LINKING HUMAN RIGHTS AND CLIMATE CHANGE AT THE UNITED NATIONS

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In January 2009, the Office of the U.N. High Commissioner for Human Rights ("OHCHR") became the first international human rights body to examine the relationship between climate change and human rights.[1] The OHCHR report reaches several important conclusions: (1) climate change threatens the enjoyment of a broad array of human rights; (2) climate change does not, however, necessarily *violate* human rights; (3) human rights law nevertheless places duties on states concerning climate change; and (4) those duties include an obligation of international cooperation.

The report is important not only in its own right, but also because it will influence subsequent consideration of the issue by other human rights bodies. Citing the report, the U.N. Human Rights Council has already encouraged its special mandate-holders to address climate change within their specific mandates.[2] It seems likely that the report will also help to spur treaty bodies to take climate change into account as they monitor state compliance with their treaty obligations.[3] It is far less clear whether the consideration of climate change by human rights bodies will affect the negotiation of a new climate agreement.

This Article first describes the impetus for the OHCHR report. The primary actor was the Republic of Maldives, an island state in the Indian Ocean particularly vulnerable to the effects of climate change. In November 2007, the Maldives convened a meeting of small island states, which decided to try to infuse the negotiation of a new climate agreement with a greater understanding of the effects of climate change on human rights. To that end, they requested that the OHCHR conduct a detailed study of the relationship between climate change and human rights, and in March 2008 the Maldives persuaded the Human Rights Council to ask the OHCHR to prepare such a report.

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[1] OHCHR, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009) [hereinafter *OHCHR Report*].

[2] U.N. Human Rights Council Res. 10/4, ¶ 3 [hereinafter Res. 10/4], *in* U.N. Human Rights Council, *Draft Report of the Human Rights Council on its Tenth Session* 13, 15, U.N. Doc. A/HRC/10/L.11 (Mar. 31, 2009). The special mandate-holders are independent experts who have been appointed by the Council to investigate and report on particular human rights or cross-cutting issues.

[3] Treaty bodies are committees of independent experts appointed to oversee compliance by states with particular treaties. For example, the Human Rights Committee considers reports by states on their compliance with the International Covenant on Civil and Political Rights and, pursuant to the Optional Protocol to that Covenant, hears submissions from individuals alleging state violations.

The second part of this article examines the report itself, focusing on its answers to two key questions: (1) whether climate change violates human rights law; and (2) whether states have obligations under human rights law to address climate change. Drawing on the most recent report of the Intergovernmental Panel on Climate Change ("IPCC"), the OHCHR report describes ways that climate change threatens the enjoyment of a wide variety of human rights, including rights to life, health, and self-determination. Nevertheless, it declines to conclude that climate change violates human rights. While the distinction between an adverse effect on the enjoyment of human rights and a violation of human rights may seem arcane, it is well-grounded in human rights law. A violation of human rights is commonly understood to imply a breach of a legal duty under human rights law. Not all adverse effects on human rights necessarily imply such a breach. A mudslide that results from heavy rains, for example, may well interfere with, or even destroy, the right to life of those harmed by it, but it is not caused by a state acting in violation of its legal obligations and, in that sense, is not a violation of human rights.

Although the report's conclusion that climate change does not violate human rights may be challenged, it is understandable that the OHCHR sought to avoid the technical as well as political obstacles to concluding that countries violate human rights law merely by emitting greenhouse gases. More importantly, the report explains that whether or not climate change violates human rights law, human rights law places duties on states that are relevant to climate change. This result may initially seem counterintuitive — how can states have legal duties to address a problem for which they are not legally responsible? — but the OHCHR is again on firm legal ground. A mudslide not caused by a state may not be a violation of human rights law, but that law may still require the state to take steps to protect those in its path.[4]

The greatest shortcoming of the OHCHR report is that it says very little about the content of states' duties concerning climate change. However, the report does take a position on one key issue: it makes clear that those duties are not limited territorially. In particular, it emphasizes that states have an international duty to cooperate in order to realize human rights, and that this duty is especially important with respect to climate change, an inherently global threat to human rights. Although this conclusion may seem innocuous, it is likely to be the most controversial in the report, because many developed states have long resisted the proposition that they have human rights obligations to those not within their territory or direct control.

The final section of this article explains how the OHCHR report is likely to lead to further examination of the effects of climate change on

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[4] *See* Budayeva v. Russia, Application No. 15339/02, (Eur. Ct. H.R. Mar. 20, 2008), http://cmiskp.echr.coe.int////tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB8614 2BF01C1166DEA398649&key=23183&sessionId=23748430&skin=hudoc-en&attachment =true (on file with the Harvard Environmental Law Review).

human rights by other components of the U.N. human rights system: the Human Rights Council, the Council's special mandate-holders, and the U.N. treaty bodies. It concludes with observations about how this issue may (or may not) influence the negotiation of a new climate change agreement, and what steps the Maldives and other states may take if that negotiation proves unsuccessful.

I. The Maldives' Effort to Link Climate Change and Human Rights

The Maldives was not the first vulnerable community to try to link climate change and human rights. In December 2005, Inuit living in the Arctic filed a petition with the Inter-American Commission on Human Rights ("IACHR") that accused the United States of violating its human rights obligations by failing to reduce its emissions of greenhouse gases.[5] The Maldives, whose residents are similarly threatened by climate change (though they are vulnerable to rising waters rather than melting ice), has taken a less confrontational approach to linking climate change and human rights. Instead of pursuing a quasi-judicial remedy against a single state, its goal has been to influence the negotiation of a new climate agreement.

A. The Maldives' Vulnerability to Climate Change

Like residents of the Arctic, the residents of small island states are especially at risk from climate change. Global warming causes sea levels to rise, both because water expands as it warms and because water from melting glaciers flows into the ocean.[6] The 2007 assessment of the IPCC estimated that sea levels will rise between 0.19 meters and 0.58 meters by the last decade of the twenty-first century.[7] More recent studies indicate that the ice sheets in Greenland and Antarctica are melting more quickly than anticipated and that, as a result, sea levels are rising more rapidly than the IPCC expected. The new studies predict that sea levels will increase by between 0.5 and 1 meter by 2100.[8]

Although rising sea levels threaten all coastal regions, small islands are particularly vulnerable. Because houses, roads, airports, hospitals, and gov-

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[5] Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (Dec. 7, 2005) [hereinafter Inuit Petition], *available at* http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf. The petition was filed by Sheila Watt-Cloutier, the chair of the Inuit Circumpolar Conference, on behalf of herself, sixty-two other named Inuit, and "all Inuit of the arctic regions of the United States and Canada who have been affected by the impacts of climate change described in this petition." *Id.* at 1.

[6] IPCC, Climate Change — 2007: Impacts, Adaptation and Vulnerability 323-24 (2007) [hereinafter IPCC 2007 Impact Assessment].

[7] *Id.* at 694.

