliance with these obligations, making it even harder to talk about breaches of these obligations.

This article suggests that the International Court of Justice (I.C.J.), by means of an advisory opinion, can clarify and explain the reach of the relevant positive obligations under international law in the context of climate change and human rights. The Court can answer the question of who bears obligations to help the people of Tuvalu, before Tuvaluans have no choice left but to abandon their land. Building upon the particular case of Tuvalu, this article presents the question that the U.N. General Assembly is suggested to pose to the I.C.J. to request this advisory opinion.

### *Introduction*

According to the Intergovernmental Panel on Climate Change (IPCC) Fifth Assessment Report, Small Island States are among the regions with the highest risk due to climate change.<sup>2</sup> With high confidence it was identified that there is "risk of death, injury, ill-health, or disrupted livelihoods in low-lying coastal zones and Small Island Developing States and other small islands, due to storm surges, coastal flooding, and sea-level rise."<sup>3</sup>

Tuvalu is just one of forty-four members of the Alliance of Small Island States which are at the forefront of climate change

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<sup>2</sup> Intergovernmental Panel on Climate Change [IPCC], *Climate Change 2014: Impacts, Adaptation, and Vulnerability* 1, 17 (2014), available at <https://ipcc-wg2.gov/AR5/report/full-report/> [hereinafter IPCC 2014].

<sup>3</sup> *Id.* at 13.

catastrophe.<sup>4</sup> The land of Tuvalu is critically affected, and people living on Tuvalu already experience vast deprivations of core human rights, such as the right to water, food, health, etc. The questions of how to maintain the island's nature and the rights of its population are crucial for the future of the island and require immediate attention.

Being greatly exposed to climate change, Tuvalu (similar to the other SIDS), has extremely limited adaptive capacity. The costs of adaptation for this least developed country in proportion to the size of its population and territory are tremendous and practically unbearable.<sup>5</sup> In addition to great exposure and inability to withstand climate change, Tuvalu and most of the other SIDS are among the least responsible for climate change.<sup>6</sup>

The injustice of climate change is acknowledged in international law, politics and climate change science. In fact, 2014 has been declared the "International Year of Small Island Developing States" by the U.N. General Assembly, with the goals of raising awareness of the SIDS' unique development challenges regarding a range of environmental problems including climate change, and of fostering the ambition to find solutions for these vulnerable States.<sup>7</sup> The legal instruments also recognize the importance of special treatment for vulnerable nations. The United Nations Framework Convention on Climate Change (UNFCCC) is

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<sup>4</sup> The Alliance of Small Island States (AOSIS) has a membership of 44 States and observers, drawn from all oceans and regions of the world: Africa, the Caribbean, the Indian Ocean, the Mediterranean Sea, the Pacific Ocean and the South China Sea. Thirty-seven are members of the United Nations, close to twenty-eight percent of developing countries, and twenty percent of the U.N.'s total membership. Together, SIDS communities constitute some five percent of the global population. It functions primarily as an ad hoc lobby and negotiating voice for Small Island Developing States (SIDS) within the United Nations system. See *About AOSIS*, ALLIANCE OF SMALL ISLAND STATES, <http://aosis.org/about/> (last visited Aug. 18, 2014).

<sup>5</sup> IPCC 2014, *supra* note 2, at 1635.

<sup>6</sup> IPCC, *Climate Change 2001: Impacts, Adaptation, and Vulnerability* 1, 867 (2001), available at [http://www.grida.no/publications/other/ipcc\\_tar/?src=/climate/ipcc\\_tar/](http://www.grida.no/publications/other/ipcc_tar/?src=/climate/ipcc_tar/). Accordingly, the Pacific islands region accounts for only 0.03% of the CO<sub>2</sub> global emissions. *Id.*

<sup>7</sup> *The International Year of Small Island Developing States*, *supra* note 1.

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founded on the principle of differentiated responsibilities and recognizes in the Preamble that since “the largest share of historical and current global emissions of greenhouse gases has originated in developed countries,” the developed States Parties must take the lead in combating climate change and its adverse effects.<sup>8</sup> Furthermore, international law calls on States to cooperate and assist each other in achieving sustainable development<sup>9</sup> and “in promoting and encouraging respect for human rights and . . . fundamental freedoms for all.”<sup>10</sup>

Alongside this differentiated approach to responsibilities, international law grants a State the “highest authority” with regard to its own territory and makes it a main protector and guarantor of the rights of its population.<sup>11</sup> Therefore, at least in theory, international law foresees both groups of obligations: the obligations of States towards their own territories and populations; and the obligations of third States to assist and support other States when it is required.

Nevertheless, this article rests on the unfortunate observation that regardless of the instructions of international law and the attention of the U.N. bodies to the SIDS, the people of Tuvalu are experiencing serious human rights deprivations, and the land of Tuvalu is vanishing. Assistance however, is reaching Tuvalu more slowly than is needed, with the islanders expected to have no choice other than to abandon their home, even before the island fully

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<sup>8</sup> United Nations Framework Convention on Climate Change, art. 3, para. 1, *opened for signature* Jun. 4, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC].

<sup>9</sup> United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, Principle 5, U.N. Doc. A/CONF.151/26/Rev.1 (Aug. 12, 1992) [hereinafter *Rio Declaration*].

<sup>10</sup> U.N. Charter, art. 1, para. 3.

<sup>11</sup> The fundamental principle of state sovereignty has its roots in the Peace of Westphalia, and is reaffirmed by numerous other documents. *See* U.N. Charter, Article 2, para. 1; United Nations Conference on the Human Environment, Swed. June 5-16, 1972, *Stockholm Declaration on the Human Environment*, A/CONF.48/14/Rev.1, *Rio Declaration supra* note 9. *See also* HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 385-86 (Anders Wedberg, trans., The Lawbook Exchange, 2009) (1945).

submerges.<sup>12</sup> Tuvaluans' cries for help and demands for solutions have thus far been fruitless.<sup>13</sup> In its search for justice, Tuvalu has already threatened to sue the U.S. and Australia before the I.C.J. for the damages Tuvalu suffers due to the excessive greenhouse gas (GHG) emissions of developed States.<sup>14</sup> However, the case has not yet reached the I.C.J. Whilst, as this article will go on to show further, the reasons for such failures are complex, including the main procedural issue of jurisdiction, proving a causal link between GHG emissions and damages seems to be the central difficulty. This causality has not yet been successfully established in the case law and it is not likely that contemporary law and science have the ability to do so. A second attempt to bring justice has been made by Palau, another member of the SIDS group. Palau also pinned its hopes on the I.C.J., but in contrast to Tuvalu's attempt to sue, has considered requesting "an advisory opinion of the I.C.J. on the responsibilities of States under international law to ensure that activities carried out under their jurisdiction or control that emit greenhouse gases do not damage other States."<sup>15</sup>

This article is inspired by these attempts and builds upon them. The I.C.J., as the highest international court and as the primary

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<sup>12</sup> J. McAdam, "Disappearing States", *Statelessness and the Boundaries of International Law*, in CLIMATE CHANGE AND DISPLACEMENT: MULTIDISCIPLINARY PERSPECTIVE 109 (J. McAdam ed., 2010); Maxine Burkett, *In Search of Refuge: Pacific Islands, Climate-Induced Migration, and the Legal Frontier*, 98 ASIA PACIFIC ISSUES 1, 4 (2011).

<sup>13</sup> See Press Release, General Assembly, As Traditional Challenges To Island States Strain Already Emptying Budgets, General Debate Speakers Ask To Be 'Saved' From Climate Change Impacts, U.N. Press Release GA/11430 (Sep. 28, 2013); Catherine McGrath, *Pacific Nations Urge Climate Change Action, Ask Australia for Help*, RADIO AUSTRALIA (May 27, 2014), <http://www.radioaustralia.net.au/international/2014-05-27/pacific-nations-urge-climate-change-action-ask-australia-for-help/1317552> (last visited Aug. 20, 2014).

<sup>14</sup> Holley Ralston, Britta Horstmann & Carina Holl, *Climate Change: Challenges Tuvalu*, GERMANWATCH 16 (2004), <http://germanwatch.org/download/klak/fb-tuv-e.pdf>; Rebecca Elizabeth Jacobs, *Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court Of Justice*, PAC. RIM L. & POL'Y J. 103, 105 (2005).

<sup>15</sup> U.N., Press Conference on Request for International Court of Justice Advisory Opinion on Climate Change, U.N. Press Release (Feb. 3, 2012).

judicial organ of the U.N., is the organ that can bring clarity to the legal ambiguity around SIDS affected by climate change. Of the two options already considered within the I.C.J., this article favors the latter, requesting an I.C.J. advisory opinion. However, it is argued that the focus of the request for an advisory opinion must be different. The example of Tuvalu shows that while most of the damages to the environmental and physical stability of the islands are yet to occur, the central challenges currently posed by climate change are to the human rights of the islanders. Therefore, instead of focusing on damages caused by the GHG emissions and responsibility for these damages, which are hard to prove and undesirable to wait for, this article investigates relevant positive obligations under international human rights law and climate law. However, most of these obligations are formulated in a broad and confusing way, leaving States a lot of room for deviation when it comes to their actions towards their own land and population and the actions of those third States which are obligated to assist. Clarifying positive obligations under human rights law and climate law has more potential under the current setting and interpretation of contemporary international law, and is a crucial step for countries like Tuvalu. This article will suggest the appropriate question for the request of an advisory opinion and justify this selection.

The following line of argumentation is adopted. Section I presents the case of Tuvalu. Drawing upon the latest case-studies conducted on Tuvalu, and the reports of the U.N. rapporteurs, this article demonstrates what makes Tuvalu so vulnerable from environmental and human rights perspectives. In Section II, potential ways for Tuvalu to render justice and to attract sufficient support from the international community are further scrutinized. In order to achieve these ends, the choice of pursuing an advisory opinion rather than a judgment is justified. In Section III the target for the question to the I.C.J. is set and justification is provided for the focus on positive obligations within international law, rather than responsibility for damages. Section IV devotes itself to an analysis of the ambiguities around these positive obligations from the perspectives of climate law and human rights law, and to revealing the grey areas in law and the points requiring clarification by the

I.C.J. Namely, the norms, questions and uncertainties in human rights law and climate change law, which can be clarified by the I.C.J., are identified. Ultimately, in Section V, conclusions are presented and the question that can be brought to the I.C.J. for its advisory opinion is formulated.

### *I. The Case of Tuvalu*

Tuvalu is one of the smallest nations in the world.<sup>16</sup> This least developed country has always existed in unstable natural conditions and for centuries has been managing to live in peace with nature, whilst dealing with many climatic threats ranging from cyclones to droughts. Climate change is to be thanked for making such a small country famous worldwide as a “sinking island.”

The island is indeed in danger. The IPCC’s Fifth Assessment Report reconfirmed that low-lying Small Island States are among the most vulnerable to the effects of climate change, particularly such an effect as sea-level rise.<sup>17</sup> Other natural phenomena associated with sea-level rise, such as floods, storm waves and surges, deep ocean swell and predicted astronomical tidal cycles further exacerbate this vulnerability.<sup>18</sup> In addition to the threat from the changing environment, the adaptive capacity of Tuvalu is very limited. The country is among the least developed States, therefore its infrastructure and economic opportunities are poor. Tuvalu’s population density is quite concentrated, with 379 people per square kilometer.<sup>19</sup> Inland relocation is therefore problematic, especially considering that the most crucial infrastructure (schools, religious sites, etc.) are also located in coastal zones, making areas already

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<sup>16</sup> CENTRAL INTELLIGENCE AGENCY, *Australia-Oceania: Tuvalu*, THE WORLD FACT BOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/tv.html> (last visited Feb. 8, 2015).

<sup>17</sup> IPCC 2014, *supra* note 2, at 1616.

<sup>18</sup> *Id.* at 1619.

<sup>19</sup> STATISTICS DIVISION, U.N. DEP’T OF ECON. & SOC. AFFAIRS, WORLD STATISTICS POCKETBOOK 2014 EDITION, 203, U.N. Doc. ST/ESA/STAT/SER.V/38, U.N. Sales No. E.14.XVII.4 (2014).

vulnerable to sea-level rise particularly overpopulated.<sup>20</sup>

There has been a lot of speculation about the future of Tuvalu. Scenarios range from the predictions that sea-level rise, in combination with other climate change impacts such as storms, flooding and sea water intrusions will soon make Tuvalu uninhabitable,<sup>21</sup> to claims that the island is growing.<sup>22</sup> The Intergovernmental Panel On Climate Change's ("IPCC") Fifth Assessment Report did not forecast the year of disappearance; however it did make some clarifications which are crucial for Tuvalu and the Pacific region. Importantly, it established that the rate of sea-level rise in the twenty-first century will be higher than we have experienced before<sup>23</sup> and also, that the rate of climate change will greatly differ between regions.<sup>24</sup> According to most of the IPCC's scales and figures, the Pacific region is at the epicenter of climate change.<sup>25</sup> Rates of relative sea-level rise for Funafuti, the main island of Tuvalu, have been approximately three times higher than the global average between 1950 and 2009.<sup>26</sup> Saline flooding of internal low-lying areas occurs regularly, and is expected to become more

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<sup>20</sup> IPCC 2014, *supra* note 2, at 1619.

<sup>21</sup> U.N. Permanent Mission of Nauru, Views on the Possible Security Implications of Climate Change to be Included in the Report of the Secretary-General to the Sixty-Fourth Session of the United Nations General Assembly (2009), [http://www.un.org/esa/dsd/resources/res\\_pdfs/ga-64/cc-inputs/PSIDS\\_CCIS.pdf](http://www.un.org/esa/dsd/resources/res_pdfs/ga-64/cc-inputs/PSIDS_CCIS.pdf).

<sup>22</sup> Paul Chapman, *Pacific Islands 'Growing Not Shrinking' Due to Climate Change*, THE TELEGRAPH, (June 3, 2010), <http://www.telegraph.co.uk/news/world-news/australiaandthepacific/tuvalu/7799503/Pacific-islands-growing-not-shrinking-due-to-climate-change.html>; Philippa McDonald, *Pacific Islands Growing, Not Sinking*, ABC AUSTRALIA, (June 3, 2010) <http://www.abc.net.au/science/articles/2010/06/03/2916981.htm?site=science/talkingscience&topic=latest>.

