

## **Human Rights Protection in view of Climate Change Impacts**

### **I. Introduction**

Climate change affects the most vulnerable people in the most adverse way.<sup>1</sup> Tropical storm Jeanne killed 3.000 people in Haiti in 2004. Hurricane Ivan destroyed or damaged over 90% of houses in Grenada and caused damage equal to two times the GDP of that country. Inuit people, who live on the sea ice in the Arctic, have been seriously affected by climate change also.<sup>2</sup> In October 2009, the Government of Maldives held its first session under the sea level, sending in this way a message to the Conference of Parties to the UN Framework Convention on Climate Change (the UNFCCC) that a rise of the sea level, caused by melting polar ice, will sink the Maldives Islands. Global warming is exacerbating natural disasters, which killed approximately 296 000 people in 2010, mainly in the developing world.<sup>3</sup> Millions are displaced by climate-related natural disasters each year.<sup>4</sup> Under „climate-related natural disasters” are understood *inter alia* floods, storms and droughts whose frequency, severity, time and location is influenced by climate change.<sup>5</sup> It does not mean that people in developed countries are saved from negative effects of climate change. Thanks to a bigger capacity to resist to climate change impacts, they suffer smaller losses and damages.

The purpose of this text is to consider human right protection in view of climate change impacts. Rightly, it has already been noted that this protection does not suffice. In a foreword for a collection of articles under the title *Human Rights and Climate Change* Mrs Mary Robinson writes: „Climate change shows up countless weaknesses in our current institutional architecture, including its human rights mechanisms. To address it effectively will require a transformation of global policy capacity – from information-gathering and collective decision-making to law enforcement and resources distribution”.<sup>6</sup>

The issue attracted a certain attention within the UN. On a proposal of Maldives, a country especially endangered by climate change, the Human Rights Council adopted resolution 7/23

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<sup>1</sup> L. M. Braman, P. Suarez, M.K. Van Aalst, Climate change adaptation: integrating climate science into humanitarian work, *International Review of the Red Cross*, vol. 92, 2010, p. 698.

<sup>2</sup> Inuit leader Sheila Watt-Cloutier's testimony before the Inter-American Commission on Human Rights, ([http://www.ciel.org/Publications/IACHR\\_WC\\_Mar07.pdf](http://www.ciel.org/Publications/IACHR_WC_Mar07.pdf)). Site visited on March 2012.

<sup>3</sup> Opening Remarks by Ms. Navi Pillay at the Human Rights Council Seminar „The Adverse Impacts of Climate Change on the Full Enjoyment of Human Rights”, 23-24 February 2012 (<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11872&LangID=e>), visited in March 2012. See also M. Beniston, Climate change and its impacts: growing stress factors for human societies, *International Review of the Red Cross*, vol. 92, 2010, p. 557.

<sup>4</sup> V. Kolmannskog, L. Trebbi, Climate change, natural disasters and displacement: a multi-track approach to filling the protection gaps, *International Review of the Red Cross*, vol. 92, 2010, p. 713.

<sup>5</sup> *Idem*, p. 715.

<sup>6</sup> M. Robinson, Forward to *Human Rights and Climate Change*, ed. S. Humphreys, Cambridge, 2010, p. XIX.

on 28 March 2008, requesting that the Office of the United Nations High Commissioner for Human Rights, in consultation with states, international organizations and inter-governmental bodies, including the International Panel on Climate Change and the secretariat of the UNFCCC, prepare a detailed analytic study on the relationship between human rights and climate change.<sup>7</sup> The High Commissioner submitted the report in 2009.<sup>8</sup> The report addressed the issues of climate change impact on some human rights and especially on the human rights of vulnerable groups. It addressed further issues of displacement, conflict and security risks and human rights implications of response measures. The report investigated the effects of climate change on the right of life, the right to adequate food, the right to water, the right to health, the right to adequate housing and the right to self-determination. The Human Rights Council has continued to consider the impact of climate change on human rights. By its resolution 10/4 from 25 March 2009, the Human Rights Council decided to organize a panel discussion on the relationship between human rights and climate change in its 11<sup>th</sup> session.<sup>9</sup> It obligated the Office of the United Nations High Commissioner for Human Rights to prepare the summary of the panel discussion and to transmit it to parties to the UNFCCC. The panel discussion was held in Geneva on 15 June 2009. By its resolution 15/13 on human rights and international solidarity from 30 September 2010, the Human Rights Council called on the international community to advance international solidarity and cooperation and to contribute to overcoming negative effects of running economic, financial and climate crises, especially in developing countries.<sup>10</sup> By its resolution 18/2, adopted at its eighteenth session, the Human Rights Council requested that the Office of the United Nations High Commissioner for Human Rights convene a seminar on addressing the adverse impacts of climate change on the full enjoyment of human rights, with a view to following up on the call for respecting human rights in all climate change-related actions and policies and forging stronger interface and cooperation between the human rights and climate change communities. It requested that the Office invite states, academic experts, civil society organizations and representatives of the most vulnerable groups of population to participate to the seminar. The Office was asked also to invite the secretariat of the UNFCCC, the United Nations Environment Programme and the United Nations Development Programme to help organize the seminar and provide assessment reports and the best available scientific data. The seminar was held on 23 and 24 February 2012.<sup>11</sup>