[8] *A Sinking Feeling*, Economist, Mar. 14, 2009, at 82.

ernment buildings are usually located near the water, rising waters "threaten vital infrastructure, settlements and facilities, and thus compromise socio-economic well-being of island communities and states."[9] Islands also face increasing frequency and severity of flooding from sea surges, as warming oceans lead to more extreme weather.[10] Warmer waters and eroding beaches undermine fishing and tourism, two critical economic bases for most small island states.[11] And, under most scenarios, their freshwater resources are likely to be "seriously compromised" as a result of rising sea levels and reduced rainfall in summer months.[12] All of these effects, as well as increasing incidence of diseases prevalent in warmer weather, combine to adversely affect the health of the islands' inhabitants.[13] Islands on low-lying coral atolls are particularly at risk from this combination of impacts, and the IPCC has recognized that "the long-term viability of some atoll states has been questioned."[14]

The Maldives' situation illustrates the dangers climate change poses to small island states in general and atoll states in particular. The Maldives is composed of about 200 inhabited and 1000 uninhabited islands grouped in twenty-six coral atolls.[15] Its population of 300,000 is widely dispersed; with the exception of the capital, Male', home to about one-third of its people, only three islands have more than 5000 residents, and seventy-four have fewer than 500.[16] The country's economy depends largely on tourism and fishing.[17] With an average height above sea level of only 1.5 meters, the Maldives is at great risk from any increase in sea levels. A sea-level rise of just under 0.5 meters by 2100 would inundate fifteen percent of Male' by 2025 and flood half of it by 2100.[18] The greater increases recently predicted would inundate the island more quickly. Moreover, the number of sea surges from extreme weather events, which cause flooding at higher levels, is expected to increase. A sea surge of 0.7 meters, which would temporarily flood the majority of the islands in the Maldives, is now expected to occur once a century; by 2050, it may occur annually.[19]

Rising sea levels and increases in the frequency and severity of sea surges would have disastrous effects on the Maldivians. More than four in ten live within 100 meters of the coastline,[20] and they have little or no higher ground to retreat to. More than eighty percent of the Maldive islands are

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[9] IPCC 2007 IMPACT ASSESSMENT, *supra* note 6, at 689, 701.
[10] *Id.* at 689, 695, 701.
[11] *Id.* at 689.
[12] *Id.* at 689, 697.
[13] *Id.* at 689–90, 701.
[14] *Id.* at 697.
[15] Submission of the Maldives to the OHCHR under Human Rights Council Res. 7/23, at 15 (Sept. 25, 2008) [hereinafter Maldives Res. 7/23 Submission], *available at* http://www2.ohchr.org/english/issues/climatechange/docs/submissions/Maldives_Submission.pdf.
[16] *Id.*
[17] *Id.*
[18] *Id.* at 19.
[19] *Id.* at 20.
[20] *Id.* at 21.

less than one meter above sea level,[21] and the highest point on any of the islands is less than 2.5 meters.[22] In addition to causing deaths from flooding, and damage to and destruction of buildings, rising waters would interfere with rescue and other services to the widely dispersed Maldivians living in small groups on the many islands far from Male'. Furthermore, they would contaminate the Maldives' limited freshwater resources, render its land unsuitable for agriculture, and erode the beaches that attract the tourists on which the Maldives' economy depends.[23] Eventually, increased flooding would make the islands uninhabitable, even before rising sea levels inundate them completely.[24]

B. The Maldives' Role in Linking Climate Change and Human Rights

Although the dimensions of the threat have become clearer in recent years, the Maldives has long recognized that climate change endangers its existence. As long ago as 1987, its then-president Maumoon Abdul Gayoom warned the U.N. General Assembly that a two-meter rise in sea level would inundate his entire country, causing "the death of a nation."[25] In 1989, the Maldives hosted a meeting of small island states that decided to mount a campaign to increase international awareness of their vulnerability to rising sea levels. The meeting made one of the first calls for a binding convention on climate change.[26] The states involved later formed the Association of Small Island States ("AOSIS"), which has lobbied in the United Nations and the climate negotiations for stricter restrictions on greenhouse gases.[27] Only in recent years, however, has the Maldives begun to place its arguments in the framework of international human rights law.

In doing so, the Maldives has not followed the essentially judicial path taken by the Inuit in their December 2005 petition to the IACHR. Although the IACHR cannot issue binding decisions, it operates as a quasi-tribunal

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[21] *Id.* at 15.

[22] Central Intelligence Agency, The World Factbook — Maldives, Apr. 9, 2009, https://www.cia.gov/library/publications/the-world-factbook/geos/mv.html (on file with the Harvard Environmental Law Review).

[23] Maldives Res. 7/23 Submission, *supra* note 15, at 21–24. Although increasing sea levels and sea surges pose the greatest threat to Maldivians, climate change is expected to harm them in other ways as well. For example, rising temperatures will contribute to the incidence of certain diseases and harm coral reefs that are the basis of the fishing and tourism sectors of the economy. More frequent extreme weather events will also cause loss of life and property damage from their storm winds, apart from the sea surges that accompany them. *Id.* at 24-30.

[24] *Id.* at 20.

[25] R.K. Pachauri, the chairman of the IPCC, recalled and quoted these words in his acceptance speech for the 2007 Nobel Peace Prize. *See* R.K. Pachauri, Chairman, IPCC, Acceptance Speech for the Nobel Peace Prize Awarded to the Intergovernmental Panel on Climate Change (IPCC) 11 (Dec. 10, 2007), *available at* http://www.ipcc.ch/graphics/speeches/nobel-peace-prize-oslo-10-december-2007.pdf.

[26] *See* James Lewis, *Small States Conference on Sea Level Rise,* 10 ENVIRONMENTALIST 141 (1990).

[27] Information on AOSIS is available at its website, http://www.sidsnet.org/aosis.

when it hears claims that members of the Organization of American States have violated their human rights obligations.[28] The Inuit petition sought a determination that the United States had violated its obligations by failing to take effective steps to curb greenhouse gas emissions. The petition detailed the effects of rising Arctic temperatures on the ability of the Inuit to enjoy a wide variety of human rights, including the rights to life (melting ice and permafrost make travel more dangerous), property (as permafrost melts, houses collapse and residents are forced to leave their traditional homes), and health (nutrition worsens as the animals on which the Inuit depend for sustenance decline in number).[29] The petition connected the rising temperatures to increasing levels of greenhouse gases,[30] and in particular to the failure by the United States to take effective steps to reduce its emissions.[31] The Inuit requested specific relief, including that the IACHR recommend that the United States "[a]dopt mandatory measures to limit its emissions of greenhouse gases and cooperate in efforts of the community of nations . . . to limit such emissions at the global level."[32]

The petition succeeded in drawing scholarly and public attention to the severe effects of global warming on the Inuit,[33] but it failed to obtain a decision by the IACHR. In November 2006, the Commission informed the petitioners that it had determined that "it will not be possible to process your petition at present."[34] The IACHR did not explain its reasoning, stating only that "the information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of [protected human] rights."[35] The Commission did hold a hearing on the connection between climate change and human rights in March 2007, but it has taken no further action.

Instead of pursuing a judicial decision against a large emitter (or group of emitters), the Maldives has tried to link climate change with human rights through a less confrontational, more political process.[36] Its aim has been not to alter the climate change policies of a particular state, but rather to influ-

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[28] *See generally* Thomas Buergenthal, *The Inter-American System for the Protection of Human Rights*, *in* HUMAN RIGHTS IN INTERNATIONAL LAW 439 (Theodor Meron ed., 1984).

[29] Inuit Petition, *supra* note 5, at 79-95.

[30] *Id.* at 20–34.

[31] *Id.* at 103–112.

[32] *Id.* at 118.