<sup>23</sup> IPCC, *Climate Change 2013: The Physical Science Basis*, at 1140, (2013), available at <http://www.climatechange2013.org/> ("It is very likely that the rate of global mean sea level rise during the 21st century will exceed the rate observed during 1971–2010 . . . due to increases in ocean warming and loss of mass from glaciers and ice sheets").

<sup>24</sup> *Id.* ("It is very likely that in the 21st century and beyond, sea level change will have a strong regional pattern, with some places experiencing significant deviations of local and regional sea level change from the global mean change").

<sup>25</sup> IPCC, 2014, *supra* note 2, at 1148, 1192.

<sup>26</sup> *Id.* at 1620.

frequent and extensive over time.<sup>27</sup>

Nevertheless, while speculation about the disappearance of Tuvalu and future climate change impacts are subject to constant debates, sea-level rise in conjunction with the inability to adapt are already having clear effects on Tuvalu today.

Whilst scientists and policy-makers are emphasizing the dangers of sea-level rise, the main stakeholders of Tuvalu are primarily concerned with the coastal erosion resulting from sea-level rise.<sup>28</sup> The majority (more than ninety percent) of communities live close to the coast, since this is where the most crucial infrastructure, including important religious sites, is located.<sup>29</sup> Coastal erosion has multiple implications for Tuvalu. First of all, it gradually diminishes the sources of fresh water, as saltwater pushes into the ground water from below.<sup>30</sup> Fresh water availability on Tuvalu is scarce in general. There are no streams, rivers or other sources of potable water in Tuvalu, and people mostly rely on rainwater catchment with storage facilities.<sup>31</sup> In the past, the people were also able to use groundwater resources for household use. Nowadays, as a result of coastal erosion, groundwater resources are polluted by saltwater intrusion and waste leachate, and are therefore no longer suitable for human consumption. As the data confirms, in Funafuti, the capital of Tuvalu which has the highest population density, water scarcity is a common problem: not only during the dry season (June – September), but also

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<sup>27</sup> *Id.*

<sup>28</sup> MINISTRY OF NATURAL RES., ENV'T, AGRIC. AND LANDS, DEP'T OF ENV'T, TUVALU'S NATIONAL ADAPTATION PROGRAMME OF ACTION 12 (2007) [hereinafter TUVALU'S NAPA].

<sup>29</sup> *Id.* at 12.

<sup>30</sup> DAVID HELD, EVA-MARIA NAG & CHARLES ROGER, THE GOVERNANCE OF CLIMATE CHANGE IN DEVELOPING COUNTRIES: A REPORT ON INTERNATIONAL AND DOMESTIC CLIMATE CHANGE POLITICS IN CHINA, BRAZIL, ETHIOPIA AND TUVALU 114 (2012).

<sup>31</sup> See U.N. Env't Programme Secretariat of the Pacific Cmty. *Applied Geoscience and Technology Division, Freshwater Under Threat: Pacific Islands. Vulnerability Assessment of Freshwater Resources to Environmental Change*, ¶ 38 (Mar., 2012), [http://www.unep.org/pdf/Freshwater\\_Under\\_Threat-Pacific\\_Islands.pdf](http://www.unep.org/pdf/Freshwater_Under_Threat-Pacific_Islands.pdf).

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occasionally during the wet season (October – March).<sup>32</sup>

Saltwater intrusion has negative implications for soil quality, and leads to the decreased productivity of agricultural lands and pulaka pits. Sixty percent of the pulaka crops, which is the main crop cultivated in Tuvalu, have already been destroyed.<sup>33</sup> Since domestically grown food remains the main source of nutrition for the islanders, these losses pose a threat to their food security.

Quantities of fish and shellfish, another main source of nutrition for the islanders, have also declined significantly.<sup>34</sup> According to the Fifth Assessment report, coral bleaching, occurring due to sea-level rise and ocean acidification, threatens the functioning of island coral reef ecosystems.<sup>35</sup> The death of coral leads to the loss of marine ecosystems which live on coral.<sup>36</sup> The average ocean temperature around Tuvalu is already at the upper limit of the 25°C - 29°C temperature range tolerated by most species found in the island's coral fisheries.<sup>37</sup> This places further concerns on the food security of the island.

Water pollution, water shortages, changes in diet and malnutrition all undermine the health of the islanders. Poor sanitation, due to high population density and pollution, further contributes to the problem. Houses on Tuvalu are built very close to each other, with a lot of informal housing being constructed. Adequate sewage systems are often absent, which leads to unsanitary conditions in some areas.<sup>38</sup> According to the report by the Special

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<sup>32</sup> TUVALU'S NAPA, *supra* note 28, at 19.

<sup>33</sup> *Id.* at 28.

<sup>34</sup> *Id.* at 24.

<sup>35</sup> IPCC 2014, *supra* note 2, at 1621.

<sup>36</sup> See Mary-Elena Carr, Madeleine Rubenstein, Alice Graff & Diego Villareal, *Sea Level Rise in a Changing Climate: What Do We Know?* in THREATENED ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE, 15, 44-45 (Michael B. Gerrard & Gregory E. Wannier eds., 2013).

<sup>37</sup> HELD, NAG & ROGER, *supra* note 30, at 114.

<sup>38</sup> See SOPAC, *Sustainable Integrated Water Resources and Wastewater Management in Pacific Island Countries: National Integrated Water Resource Management Diagnostic Report Tuvalu*, SOPAC MISCELLANEOUS REPORT 647, 1, 5 (2007) available at <http://ict.sopac.org/VirLib/MR0647.pdf>; U.N. Habitat Human

Rapporteur, water-borne diseases such as diarrhea are common, particularly among children.<sup>39</sup>

The factors demonstrated above clearly show that environmental stress is already severely affecting the living conditions of people on the island. Although acknowledging such a link has been controversial in international law,<sup>40</sup> it appears that an agreement has been reached on the relationship between climate change and human rights.<sup>41</sup> The latest resolution adopted by the Human Rights Council on this matter states that “climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights.”<sup>42</sup> The situation on Tuvalu is clear evidence for such a conclusion.

However, contrary to the common view that the main danger for Tuvaluans is the physical disappearance of the island in the future, the principal challenges that are already being experienced by

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Settlements Programme, *Cities and Climate Change: Global Report on Human Settlements 2011*, 1, 129-162 (2011) available at <http://unhabitat.org/books/cities-and-climate-change-global-report-on-human-settlements-2011/>.

<sup>39</sup> Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, *Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque, on Her Mission to Tuvalu (17-19 July 2012)*, U.N. GAOR, U.N. Doc. A/HRC/24/44/Add.2 ¶ 19 (Jul. 1, 2013)[hereinafter *Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation*] (finding the efforts to provide rainwater tanks and to increase awareness of the necessity of boiling water have not made a significant impact on the number of diarrhea cases).

<sup>40</sup> See the controversy in the development of a link between climate change and human rights in M. Limon, *Human Rights and Climate Change: Constructing a Case for Political Action*, 33 HARV. ENVTL. L. REV. 439, 445 (2009).

<sup>41</sup> Malé Declaration on the Human Dimension of Global Climate Change, adopted 14 November 2007; Human Rights Council Res. 7/23, Human Rights and Climate Change, 7th Sess., Mar. 3 - Apr. 1, 2008, U.N. Doc. A/HRC/7/78 (July 14, 2008); Stephen Humphreys, *Climate Change and Human Rights: A Rough Guide*, INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY (2008), [http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/136\\_report.pdf](http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/136_report.pdf); Office of the High Commissioner for Human Rights (OHCHR), Report of the OHCHR on the Relationship Between Climate Change and Human Rights, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009).

<sup>42</sup> Human Rights Council Res. 10/4, Human Rights and Climate Change, 10th Sess., U.N. Doc. A/HRC/10/L.11, (Mar. 25, 2009).

the islanders arise from the fact that climate change severely impacts the human rights of the islanders. Putting aside the future prognoses and concerns about the right to self-determination and the right not to be forcibly evicted, today's situation on the island demonstrates that the most critical national challenge for Tuvaluans is the quality and availability of potable water.<sup>43</sup> This challenge clearly translates into a threat to the right to water, and further impacts other human rights, such as the right to health and the right to food.<sup>44</sup> Other rights also can be simultaneously affected, especially since by nature all human rights are interdependent, interrelated and indivisible.<sup>45</sup> Therefore, it is of primary importance for Tuvalu to act on this problem.

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<sup>43</sup> See TUVALU'S NAPA, *supra* note 28, at 25; Human Rights Council, National Report Submitted In Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21, Tuvalu, ¶ 105, U.N. Doc. A/HRC/WG.6/16/TUV/1, (Jan. 25, 2013). See also Human Rights Council, Report of the Working Group on the Universal Periodic Review: Tuvalu, ¶ 9, U.N. Doc. A/HRC/24/8 (Jul. 5, 2013): (identifying this problem as a key national priority not only by Tuvaluan Government itself, but also in the recommendations provided by the other countries who took a part in the review).

<sup>44</sup> OHCHR, *What Are Human Rights?*, [http://www.ohchr.org/en/issues/Pages/What areHumanRights.aspx](http://www.ohchr.org/en/issues/Pages/What%20areHumanRights.aspx) (last visited Aug. 20, 2014). Ultimately, the right to life is also threatened. The right to life in the case of Tuvalu should be understood in a broad context. This means that this right not only entails that humans cannot be arbitrarily deprived of their lives, but this right is also about the positive measures that the State Parties should take, for instance, the efforts to reduce malnutrition, epidemics and infant mortality. According to the U.N. Human Rights Committee, General Comment No. 6 on the Right to Life (Article 6), the protection of the right to life is closely related to measures for the fulfillment of other rights, such as those related to food, water, health and housing. U.N. Committee on Economic, Social and Cultural Rights, *General Comment No. 6: The Right to Life (Article 6 of the Covenant)*, U.N. Doc. E/1996/22 (Nov. 24, 1995). Consequently, should the planned relocation fail to consider later threats, the right to life will be compromised. This article therefore, focuses on the right to water, health, and food as currently most actual and requiring attention of Tuvalu and further the attention of the international community.

<sup>45</sup> *What Are Human Rights?*, *supra* note 44; World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23 (July 12, 1993) [hereinafter *Vienna Declaration*].

*II. The Way for Tuvalu to Go About it:  
Advisory Opinion v. I.C.J. Judgment*

The situation, in which Tuvalu currently finds itself, along with many other Small Island States, requires a solution. Yet, the process of finding this solution is deadlocked. Political powers and States during the negotiations seem unable to agree on what climate change victims can do and what the international community must do to help them. Therefore an authoritative opinion to clarify who bears which obligations would be very timely. As the primary judicial organ of the United Nations, the I.C.J. can contribute to the understanding of the issue and its resolution. The I.C.J. has two primary functions: the first function is to settle legal disputes submitted to it by States through its judgments; the second function is to provide advisory opinions on legal questions submitted to it by authorized organs. In this section, both options are considered and an argument is put forward for why requesting an advisory opinion currently has more benefits for Tuvalu.

*A. An I.C.J. Judgment and Difficulties with Pursuing It*

The main benefit of having an I.C.J. judgment on the question of responsibility towards nations affected by climate change is that an I.C.J. judgment is, by nature, a binding decision of the Court. The judgment could change the current state of affairs radically, since it would be binding and would create a precedent for cases to come.<sup>46</sup> In environmental law, the judgments of the I.C.J. have been shown to be particularly important. Such influential judgments as that of the *Trail Smelter* case, where the no-harm principle and polluter-pays principle were invoked,<sup>47</sup> demonstrate the

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<sup>46</sup> PATRICIA BIRNIE, ALAN BOYLE & CATHARINE REDGWELL, *INTERNATIONAL LAW AND THE ENVIRONMENT* 20-21 (2d ed. 2002) (“a body of jurisprudence accumulates, particularly in the case of the I.C.J., and contributes to the progressive development of international law”).

<sup>47</sup> *Trail Smelter Case* (U.S./Can.), 3 R.I.A.A. 1905 (1941); *Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 4; *Lake Lanoux Arbitration* (Fr. v. Spain), 12

essential role that case law plays in the formation and development of principles of international law and customary international law. Yet, it is not accidental that the case of climate change damages has never reached the Court. There are numerous obstacles to such an I.C.J. judgment.

Since the I.C.J.'s jurisdiction is based on State consent, the first and the most trivial hurdle is that it is possible that the States against which the case is initiated are not currently under the jurisdiction of the I.C.J.<sup>48</sup> This is for instance the case for the United States of America,<sup>49</sup> historically the largest emitter of GHGs, and currently the second largest emitter.<sup>50</sup> Such States would therefore have to accept the jurisdiction of the Court first, which is highly unlikely.<sup>51</sup> Another very clear and objective obstacle is the cost of such a legal suit, which cannot be afforded by the least developed countries, especially when they confront economically strong world powers such as the U.S., with a group of experienced lawyers by their side.

Another disadvantage is that such an open confrontation, in front of the I.C.J., would certainly create quite strong political turbulence and could have negative implications for future

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R.I.A.A. 281 n.1 (1957); Settlement of Gut Dam Claims (U.S. v. Can.), 8 I.L.M. 118 (Lake Ontario Claims Trib. 1969). For information on the contribution of these cases to international law see YALE CENTER FOR ENVIRONMENT LAW AND POLICY, CLIMATE CHANGE AND THE INTERNATIONAL COURT OF JUSTICE (Vivienne Caballero & Lia Nicholson eds., 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2309943](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2309943); PATRICIA BIRNIE, ALAN BOYLE & CATHERINE REDGWELL, INTERNATIONAL LAW AND THE ENVIRONMENT 27-28 (3d ed., 2009).

<sup>48</sup> U.N. Charter, Statute of the International Court of Justice, Apr. 18, 1946, Article 36 [hereinafter I.C.J. Statute].