In a statement of the President of the Security Council from 20 July 2011, the Security Council expressed its concern that possible adverse effects of climate change may, in the long term, aggravate certain existing threats to the international peace and security. Especially, it

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<sup>7</sup> ([http://www2.ohchr.org/english/issues/climatechange/docs/Resolution\\_7\\_23.pdf](http://www2.ohchr.org/english/issues/climatechange/docs/Resolution_7_23.pdf)), visited in March 2012.

<sup>8</sup> Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, A/HRC/10/61, 15 January 2009 (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/103/44/PDF/G0910344.pdf?OpenElement>), visited in March 2012.

<sup>9</sup> ([http://www2.ohchr.org/english/issues/climatechange/docs/resolution10\\_4.doc](http://www2.ohchr.org/english/issues/climatechange/docs/resolution10_4.doc)), visited in March 2012.

<sup>10</sup> (<http://www2.ohchr.org/english/bodies/hrcouncil/docs/A-65-53-Add1.pdf>), visited in March 2012.

<sup>11</sup> Materials are available at (<http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRClimateChangeIndex.aspx>), visited in March 2012.

expressed concern for possible security implications of the loss of the territory of some states caused by sea-level-rise.<sup>12</sup>

At the Human Rights Council Panel Discussion on the Relationship between Human Rights and Climate Change, held on 15 June 2009, the USA „...did not consider that human rights law provided an optimal framework for addressing climate change internationally. Rather than through human rights law, climate change could be more effectively addressed through traditional systems of international cooperation, including through the UNFCCC”.<sup>13</sup>

Human rights are originally and primarily a relationship between an individual and a state under whose jurisdiction he or she is situated. The international community intervenes in this relationship to provide minimal international standards of human rights protection and various forms of external control over national respect for these standards, and to secure in this way a certain respect for human dignity as a condition for social stability and universal peace. However, climate change impacts on human rights are in good part a matter of the relationship between the international community and an individual. It is a relationship that escapes the exclusive jurisdiction of a state. On the other hand, for the time being, traditional systems of international cooperation, including through the UNFCCC, do not provide effective means to stop climate change or remedy its negative effects.

## **II. Responsibility of a state for human rights violation caused by climate change**

The European Court of Human Rights (the ECtHR) confirmed many times that a state may be responsible for a human right violation caused by pollution.<sup>14</sup> Generally, a state is obligated to apply environmental law and to do all that is reasonably possible to prevent an environmental breach of human rights. There are a few conditions that have to be fulfilled. One of them is that an environmental cause of a human right breach has to be under the jurisdiction of a state. However, the anthropogenic cause of climate change – the emission of greenhouse gases – is dispersed over the whole world. The emission of greenhouse gases escapes the national control of any individual state. Certainly, different countries participate by different amounts in the global emission of greenhouse gases. But, even a total prohibition of emission of greenhouse gases in the country with the biggest emission levels would not reduce in a decisive way the anthropogenic cause of climate change and its detrimental effects. It means that no state alone can take effective measures on its territory to prevent the negative effects of climate change. Only all states united may do it.

In spite of that, states are not free of any single responsibility for human right violations caused by climate change. To elaborate on the responsibility of a state for human rights violation caused by climate change, we shall start from the *Fadeyeva* case. In *Fadeyeva*, the ECtHR found that Russia was responsible for violation of the right to home and private life,

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<sup>12</sup> S/PRST/2011/15.