[33] *See* Randall S. Abate, *Climate Change, the United States, and the Impacts of Arctic Melting: A Case Study in the Need for Enforceable International Environmental Human Rights,* 43A STAN. J. INT'L L. 3 (2007); Hari M. Osofsky, *The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples' Rights,* 31 AM. INDIAN L. REV. 675 (2007); Joanna Harrington, *Climate Change, Human Rights, and the Right to Be Cold,* 18 Fordham Envtl. L. Rev. 513 (2007).

[34] Letter from Ariel E. Dulitzky, Assistant Executive Sec'y, Inter-Am. Comm'n on Human Rights ("IACHR"), to Paul Crowley, Legal Representative of Sheila Watt-Cloutier et al. (Nov. 16, 2006) (on file with the Harvard Environmental Law Review).

[35] *Id.*

[36] For another description of the Maldives' efforts to situate climate change in the context of human rights, see Marc Limon, *Human Rights and Climate Change: Constructing a Case for Political Action*, 33 HARV. ENVTL. L. REV. 439 (2009).

ence the ongoing negotiation of a new climate agreement. The forum for that negotiation is the Conference of the Parties to the U.N. Framework Convention on Climate Change ("UNFCCC").[37] The Kyoto Protocol to the UNFCCC only requires reductions in greenhouse gases during the 2008-2012 period,[38] and the UNFCCC Conference of the Parties ("COP") has decided to try to negotiate a new, post-Kyoto agreement by the end of 2009.[39] The Maldives hopes to infuse that negotiation with a heightened awareness of the human rights implications of climate change. To that end, it convened a November 2007 meeting of representatives of small island states, which adopted the Male' Declaration on the Human Dimension of Global Climate Change.[40]

The Male' Declaration sets out a kind of road map for bringing human rights into the climate negotiation. It requests the COP, the forum for the climate negotiation, to "seek the cooperation of" the Human Rights Council, the chief inter-governmental human rights body in the United Nations, and the OHCHR, the human rights office of the UN Secretariat, "in assessing the human rights implications of climate change."[41] At the same time, the Declaration asks the OHCHR to prepare a "detailed study" of the effects of climate change on human rights, to be published before the March 2009 session of the Human Rights Council, and it asks the Council to convene a debate on human rights and climate change at that session.[42] Thus, the Declaration envisages a three-step process: first, the OHCHR prepares a report that provides analytical support for the linkage between climate change and human rights; second, the government representatives on the Human Rights Council provide political support for that linkage; and third, the climate negotiators in the UNFCCC COP look to the OHCHR and the Human Rights Council for guidance on the issue.

The Male' Declaration could not, of course, *require* any of these bodies to take these steps. To start the process in motion, the Human Rights Council had to request that the OHCHR prepare the report. Accordingly, in March 2008, at the next Council session after the Male' meeting, the Maldives proposed that the Council adopt a resolution requesting that the OHCHR conduct "a detailed analytical study on the relationship between climate change and human rights, to be submitted to the Council prior to its

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[37] UNFCCC, May 9, 1992, 1771 U.N.T.S. 107.

[38] Kyoto Protocol to UNFCCC, art. 3, U.N. Doc. FCCC/CP/1997/L.7/Add.1 (Dec. 10, 1997). Those reductions are required only of Annex I parties, which are generally industrialized countries.

[39] UNFCCC Conference of the Parties, Bali Action Plan, Dec. 1/CP.13, *in* Report of the Conference of the Parties at Its Thirteenth Session, at 3, U.N. Doc. FCCC/CP/2007/6/Add.1 (Mar. 14, 2008).

[40] Male' Declaration on the Human Dimension of Global Climate Change, Nov. 14, 2007, *available at* http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf.

[41] *Id.* ¶ 3.

[42] *Id.* ¶¶ 4, 5.

[March 2009] session," at which the issue would again be considered.[43] The resolution attracted seventy-eight co-sponsors (including high-emitting states such as Australia, Germany, India, Indonesia, and the United Kingdom) and was adopted by consensus as Council Resolution 7/23.[44] The next step was the preparation of the report.

II. The OHCHR Report on Climate Change and Human Rights

The OHCHR published its report on climate change and human rights in January 2009, after receiving submissions from states, international agencies, and non-governmental organizations. In preparing the report, the OHCHR faced two legal questions: (1) does climate change violate human rights law? and (2) what obligations, if any, does human rights law impose on states with respect to climate change? In response to the first question, the OHCHR report states that climate change has and will have a range of effects on human rights, but it declines to conclude that climate change violates human rights law. In response to the second, it takes the position that states nevertheless have legal obligations to those whose rights are affected by climate change, and that those obligations extend extraterritorially in important respects. The following sections examine each of these positions.

A. The Effect of Climate Change on Human Rights

The OHCHR report describes at some length the direct and indirect effects of climate change on the enjoyment of human rights, but it concludes with much less analysis that it does not violate human rights law. In both cases, its conclusions reflect the views of the states that expressed their views to the OHCHR on the connections between climate change and human rights.

Resolution 7/23 asked the OHCHR to prepare the report "in consultation with and taking into account the views of States, international organizations . . . and other stakeholders," and encouraged states to contribute to the report.[45] The OHCHR's ensuing request for information did not ask the recipients to take positions on whether climate change violates human rights, but it did ask, *inter alia,* for assessments of the impact of climate change, including on human rights.[46] The OHCHR received thirty responses from

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[43] U.N. Human Rights Council Res. 7/23 [hereinafter Res. 7/23], *in* U.N. Human Rights Council, *Report of the Human Rights Council on Its Seventh Session*, at 65, U.N. Doc. A/HRC/7/78 (July 14, 2008) [hereinafter U.N. HRC Seventh Session Report].

[44] U.N. HRC Seventh Session Report, *supra* note 43, ¶ 278, at 149.

[45] Res. 7/23, *supra* note 43, ¶ 1.

[46] The request also asked for national studies of the relationship between climate change and human rights, as well as information on national and international projects to mitigate or adapt to climate change, with assessments of the effects of such efforts on human rights. *See* Letter from Ibrahim Wani, OHCHR, to All Member States Accredited in Geneva (June 2, 2008) (on file with the Harvard Environmental Law Review).

states.[47] Many of the submissions were very brief and did not express any views on the connections between climate change and human rights. Japan, for example, provided only a one-page description of its support for developing countries' efforts to mitigate and adapt to climate change.[48] Those states that did express their views on the relationship between climate change and human rights agreed that climate change threatens the enjoyment of human rights.[49] Even the United States, still under the Bush Administration at the time, acknowledged that climate change has implications for the full enjoyment of human rights, although it said that the implications could be positive as well as negative.[50]

The longest submission by far was from the Maldives, which took advantage of its opportunity to try to influence the outcome of the procedure it had set in motion. Like the submission of the Marshall Islands, whose sixty

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[47] The OHCHR also received submissions from ten U.N. bodies or agencies, seventeen non-governmental organizations, and four national human rights institutions, as well as the European Commission and the Organization of American States. *See* OHCHR, *OHCHR Study on the Relationship Between Climate Change and Human Rights: Submissions and Reference Documents Received*, http://www2.ohchr.org/english/issues/climatechange/submissions.htm (last visited Apr. 5, 2009) (on file with the Harvard Environmental Law Review). In addition, the OHCHR held a "consultation" in October 2008, at which over one hundred people, many representing states, listened to presentations on various aspects of climate change and human rights. The speakers included the Secretary of the IPCC and officials of the World Bank and UNICEF, as well as academics and representatives of non-governmental organizations. I spoke at the meeting on behalf of the Center for International Environmental Law. For a list of speakers and links to their papers, see OHCHR, *OHCHR Study on the Relationship Between Climate Change and Human Rights: Open-Ended Consultation Meeting (22 October 2008)*, http://www2.ohchr.org/english/issues/climatechange/consultation.htm (last visited Apr. 5, 2009).