<sup>49</sup> The I.C.J. lacks jurisdiction over the United States. For other states which are not under the jurisdiction of the I.C.J., see *Jurisdiction*, INTERNATIONAL COURT OF JUSTICE, <http://www.ICJ-cij.org/jurisdiction/?p1=5&p2=1&p3=3> (last accessed Aug. 18, 2014).

<sup>50</sup> WORLD RESOURCE INSTITUTE, *The History of Carbon Dioxide Emissions* (May 21, 2014), <http://www.wri.org/blog/2014/05/history-carbon-dioxide-emissions>.

<sup>51</sup> For a list of States which are not under the jurisdiction of the I.C.J. see, *Jurisdiction*, *supra* note 49.

negotiations and actions concerning mitigation and adaptation to climate change. For instance, it could de-motivate other developed countries, who are also among the polluters, to continue cooperation and assistance. There are countries which are currently making significant voluntary contributions to adaptation funds. The United Kingdom and Germany, for instance, together provide almost thirty percent of the climate funds.<sup>52</sup> Yet the enthusiasm of these developed States to help can decrease should they see an aggressive position from those whom they are trying to help. Furthermore, these developed countries can freeze the aid which is provided for other non-climate related programs, such as voluntary programs targeting education, food supply and medical assistance.<sup>53</sup> The opposite, but still negative scenario, might be that developed States will limit their participation in the future of SIDS solely to financial assistance, since it is not clear under the UNFCCC to what extent assistance is required from developed States.<sup>54</sup> Meanwhile, as shown further, money cannot fix all the problems that developing countries are struggling with.

Nevertheless, the most substantial hurdles arise from a legal perspective. Bringing the case to the I.C.J. means claiming that one State or a group of States is responsible. According to the Articles on the Responsibility of States for Internationally Wrongful Acts (the ILC Draft Articles), the primary point of reference in relation to the law of State responsibility is that every internationally wrongful act of the State entails the responsibility of that State.<sup>55</sup> International

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<sup>52</sup> *Contributor Countries*, CLIMATE FUNDS UPDATE, <http://www.climatefundsupdate.org/global-trends/donor-countries> (last accessed Aug. 18, 2014).

<sup>53</sup> Maxine Burkett, *A Justice Paradox: On Climate Change, Small Island Developing States, and the Quest for Effective Legal Remedy*, 35 U. HAW. L. REV. 643 (2013).

<sup>54</sup> Article 4 of the UNFCCC only lays down that Annex II “shall also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects” without specifying what this assistance entails. UNFCCC, *supra* note 8, at art. 4.

<sup>55</sup> Int’l L. Comm’n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, 53d Sess., Supp. No. 10, A/56/10, at art. 1, *reprinted in* [2001] Y.B. Int’l L. Comm’n 30, A/CN.4/SER.A/2001/Add.1 (Part 2).

responsibility can be based upon two conditions. Firstly, conduct of a State consisting of an action or omission must be attributable to the State.<sup>56</sup> Secondly, the act or omission must constitute the breach of an international obligation of that State.<sup>57</sup> Breach of the obligations covers both treaty and non-treaty obligations.<sup>58</sup>

Non-treaty obligations of States are grounded in the rules of customary international law. In environmental law an accepted custom is that no State shall cause harm to another.<sup>59</sup> This rule allows Tuvalu to claim that developed States, which have been emitting GHGs and substantially contributing to climate change, have caused damages to Tuvalu. To establish the breach of this rule, Tuvalu will have to show that there is: a) a wrongful act attributable to the State; b) a causal link between the activity and damage; c) a violation of either international law or a violation of a duty of care, which is d) owed to the damaged State.<sup>60</sup> Proving these elements in the case of the climate change damages is highly challenging.

Even if the damaging activities causing climate change can be attributed to a particular State, the question of causation between the damaging activity and the damage to third States will remain. The problem arises from the fact that the affected State has to prove that an injury has been triggered by the relevant behavior of actors on the territory of the responsible State.<sup>61</sup> Tuvalu would therefore have to prove firstly that the emissions of the U.S., for instance, have

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<sup>56</sup> *Id.* at art. 2.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Trail Smelter Case, *supra* note 47; PHILIPPE SANDS & JACQUELINE PEEL, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 196 (3d ed. 2012). Another principle of international customary law which might be relevant is the “polluter pays principle.” This principle provides that the “polluter should, in principle, bear the costs of pollution.” Nevertheless, the “polluter pays principle” has not received a lot of support and attention among States and in case law. *Id.* at 229.

<sup>60</sup> Richard S.J. Tol & Roda Verheyen, *State Responsibility and Compensation for Climate Change Damages – A Legal and Economical Assessment*, 32 *ENERGY POL’Y* 1109, 1111 (2004).

<sup>61</sup> U.N. High Comm’r for Refugees (UNHCR), *Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches*, 8, PPLA/2012/01 (Feb. 2012).

caused the sea-level rise and secondly that this particular sea-level rise caused by the U.S.'s illegal emissions, has led to the human rights violations and damages to the State of Tuvalu.<sup>62</sup> To establish this kind of causality under contemporary international law appears highly challenging, if not impossible.<sup>63</sup> Furthermore, scientifically speaking, it is difficult to prove that the injury was caused by climate change related events, provoked by the behavior of a particular State, rather than "purely natural (geophysical) events."<sup>64</sup> Among other reasons, which hamper the establishment of causality between a damaging activity and harm, are spatial and temporal factors. States that have caused the harm are most frequently geographically remote from those who suffer the consequences. The causes of the grave effects which the Pacific region is facing are geographically diffused, as many States have jointly contributed to climate change.<sup>65</sup> Causality is also problematic, since most of the damages to a State such as Tuvalu are yet to come. Suing developed States for future damages is highly problematic since, as Jacobs argues, Tuvalu would have to use the arguments of intergenerational equity and the precautionary principle, which are currently only emerging in international law and have never been applied within the I.C.J.'s judgments.<sup>66</sup>

Although establishing the breach of an international treaty obligation to the large extent avoids the challenge of establishing causality, since there is no need to prove damages, it still appears problematic. Section 5 devotes itself to analysis of the positive obligations of States in the climate change context. Particularly it looks into the obligation of developed States to assist developing States in adaptation to climate change and into the extraterritorial

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<sup>62</sup> Jacobs, *supra* note 14, at 111.

<sup>63</sup> See Tol & Verheyen, *supra* note 60; Christina Voigt, *State Responsibility for Climate Change Damages*, 77 (1) NORDIC J. INT'L L. 1 (2008).

<sup>64</sup> Jacobs, *supra* note 14, at 111.

<sup>65</sup> STEPHEN M. GARDINER ET AL, CLIMATE ETHICS: ESSENTIAL READINGS 84 (2010).

<sup>66</sup> Jacobs, *supra* note 14, at 119. See also: M. Gromilova & N. Jägers, *Climate Change Induced Displacement and International Law*, in RESEARCH HANDBOOK ON CLIMATE CHANGE AND ADAPTATION LAW 70, 100 (J. Verschuuren ed., 2013).

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obligations under human rights law, revealing the problems with these obligations and hence the difficulties with establishing their breach.

The legal obstacles listed above might have been among the reasons for Tuvalu not proceeding with its threat to bring the case in front of the I.C.J. There is however, another option for Tuvalu.

*B. An Advisory Opinion and Its Value for the Case of Tuvalu*

A second option within the I.C.J. is to request an advisory opinion, since the I.C.J., as the primary judicial organ of the U.N., is a legal advisor to the U.N. in addition to its function of settling legal disputes.

An advisory opinion is an opinion issued by the Court concerning the legality of the legislation or conduct under question that does not have a binding effect, but rather advises on the interpretation and understanding of a rule of international law.<sup>67</sup> Although the opinion is merely advisory, its “judicial pronouncement is not only legal advice in the ordinary sense.”<sup>68</sup> According to Article 38 paragraph 1(d) of the I.C.J. Statute, at the very least the advisory opinions constitute a “subsidiary source of law.”<sup>69</sup> However, as Karin Oellers-Frahm argues, the contribution of the advisory opinions to the development of international law is even more substantial.<sup>70</sup> Though they are not legally binding, the advisory opinions of the I.C.J. still have “legal value and moral authority.”<sup>71</sup> Pasqualucci even argues that advisory opinions may be more influential than judgments in contentious cases because they affect the general interpretation of international law for all States rather

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<sup>67</sup> *Advisory Jurisdiction*, INTERNATIONAL COURT OF JUSTICE, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2> (last visited August 18, 2014).

<sup>68</sup> Karin Oellers-Frahm, *Lawmaking through Advisory Opinions?*, 12 GERMAN L.J. 1033, 1046 (2011).

<sup>69</sup> I.C.J. Statute, *supra* note 48, at art. 38 (1)(d).

<sup>70</sup> Oellers-Frahm *supra* note 68, at 1041.

<sup>71</sup> *Id.*; *see also* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 556, (Jul. 8) (dissenting opinion of Judge Koroma).

than just for the parties to an individual opinion.<sup>72</sup> Furthermore, though lacking legal power, in all twenty-four cases where the I.C.J. has rendered an advisory opinion, the requesting organs have respected the opinion of the Court.<sup>73</sup> This can be explained by the fact that since the I.C.J. is a principal judicial organ of the U.N., non-compliance with its opinion can compromise the reputation and position of the Court and the whole system of the U.N. institutions.<sup>74</sup> The members of the U.N., who have established the Court, have a tacit agreement to respect its decisions.<sup>75</sup>

From a procedural point of view, an advisory opinion is more achievable than an I.C.J. judgment. The request for an advisory opinion with all the explanatory documents must come from an authorized organ, regardless of whether the actors involved have accepted the jurisdiction of the Court.<sup>76</sup> The General Assembly, which has climate change firmly on its agenda, is directly authorized to request the International Court of Justice to give an advisory opinion on any legal question.<sup>77</sup> To proceed with the request for an advisory opinion the question should be put on the agenda of the General Assembly's session and has to gain a certain level of support within the General Assembly. According to the Rules of Procedures of the General Assembly, "all items proposed by any Member of the United Nations" and "all items which the Secretary-General deems it necessary to put before the General Assembly" shall be included on the agenda of any regular session.<sup>78</sup> Furthermore, the item must gain a certain level of support within the General Assembly. Accordingly,

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<sup>72</sup> JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 30 (2003).

<sup>73</sup> MOHAMED SAMEH M. AMR, *THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE AS THE PRINCIPAL JUDICIAL ORGAN OF THE UNITED NATIONS* 116 (Kluwer Law International 2003).

<sup>74</sup> *Id.* at 115.

<sup>75</sup> *Id.*

<sup>76</sup> I.C.J. Statute, *supra* note 48, at art. 65.

<sup>77</sup> U.N. Charter art. 96, ¶ 1. Attempts to question the competence of the General Assembly are limited, since it is difficult to imagine a question which would fall outside of the Assembly's competence.

<sup>78</sup> Rules of Procedure of the General Assembly, Rule 13, U.N. Doc. A/520/Rev.17 (2008).

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for an “important question” there should be support of a two-third majority of the present voting members, while for “other questions” a simple majority of members present and voting is sufficient.<sup>79</sup>

Arguably, the question concerning climate change and environments and human rights affected by it has the potential to get on the agenda of the General Assembly and to gain a sufficient level of support. First of all, either the State of Tuvalu as a member of the United Nations, or the Secretary-General, Ban Ki-moon, can suggest such an initiative. Tuvalu can make the suggestion as the State interested in finding the solution, even if this means acknowledging some obligations of its own.<sup>80</sup> The Secretary General could also make this suggestion, as according to his latest statement, the Small Island States are his priority.<sup>81</sup>

Secondly, it is also reasonable to believe that other Members of the General Assembly will support the initiative. The question concerning climate change, the environment and human rights affected by it is an “important one” since it is a global issue, resolution of which is connected to the “maintenance of international peace and security.”<sup>82</sup> As stated above, such an initiative should be supported by a two-third majority of the present and voting members.<sup>83</sup> The amount of support to be gained is therefore set high. Nonetheless, there are reasonable grounds to believe that the General Assembly would support the question concerning climate change. This belief rests on the fact that the General Assembly shows its rising concern regarding climate change. The president of the General Assembly, John Ashe, has announced that climate change is

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<sup>79</sup> I.C.J. Statute, *supra* note 48, at art. 18.

<sup>80</sup> It will be shown further, that the State of Tuvalu takes an active position in the debates on climate change, and is willing to accept strict emission targets, that normally do not apply to the developing States, as long as it helps the State to overcome the climate change impacts. *See infra* notes 105-106.

<sup>81</sup> U.N. Secretary-General, Remarks at launch of International Year for Small Island Developing States (Feb. 24, 2014), <http://www.un.org/sg/statements/index.asp?nid=7481>.

<sup>82</sup> Rules of Procedure of the General Assembly, Rule 83, U.N. Doc. A/520/Rev.17 (2008).

<sup>83</sup> I.C.J. Statute, *supra* note 48, at art. 18.

a top priority for the General Assembly agenda.<sup>84</sup> He also acknowledged the that small island nations are already experiencing the effects of climate change, and that for Pacific islands such as Tuvalu and the Marshall Islands there is a risk of disappearance in upcoming decades.<sup>85</sup> Additionally, the General Assembly has frequently shared its frustration about the poor commitments made by States in combating dangerous climate change. As it was proclaimed at one of the General Assembly meetings in September 2013: “The unfortunate truth is that far too few leaders are willing to stand up to the fossil fuel polluters and put in place the policies needed to drive us towards a sustainable future. In doing so, they are failing to represent the best interests of the vast majority of the people they represent.”<sup>86</sup>

What also makes the advisory opinion more flexible from a procedural perspective is that although the request to the I.C.J. should contain “exact statement of the question upon which an opinion is required, the Court has an authority to define the exact scope of the question, and its ‘real objective.’”<sup>87</sup> When it is necessary in order to carry out its judicial function, the Court can even reformulate the question submitted to it for an opinion, in order to clarify the real meaning of the question it has to answer. Arguably,

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<sup>84</sup> Courtney Brooks, *Climate change tops U.N. General Assembly President’s Agenda* AL JAZEERA AMERICA (Sept. 30, 2013), <http://america.aljazeera.com/articles/2013/9/30/un-general-assembly-president-puts-climate-change-at-top-of-agenda.html>.