<sup>13</sup> *Human Rights Council Panel Discussion on the Relationship between Human Rights and Climate Change*, 15 June 2009, Palais des Nations, Geneva, parag. 66, p. 11. Available at (<http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRCClimateChangeIndex.aspx>), visited in March 2012.

<sup>14</sup> See exhaustive review and analysis of the relevant practice of the ECtHR by *M. Geistlinger*, *Impacts of the European System of Human Rights Protection on the Law of Environment*, in *European System of Human Rights Protection: Experiences and New Challenges*, Collection of papers presented at the International Conference held at the Faculty of Law in Niš on October 13-14, 2003, Niš, 2005, p. 15-34.

guaranteed by Article 8 of the ECHR.<sup>15</sup> The state tolerated an operation of a steel plant in the middle of a densely populated town, while the plant was violating domestic environmental legislation by emitting toxic gases. The authorities established a buffer zone around the steel plant – „the sanitary security zone” – and they were obligated to resettle inhabitants who were living in the buffer zone. However, they did not do it.<sup>16</sup> The air pollution seriously affected living conditions in the applicant’s flat, which was close to the plant within the sanitary zone. Mrs Fadeyeva got an illness. The ECtHR observed that the steel plant was responsible for almost 95% of the overall air pollution in the city. So, the main cause of pollution was easily definable<sup>17</sup> and the authorities were in a position to take adequate measures to prevent or reduce the pollution.<sup>18</sup> They missed the opportunity to do it and to strike a fair balance between the competing interests of the applicant and the community as a whole. The ECtHR stated: „although the situation around the plant called for a special treatment of those living within the zone, the State did not offer the applicant any effective solution to help her move away from the dangerous area. Furthermore, although the polluting plant in issue operated in breach of domestic environmental standards, there is no indication that the State designed or applied effective measures which would take into account the interests of the local population, affected by the pollution, and which would be capable of reducing the industrial pollution to acceptable levels”.<sup>19</sup>

*Fadeyeva* confirms that a state is obligated not only to eliminate a source of pollution but, also, to mitigate the effects of pollution. Russia had two ways to fulfil its obligation to respect the right to home and private life of Mrs Fadeyeva – to apply effective measures which would reduce the industrial pollution to acceptable levels or to offer the applicant a possibility to move away from the dangerous zone.

Parties to the UNFCCC accepted certain obligation not only to „take precautionary measures to anticipate, prevent or minimize the causes of climate change but also to mitigate its adverse effects”.<sup>20</sup> They obligated themselves to formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change..., and measures to facilitate adequate adaptation to climate change.<sup>21</sup> They bound themselves to take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example impact assessments, formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change.<sup>22</sup> Those are very broad and complex obligations. But, if a party to the UNFCCC fails to formulate or implement national programmes containing measures to mitigate the adverse effects of climate change or to facilitate adequate adaptation to climate change, and if this results in a human right violation, the responsibility of a state for a human rights breach may be ascertained. Certainly, it must be a measure that had been accessible to

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<sup>15</sup> *Fadeyeva c. Russia* (App. no. 55723/00), Judgment of 9 June 2005.

<sup>16</sup> *Idem*, parag. 11.

<sup>17</sup> *Idem*, parag. 91.

<sup>18</sup> *Idem*, parag. 92.

<sup>19</sup> *Idem*, parag. 133.

<sup>20</sup> Art. 3 (3) of the UNFCCC.

<sup>21</sup> Art. 4 (1, b) the UNFCCC.