[48] *See* Submission of Japan to the OHCHR under Human Rights Council Res. 7/23, *Answer to Question (e),* at 2 (2008) [hereinafter Japan Res. 7/23 Submission], *available at* http://www2.ohchr.org/english/issues/climatechange/docs/submissions/Japan.pdf. Similarly, New Zealand focused on its support for the efforts of Pacific island states to adapt to the effects of climate change. *See* Submission of New Zealand to the OHCHR under Human Rights Council Res. 7/23, at 2 (2008) [hereinafter New Zealand Res. 7/23 Submission], *available at* http://www2.ohchr.org/english/issues/climatechange/docs/submissions/New_Zealand.pdf.

[49] *See, e.g.*, Submission of Australia to the OHCHR under Human Rights Council Res. 7/23, at 4 (2008) [hereinafter Australia Res. 7/23 Submission], *available at* http://www2.ohchr.org/english/issues/climatechange/docs/submissions/Australia.pdf ("An effective mitigation and adaptation response to climate change will alleviate its impacts on nations, which will in turn, reduce the risk to human rights."); Submission of Canada to the OHCHR under Human Rights Council Res. 7/23, at 1 (2008) [hereinafter Canada Res. 7/23 Submission], *available at* http://www2.ohchr.org/english/issues/climatechange/docs/canada.pdf ("[T]here can be an impact on the effective enjoyment of human rights as a result of situations arising from environmental degradation amplified by climate change."); Submission of the United Kingdom to the OHCHR under Human Rights Council Res. 7/23, at 3 (2008) [hereinafter United Kingdom Res. 7/23 Submission], *available at* http://www2.ohchr.org/english/issues/climatechange/docs/submissions/UK.pdf ("[C]limate change may impact on the full enjoyment of human rights at the national level.").

[50] *See* Submission of the United States to the OHCHR under Human Rights Council Res. 7/23, at 4 (2008) [hereinafter United States Res. 7/23 Submission], *available at* http://www2.ohchr.org/english/issues/climatechange/docs/submissions/USA.pdf ("In some instances, for example where climate change leads to localized increases in crop yields, the effect on enjoyment may be positive. In other instances, the effect on enjoyment may be profoundly negative.").

thousand people live on twenty-nine coral atolls and five single islands in the North Pacific, the Maldives' submission described how rising sea levels and other effects of climate change threaten the human rights of the residents of small islands.[51] These residents' right to life, for example, would be harmed by increased frequency and severity of flooding; their right to property would be affected by the loss of homes and other possessions because of inundation; enjoyment of their rights to health, food, water, and housing would be infringed by rising waters and temperatures; and their collective right to self-determination would be destroyed by the loss of the country itself.[52]

Building on this consensus among states that climate change threatens human rights, the OHCHR report elaborates on the rights most affected by climate change. It begins by noting that although universal human rights treaties do not recognize a specific right to a safe and healthy environment,[53] the bodies charged with overseeing compliance with those treaties have recognized "the intrinsic link between the environment and the realization of a range of human rights."[54] Most of the jurisprudence on the connections between the environment and human rights has been developed by regional tribunals, although treaty bodies have contributed as well. Together, they have established that environmental degradation may interfere with many rights, including rights to life,[55] health,[56] privacy,[57] and property,[58] as well as components of the right to an adequate standard of living, such as water[59] and food.[60]

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[51] *See* Submission of the Marshall Islands to the OHCHR under Human Rights Council Res. 7/23, at 2 (2008) [hereinafter Marshall Islands Res. 7/23 Submission], *available at* http://www2.ohchr.org/english/issues/climatechange/docs/Republic_of_the_Marshall_Islands.doc; Maldives Res. 7/23 Submission, *supra* note 15.

[52] *See* Marshall Islands Res. 7/23 Submission, *supra* note 51, at 8–11; Maldives Res. 7/23 Submission, *supra* note 15, at 39–56.

[53] Two regional human rights treaties do recognize such a right explicitly. *See* African Charter on Human and Peoples' Rights art. 24, June 27, 1981, 21 I.L.M. 58 ("All peoples shall have the right to a general satisfactory environment favorable to their development."); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights art. 11, Nov. 17, 1988, 28 I.L.M. 156 (declaring that everyone has "the right to live in a healthy environment").

[54] *OHCHR Report*, *supra* note 1, ¶ 18.

[55] *See Budayeva, supra* note 4; Öneryildiz v. Turkey, 41 Eur. Ct. H.R. 20 (2004).

[56] *See* Marangopoulos Found. for Human Rights v. Greece, No. 30/2005, European Comm. of Soc. Rights (2006); Comm. on Econ., Soc. and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health*, ¶ 4, U.N. Doc. E/C.12/2000/4 (2000) [hereinafter *General Comment 14*]; Soc. and Econ. Rights Action Ctr. v. Nigeria, No. 155/96, African Comm. Human & Peoples' Rights (2001) [hereinafter *Ogoniland*].

[57] *See* Fadeyeva v. Russia, 45 Eur. Ct. H.R. 10 (2005); López Ostra v. Spain, 20 Eur. Ct. H.R. 277 (1994) [hereinafter *López Ostra*].

[58] *See* Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172 (2007); Maya Indigenous Cmty. of the Toledo Dist. v. Belize, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 at ¶ 5-6 (2004).

[59] *See* Comm. on Econ., Soc. and Cultural Rights, *General Comment 15: The Right to Water*, U.N. Doc. E/C.12/2002/11 (2003).

[60] *See Ogoniland, supra* note 56, ¶ 65.

In line with these precedents, the OHCHR report describes the effects of climate change on particular rights, drawing largely on the 2007 assessment report of the IPCC on climate change impacts. The OHCHR report states, for example, that "observed and projected effects of climate change will pose direct and indirect threats to human lives" as a result of events such as floods, storms, and droughts, as well as an increase in hunger and malnutrition.[61] It cites an estimate that an additional six hundred million people will face malnutrition as climate change causes crop productivity in many regions to decrease, impairing the right to food as well as the right to life.[62] The loss of glaciers and reductions in snow cover will reduce the availability of water, and thus affect the right to water, for the more than one billion people who receive melt water from mountains.[63] The right to the highest attainable standard of health will be infringed by not only malnutrition and extreme weather events, but also malaria and other diseases that thrive in warmer weather.[64] Rising temperatures have already affected the right to adequate housing in the Arctic and low-lying island states by forcing the relocation of communities.[65] Additionally, "[t]he inundation and disappearance of small island States would have implications for the right to self-determination, as well as for the full range of rights for which individuals depend on the State for their protection."[66]

The report also states that climate change will particularly affect segments of the population that are already vulnerable as a result of their status. It describes factors affecting the vulnerability to climate change of women, children, and indigenous peoples, each of whose rights are protected by specific human rights treaties.[67] The report also draws attention to the large number of persons who will become migrants as a result of climate change, either within their own state or across international borders, and again notes the possible disappearance of small island states. With respect to the populations forced to leave a sinking state and flee to other countries, the OHCHR notes that "[h]uman rights law does not provide clear answers as to the[ir] status."[68] Finally, the report observes that measures taken in re-

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[61] *OHCHR Report*, *supra* note 1, ¶ 22 (citing *IPCC 2007 Impact Assessment*, *supra* note 6, at 393).