<sup>85</sup> *Id.*

<sup>86</sup> Alden Meyer & Kelly Rigg, *U.N. General Assembly: Time for Leaders to Deliver Climate Ambition*, RESPONDING TO CLIMATE CHANGE (Sept. 25, 2013) <http://www.rtcc.org/2013/09/23/un-general-assembly-time-for-leaders-to-deliver-climate-ambition/> (last accessed 19 August 2014).

<sup>87</sup> For instance, in the *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion*, the Court had to deal with differences between the English and the French draft of the Question. Despite the translational difficulties the Court held that “it is unnecessary to pronounce in the possible divergence between English and French texts of the question posed, since the real objective of the question was clear: ‘to determine the legality or illegality of the threat or use of Nuclear Weapons.’” *See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. 238 (July 8).

the Court can also go beyond the scope of request.<sup>88</sup> This gives flexibility and allows the Court to show its own understanding of the problem.

Ultimately, from a political perspective, requesting an I.C.J. advisory opinion is more feasible and less turbulent. First of all, there is no need to confront any particular State and to name polluters or responsible States. Secondly, since the form of the opinion is not legally binding, it might lead to a more courageous statement by the I.C.J., with the Court going into controversial and problematic questions, such as the distribution and attribution of responsibility, which they would possibly avoid in a judgment.

The technicalities stated above reveal the benefits and feasibility of an advisory opinion, particularly when considered in comparison to an I.C.J. judgment. As long as the General Assembly supports the initiative and the question is legal, the Court will more likely accept it and would give its opinion. Importantly, the I.C.J. has never denied rendering its opinion when so requested by the General Assembly.<sup>89</sup>

### III. *The Focus of the Request for an Advisory Opinion from the I.C.J.*

Identifying and formulating the question which the State of Tuvalu can pose in front of the I.C.J. is the central task of this article. The idea of asking for an I.C.J. opinion regarding climate change injustice, as already mentioned, is not novel. In 2011, the Republic of Palau announced its intention to request “on the urgent basis . . . an advisory opinion from the I.C.J. on the responsibilities of States under international law to ensure that activities carried out under their jurisdiction or control that emit greenhouse gases do not damage other States.”<sup>90</sup> This attempt was welcomed and further

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<sup>88</sup> AMR, *supra* note 73, at 80.

<sup>89</sup> Aaron Korman & Giselle Barcia, *Rethinking Climate Change: Towards an International Court of Justice Advisory Opinion*, YALE J. INT’L L. ONLINE 37, 38 (2012).

<sup>90</sup> Press Conference on Request for International Court of Justice Advisory

developed by scholars. The Yale Center for Environmental Law and Policy prepared a detailed proposal for a request of an advisory opinion with the question formulated as follows: “What are the obligations under international law of a State for ensuring that activities under its jurisdiction or control that emit greenhouse gases do not cause, or substantially contribute to, serious damage to another State or States?”<sup>91</sup> However, the question should have a different focus and target.

First, as the case of Tuvalu has demonstrated, the central concern is not the physical disappearance of the island and the damages to its ecosystem, but rather the implications of climate change on the human rights of its people. Second, as has already frequently been stated, Tuvaluans must be helped before irreversible damage is done. Therefore, the focus of the question should be on the positive obligations under international law which are relevant for the protection of human rights and environment, rather than on the obligations and responsibilities to make reparations for injuries. Third, to a great extent, the ability of the Court to issue its advisory opinion on questions concerning responsibility for damages meets the same obstacles as the request for an I.C.J. judgment. This means that, even in the form of an opinion, the I.C.J. will have to talk about scientific uncertainty, intergenerational climate justice and attribution (which are outside of the competence of the court and politically dangerous). Arguably, addressing a question which targets damages and responsibilities for climate change, can even compromise the chances that the General Assembly will support the request, since for them it also would be a controversial political move.

The article therefore suggests a question which targets positive obligations of States towards its environment and population. Such a formulation would require the Court to look at climate change and human rights treaties and to clarify the uncertainties they entail. Should this task be accomplished it will

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Opinion on Climate Change, *supra* note 15.

<sup>91</sup> See CLIMATE CHANGE AND THE INTERNATIONAL COURT OF JUSTICE, *supra* note 47, at 8.

become clear which obligations Tuvalu and third States bear regarding the protection of human rights and the environment of Tuvaluans. Only when this is understood, are we able to analyze whether and how the breach of these obligations can be established.

*IV. Building/Clarifying the Components of the Request for the I.C.J.'s Advisory Opinion on the Case of Tuvalu*

As the story of Tuvalu reveals, climate change creates a two-fold challenge for the island and its population. The first dimension is the environmental degradation which in the long-run threatens the very existence of Tuvalu. The second dimension is the fact that climate change puts pressure on the livelihood of the islanders and poses human rights concerns. International law entails legal obligations which correspond to these challenges. Accordingly, it is further considered which obligations the State of Tuvalu holds towards its environment and population, and which obligations third States have regarding the provision of assistance. In this section, it is identified to what extent obligations under climate law and human rights law are clear and enforceable, and whether it is currently possible to establish the breach of these obligations. Ultimately, the ambiguities around these legal obligations are revealed and the proper formulation of the task for the I.C.J. is suggested.

*A. A Climate Law Perspective: Obligations and Compliance*

Since one of the foundations of climate law is the principle of common-but-differentiated responsibilities, it is important to make a distinction between the obligations of Tuvalu and those of developed States.

*1. Tuvalu's Climate Change Related Obligations*

Among positive obligations under the UNFCCC common to all the States are the obligations to mitigate and to adapt to climate

change, laid down in Article 4.1.<sup>92</sup> Since the contribution of Tuvalu to the global emissions of GHGs is negligible, the obligation to mitigate climate change is not relevant. Therefore, the obligation to adapt to climate change effects, to protect its land from the degradation of the coastal zones, saltwater intrusion and coral dying is what appears to be important.

More specifically, Article 4.1(b) requires States to “formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing . . . measures to facilitate adaptation to climate change.”<sup>93</sup> In this regard, after the critical “Review of Environment Related Laws” of Tuvalu prepared by the Secretariat of the South Pacific Regional Environment Programme (“SPREP”) in 2007,<sup>94</sup> which indicated poor legal development in the context of environmental protection and climate change resistance, a number of ameliorative measures have been enacted by the Tuvaluan government. Among these achievements is the adoption of the Environmental Protection Act 2008,<sup>95</sup> which laid down several important objectives for the Tuvaluan government, such as promotion of a clean and healthy environment, promotion of public awareness and involvement in environmental issues, promotion of the conservation and sustainable use of biological

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<sup>92</sup> UNFCCC, *supra* note 8. *See also* Kyoto Protocol to the United Nations Framework on Climate Change, *opened for signature* Dec. 11, 1997, U.N. Doc FCCC/CP/1997/7/Add. 1 (entered into force Feb. 16, 2005). Among the commitments are: to provide and communicate climate change related information (Article 4.1(a)); adopt and implement mitigation and adaptation measures (Article 4.1(b)); cooperate in technology transfer, adaptation, “climate-proofing” economic, social and environmental policies and actions, research and observations, information exchange, education, training and public awareness (Article 4.1(c-i), 5,6), communicate information regarding the Parties implementation of the UNFCCC (Article 4.1(j), 12.1). *Id.*

<sup>93</sup> UNFCCC, *supra* note 8, at art. 4.1(b).

<sup>94</sup> Secretariat of the South Pacific Regional Environmental Program, Department of Environment, Review of Environment Related Laws in Tuvalu: Environment Legislation Drafting Project, <http://www.sprep.org/att/IRC/eCOPIES/Countries/Tuvalu/35.pdf> (June 2007) [hereinafter SPREP, 2007].

<sup>95</sup> Environment Protection Act, 2008, Cap. 30/25 (Tuvalu), *available at* [http://tuvalu-legislation.tv/cms/images/LEGISLATION/PRINCIPAL/2008/2008-0002/EnvironmentalProtectionAct\\_1.pdf](http://tuvalu-legislation.tv/cms/images/LEGISLATION/PRINCIPAL/2008/2008-0002/EnvironmentalProtectionAct_1.pdf).

diversity and protection and conservation of natural resources, on the land, in the air, and in the sea. Importantly, the Act devoted a whole section, Part 8, to “Responses to Climate Change.”<sup>96</sup> Prior to that, Tuvalu had no legislation directly related to climate change issues. Moreover, Tuvalu’s National Adaptation Programme of Action (NAPA), finalized in 2007, sets the priorities for adaptation actions and provides detailed description of which adaptation activities are planned, with estimations of the costs and the actors involved.<sup>97</sup>

Recently there have been new developments in law, promoting the idea that adaptation can take another form such as migration.<sup>98</sup> It is highly relevant to make a note on the attitude of Tuvaluans and the Tuvaluan government towards this idea. Though migration, induced displacement, and planned relocation were acknowledged as adaptation strategies by the Cancun Agreement,<sup>99</sup> Tuvaluans and the Tuvaluan government do not show enthusiasm for this strategy. There is no official government policy on climate-related migration.<sup>100</sup> There have been no claims made for other States to accept them as migrants. Tuvalu’s NAPA, for instance, is silent about migration as a climate change adaptation strategy, rather talking about migration and resettlement as “a last resort to adaptation” in the worst case scenario.<sup>101</sup> The few migration schemes that are currently available for Tuvaluans are not connected to climate change concerns. For instance, migration to New Zealand is currently possible for Tuvaluans under the Pacific Access Category, a scheme that allows an annual quota of 75 migrants from Tuvalu to settle in New Zealand.<sup>102</sup> This scheme, as it is confirmed by an

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<sup>96</sup> *Id.* at Part 8

<sup>97</sup> TUVALU’S NAPA, *supra* note 28.

<sup>98</sup> Climate Change Conference, Cancun, Mex., Nov. 29 - Dec. 10, 2010, *Cancun Adaptation Framework to Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010*, U.N. Doc. FCCC/CP/2010/7/Add.1 (Mar. 15, 2011) [hereinafter *Cancun Adaptation Framework*].

<sup>99</sup> *Id.*

<sup>100</sup> HELD, NAG & ROGER, *supra* note 30, at 103.

<sup>101</sup> TUVALU’S NAPA, *supra* note 28, at 25.

<sup>102</sup> *Immigration New Zealand: Pacific Access Category*, IMMIGRATION NEW ZEALAND, <http://www.immigration.govt.nz/migrant/stream/live/pacificaccess/>.

official of the New Zealand Ministry of Foreign Affairs and Trade, has no link to climate change.<sup>103</sup> The qualifying conditions for the scheme are strict and require a good command of English, a job offer from New Zealand and positive results of a health examination.<sup>104</sup> This often makes migration an unachievable adaptation strategy for the most vulnerable and poor. Furthermore, the empirical data reveals that many Tuvaluans are reluctant to abandon their land and cultural ties and want to stay on the island by all means. Even those people who do move migrate mostly due to economic reasons.<sup>105</sup>

Apart from this reluctance to accept migration as a climate change adaptation strategy, Tuvalu is taking an active position regarding mitigation and adaptation. It is confirmed not only by Tuvalu's readiness to accept strict mitigation targets,<sup>106</sup> its constant call for adaptation funds, and vocal position at the Pacific Forum, but also by its 2020 Renewable Strategy, initiated by the Government of Tuvalu in 2009, which aims for the country to generate one-hundred percent of its energy from renewable sources by the year 2020.<sup>107</sup>

Despite the efforts of Tuvalu, legally speaking, the country is not bound by the obligations of Article 4 of the UNFCCC. From the text it is clear that the obligation to adopt mitigation and adaptation for developing countries depends on the support of developed countries, since Article 4.7 specifies that "the extent to which developing States Parties will effectively implement their

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<sup>103</sup> Shawn Shen & François Gemenne, *Contrasted Views on Environmental Change and Migration: the Case of Tuvaluan Migration to New Zealand*, 49 INT'L MIGRATION 232 (2011).

<sup>104</sup> *Immigration New Zealand: Pacific Access Category*, *supra* note 102.

<sup>105</sup> Shen & Gemenne, *supra* note 103, at 232-238. See also Colette Mortreux & Jon Barnett, *Climate change, migration and adaptation in Funafuti, Tuvalu*, 19 GLOBAL ENVIRONMENTAL CHANGE 105, 109 (2009).

<sup>106</sup> Lenore Taylor, *Tuvalu Call for Copenhagen Protocol Splits Developing Nation Bloc*, AUSTRALIAN Dec. 10, 2009, <http://www.theaustralian.com.au/national-affairs/policy/tuvalu-call-for-copenhagen-protocol-splits-developing-nation-bloc/story-e6frg6xf-1225808881276>; John Vidal, *Copenhagen Talks Break Down as Developing Nations Split Over 'Tuvalu' Protocol*, THE GUARDIAN, Dec. 9, 2009, <http://www.theguardian.com/environment/2009/dec/09/copenhagen-tuvalu-protocol-split>.

<sup>107</sup> HELD, NAG & ROGER, *supra* note 30, at 104.

commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology. . .”<sup>108</sup> Article 4.8 also specifies which groups require particular attention and support, with “small island countries” and “countries with low-lying coastal areas” being on the top of the list.<sup>109</sup> Regarding the obligations under the Cancun Agreement, which invited the Parties to enhance understanding and cooperation with regard to migration, induced displacement, and planned relocation as adaptation strategies, it is also not possible to conclude that Tuvalu does not comply.<sup>110</sup> The Cancun Adaptation Framework is a voluntarily agreement which does not have a binding power on its parties.<sup>111</sup> Even though the 2010 Cancun Agreement made a positive contribution towards the recognition of the issue by the international community, it is still questionable at which point migration can be accepted as an adaptation strategy.

## 2. *Positive Obligations of Developed States*

The provisions set by Article 4 specifically for developed countries clearly reflect the principle of common-but-differentiated responsibilities.<sup>112</sup> Accordingly, apart from the commitments which are common for all Parties to the Convention, developed States Parties have differentiated commitments; how conscientiously they realize these commitments depends on the ability of the developing

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<sup>108</sup> UNFCCC, *supra* note 8, at art. 4.7.