<sup>22</sup> Art. 4 (1, f) the UNFCCC.

the state. Equally, an uneven distribution of the social and economic burden of measures for preventing or minimizing the causes of climate change or measures for mitigating or adaptation to climate change may result in human rights violations.<sup>23</sup>

However, the problem is that developing countries and especially the developing countries which are most vulnerable to the adverse effects of climate change don't have that many measures at their disposal to facilitate adequate adaptation to climate change or to mitigate the detrimental impacts of climate change. Having in mind the kinds and the magnitude of climate change impacts as well as the economic and administrative possibilities and priorities of developing countries, it may be said that their capacities to resist climate change impacts are very limited. In spite of this fact, judicial protection of human rights may be a very useful procedure to investigate whether a state has taken all measures that were at its disposition to protect human rights in view of climate change impacts.<sup>24</sup>

### III. Common responsibilities for human rights violations caused by climate change

The main cause of anthropogenic interference in the climate system was the industrial revolution, a global technologic and economic process that benefited mostly the now-developed countries. Some developing countries, which did not benefit or benefited very little from the industrial revolution, are and will be the most affected by the negative impacts of climate change. So, climate change processes include an inherent injustice: the biggest price is paid by the countries which benefited the least. The UNFCCC is inspired by the principle of equity: „The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities”.<sup>25</sup> The developed Parties are obligated to „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>26</sup> It is also stated that „the extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology...”.<sup>27</sup>

Art. 12 (8) of the Kyoto Protocol provides a share of the proceeds from Clean Development Mechanism projects for covering the cost of adaptation of developing countries that are particularly vulnerable to the adverse effects of climate change. At the seventh Conference of

<sup>23</sup> A comparable example appears in literature: „...in some of the countries affected by the 2004 Asian tsunami, there were reports that buffer zones were established in a discriminatory manner to allowing construction of tourism facilities, while local residents were not allowed to return and rebuild their homes”. Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin, Protection of Internally Displaced Persons in Situations of Natural Disasters, A/HRC/10/13/Add.1, 5 March 2009, parag. 58, quoted by *V. Kolmannskog, L. Trebbi*, op. cit., p. 719

<sup>24</sup> See, for example, the successful engagement of the Red Cross/Red Crescent societies in mitigation of flood effects in the West and Central Africa Zone in 2008. *L.M. Braman, P. Suarez, M.K. van Aalst*, op. cit., p. 702.

<sup>25</sup> Art. 3 (1) the UNFCCC.

<sup>26</sup> Art. 4 (4) the UNFCCC.

<sup>27</sup> Art. 4 (7) the UNFCCC.

the Parties to the UNFCCC serving as the meeting of the Parties to the Kyoto Protocol, held in Marrakech in 2001, the Parties established the Adaptation Fund.<sup>28</sup> At the Conference in Copenhagen in 2009, the Parties encouraged developed countries and international organizations to provide funding to the Adaptation Fund in addition to the shares of the proceeds from Clean Development Mechanism projects. The Fund has started adaptation projects in a number of developing countries.<sup>29</sup>

It is a classic example of an organized inter-state cooperation. Individuals do not participate directly, even if they are affected by climate change. In adopting the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights by its resolution 63/117 on 10 December 2008, the General Assembly of the UN has created a possibility that an individual may take an active role at the international level to protect economic, social and cultural rights against climate change impacts. A state party to the Covenant that accepts the Protocol will recognize the competence of the Committee on Economic, Social and Cultural Rights to receive and consider individual communications.<sup>30</sup> Individuals and groups of individuals under the jurisdiction of a state party that becomes a party to the Protocol will be authorized to submit communications to the Committee against the state party, when they believe that the state party is responsible for violation of the rights guaranteed by the Covenant.<sup>31</sup> It may cover responsibility of a state for environmental violations of the protected rights. Article 14 of the Optional protocol is of special importance. According to art. 14 (1,1) the Committee may transmit, with the consent of the State Party concerned, to United Nations specialized agencies, funds and programmes, its views or recommendations concerning communications that indicate a need for technical advice or assistance and it may send to them any matter arising out of communications which may assist them in deciding on international measures likely to assist State Parties in providing realisation of the rights protected by the Covenant. So, individual communications may initiate an international cooperation in favour of the protection of economic, social and cultural rights. It is important. Climate change affects differently various regions and countries worldwide, but it also affects differently various regions and groups in the same country. The interests of various regions and groups concerning the mitigation of climate change impacts or the adaptation to them may vary within the same country.<sup>32</sup> If a state does not protect equally all the different interests of all individuals or groups, disadvantaged individuals and groups, then the societal security is threatened. Therefore, it is important that any individual or group of individuals has a possibility to present a claim at the international level.

#### IV. Environmental Refugees

Domestic and international human rights protections as well as other legal regimes are not capable of resolving the problems that might be encountered in the future by the population of small island states. Due to a rise of the sea level, these states might lose their territories. The

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<sup>28</sup> See the web portal of the Fund: (<http://www.adaptation-fund.org>).