[62] *Id.* ¶ 26 (citing U.N. Dev. Programme, *Human Development Report 2006: Beyond Scarcity: Power, Poverty and the Global Water Crisis* (2006), *available at* http://hdr.undp.org/en/media/HDR06-complete.pdf).

[63] *Id.* ¶ 29.

[64] *Id.* ¶ 32.

[65] *Id.* ¶ 36 (citing *IPCC 2007 Impact Assessment*, *supra* note 6, at 672).

[66] *Id.* ¶ 41.

[67] *Id.* ¶¶ 42–54; *see* Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13 (signed but not ratified by the United States); Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3 (signed but not ratified by United States); Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382.

[68] *OHCHR Report*, *supra* note 1, ¶ 60. For a thorough analysis of the problem of climate change refugees and an innovative proposal for a new international agreement to address it, see Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENVTL. L. REV. 349 (2009).

sponse to climate change may themselves have implications for human rights. For example, agro-fuel production may contribute to increases in food prices.[69]

After reading the report's description of the many ways that climate change threatens the enjoyment of human rights, one might expect the OHCHR to conclude that climate change threatens to *violate* human rights, and indeed that it already violates human rights when, for example, it forces residents of the Arctic to abandon their homes and communities. But the OHCHR report does not draw that conclusion. Instead, it states: "While climate change has obvious implications for the enjoyment of human rights, it is less obvious whether, and to what extent, such effects can be qualified as human rights violations in a strict legal sense."[70] It describes three obstacles to treating the effects of climate change as human rights violations: (1) "it is virtually impossible to disentangle the complex causal relationships" linking emissions of a particular country to a specific effect; (2) "global warming is often one of several contributing factors to climate change-related effects such as hurricanes [or] environmental degradation," which makes it "often impossible" to establish how such an event is attributable to global warming; and (3) "adverse effects of global warming are often projections about future impacts, whereas human rights violations are normally established after the harm has occurred."[71]

Although this language is not completely clear, the OHCHR seems to be concerned with two links in the chain of causation between states' emissions of greenhouse gases and the effects of climate change on human rights. The second and third of their three concerns have to do with the difficulty of concluding that a particular effect on human rights results from global warming rather than other possible causes, especially before the effect has occurred. The first of the concerns seems to refer to the difficulty inherent in allocating responsibility for contributions to global warming among two hundred states. These are not trivial problems, but the OHCHR may overstate the degree to which they prevent a conclusion that at least some effects of climate change violate human rights.

While it is true that global warming cannot and should not be blamed for every hurricane or drought, some of its effects are clearer and, indeed, are already being felt. There is little doubt that the Inuit, for example, are already experiencing adverse effects of climate change. The IPCC 2007 assessment states with "very high confidence"[72] that in the polar regions there is already "strong evidence of the ongoing impacts of climate change on . . . communities," and that "[w]arming and thawing of permafrost will bring detrimental impacts on community infrastructure."[73] It states with "high

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[69] *OHCHR Report,* supra note 1, ¶¶ 65–68.

[70] *Id.* ¶ 70.

[71] *Id.*

[72] "Very high confidence" indicates at least ninety percent certainty of being correct. *IPCC 2007 Impact Assessmen*t, *supra* note 6, at 4.

[73] *Id.* at 655.

confidence"[74] that "[t]he resilience shown historically by Arctic indigenous peoples is now being severely tested," and that "[s]ubstantial investments will be necessary to adapt or relocate physical structures and communities."[75] And there is a great deal of scientific agreement on the foreseeable effects of climate change on other vulnerable communities, including in particular small island states such as the Maldives.[76] As the OHCHR report acknowledges, an effect on a human right does not have to have occurred in order to indicate a violation; the effect may be "imminent."[77] One could argue that many of the effects of climate change are already imminent, even though they may not happen for years, because their causes are occurring now and they will soon be difficult or impossible to forestall.

Assigning responsibility to specific states for climate change is a real problem, but the primary difficulty is not causation. It is not necessary to link the emissions of a particular state to a particular harm in order to assign responsibility for the harm; since all greenhouse gases contribute to climate change, wherever they are released, responsibility could be allocated according to states' shares of global emissions of greenhouse gases. While precise allocations of responsibility would be controversial, it is clear that most states contribute well under one percent of total emissions, and that relatively few are responsible for the lion's share. The United States and China together contribute more than one-third of current emissions, and together with the European Union are responsible for more than half. Adding just four more states — Russia, India, Japan, and Brazil — brings the share of the largest emitters to more than two-thirds of the total. On this basis, it would be possible, at least in principle, to conclude that even if all states contribute to climate change and are therefore joint violators of the human rights affected by it, some states are far more culpable than others, and to allocate responsibility accordingly.

One difficult issue would be determining whether and how to take into account past emissions, which would greatly increase the relative shares of the EU and the United States. But the more fundamental objection to allocating states' responsibility based on their shares of global emissions is that it ignores their widely varying per capita emissions. It may well seem unjust, for example, to treat China as if it were as responsible for the effects of climate change as the United States based on their (current) total emissions, when China's per capita emissions are far less. This is a real problem, but it is a problem of fairness rather than causation.

In addition to these obstacles to calling climate change a violation of human rights, there are political difficulties. The largest emitters of greenhouse gases are, not coincidentally, the most powerful states in the world. Accusing them of violating human rights would distract from the need to

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[74] "High confidence" indicates about eighty percent confidence of being correct. *Id.* at 4.
[75] *Id.* at 655.
[76] *See supra* Part I.A.
[77] *OHCHR Report, supra* note 1, at 23 n.104 (citing Aalbersberg v. The Netherlands, No. 1440/2005, Hum. Rts. Comm., ¶ 6.3, U.N. Doc. CCPR/C/87/D/1440/2005 (2006)).

win their consent to an effective climate agreement, as well as ensure their opposition to further consideration of the effects of climate change on human rights. Unsurprisingly, while the responses of states to the OHCHR request for information generally agreed that the effects of climate change threaten the enjoyment of human rights, they provided no support for the conclusion that climate change is itself a violation of human rights law.

The United States argued generally that "moving toward a human rights-based approach to climate change would be impractical and unwise."[78] Its objections were based on its understanding of human rights as primarily designed to require governments to provide remedies to victims of human rights violations within their jurisdiction. It said that, in this light, the complex, global, long-term nature of climate change makes it ill-suited for consideration as a human rights problem: "[I]t will be difficult and problematic to identify any particular party as being uniquely responsible for any particular impairment of the enjoyment of human rights caused by climate change or even any particular harm as being proximately caused by any particular act or omission by any particular government or governmental actor."[79] Other countries that did not share the United States' limited view of human rights nevertheless declined to argue that climate change is a violation of human rights law. Although the United Kingdom seemed to support a role for human rights in considering climate change, it made clear that it did not regard climate change as a human rights violation,[80] and even the Maldives and the Marshall Islands did not press for that conclusion.