<sup>109</sup> *Id.* at art. 4.8(a-b).

<sup>110</sup> *Cancun Adaptation Framework, supra* note 98.

<sup>111</sup> JANE MCADAM, CLIMATE CHANGE, FORCED MIGRATION, AND INTERNATIONAL LAW 232 (2012); Rowena Maguire, *Foundations of International Climate Law: Objectives, Principles and Methods*, in CLIMATE CHANGE AND THE LAW 83, 107 (Erkki J. Hollo, Kati Kulovesi & Michael Mehling eds., 2013); *Cancun Adaptation Framework, supra* note 98.

<sup>112</sup> UNFCCC, *supra* note 8, at art.4. “All Parties, taking into account their *common but differentiated responsibilities* and their specific national and regional development priorities, objectives and circumstances, shall...” *Id.* (emphasis added).

and least developed countries to adapt.

Since this article is mainly concerned with the obligations that can help Tuvalu overcome climate change hardship and adapt to its impacts, and consequently does not consider the question of damages caused by the GHG emissions of the developed States, the focus is on obligations regarding adaptation. Accordingly, among adaptation obligations the following seem to be the most crucial in the case of Tuvalu:

- Article 4.3 sets financial obligations aimed at helping developing countries to meet the agreed full costs of preparing for adaptation; and also to provide such financial resources, including for the transfer of technology needed by the developing country Parties to meet the agreed full incremental costs of implementing measures.<sup>113</sup> For Tuvalu it means that first of all, Annex II countries should cover the full costs of activities related to preparation and submission of developing countries' national communications, such as the preparation of NAPA and relevant capacity building. Secondly, developed countries should provide funds and technologies for adaptation measures.

- Article 4.4 provides that the developed States Parties and other developed Parties included in Annex II shall also assist the developing States Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects.<sup>114</sup> This broad obligation, as some scholars argue, sets unlimited liability of the developed countries for the costs of adaptation.<sup>115</sup>

- Article 4.5 requires developed countries to "take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other Parties, particularly developing country Parties,

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<sup>113</sup> UNFCCC, *supra* note 8, at art. 4(3).

<sup>114</sup> *Id.* at art. 4(4).

<sup>115</sup> M.J. Mace, *Adaptation under the U.N. Framework Convention on Climate Change: The International Legal Framework*, in FAIRNESS IN ADAPTATION TO CLIMATE CHANGE 63 (W. Neil Adger et al. eds., 2006); PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 64 (2nd ed. 2003).

to enable them to implement the provisions of the Convention.”<sup>116</sup> Article 4.8 expands further on the commitment to provide “funding, insurance and the transfer of technology, to meet the specific needs and concerns of developing country Parties . . . arising from the adverse effects of climate change and/or the impact of the implementation of response measures.”<sup>117</sup> Ultimately, Article 4.9 takes full account of the specific needs and special situations of the least developed countries in their actions with regard to funding and transfer of technology.<sup>118</sup>

Accordingly, as a least developed country and arguably a particularly vulnerable country, Tuvalu qualifies for international assistance to prepare and implement its adaptation programs, including provision of financial and technical resources. In fact, perhaps thanks to its vocal position at the UNFCCC forum and in the media, Tuvalu is currently attracting quite substantial support from developed States.

When it comes to assistance under Article 4.3 and 4.4, the funding priorities for adaptation in Tuvalu, as for other least developed countries, are determined by the UNFCCC Least Developed Countries Fund. The Fund was established to assist least developed countries (LDC) parties in the preparation, development and implementation of NAPAs.<sup>119</sup> Accordingly, Tuvalu’s NAPA established for 2007-2014 identified seven priorities for adaptation, including three top priorities, which were shown to be particularly important for Tuvalu: to increase coastal resilience; to introduce salt-tolerant pulaka species to promote food security; and to improve rainwater storage capacity to increase access to safe drinking water for the country’s citizens.<sup>120</sup> The total costs for Tuvalu’s seven NAPA pilot projects were estimated to be US\$8,669,800.<sup>121</sup>

With the help of the Global Environmental Facility, which

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<sup>116</sup> UNFCCC, *supra* note 8, at art. 4(5).

<sup>117</sup> *Id.* at art. 4(8).

<sup>118</sup> *Id.* at art. 4(9).

<sup>119</sup> *Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation*, *supra* note 39, ¶ 41; A Savoir Report, *supra* note 34, at 107.

<sup>120</sup> TUVALU’S NAPA, *supra* note 28, at 36-38

<sup>121</sup> *Id.* at 38.

serves as the financial mechanism for the UNFCCC,<sup>122</sup> Tuvalu's government was able to attract significant amounts of funding.<sup>123</sup> Overall, US\$13,275,150 was allocated for Tuvalu, which is more than the target set by the NAPA. However, there are several concerns regarding this apparent success.

The first concern originates from the point that the development of NAPAs, and therefore the estimations of costs, is taking place under the supervision of UNFCCC sponsored consultants. This means that it remains a riddle to what extent the cost-estimations set reflect the real demand of the country. This concern is particularly acute taking into account the "disconnection between the national reality and the international debate on the adverse impacts of climate change on people in Tuvalu."<sup>124</sup> Further, access to information in Tuvalu is low; understanding in society of the problems and therefore the need to take active adaptation measures is very poor.<sup>125</sup> Many people are not even aware of, or do not believe in, climate change and threats posed to the country. This casts a shadow on the participation of society and their involvement in identifying suitable adaptation strategies and helping in their effective implementation.

Furthermore, the distribution of funds attracted is disturbing. A closer look at how the funds provided match Tuvalu's NAPA priorities demonstrates that the points most crucial for Tuvalu, such as water and agricultural concerns, are not prioritized by the funds provided. For example, the existing GEF funding does not cover either Tuvalu's second NAPA priority (to increase the distribution of salt-resistant pulaka species to ensure that domestic food security is not compromised by climate-induced saltwater intrusion), or its sixth NAPA priority (to strengthen community disaster preparedness).<sup>126</sup> Some targets are not financed sufficiently, as is the case for the

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<sup>122</sup> *What is GEF?* THE GLOBAL ENVIRONMENT FACILITY, <http://www.thegef.org/gef/whatisgef> (last visited Aug. 19, 2014).

<sup>123</sup> HELD, NAG & ROGER, *supra* note 30, at 109.

<sup>124</sup> *Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation*, *supra* note 39, ¶ 44.

<sup>125</sup> *Id.* ¶ 45.

<sup>126</sup> See HELD, NAG & ROGER, *supra* note 30, at 110.

projects on safe drinking water and fisheries management, which currently are underfinanced.<sup>127</sup> This situation is greatly undesirable since, as has been shown in Section I, water concerns and food security are the central problems for Tuvalu.

What is also questionable is the use of the funds. According to the analysis by Smith and Hemstock, Tuvalu receives annually an average total of U.S. \$14 million of aid (average in 2005-2009).<sup>128</sup> From these funds, eight percent is officially designated for "Technical Assistance";<sup>129</sup> however, the analysis of actual spending on projects and activities reveals that around thirty-five per cent of total aid received is spent on 'Technical Assistance.'<sup>130</sup> This is a warning, as it highlights that a third of the funds are going towards support and administration of the aid sector, rather than to real projects.

While the National Strategy for Sustainable Development (Te Kakeega II), whose goals and ambitions NAPA is assisting, will be running until 2015 and the success of Tuvalu's adaptation efforts can only be assessed then, there are other concerns apart from the financial. From the field observations made by the Special Rapporteur on the human right to safe drinking water and sanitation during her mission in July, 2012, it follows that "the country could still take other adaptation measures to address the adverse effects of climate change."<sup>131</sup> In that regard, the Rapporteur emphasized that "adaptation should not be limited to technical adaptation, but should also include social and economic aspects focusing on people's needs."<sup>132</sup> The format of assistance therefore needs to be improved and to become more sensitive to the cultural and social context.

In this regard, it also has to be considered what form of

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<sup>127</sup> *Id.*

<sup>128</sup> Roy Smith & Sarah Hemstock, *An Analysis of the Effectiveness of Funding for Climate Change Adaptation Using Tuvalu as a Case Study* 3 INT'L J. CLIMATE CHANGE: IMPACTS & RESPONSES 67 (2011).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, supra* note 39, ¶ 41.

<sup>132</sup> *Id.* ¶ 41.

assistance developed countries must provide to Tuvalu if migration is an adaptation strategy. The requirements to qualify for the migration agreement that Tuvalu currently has with New Zealand are quite strict. Immigrants need to meet very stringent conditions before they can move to New Zealand and, as has been already discussed, the Pacific Access Category does not exactly target climate-related migration, therefore it is not helpful for the most vulnerable people, including the elderly, children and uneducated women.<sup>133</sup>

The same concerns arise when it comes to technology transfer under Articles 4.5, 4.8 and 4.9. There are technologies available which can help Tuvalu to adapt. Developed, wealthy countries, such as the United Kingdom and the Netherlands are able to withstand sea-level rise of up to 5m due to the adaptation initiatives the Thames Estuary 2100 (TE2100) Project and the Netherlands Delta Commission respectively.<sup>134</sup> However, so far these technologies have not been shared with Tuvalu.

As has been shown, a certain level of support and assistance is already provided by developed countries to Tuvalu. However, the amount of this support as well as its form needs to be improved in order to promote successful adaptation on Tuvalu. Still, claiming that developed countries do not comply with their obligations under Article 4 appears problematic, as this article shows further.

### 3. *Remaining Uncertainties*

Article 4 in general, and specifically its subsections 4.3, 4.4 and 4.5, require all developed countries to assist developing countries in meeting the costs of adaptation to the effects of climate change,<sup>135</sup> including through technology transfer. These are one of the most prominent reflections of the principle of common but

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<sup>133</sup> Jane McAdam, *Environmental Migration Governance* 30 (UNSW Law Research Paper, 2009); Gromilova & Jägers, *supra* note 66, at 90.

<sup>134</sup> Robert J. Nicholls et al., *Sea-level Rise and its Possible Impacts Given a 'beyond 4°C world' in the Twenty-first Century*, 369 PHIL. TRANS. ROYAL SOC'Y 161, 176 (2011).

<sup>135</sup> UNFCCC, *supra* note 8, at art. 4(3), 4(4).

differentiated responsibilities, and clearly establish the obligations of developed States, but the evaluation of compliance with these provisions in reality is problematic.<sup>136</sup> The I.C.J. in its advisory opinion can therefore consider the following legal discrepancies.

As demonstrated, Article 4.3 sets financial obligations aimed at helping developing countries to meet the agreed full costs of preparing for adaptation and also to provide such financial resources, including for the transfer of technology, needed by the developing country Parties to meet the agreed full incremental costs of implementing adaptation measures. Yet, as the analysis of Tuvalu's current adaptation efforts have revealed, not all of the costs are covered and in many ways the assistance is not effective.<sup>137</sup>

There are numerous difficulties associated with Article 4.3 that create obstacles for Tuvalu in making claims that developed countries do not comply with their obligations. First of all, as has been quoted, developed countries are expected to provide funding to meet the "agreed" costs. This means the costs agreed upon between developing countries and the UNFCCC's financial mechanism, which is represented by the Global Environmental Facility (GEF).<sup>138</sup> The way the funding priorities and estimations are being set by the UNFCCC financial mechanism, as noted above, does not fully reflect the real demands of Tuvalu. Secondly, developing countries are only eligible to receive the finances that cover "incremental costs." The UNFCCC does not specify what incremental costs entail.<sup>139</sup> Mace argues that "incremental cost" refers to the cost additional to actions necessary to address a national need and refers to the additional costs of more expensive environmental projects.<sup>140</sup> Arguably, the costs of actions that support aims other than purely the need to address climate change impacts, or that would be implemented anyway with

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<sup>136</sup> RODA VERHEYEN, *CLIMATE CHANGE DAMAGE AND INTERNATIONAL LAW: PREVENTION DUTIES AND STATE RESPONSIBILITY* 92-93 (2005).

<sup>137</sup> See *supra* notes 130-139.

<sup>138</sup> Mace, *supra* note 115, at 63.

<sup>139</sup> Susanne Olbrisch, Erik Haites, Matthew Savage, Pradeep Dadhich & Manish Kumar Shrivastava, *Estimates of incremental investment for and cost of mitigation measures in developing countries*, 11 *CLIMATE POL'Y* 970, 971 (2011).

<sup>140</sup> Mace, *supra* note 115, at 66.

funding from other sources are, in a strict sense, not incremental.<sup>141</sup> For instance the example given by Verheyen is the one of sea defenses in coastal States which need to be maintained and upgraded in coastal areas over time regardless of climate change, in order to guard against changes in sea level and tidal waves.<sup>142</sup> In this case however, the UNFCCC funding mechanism and the assistance of the Annex II countries are only meant to fund the centimeters added due to the expected sea-level rise from anthropogenic climate change.<sup>143</sup> Such interpretations are highly unfavorable for Tuvalu, since the country is historically affected by coastal erosion which does not only happen due to climate change.<sup>144</sup> The I.C.J. can undertake the challenge of clarifying and giving its understanding on what is implied by policy-makers when they use the phrase “agreed full incremental costs of preparing for adaptation.”

Under Article 4.4, the developed States Parties and other developed Parties included in Annex II shall also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects.<sup>145</sup> As has already been shown, the scope of liability for developed States under this provision is arguably unlimited.<sup>146</sup> However the forms this assistance can take are not specified. Furthermore, it was demonstrated that financial assistance is not always sufficient. Technical assistance and support in training and education have in many cases proved to be more important for Tuvalu. The definition of adaptation measures is nevertheless lacking under the UNFCCC. The I.C.J. can therefore give its interpretation of what constitutes adaptation measures. In that regard, the Court can provide its opinion on whether migration constitutes a form of adaptation strategy. Though the Cancun Agreement has stated that

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<sup>141</sup> VERHEYEN, *supra* note 136, at 97-98. *See also* MARCO GRASSO, JUSTICE IN FUNDING ADAPTATION UNDER THE INTERNATIONAL CLIMATE CHANGE REGIME 75 (2010).

<sup>142</sup> VERHEYEN, *supra* note 136, at 97-98.