<sup>29</sup> ([http://www.adaptation-fund.org/funded\\_projects](http://www.adaptation-fund.org/funded_projects)), visited in April 2012.

<sup>30</sup> Art. 1 of the Protocol.

<sup>31</sup> Art. 2 of the Protocol.

<sup>32</sup> See, for example, *Massachusetts v. EPA*, D. Shelton, Equitable utilization of the atmosphere: a rights-based approach to climate change? In *Human Rights and Climate Change*, Ed. S. Humphrey, Cambridge, 2010, p. 103.

Maldives, speaking on behalf of fourteen small island countries, warned that the entire population of some low-lying countries might be forced to migrate to other countries.<sup>33</sup> Forced migration might also be caused by an extension of deserts or other impacts of climate change. During the 10<sup>th</sup> session of the Human Rights Council in March 2009, Israel noted that there was a need to find an agreed legal definition of the concept of „environmental refugees.”<sup>34</sup> The idea has been supported in literature.<sup>35</sup>

A context-oriented and dynamic interpretation of existing refugee law may be helpful in certain situations,<sup>36</sup> but it does not resolve the problem. A new convention would be the best solution.<sup>37</sup> The UN Human Rights Council is the right body for preparing a draft of the convention. The convention should define the concept of „environmental refugee”, and should define the rights of environmental refugees and the corresponding obligations of immigration countries as well as the corresponding obligations of the international community. The convention should establish an implementing body. Really, the problems of environmental refugees cannot be resolved exclusively in terms of the relationship between an environmental refugee and an immigration country. In the most drastic situations, like the sinking of low-lying countries into the sea, refugees would be deprived of their houses, jobs, pensions, the right to health protection etc. Environmental refugees should have the right to compensation for these losses. Besides, they should have the right to preserve their cultural identity and the immigration country should be obligated to provide the refugees with adequate opportunities. The surrounding countries are developing countries, which are not capable of compensating these losses nor of providing opportunities for the preservation of cultural identities. This burden should be shared by the whole international community, especially by developed countries.

## V. Concluding remarks

Climate change has already been and will continue to be to an even larger degree a factor in the violation of human rights. The impacts of climate change on human rights are numerous and diverse. Various human rights – from the right to life and the right to property to the right to cultural identity – of people of various regions may be affected.

The protection of human rights in the face of climate change impacts may be realized partly through standard national and international procedures. However, the protection of human rights in the face of climate change, in the most drastic situations, requires the establishment of a legal relationship between an affected individual and the international community.

The national measures taken to mitigate climate change by the reduction green-house gases or taken for the purpose of adaptation to climate change effects, as well as the failures

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<sup>33</sup> *Human Rights Council Panel Discussion on the Relationship between Human Rights and Climate Change*, 15 June 2009, Palais des Nations, Geneva, parag. 96, p. 15.

<sup>34</sup> *Idem*, parag. 95, p. 15.

<sup>35</sup> See, for example, *B. Docherty, T. Giannini*, *Confronting a rising tide: a proposal for a convention on climate change refugees*, *Harvard Environmental Law Review*, vol. 33, 2009, p. 349; *V. Kolmannskog, F. Myrstad*, *Environmental Displacement in European Asylum Law*, *European Journal of Migration and Law*, vol. 11, 2009, p. 313.

<sup>36</sup> *V. Kolmannskog, L. Trebbi*, *op. cit.* p. 723.

<sup>37</sup> *B. Docherty, T. Giannini*, *op. cit.* p. 350.

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to take protective measures, remain under national jurisdiction and they may be the subject-matter of standard procedures of national and international control over respect for human rights. However, these standard procedures of human rights protection have to be supplemented by an international cooperation aiming to enhance the capacities of developing countries for the protection of human rights in face of climate change impacts. The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights by its resolution 63/117 on 10 December 2008 is an instrument that may serve this purpose.

The most drastic impacts to human rights, caused for example by the sinking of the territories of low-laying countries into the sea, cannot be resolved within a relationship between a national state and an individual. They require the establishment of a legal relationship between the international community, or at least developed countries, and affected individuals. This relationship should be established by a new convention on environmental refugees.