Whether climate change violates human rights may be less important than it first appears. The question would be of the greatest consequence if it determined whether states have any duties regarding climate change. As the next section explains, however, the OHCHR report correctly concludes that climate change need not violate human rights for states to have legal obligations under human rights law concerning it.

B. States' Human Rights Obligations Concerning Climate Change

Immediately after declining to find that climate change is a violation of human rights law, the OHCHR report states, "Irrespective of whether or not climate change effects can be construed as human rights violations, human rights obligations provide important protection to the individuals whose rights are affected by climate change."[81] This may be the most important

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[78] United States Res. 7/23 Submission, *supra* note 50, at 4.

[79] *Id.* at 6. Even if such a basis for legal remedies were devised, the United States concluded, it would be unlikely to help address climate change, since the remedies would not necessarily accrue to those most vulnerable and would not be enforced by the governments against which they were imposed. Moreover, the adversarial pursuit of human rights claims would contrast with the effort to achieve international cooperation in the negotiation of a new climate agreement. *Id.* at 7.

[80] United Kingdom Res. 7/23 Submission, *supra* note 49, at 3.

[81] *OHCHR Report*, *supra* note 1, ¶ 71.

statement in the report. It indicates that states have duties to protect their people from threats to human rights even when the states are not directly responsible for those threats. Although the report is much less clear on exactly what states' duties are concerning climate change, it does emphasize that states' obligations extend to those beyond their territory, not just to those within it.

Although the OHCHR's conclusion that states have legal duties concerning climate change even though climate change itself is not a human rights violation may seem counterintuitive, it is firmly grounded in human rights law. States are generally responsible not only for ensuring that their own conduct does not violate human rights, but also for protecting against interference with human rights from other sources, including private actors.[82] Human rights bodies have made clear that this duty to protect applies to environmental degradation that harms human rights.[83] Although most of these cases involve the duty to protect against private actions that infringe a human right, states also have duties with respect to other threats beyond their control, such as natural disasters.[84] In *Budayeva v. Russia,* for example, the European Court of Human Rights found that Russia had not implemented policies to protect the inhabitants of a region prone to deadly mudslides. (It had not maintained dams, for example, and observation posts to provide timely warnings.) The court concluded that Russia had failed to "discharge the positive obligation to establish a legislative and administrative framework designed to provide effective deterrence against threats to the right to life as required by Article 2" of the European Convention on Human Rights, and had thereby violated the Convention.[85]

As a result, whether a state *causes* climate change is a separate question from whether it has a duty to address the effects of climate change on human rights. Of course, the causal question may still be relevant to the content of a state's duty: if climate change does not cause the infringement in question, reducing emissions would not protect against that infringement. Even if climate change does cause or contribute to an adverse effect on human rights, a state's contribution to worldwide greenhouse gases may be so minimal that reducing its emissions would have no appreciable effect. In that case, however, the state could well have other duties, such as helping its people to adapt to climate change. The existence of such duties would not depend on

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[82] *See* Hum. Rts. Comm., *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 8, CCPR/C/21/Rev.1/add.13 (2004). *See generally* John H. Knox, *Horizontal Human Rights Law,* 102 AM. J. INT'L L. 1 (2008).

[83] *See* Hatton and Others v. United Kingdom, 37 Eur. Ct. H.R. 28, ¶ 98 (2003); U.N. Comm. on Econ., Soc. and Cultural Rights, *supra* note 59, ¶¶ 21, 23; *Ogoniland, supra* note 56, ¶ 57; *López Ostra*, *supra* note 57, ¶ 51.

[84] *General Comment 14*, *supra* note 56, ¶ 40 ("[With respect to the right to health,] [s]tates parties [to the ICESCR] have a joint and individual responsibility . . . to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons.").

[85] *Budayeva, supra* note 4.

whether the state could be shown to have caused the harm itself through, for example, its contribution of greenhouse gases.

By making clear that states have duties concerning climate change regardless of whether they can be shown to be legally responsible for climate change itself, the OHCHR report usefully moves the discussion of climate change and human rights forward. It provides a basis for applying human rights norms to climate change even in the absence of clear answers to issues of causation, answers that are unlikely to emerge from a political debate over relative degrees of responsibility for past behavior.

Unfortunately, the report is less successful at identifying exactly what duties states have. Although it says that states should comply with human rights law both in the measures they take to address climate change and in fulfilling their obligation to protect individuals against foreseeable threats to their human rights caused by climate change,[86] it provides little guidance on how states should do so.[87] Drawing on the jurisprudence of human rights tribunals with respect to other environmental threats to human rights, the OHCHR report emphasizes the importance of access to information and participation in decision-making.[88] But it leaves much work to be done in explaining how human rights norms apply to states' duties to mitigate and adapt to climate change.

The report does take a firm stand on one particularly important issue concerning state duties. It states unequivocally that human rights law imposes extraterritorial duties. Such duties are obviously of critical importance with respect to the effects of climate change, an inherently global phenomenon. Indeed, human rights law would be of very limited value in addressing climate change if it imposed duties on states only with respect to those persons within their own borders. After stressing that "[c]limate change can only be effectively addressed through cooperation of all members of the international community,"[89] the OHCHR identifies several "obligations of international cooperation."[90] It bases the general obligation to cooperate on several treaties, including the U.N. Charter,[91] but it derives more specific extraterritorial duties primarily from interpretations of the International Covenant on Economic, Social and Cultural Rights ("ICESCR"). The Committee on Economic, Social and Cultural Rights, the body of independent experts charged with overseeing compliance with the treaty, has identified

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[86] *OHCHR Report*, *supra* note 1, ¶¶ 72–74.

[87] Many of its statements are at a high level of generality. *See, e.g.*, *id.* ¶ 80 ("Human rights standards and principles should inform and strengthen policymaking in the area of climate change, promoting policy coherence and sustainable outcomes.").

[88] *Id.* ¶¶ 78–79. As an example of access to information, the report states that "it is critically important that early-warning information be provided in a manner accessible to all sectors of society." *Id.* ¶ 78. And as an example of participation in decision-making, it says that "adequate and meaningful consultation with affected persons should precede decisions to relocate people away from hazardous zones." *Id.* ¶ 79.

[89] *Id.* ¶ 84.

[90] *Id.* ¶¶ 85–91.

[91] *Id.* ¶ 85 ("International cooperation to promote and protect human rights lies at the heart of the Charter of the United Nations.").

four types of extraterritorial duties: (1) to "refrain from interfering with the enjoyment of human rights in other countries"; (2) to take measures to prevent private actors from engaging in such interference; (3) to take steps through aid and cooperation "to facilitate fulfillment of human rights" abroad; and (4) to ensure that international agreements do not adversely affect human rights.[92]

Even though the OHCHR does not elaborate on these duties, its restatement of them is likely to prove the most controversial section of the report. Extraterritorial application of duties under human rights treaties is a difficult issue politically as well as legally. Some treaties, such as the International Covenant on Civil and Political Rights ("ICCPR"), have jurisdictional limits.[93] The ICESCR does contain language that provides support for extraterritorial obligations, including duties of assistance and cooperation,[94] but its Committee's interpretations are not legally binding, nor have its pronouncements on extraterritoriality been met with universal acceptance. In particular, developed states have resisted extraterritorial obligations, seeing them as a potential basis for developing countries to argue that they are entitled to financial assistance as a matter of right.[95]

States' submissions to the OHCHR largely avoided taking any position on the content of state duties under human rights law, particularly with respect to extraterritorial duties. The OHCHR request for information asked for "[v]iews on the relationship between obligations arising out of international climate conventions and international human rights treaties, including on international assistance and cooperation,"[96] but even states that methodically responded to all of its other questions often did not include a substantive response to this one.[97] Finland may have spoken for many when it stated, "Defining the concrete implications of the responsibility of states based on international human rights treaties in matters of climate change is

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[92] *Id.* ¶ 86.