<sup>143</sup> *Id.*

<sup>144</sup> TUVALU'S NAPA, *supra* note 28, at 11, 22, 28.

<sup>145</sup> UNFCCC, *supra* note 8, at art. 4(4).

<sup>146</sup> Mace, *supra* note 115, at 64.

migration, planned relocation and climate induced displacement are among adaptation strategies, this trend has not been supported by any legally binding agreement under the UNFCCC.<sup>147</sup> The Court can bring its opinion on this matter and further suggest which forms the assistance to developing countries can take in that regard.

Though Article 4.4 sets no limits to the obligation to assist, it does not clarify the term “particularly vulnerable,” raising further questions as to which developing countries fall within this category.<sup>148</sup> For Tuvalu, this arguably does not create problems since both the preamble to the UNFCCC and Article 4.8 emphasize the particular vulnerability of Small Island States and low-lying areas.<sup>149</sup> Yet, this provision still requires further interpretation. Should the I.C.J. provide its understanding of the definition “particularly vulnerable” this will dispel the doubts that Tuvalu is eligible for assistance and will be highly important for the countries whose case is not so clear.

A further point lacking clarity concerns the level of assistance that is required from developed countries. As Lefeber concludes, the wording of Article 4.3 and 4.4 demonstrates that these provisions only foresee partial funding of adaptation measures by Annex II countries.<sup>150</sup> The way in which Article 4.3 and 4.4 are formulated, using the term “shall” and term “assist” makes clear that there is no straight obligation for Annex II countries to bear the full costs of adaptation in all developing countries.<sup>151</sup> Developed countries are only required to endeavor to assist developing countries that are particularly vulnerable to adverse effects of climate change in meeting the cost of adaptation.<sup>152</sup> The way to measure the extent to which Tuvalu must be assisted and the volume of such assistance can

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<sup>147</sup> As it has been stated, the Cancun Adaptation Framework is a non-legally binding agreement. *See Cancun Adaptation Framework, supra* note 117.

<sup>148</sup> UNFCCC, *supra* note 8, at art. 4(4).

<sup>149</sup> UNFCCC *supra* note 8, at Preamble, art. 4(8).

<sup>150</sup> René Lefeber, *Climate Change and State Responsibility, in INTERNATIONAL LAW IN THE ERA OF CLIMATE CHANGE* 322 (Rosemary Rayfuse & Shirley V. Scott eds., 2012).

<sup>151</sup> *See* the wording in UNFCCC, *supra* note 8, at art. 4(3), 4(4).

<sup>152</sup> Lefeber, *supra* note 151, at 322.

be suggested by the Court in its advisory opinion.

The following relevant obligations, Article 4.5, Articles 4.8 and Article 4.9, require developed countries to facilitate and finance the transfer of technologies and know-how to developing States Parties, and emphasize the specific needs and concerns of the least developed countries in their actions with regard to funding and transfer of technology.<sup>153</sup> There is, however, no universally recognized, enforceable definition of what “technology transfer” is and which forms it can take. The content of the notion of “technology transfer” remains debatable. As noted by Bodansky, the Convention uses broad language with respect to technology transfer and does not explain the terms.<sup>154</sup> Measuring compliance is therefore highly problematic. The same goes for compliance with Article 4.8 and 4.9, since there is no agreement on interpretation. As Mace shows, developed States tend to refer to scientific uncertainty as an excuse to delay assisting developing States in adaptation.<sup>155</sup> Further obstacles posed to technology transfer by markets, patent law and science<sup>156</sup> are also not addressed by the UNFCCC.

While it is not clear what is implied by technology transfer, in the context of Tuvalu it might be very helpful to clarify this obligation. As shown above, there are technologies available which can help Tuvalu to adapt. So the question of whether developed countries have an obligation to transfer these technologies to Tuvalu is highly relevant, yet impossible to answer under contemporary international law, since the scope of this obligation is not clear. The I.C.J. can resolve these doubts by providing a definition of technology transfer and an understanding of the conditions and scope of its provision.

It can be concluded that despite the fact that the climate change legal framework recognizes the specific needs of developing

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<sup>153</sup> UNFCCC, *supra* note 8, at art. 4(5), 4(8), 4(9).

<sup>154</sup> Daniel Bodansky, *The United Nations Convention on Climate Change: A Commentary* 18 YALE J. INT’L. L. 451, 529-530 (1993).

<sup>155</sup> Mace, *supra* note 115, at 62.

<sup>156</sup> See generally Daniel K. N. Johnson & Kristina M. Lybecker, *Challenges to Technology Transfer: A Literature Review of the Constraints on Environmental Technology Dissemination* (Colorado College, Working Paper No.2009-07, 2009).

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countries, and that the principle of “common but differentiated responsibilities and respective capabilities,” which requires developed State Parties to “take the lead in combating climate change and the adverse effects thereof” is a continuing theme throughout the UNFCCC,<sup>157</sup> when it comes to clear obligations in the context of climate change, it appears too difficult to identify the substance of these obligations. The main reason for this lies in the fact that the UNFCCC and its agreements mainly set up common goals, shared principles and general interests of the international community, using such language as “shall” and “commitments” instead of “must” or “obligated.” This leaves developed States with a lot of room to maneuver. Article 4 of the UNFCCC, where the obligations are listed, is a clear demonstration of this.<sup>158</sup> It is the longest Article of the Treaty and is also the least clear. As Aliozi fairly argues, “it is a common practice of the law-makers in international law, to use broad language, in order to achieve consensus and ‘signatures’ by States; while the most common side-effect of this broad language, is that the law becomes unclear as to what it actually commands.”<sup>159</sup> Furthermore, Aliozi concludes that this gives “leeway” for the duty-bearers to escape responsibility.<sup>160</sup> Since Article 4 is the only source of obligations that can promise Tuvalu and other States affected by climate change more successful possibilities for adaptation, it is absolutely crucial to clarify these provisions.

*B. A Human Rights Perspective, Obligations and Compliance*

Section I has shown that decreased productivity of agricultural lands, water pollution and water shortages seriously impact the daily lives of Tuvaluans and translate into clear human

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<sup>157</sup> UNFCCC, *supra* note 8, at art. 3(1).

<sup>158</sup> See the wording in UNFCCC, *supra* note 8, at art. 4.

<sup>159</sup> Zoi Aliozi, *Human Rights Law Review: Article 4 of the UNFCC 1992*, CLIMATE EMERGENCY INSTITUTE (Nov. 2013), [http://www.climateemergencyinstitute.com/uploads/Zoi\\_UNFCCC\\_Art\\_4\\_-\\_Human\\_Rights\\_-Nov\\_2013.pdf](http://www.climateemergencyinstitute.com/uploads/Zoi_UNFCCC_Art_4_-_Human_Rights_-Nov_2013.pdf).

<sup>160</sup> *Id.*

rights concerns. It was also demonstrated that today's most critical national challenge for Tuvaluans is the quality and availability of potable water.<sup>161</sup> It was demonstrated that this challenge clearly translates into a threat to the right to water, and further impacts other human rights, such as the right to health and the right to food.<sup>162</sup> The question of which actors under international human rights law bear obligations to sustain the right to water, rights to health and right to food of Tuvaluans will now be addressed further.

### *1. Tuvalu's Obligations Regarding Protection of Human Rights*

It is the duty of States to promote and protect all human rights and fundamental freedoms, regardless of their political, economic and cultural systems.<sup>163</sup> Under human rights law, a State has the primary legal obligation towards those within its territory and jurisdiction.<sup>164</sup> Such a State-centric paradigm, where the obligations are "vertical" and based on principles of "states' sovereignty, political and territorial authority and non-intervention" is a common characteristic of international human rights law.<sup>165</sup> Hence, Tuvalu is the primary guarantor and protector of the rights of Tuvaluans.

The right to water, the right to health and the right to food are

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<sup>161</sup> See *supra* Section I; TUVALU'S NAPA, *supra* note 28, at 25; National Report Submitted In Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21, Tuvalu, *supra* note 43, ¶ 105; Report of the Working Group on the Universal Periodic Review: Tuvalu, *supra* note 43, ¶ 9.

<sup>162</sup> *What Are Human Rights?*, *supra* note 44. Ultimately the right to life is also threatened. The right to life in the case of Tuvalu should be understood in a broad context. This means that this right not only entails that humans cannot be arbitrarily deprived of their lives, but that it is also about the positive measures that the State Parties should take, for instance the efforts to reduce malnutrition, epidemics and infant mortality.

<sup>163</sup> *Vienna Declaration*, *supra* note 45.

<sup>164</sup> John H. Knox, *Climate Change and Human Rights Law* 50 VA. J. INT'L L. 163 (2009).

<sup>165</sup> See S. Willcox, *A Rising Tide: The Implications of Climate Change Inundation for Human Rights and State Sovereignty*, 9 ESSEX HUM. RTS. REV. 11 (2012); GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 4 (3d ed. 2007).

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protected by the core human rights instruments. Tuvalu however, has not acceded to the most relevant treaty in that regard, the International Covenant on Economic, Social and Cultural Rights (“ICESCR”).<sup>166</sup> Meanwhile, ICESCR is the most authoritative source when it comes to the right to water, the right to health and the right to food.<sup>167</sup> However, there are relevant treaties for the protection of the right to water, right to health and the right to food which have been joined by Tuvalu. Tuvalu has acceded to the Convention on the Rights of the Child (“CRC”),<sup>168</sup> the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”),<sup>169</sup> and just recently, in 2013, the Convention on the Rights of Persons with Disabilities (“CRPD”).<sup>170</sup> These treaties have clear references to the rights under scrutiny.

CEDAW sets out an agenda to end discrimination against women, and explicitly refers to water and sanitation (which is a prerequisite of the right to health) within its text. Article 4.2 (h) of CEDAW provides:

States parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: . . . [t]o enjoy adequate living conditions, particularly in relation to housing,

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<sup>166</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *Ratification Status for CESCR*, [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CESCR&Lang=en](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CESCR&Lang=en).

<sup>167</sup> ICESCR, *supra* note 167, at art. 11-12.

<sup>168</sup> Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *Ratification Status for Tuvalu* [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=181&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=181&Lang=EN).

<sup>169</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; *Ratification Status for Tuvalu*, *supra* note 169.

<sup>170</sup> Convention on the Rights of Persons with Disabilities, Jan. 24, 2007 2515 U.N.T.S. 3 [hereinafter CRPD]; *Ratification Status for Tuvalu*, *supra* note 169.

sanitation, electricity and water supply, transport and communication.<sup>171</sup>

The food concern for women is also acknowledged in the preamble to the treaty.<sup>172</sup>

The Convention on the Rights of the Child likewise explicitly emphasizes the crucial importance of water, environmental sanitation and hygiene, and adequate nutritious foods for the welfare of children. Article 24.2 states:

States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: . . . to combat disease and malnutrition, including within the framework of primary health care, though, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution. . .<sup>173</sup>

Lastly, the Convention on the Rights of Persons with Disabilities likewise promotes the right to water for persons with disabilities, prescribing in article 28 to “ensure equal access by persons with disabilities to clean water.”<sup>174</sup> The right to food is recalled in the convention in relation to health care: “Prevent discriminatory denial of health care or health services or food and fluids on the basis of disability.”<sup>175</sup> Furthermore, States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing.<sup>176</sup> The importance of promoting and guaranteeing health for persons with disabilities is mentioned in the Convention on numerous occasions.<sup>177</sup>

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<sup>171</sup> CEDAW, *supra* note 170, at art. 4(2)(h).

<sup>172</sup> *Id.* at Preamble.

<sup>173</sup> CRC, *supra* note 169, at art. 24(2).

<sup>174</sup> CRPD, *supra* note 171, at art. 28(2)(a).

<sup>175</sup> *Id.* at art. 25(f).

<sup>176</sup> *Id.* at art. 28(1).

<sup>177</sup> *See id.* at Preamble (v), Article 16(4), Article 22(2), Article 25, Article 26,

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Therefore, at least under these three treaties (CEDAW, CRC and CRPD) Tuvalu has obligations to ensure the right to water, health and food for women, children and persons with disabilities. These obligations are crucial since all of these groups belong to the most vulnerable categories of people, and are also most affected when it comes to climate change.<sup>178</sup> Moreover, Tuvalu has an obligation to ensure that “at the very least, minimum essential levels of each of the rights”<sup>179</sup> are guaranteed to women, children and persons with disabilities.

Even though Tuvalu did not incorporate into their domestic law all the changes implied by the treaties to which it is a signatory, Tuvalu has addressed human rights matters of significant relevance for the country by using the National Strategic Development Plan (Te Kakeega).<sup>180</sup> Accordingly, mitigating climate change impacts on agriculture and promoting access to safe drinking water are among the priorities for action set in the Plan.<sup>181</sup> Furthermore, the Sustainable and Integrated Water and Sanitation Policy 2012-2021 (Te Panukua), developed by the Ministry of Public Utilities and the National Water and Sanitation Steering Committee and approved by the Government, sets the vision, goals and strategies to, *inter alia*, achieve a safe, reliable, affordable and sustainable water supply, minimize waste and conserve scarce water supplies.<sup>182</sup> It adopts the human right to safe drinking water and sanitation as one of its

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Article 27(1)(b).

<sup>178</sup> Report of the OHCHR on the Relationship between Climate Change and Human Rights, *supra* note 41, ¶ 42; IPCC 2014, *supra* note 2, at 6.

<sup>179</sup> United Nations Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004). For more on the minimum core obligations see: MANISULI SSENIONJO, *ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW* 65 (2009).

<sup>180</sup> Report of the Working Group on the Universal Periodic Review: Tuvalu, *supra* note 43, at 4; GOVERNMENT OF TUVALU, *TE KAKEEGA II NATIONAL STRATEGY FOR SUSTAINABLE DEVELOPMENT 2005-2015* (2005), [hereinafter *TE KAKEEGA*] <http://www.un.org/esa/agenda21/natlinfo/countr/tuvalu/nsds.pdf>.

<sup>181</sup> *TE KAKEEGA*, *supra* note 181, at 19, 23.