[93] ICCPR art. 2(1), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 360 ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . . .").

[94] ICESCR art. 2(1), Dec. 16, 1966, 993 U.N.T.S. 3 ("Each state party to the present Covenant undertakes to take steps, individually *and through international assistance and cooperation*, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means . . . .") (emphasis added).

[95] *See* Matthew Craven, *The Violence of Dispossession: Extra-Territoriality and Economic, Social, and Cultural Rights*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ACTION 71, 77 (Mashood A. Baderin & Robert McCorquodale eds., 2007) (citing statements by the United States and other developed countries that the ICESCR does not give rise to extraterritorial duties).

[96] *See* OHCHR, *OHCHR Study on the Relationship Between Climate Change and Human Rights: Submissions and Reference Documents Received*, *supra* note 47.

[97] The United States did state that "there is no legal basis under human rights law for holding national governments accountable for climate change impacts that have primarily extraterritorial and long-term origins." United States Res. 7/23 Submission, *supra* note 50, at 6.

such a complex issue that it makes further examination on the national level necessary."[98]

The Maldives' submission provided the most detail on the legal duties of states to respond to the threats climate change poses to human rights, providing a legal brief for the position that states have duties under human rights treaties and customary international law to take steps to protect the human rights of those outside their territory as well as within it. Its submission and that of the Marshall Islands described the measures each state has taken to try to protect its own people from the effects of climate change. For example, the Maldives built a three-meter sea wall around Male' in 2002 to protect it from sea surges, has participated in regional efforts to institute a disaster warning system, and has developed its own capacity to respond to disasters, all of which help to protect the right to life.[99] But both island states emphasized that by themselves they cannot protect the human rights of their people from climate change, and stressed the responsibility of the international community as a whole to take the actions necessary to protect those people most vulnerable to its effects.[100] In particular, the Maldives' submission argued that the right to self-determination, by its nature, imposes duties on states outside their own territory, that the text and authoritative interpretations of the ICESCR establish that its parties have extraterritorial duties of international assistance and cooperation to promote its rights, and that even the ICCPR, which has been interpreted to impose duties on states only to respect the rights of those within their "effective control," applies with respect to effects of climate change so drastic as to place the residents of small island states under the effective control of the states causing the harm.[101]

The emphasis by the OHCHR on *cooperation* rather than *assistance* may be an effort to avoid the stale debate over whether development assistance is a legal obligation. The report echoes in this respect not only the Maldives' submission, which stressed that climate change particularly implicates the responsibility of all states to cooperate with one another to address common challenges to human rights,[102] but also the submission of the United Kingdom, which suggested an international accord to address the human rights implications of climate change.[103] In contrast to the United States, which seemed to see human rights law only as a potential basis for adver-

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[98] Submission of Finland to the OHCHR under Human Rights Council Res. 7/23, at 3 (2008) [hereinafter Finland Res. 7/23 Submission], *available at* http://www2.ohchr.org/english/issues/climatechange/docs/submissions/Finland.pdf.

[99] Maldives Res. 7/23 Submission, *supra* note 15, at 44–45.

[100] *Id.* at 83 ("The Maldives on its own is incapable of preventing the violations of fundamental human rights that are already taking place as a result of climate change . . . . Consequently, the international community must take into account international human rights obligations in the course of negotiations addressing climate change."); Marshall Islands Res. 7/23 Submission, *supra* note 51, at 13 ("[T]he international community must respond with a verifiable commitment which explicitly ensures that collective international action on climate change will ensure the survival and development aspirations of all nations and peoples.").

[101] Maldives Res. 7/23 Submission, *supra* note 15, at 74–79.

[102] *Id.* at 77.

[103] United Kingdom Res. 7/23 Submission, *supra* note 49, at 3.

sarial claims against governments, the United Kingdom said that it welcomed "a stronger focus on climate justice and equity issues both between industrialised and developing countries" and at the sub-national level, "where it is often the poorest and most vulnerable whose rights are threatened by climate change" and who benefit the least from efforts to address it.[104] The United Kingdom advocated a "compact" between the international community and developing countries, which would recognize the role of the international community in addressing the serious threat climate change poses to human rights and define the respective duties of the international community and the developing countries receiving support.[105]

Alternatively, the emphasis on the duty of international cooperation in the OHCHR report may simply reflect the critical importance of that duty in facing a threat to human rights that cannot otherwise be effectively addressed.[106] The weight the OHCHR places on the duty is shown by the fact that the final sentence of the report re-emphasizes it: "International human rights law complements the United Nations Framework Convention on Climate Change by underlining that international cooperation is not only expedient but also a human rights obligation and that its central objective is the realization of human rights."[107]

If taken seriously, the OHCHR suggestion that international cooperation is a human rights obligation could provide a framework for a more sustained definition of the duties of states under human rights law to address climate change. Specifically, the duty of international cooperation provides a basis for applying the environmental human rights jurisprudence established by human rights bodies to climate change. Because this jurisprudence was developed in the context of environmental harm that does not cross an international boundary, it assumes a single polity whose decisions as to how to balance the benefits and costs of environmental policies are entitled to deference, as long as they result from an informed, inclusive process. There are legal and practical obstacles to extending this jurisprudence to transboundary environmental harm, the benefits and costs of which are not felt by just one country. The duty to cooperate provides a way to overcome these

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[104] *Id.*

[105] The United Kingdom specified some of the duties that should fall on developing countries: targeting the most vulnerable within their countries, ensuring transparency and accountability of funding, and ensuring wide participation of affected groups in development strategies. It did not identify duties of the international community, nor explain which states would be included in the "developing countries" category. The implication might be, though, that developed states would be under some obligation to provide assistance to developing states to address climate change, in return for the latter adopting the duties listed above. *Id.*

[106] *See* John H. Knox, Climate Change as a Global Threat to Human Rights 4 (2008), *available at OHCHR Study on the Relationship Between Climate Change and Human Rights: Open-Ended Consultation Meeting*, *supra* note 47 (presented on behalf of CIEL to the October 2008 OHCHR consultation) ("Nowhere is international cooperation more important than in addressing global threats to human rights, such as climate change. While cooperation usually is necessary to support the state primarily responsible for fulfilling the rights of its people, in this case cooperation is the only practical way that the problem can be solved at all.").

[107] *OHCHR Report*, *supra* note 1, ¶ 99.

obstacles, by requiring the international community to establish a global polity for the purpose of addressing climate change.[108]

III. Possible Effects of the OHCHR Report

The OHCHR report is likely to influence subsequent consideration of the connection between climate change and human rights, especially within the U.N. human rights system. Its effects are likely to be greatest on other non-governmental human rights bodies. It is difficult to predict whether it will affect the climate negotiation by heightening its awareness of human rights, the goal of the Male' Declaration that first called for the report.

In March 2009, the Human Rights Council adopted by consensus Resolution 10/4, which echoes in its preambular paragraphs the OHCHR report's conclusion that climate change-related effects have a range of implications for the effective enjoyment of human rights, particularly on vulnerable communities.[109] Perhaps unsurprisingly, the states that make up the Council did not endorse, or even mention, the report's statement that states have duties under human rights law to address climate change. The resolution does refer to international cooperation, but rather than reaffirming the OHCHR's conclusion that international cooperation is an obligation under human rights law, Resolution 10/4 says only that cooperation is necessary to enable the implementation of the UNFCCC.[110] As Marc Limon explains, the Maldives and other vulnerable countries sought the stronger language, but were unable to convince developed countries to accept it.[111] Their rejection indicates that the OHCHR's attempt to focus on obligations of cooperation rather than assistance did not succeed in overcoming the aversion of developing countries to recognition of any extraterritorial obligations whatsoever.

The Council resolution is valuable in other ways, however. Most importantly, it encourages institutional follow-up of the connections between climate change and human rights. It welcomes the decision of the special rapporteur on housing to prepare a report on the effects of climate change on the right to adequate housing, and it "encourages other relevant special procedure mandate-holders to give consideration to the issue of climate change within their respective mandates."[112]

Such ongoing attention to the effects of climate change on human rights offers real advantages. If the independent experts with mandates to prepare regular reports on the rights to water, to food, and to health, for example, began to incorporate climate change into their work, they would help to raise

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[108] I develop this argument in another article. *See* John H. Knox, *Climate Change and Human Rights Law,* 50 Va. J. Int'l L. (forthcoming 2009).

[109] Res. 10/4, *supra* note 2, at 14–15.

[110] *Id.* at 14.

[111] Limon, *supra* note 36, at 455.

[112] Res. 10/4, *supra* note 2, 43.

awareness of the threats climate change poses to human rights.[113] The attention their work would bring to the problem would be increased if they issued a joint report, or if their separate reports on the topic were coordinated and compiled.[114] The Council could also decide to appoint a new special rapporteur to focus on climate change and human rights. A new mandate devoted to the connection could raise public awareness, address gaps in the coverage of the other rapporteurs, and serve as a focal point for the issue within the United Nations.[115] Another, longer-term possibility is that the bodies charged with monitoring compliance with the U.N. human rights treaties will start to request that states include information on climate change in their reports under the treaties. The treaty bodies could issue statements on the linkage between climate change and human rights, including in their concluding observations on states' reports.[116]

Because the OHCHR report is the first detailed effort by a U.N. body to examine the relationship of climate change and human rights, the U.N. special rapporteurs and independent experts on treaty bodies are likely to look to it as a starting point for further analysis. The same considerations that influenced the OHCHR report may induce them to follow its lead in focusing on states' duties under human rights law to address climate change, rather than treating climate change as a human rights violation in itself. They will be likely to elaborate on what those duties are, as well as draw public attention to the effects of climate change on particular human rights in specific situations.

What effect will this sustained attention to climate change and human rights have on the climate negotiation? The views of human rights institutions will certainly be transmitted to the climate forum. At its March 2009 meeting, the Human Rights Council decided to hold a panel discussion on the relationship between climate change and human rights at its June 2009 session, to make the summary of that discussion available to the UNFCCC COP, and to encourage the OHCHR to participate "at a senior level" at the December 2009 meeting of the COP.[117] In addition, interested groups will undoubtedly use the OHCHR report and any subsequent work by human rights bodies to try to influence the climate negotiation. But it is far less clear what effect these efforts will have on the negotiation itself.

The hope, of course, is that if the climate negotiators have a better understanding of the effects of climate change on human rights, they will be more likely to reach an agreement that protects human rights. Even if the

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[113] *See* CTR. FOR INT'L ENVTL. LAW, PRACTICAL APPROACHES TO INTEGRATING CLIMATE CHANGE AND HUMAN RIGHTS LAW AND POLICY 16 (2009), *available at* http://www.ciel.org/Publications/CCandHRE_Feb09.pdf. The CIEL paper resulted from a meeting of experts convened in January 2009. *Id.* at 3.

[114] *Id.* at 17.

[115] *Id.* at 20–22.

[116] *See id.* at 27–33.

[117] Res. 10/4, *supra* note 2, ¶¶ 1, 2, 5.

examination of the effects of climate change on human rights does not influence the negotiators directly, however, it may do so indirectly. By drawing attention to the harm climate change causes to fundamental rights of identifiable people, human rights bodies may help to make that harm more real to the public in less vulnerable countries. A result may be to build support in those countries for an effective agreement.

After twenty years of watching the international community fail to take the decisive steps necessary to ensure that rising sea levels do not destroy them, the Maldives and other small island states are not naïve. Even while they work to convince other states to agree to a climate agreement that safeguards their rights, they recognize that it may become necessary to evacuate their people.[118] The twelve thousand citizens of Tuvalu, a Pacific group of islands that constitute one of the smallest countries in the world, are hoping to be admitted into Australia or New Zealand. The president of Kiribati, a state composed of low atoll islands in the South Pacific, has also proposed sending his people to nearby countries, including Australia and New Zealand.[119] And in November 2008, the newly elected president of the Maldives, Mohamed Nasheed, announced that his government would establish a national trust fund to pay for relocation to a new homeland, should it become necessary to evacuate the country.[120] "For the sake of the Maldives and the rest of the world, I hope this fund never needs to be used for its ultimate purpose," he said. "If we are unable to save countries like the Maldives, it may be too late to save the rest of the world from the apocalyptic effects of self-reinforcing, runaway global warming."[121]

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[118] Indeed, rising sea levels are already forcing the evacuation of the Carteret Island, atolls in the Bougainville Autonomous Region of Papua New Guinea, by rendering them unsuitable for agriculture. Bougainville plans to move their approximately 1500 residents to its main island. *See* Integrated Regional Information Networks (IRIN), Papua New Guinea: The World's First Climate Change "Refugees," June 8, 2008, http://www.irinnews.org/Report.aspx?ReportId=78630 (on file with the Harvard Environmental Law Review); Firim Nanol, *First "Climate Refugees" Look to Relocate to PNG,* Australia Network News, Feb. 13, 2009, http://australianetworknews.com/story.htm?id=15279 (on file with the Harvard Environmental Law Review).

[119] He would like them to take one thousand of Kiribati's younger people every year and train them in skilled professions, so that those citizens could then lead the way in finding permanent new homes abroad for their compatriots. *See* Christine Russell, *The Presidents of Two Island Nations Draft Escape Plans, Anticipating Sea Level Rise,* Sci. News, Feb. 28, 2009, *available at* http://sciencenews.org/view/feature/id/40789/title/First_wave.

[120] *Id.* Kiribati is also reported to be looking for land in other countries to which its 100,000 constituents could relocate. *See Kiribati Looks to Move Sea Threatened Communities Abroad,* Australia Network News, Feb. 9, 2009, http://australianetworknews.com/story.htm?id=15106 (on file with the Harvard Environmental Law Review).

[121] Russell, *supra* note 119.