<sup>182</sup> Government of Tuvalu, South Pacific Applied Geoscience Commission, *Te Panukua: Sustainable and Integrated Water and Sanitation Policy 2012-2021* (2013),

guiding principles, which is a very important first step.<sup>183</sup>

Despite the acknowledged efforts that Tuvalu is currently making in improving rights to water, health and food for its population,<sup>184</sup> the success is poor.<sup>185</sup> According to the results of the latest universal periodic review of the country conducted in 2013, the Human Rights Council has recognized that the current situation regarding water availability on the island does not correspond to human rights standards, with women and children continuing to be the most vulnerable groups affected.<sup>186</sup> The majority of the 38 delegations that participated in the periodic review stated in their recommendations the importance of further promotion of the human right to safe drinking water and health.<sup>187</sup> Food security was also mentioned in the report and in the recommendations as a remaining concern.<sup>188</sup>

While the majority of the delegates that participated in the

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<sup>183</sup> *Id.* at 5.

<sup>184</sup> See Human Rights Council, Report of the Working Group on the Universal Periodic Review: Tuvalu, *supra* note 43. Accordingly, the latest periodic review of the Tuvalu's effort with regard to human rights made in 2013, reveals the progress with human rights commitments, such as reporting to the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women; the support of the visit of the Special Rapporteur on the human rights to safe drinking water and sanitation, the support of the ratification of the Convention on the Rights of Person with Disabilities; the accession to the Rome Statute of the International Criminal Court; the inclusion of gender in government planning; and the visibility given to climate change issues. See also *Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation*, *supra* note 39, Conclusion and Recommendations: The Special Rapporteur has "appreciated the strong determination of the Government and people of Tuvalu to confront and respond to the many challenges based on their long experience" with climate variability, including their capacity to make access to water and sanitation a more tangible reality.

<sup>185</sup> Report of the Working Group on the Universal Periodic Review: Tuvalu, *supra* note 43; *Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation*, *supra* note 39, ¶¶ 51-54.

<sup>186</sup> Report of the Working Group on the Universal Periodic Review: Tuvalu, *supra* note 43.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* See the recommendations of Singapore, Ireland and Mexico.

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periodic review have advised Tuvalu to join the core Covenants,<sup>189</sup> the reviewers also acknowledged challenges and constraints in the implementation of recommendations and the overall human rights commitments. Among these constraints are mainly funding constraints, resource availability and technical limitations.<sup>190</sup> Importantly, the Working Group of the Periodic Review acknowledged the specific vulnerabilities that Tuvalu faces, namely the threat of the adverse impacts of climate change and sea-level rise, as well as the lack of adaptive capacity.<sup>191</sup>

The crucial character of international assistance and support for the State of Tuvalu has been acknowledged by many members of the periodic review.<sup>192</sup> The Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque, has also emphasized the crucial importance of international assistance for Tuvalu,<sup>193</sup> and at the same time recommended that “The Government of Tuvalu, which bears the main responsibility for the realization of the human rights to water and sanitation, takes concrete and targeted steps within the maximum of available resources, including by seeking international cooperation aid and assistance, to make these rights a reality for all.”<sup>194</sup> Ultimately, “Tuvalu reiterated its commitment to protect the human rights of its people, for which purpose it requested relevant assistance in its effort to fulfil its human rights obligations.”<sup>195</sup>

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<sup>189</sup> *Id.* ¶¶ 82-85.

<sup>190</sup> *Id.* ¶ 11.

<sup>191</sup> Report of the Working Group on the Universal Periodic Review: Tuvalu, *supra* note 43 ¶ 6.

<sup>192</sup> *Id.* ¶ 22 (Maldives), ¶ 24 (Montenegro), ¶ 30 (Philippines), ¶ 31 (Senegal), ¶ 42 (Thailand), ¶ 44 (Turkey), ¶ 53 (Algeria), ¶ 59 (Costa Rica), ¶ 67 (delegate from the Crown Counsel), ¶ 72 (Indonesia), ¶ 75 (Malaysia); ¶ 82.5 (Conclusions and Recommendations of Azerbaijan), ¶ 82.6 (Italy), ¶ 82.45 (Singapore), ¶ 82.56 (Uruguay), ¶ 84.17 (Netherlands).

<sup>193</sup> *Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, supra* note 39, ¶¶ 51-54.

<sup>194</sup> *Id.* ¶54 (a).

<sup>195</sup> Report of the Working Group on the Universal Periodic Review: Tuvalu, *supra* note 43, ¶ 20.

2. *Obligations of the State When It Fails and the Obligations of the International Community*

The analysis provided above of the relevant reports reveals that despite Tuvalu's efforts, the State is not successful in guaranteeing the most threatened human rights to its population. If a State fails to guarantee human rights within its territory, then at least two relevant questions appear: what are the obligations of the State that failed to comply with its primary human rights obligations? And, are there any obligations on the part of third States?<sup>196</sup>

*a. Obligation to Seek International Assistance*

As has been stated in the recommendations to Tuvalu, the Government should act to promote the most vulnerable human rights by, among other steps, "seeking international cooperation aid and assistance."<sup>197</sup> International human rights law however, is not clear on the legal status of the obligation to seek international assistance. Even in case such obligation can be derived from Article 2.1 of the ICESCR<sup>198</sup> which explicitly calls on each of its State Parties to "take

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<sup>196</sup> See also Mariya Gromilova, *Revisiting Planned Relocation as a Climate Change Adaptation Strategy: The Added Value of a Human Rights-Based Approach* 10 UTRECHT L. REV. 76 (2014).

<sup>197</sup> *Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation*, *supra* note 39, ¶ 54 (a).

<sup>198</sup> Manisuli Ssenyonjo, *Economic, Social and Cultural Rights*, in INTERNATIONAL HUMAN RIGHTS LAW: SIX DECADES AFTER THE UDHR AND BEYOND 49, 68 (Mashood Baderin & Manisuli Ssenyonjo eds., 2010). The Committee has emphasized the importance of mutual responsibility in this regard, meaning that developing states also have international obligations. See also M. Sepúlveda, *Obligations of 'International Assistance and Cooperation' in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* 24 (2) NETH. Q. HUM. RTS 271, 290 (2006). Sepúlveda identifies two duties in that regard: the duty for to seek international assistance, and the duty to "identify in their reports any particular needs that they may have for technical assistance or development cooperation." *Id.* Besides the legally binding instruments which imply the obligation to seek international assistance, there are human rights documents which directly focus on such obligation. For instance, the

steps, individually and through international assistance and cooperation . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant . . .,”<sup>199</sup> it is still not obligatory for Tuvalu since it is not a party to the Covenant.

Though not bound by this obligation, it is evident that Tuvalu is searching for such assistance. The confirmation is Tuvalu’s active position in the UNFCCC negotiations, human rights forums, in press and in media.<sup>200</sup> The next question to consider then is whether there are any obligations on the part of third States, e.g. extraterritorial obligations to help in securing the rights of Tuvaluans.

### *b. Extraterritorial Obligations of States*

When it comes to the obligations of third States towards helping and protecting Tuvaluans’ rights to water, health and food, the ICESCR in Article 2.1 explicitly calls on each of its States Parties to act to protect the rights recognized in the Covenant.<sup>201</sup> Moreover, the essential role of such cooperation in facilitating the full realization of the relevant rights is further underlined by the

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Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural rights - a legal document conducted by leading experts in international law and human rights on September 28, 2011, directly lays down the obligation to seek international assistance and cooperation, namely: “A State has the obligation to seek international assistance and cooperation on mutually agreed terms when that State is unable, despite its best efforts, to guarantee economic, social and cultural rights within its territory.” *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, ETO CONSORTIUM, ¶ 34 (2013), available at [http://www.etoconsortium.org/nc/en/library/maastricht-principles/?tx\\_drblob\\_pi1%5BdownloadUid%5D=23](http://www.etoconsortium.org/nc/en/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23) [hereinafter *Maastricht Principles*].

<sup>199</sup> ICESCR, *supra* note 166, at art. 2(1).

<sup>200</sup> See, e.g., HELD, NAG & ROGER, *supra* note 30; Report of the Working Group on the Universal Periodic Review: Tuvalu, *supra* note 43; Ralston, Horstmann & Holl *supra* note 14; Statement by His Excellency Right Honourable Sir Tomasi Puapua PC, KBE Governor General Of Tuvalu to the U.N. General Assembly (Sept. 14, 2002), available at <http://www.un.org/webcast/ga/57/statements/020914tuvaluE.htm>; McGrath, *supra* note 13.

<sup>201</sup> ICESCR, *supra* note 166, at art. 2(1).

specific provisions contained in articles 11, 15, 22 and 23 of the ICESCR.<sup>202</sup> According to Sepúlveda, the premise of Article 2.1 is that “some countries are not able to achieve the full realization of economic, social and cultural rights if those countries in the position to assist do not actually provide them with assistance.”<sup>203</sup> This understanding of the extraterritorial character regarding realization of economic, social and cultural rights further finds support in the General Comments and other human rights reports and soft law instruments.<sup>204</sup> The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights is one of the prominent developments in that regard.<sup>205</sup> Nevertheless, it has to be emphasized that the nature of extraterritorial obligations remains a highly controversial topic within human rights law, with no legally binding document that elaborates on the content of extraterritorial obligations. Therefore, the analysis proceeds by focusing on the soft law instruments.

In the General Comment on the right to water, which is the most vulnerable right of Tuvaluans, the U.N. Committee on Economic, Social and Cultural Rights stated: “for the avoidance of any doubt, the Committee wishes to emphasize that it is particularly incumbent on States parties, and other actors in a position to assist, to provide international assistance and cooperation, especially economic and technical, which enables developing countries to fulfil their core obligations . . .”<sup>206</sup>

As regards the right to health, which is also seriously impacted, the Committee again holds that it is particularly incumbent on States parties and other actors in a position to assist, to provide “international assistance and cooperation, especially economic and technical,” which enables developing countries to fulfill their core

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<sup>202</sup> ICESCR, *supra* note 166, at art. 11, 15, 22, 23.

<sup>203</sup> Sepúlveda, *supra* note 198, at 280.

<sup>204</sup> *Id.*

<sup>205</sup> *Maastricht Principles*, *supra* note 198.

<sup>206</sup> U.N. Committee on Economic, Social and Cultural Rights, *General Comment No. 15: The Right to Water (Articles 11 and 12 of the Covenant)*, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003).

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and other obligations.<sup>207</sup> Secondly, it refers to the “core obligation” which means that developed States have to assist at least to an extent when the minimum essential level of each right is insured in the developing countries.<sup>208</sup>

The General Comment on the right to food re-establishes the importance of the obligation: “[S]tates parties should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to adequate food.”<sup>209</sup> Furthermore, the Committee also establishes the structure of this duty: “States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required.”<sup>210</sup>

Regarding the case of Tuvalu, the controversial question is whether the States Parties to the ICESCR in a position to assist are also obliged to provide this assistance to those who are not parties to the Covenant. Since this matter is not directly clarified by the Committee, it is suitable to look at the origins of the obligation and to understand the probable intention of the drafters. Article 1 of the U.N. Charter calls for achieving “international cooperation in solving international problems of an economic, social and cultural or humanitarian character.”<sup>211</sup> Articles 55 and 56 of the U.N. Charter and Articles 22 and 28 of the UDHR further promote this obligation, particularly calling on the U.N. Members to promote “solutions of international economic, social, health, and related problems; and international cultural and educational cooperation”<sup>212</sup> and claiming

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<sup>207</sup> U.N. Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the Covenant)*, ¶ 45, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

<sup>208</sup> SSENYONJO, *supra* note 179, at 65.

<sup>209</sup> U.N. Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The Right to Adequate Food (Article 11 of the Covenant)*, ¶ 36, U.N. Doc. E/C.12/1999/5 (1999).

<sup>210</sup> *Id.*

<sup>211</sup> U.N. Charter, art. 1.

<sup>212</sup> *Id.* at art. 55, 56; U.N. General Assembly, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

that

everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.<sup>213</sup>

Furthermore, by looking at the wording of the ICESCR and of the Comments of the Committee, it can also be concluded that the recipients of assistance are not only those who are parties to the Covenant. The Committee in its commentaries refers to “developing countries”<sup>214</sup> or “other countries”<sup>215</sup> which does not exclude States non-parties to the ICESCR. The Covenant itself also does not directly exclude non-parties from receiving international assistance and cooperation, only specifying from whom the assistance is expected.<sup>216</sup> This, as Ssenyonjo argues, follows from the fact that “the rules concerning the basic human rights of the human person’ are *erga omnes* obligations and that, as indicated in the fourth preambular paragraph of both the ICESCR and the ICCPR, there is a U.N. Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms.”<sup>217</sup>

Furthermore, at least one treaty ratified by Tuvalu contains a reference to international assistance. The Committee on the Rights of the Child has clearly stated that “[w]hen States ratify the Convention, they take on obligations not only to implement it within their jurisdiction but to contribute, through international cooperation, to global implementation.”<sup>218</sup>

Therefore, it can be concluded that human rights law does

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<sup>213</sup> UDHR, *supra* note 213, at art. 22.

<sup>214</sup> *General Comment No. 15*, *supra* note 207, ¶ 38.

<sup>215</sup> *Comment No. 12*, *supra* note 211, ¶ 36.

<sup>216</sup> ICESCR, *supra* note 166, at art. 2(1).

<sup>217</sup> SSENYONJO, *supra* note 179, at 70.

<sup>218</sup> Committee on the Rights of the Child, *General Comment No. 5: General Measures of Implementation for the Convention on the Rights of the Child (Articles 4, 42 and 44(6))*, ¶ 7, U.N. Doc. CRC/GC/2003/5, (Oct. 3, 2003).

provide that State Parties to the ICESCR have obligations to provide assistance to Tuvalu, even though Tuvalu itself is not a party to the Covenant. Furthermore, it can also be claimed that Tuvalu must receive this assistance from “those in the position to assist” since the domestic resources needed to satisfy the most basic human rights of Tuvaluans are scarce.

### C. *Remaining Uncertainties*

While the legal basis of the extraterritorial obligations might be acknowledged,<sup>219</sup> the character, scope and the extent of these obligations are questionable.<sup>220</sup> First, regardless of the fact that the Committee has referred to the State’s obligations of international assistance and cooperation in various observations, comments and practices, there is still a big disagreement as to whether the obligations underpinning the provision of Article 2 are legally binding.<sup>221</sup> In the debates surrounding the drafting of the optional protocol to the ICESCR, such countries as the United Kingdom, Canada, France and some others have claimed that international cooperation and assistance is an “important moral obligation” but “not a legal entitlement.”<sup>222</sup> For instance, the fact that the Committee

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<sup>219</sup> Knox, *supra* note 165, at 163, 201-02; Christian Curtis & Magdalena Sepúlveda, *Are extra-territorial obligations reviewable under the optional protocol to the ICESCR?* 27 *NORDISK TIDSSKRIFT FOR MENNESKERETTIGHETER* 54, 55-56 (2009).

<sup>220</sup> FONS COOMANS & MENNO T. KAMMINGA, *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* 47 (2004); Knox, *supra* note 165, at 207; GLOBAL JUSTICE, *STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN INTERNATIONAL LAW* (Malcolm Langford, Wouter Vandenhoe, Martin Scheinin & Willem van Genugten eds., 2013).

<sup>221</sup> Malcolm Langford, Fons Coomans & Felipe Gómez Isa, *Extraterritorial Duties in International Law*, in *GLOBAL JUSTICE, STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN INTERNATIONAL LAW* *supra* note 222, at 51, 62-64.

<sup>222</sup> See Report of the Open-Ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the ICESCR on its Second Session, ¶ 76, U.N. Doc. E/CN.4/2005/52 (Feb. 10, 2005).

in its General Comment on the Right to Adequate Food uses recommendatory language (“should”) in talking about the duty of international assistance further makes it difficult to identify what the exact weight of these obligations is.<sup>223</sup> However, Ssenyonjo rightly challenges this attitude: “if there is no legal obligation underpinning the human rights responsibility of international assistance and cooperation, then, inescapably, all international assistance and cooperation fundamentally rests on charity.”<sup>224</sup> There is space for a valuable contribution from the I.C.J. through an advisory opinion, in which the Court can make a note on the legal weight of extraterritorial obligations. Importantly, the I.C.J. has already played a critical role in the development of understanding extraterritorial obligations. In its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the I.C.J. allayed the doubts regarding the jurisdictional clause in the ICESCR, establishing that the human rights obligations extend beyond a State’s borders.<sup>225</sup>

Secondly, the reach of extraterritorial obligations is a “key issue.”<sup>226</sup> Neither the form of assistance, nor its reach is identified. The obligation of international assistance is an extension of the duty to fulfill, which is an open-ended obligation and imposes positive, rather than negative duties on States.<sup>227</sup> The Committee has not developed the precise content of the obligation to fulfill at the international level. From the text of the Covenant it follows that assistance depends on the availability of resources, since the States are obligated to realize the rights of the Covenant to the “maximum

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<sup>223</sup> *General Comment No. 12*, *supra* note 210, ¶ 36 (“States parties *should* recognize the essential role of international cooperation”); ¶37 (“Priority in food aid should be given to the most vulnerable population.”) *See also* Langford, Coomans & Isa, *supra* note 222, at 51, 107.

<sup>224</sup> SSENYONJO, *supra* note 179, at 68.

<sup>225</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J., (July 9, 2004) *available at* <http://www.I.C.J.-cij.org/docket/files/131/1671.pdf>. *See also* SSENYONJO, *supra* note 179, at 72; Langford, Coomans & Isa, *supra* note 223, at 60.

<sup>226</sup> Langford, Coomans & Isa, *supra* note 222, at 51, 64.

<sup>227</sup> Knox, *supra* note 165, at 48.

of available resources.”<sup>228</sup> Who decides what level of assistance is required from each State and what assessment procedure will be used are not directly prescribed. Langford *et al.* show that there is arguably a quantitative side to these obligations.<sup>229</sup> The Committee has set the percentage of the gross national product (GNP)/gross domestic product (GDP) that developed States should dedicate to international cooperation and development assistance.<sup>230</sup> The commitment was ultimately set at 0.7 percent of the GNP/GDP to be transferred to developing countries as an international assistance.<sup>231</sup> Yet, so far most developed States are far below this amount.<sup>232</sup> Though the 0.7 percent commitment is nonbinding, when the commitments are “constantly and consistently made,” they “can be a source of law for interpreting hard obligations in international treaties.”<sup>233</sup> A second quantitative aspect is arguably the U.N. recommendation to the developed countries to allocate at least 0.15 percent of their CNP to Least Developed Countries.<sup>234</sup> As Langford *et al.* show, “although it may be difficult to argue that 0.15 per cent is binding, it would be possible to argue at a minimum that States are under an obligation to orientate their development cooperation activities towards the full realization of the rights enshrined in the

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<sup>228</sup> ICESCR, *supra* note 166, at art. 2(1)

<sup>229</sup> Langford, Coomans & Isa, *supra* note 222, at 110.

<sup>230</sup> SSENIONJO, *supra* note 179, at 78 (referring to CESCR *Summary Record of the 14th Meeting: Ireland*, ¶ 38, U.N. Doc. E/C.12/1999/SR.14.; CESCR, *Summary Record: Japan*, ¶ 10, U.N. Doc. E/C.12/2001/SR.42; *Summary Record of the 48<sup>th</sup> Meeting: Germany*, ¶ 37, U.N. Doc. E/C.12/2001/SR.48).

<sup>231</sup> G.A. Res. 2626 (XXV) U.N. GAOR, 25th Sess., U.N. Doc. A/RES/25/2626.

<sup>232</sup> ODA as a percentage of GDP was as follows: Belgium (0.36%); Switzerland (0.34%); France (0.33%); Finland and UK (0.31%); Ireland (0.30); Japan, Germany and Australia (0.27%); New Zealand and Portugal (0.26); Canada and Austria (0.25); Spain (0.24%); Greece (0.19%); Italy (0.13%) and the United States (0.10%). By 2000 only five states have reached the requirement: Denmark (1.06%), Netherlands (0.82%), Sweden (0.81%), Norway (0.80%) and Luxembourg (0.70%). See SSENIONJO, *supra* note 179, at 78.

<sup>233</sup> Langford, Coomans & Isa, *supra* note 222, at 110.

<sup>234</sup> Third International Conference on Least Developed Countries, *Brussels Programme of Action for the Least Developed Countries for the Decade 2001-2010*, Brussels, Belg., May 14-20, 2001, U.N. Doc. A/CONF.191/13.

ICESCR and justify why they cannot devote a significant enough amount of development aid to the poorest States.”<sup>235</sup> However, this understanding has not found support in the activities of the developed countries.

Moreover, the forms that international assistance can take are not clear. As it follows from the text of the Covenant, assistance mainly means financial and technical assistance.<sup>236</sup> Nevertheless, as has already been claimed, the situation on Tuvalu indicates that purely financial and technical assistance might not be sufficient. Several examples that clearly demonstrate this can be derived from the report of the Special Rapporteur on the human right to safe drinking water and sanitation.<sup>237</sup> One example is that it is a common and culturally accepted practice for Tuvaluans due to the “behavioral issues,” to use the ocean as a toilet.<sup>238</sup> The attempt to introduce composting toilets (which are dry toilets) as a sustainable solution for an atoll island country with scarce water resources, met with huge resistance from islanders, who were skeptical about the idea and greatly reluctant to start using them. It cost enormous effort for the project promoters to engage the community in this initiative and to convince Tuvaluans of the benefits of this sustainable solution.<sup>239</sup> Another example already mentioned from the same report is the fact that Tuvaluans are still skeptical and often even unaware of the threats they are facing in light of climate change.<sup>240</sup> For the promotion and the protection of the rights of vulnerable people, such a discord between reality and the attitude of the Tuvaluan society presents a clear challenge, making it difficult for financial assistance to be used efficiently. This clearly shows that technical and financial assistance is not enough and that other forms of assistance, targeting for instance education, should be provided to Tuvaluans. The I.C.J. could take a closer look at the amount of assistance Tuvalu is

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<sup>235</sup> Langford, Coomans & Isa, *supra* note 222, at 111.

<sup>236</sup> ICESCR, *supra* note 166, at art. 2(1).

<sup>237</sup> *Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation*, *supra* note 39.

<sup>238</sup> *Id.* ¶ 29.

<sup>239</sup> *Id.* ¶ 30.

<sup>240</sup> *Id.* ¶ 44.

receiving, which forms it takes and whether it corresponds to the U.N. recommendations and requirements. In the same vein, through its advisory opinion the Court can suggest what the content of the obligation of assistance and cooperation is.

Other remaining questions such as the distribution of the obligation to assist between developed countries and, importantly, what happens if those who are obligated to provide assistance do not live up to this obligation can also find clarification in the advisory opinion of the I.C.J.

### *V. Conclusions*

Regardless of whether Tuvalu will physically disappear in this or the next century, the human rights of the people living on this island are already affected today due to the impacts of climate change. Instead of waiting for worse things to happen to Tuvalu and its population, and instead of searching for responsible or liable parties, there is a need to act already and to ensure that the threatened human rights of the islanders get immediate attention. This article suggested a legal strategy which can already be used to help the islanders today. There are positive obligations in international law for both sides. For SIDS and the international community there are positive obligations which are relevant for the protection of the land and the human rights of populations of vulnerable States. The role of developed States in acting is paramount. Should the legal obligations of providing assistance to Tuvalu be effectively fulfilled, a lot of problems of this State and its population can be resolved.

However these obligations have been formulated so vaguely and in such a confusing manner, that it does not appear to be possible to identify the reach of these obligations, the way they must be implemented and the way the compliance with these obligations can be measured.

The I.C.J. has the power to clear up the ambiguity around these obligations through an advisory opinion. Besides the high legal value of having such an advisory opinion for the development and understanding of contemporary international law, procedurally

speaking, the request for an advisory opinion is feasible. The General Assembly, as the U.N. organ that is directly authorized to request the advisory opinion from the I.C.J., has on numerous occasions expressed its interest and concern about the situation of SIDS and has even pronounced 2014 as the International Year for Small Island Developing States. Therefore, it seems only logical that the General Assembly help SIDS to overcome the challenges of climate change by requesting the I.C.J. to adopt an advisory opinion on the ambiguities in international law relevant for the protection of Tuvaluans. Such a request could be formulated as follows: *What are the legal obligations of the State of Tuvalu to protect its land and the human rights of its population affected due to climate change-related impacts, and what are the obligations of third States to assist Tuvalu in this mission?*

While some components of the answer to this question can be established, much remains unanswered and requires legal clarification by the I.C.J. When it comes to the obligations of Tuvalu, clarification is mainly required on some foundational human rights issues. The nature of extraterritorial obligations is highly controversial, with the State's obligations towards its own territory often being prioritized, and no clear balance between these has been established. Therefore, it is not clear when exactly it can be said that Tuvalu has failed to live up to its human rights obligations and from what moment on Tuvalu can begin requesting support from the international community. The Court has the power to further explain the nature of the extraterritorial obligations, and clarify from what moment on the State that fails to guarantee the rights of its own people must be assisted by third States. The obligation "to seek international assistance" can also be considered and discussed by the Court.

The main ambiguities, however, are within the second part of the question, "what are the obligations of third States to assist?" Under climate law, Article 4 of the UNFCCC, the central source of obligations which enable Tuvalu to receive assistance, creates many uncertainties. The language used in Article 4 and the definitions laid down in Article 1 are unclear. This makes effective and consistent implementation of these norms close to impossible. Article 4.3, for

instance, while setting obligations for developed States to provide financial resources to meet the agreed full incremental costs of preparing for adaptation, does not specify what is meant by such costs. Article 4.4 formulates a broad obligation to assist, without clarifying what forms this assistance can take and what the scope of this assistance is. Article 4.5 prescribes the obligation to transfer technologies to developing countries to assist them in adaptation, without clarifying the content of technology transfer, the moment such technologies must be transferred, and whether there are any limitations for the technology transfer.

Under human rights law, the concerns are similar. Though human rights law in Article 2 of the ICESCR sets down the obligations of international assistance and cooperation, these obligations are hardly legally binding. Since the nature of extraterritorial obligations is highly controversial, the character and status of these obligations are not yet clarified. Even if there are extraterritorial obligations for States parties to the ICESCR to assist other States, it is unclear which form of assistance is expected and what the scope and the reach of this assistance are.

The analysis of the legal frameworks relevant for the problems of Tuvalu leads to an unfortunate conclusion. The few legal provisions under human rights law and climate law that hold positive obligations of developed States towards Tuvalu are not effective, since it is hardly possible to establish what constitutes non-compliance with these obligations, and to determine how these obligations must to be implemented. The I.C.J. through its advisory opinion can provide clarification to the identified legal ambiguities and specify what the compliance with these obligations should look like and which forms it can take.

The I.C.J. can also give its opinion on the relationship between climate change and human rights law. The story of Tuvalu is an evident demonstration that climate change and human rights are intrinsically linked. The norms of human rights law and climate law, therefore, have to be seen and interpreted in conjunction. The fact that the UNFCCC does assure compliance of developed States with their obligations to assist developing countries in adaptation makes it impossible for developing countries to sustain and fulfill the human

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rights obligations towards their own populations. This means that due to the threats posed to some countries by climate change, the burden on human rights law has increased. Accordingly, when looking at the SIDS from a human rights perspective the new important way of providing assistance to these countries is through assisting them in their adaptation to climate change. Human rights obligations can therefore lay down the baseline against which to measure the extent and scope of required adaptation under climate law. This means that while it is too difficult to establish which adaptation measures are required in the context of climate law alone (the outcome and the success of adaptation measures are hard to measure and evaluate), when human rights concerns are involved these technicalities lose their relevance. In the context of human rights law, it is not so important who is responsible for climate change and who bears which share of emissions. What is important is that not providing assistance in adaptation has an immediate impact on human rights. The extent of the assistance is then also arguably clear: it has to restore the enjoyment of basic human rights. In that regard, the Court could take a closer look at the human rights perspective on climate change and, through this lens, specify which forms international assistance and cooperation can take under human rights law in the context of climate change.