# The international legal protection of environmental refugees: a human rights-based, security and state responsibility approach

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# 10 The rights-based approach

Most international human rights instruments were drafted before the emergence of environmental law and the environment as a common concern and, as a result, do not mention the environment. Human rights institutions have been able to bridge part of this gap by using the human rights instruments as a 'living document', but many protection gaps remain. As discussed in part II, 'human rights obligations of States in an environmental context have been either deduced from a substantive right to a healthy environment'[1] (on the regional and national level), from international environmental laws 'that incorporate and utilize human rights guarantees deemed necessary or important to ensuring effective environmental protection [especially procedural rights or from human rights law that] re-casts or interprets internationally-guaranteed human rights to include an environmental dimension when environmental degradation prevents full enjoyment of the guaranteed rights.'[2] In this last approach, a healthy environment is considered a *sine qua non* for the full enjoyment of the respective human rights.[3]

As Knox has classified, the current

> 'jurisprudence takes a two-pronged approach. First, it sets out strict procedural duties, including prior assessment of environmental impacts, access to participation in decision-making and to judicial remedies, which States must follow in deciding how to strike the balance between environmental protection and other societal interests, such as economic development. Second, it defers to the substantive decisions that result from these procedures, as long as the decisions do not result in the reduction of human rights below minimum standards.'[4]

This chapter will explore if current human rights jurisprudence may extend to protect those forcedly displaced by environmental degradation (including those affected by climate change).

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1 Ammer et al. 2010, p. 3.
2 Shelton 2006.
3 See Ammer et al. 2010, p. 3 and Shelton 2008, p. 130. Shelton also points out a fourth relationship between human rights and environmental law: International environmental law articulates ethical and legal duties of individuals that include environmental protection and human rights. This dimension falls outside the scope of this research.
4 Knox 2009, p. 5.

This chapter first analyses the possibilities for a global substantive right to a healthy environment. Furthermore, it analyses the possibilities of strengthening the role of procedural rights and – as most environmental refugees are from developing States that must be considered unable or sometimes unwilling to protect its nationals against environmentally forced migration – this paragraph also analyses the existence of positive extraterritorial obligations for States. It ends with an analysis on obligations towards IDPs.

## 10.1 RIGHT TO A HEALTHY ENVIRONMENT

The human right to a healthy environment is a right with both individual and collective connotations. In its individual dimension and its relationship to other rights, its violation may have direct or indirect repercussions on the individual.[5] Environmental degradation may cause irreparable damage to human beings. Inadequate environmental conditions can undermine the effective enjoyment of other enumerated rights, such as the rights to life, health, water, and food. Therefore, a healthy environment is a fundamental right for the existence and well-being of humankind.[6] This right to a healthy environment covers harm to the environment that infringes on human rights and leaves out environmental degradation that does not appreciably affect humans. Consistent with this recognition, the right to a clean environment has been codified in soft law instruments, regional human rights agreements,[7] national constitutions, and sub-national constitutions.[8] And topic specific instruments also make references to environmental quality.[9]

5 IACtHR, Environment and Human Rights Advisory Opinion, OC-23/17 of November 15, 2017, p. 2.

6 *Ibid.*, p. 2.

7 On the regional level, the ACHPR was the first international human rights instrument to contain an explicit guarantee of environmental quality 'all peoples shall have the right to a general satisfactory environment favorable to their development' Art 24. Subsequently, the Protocol on Economic, Social and Cultural Rights to the American Convention on Human Rights (Protocol of San Salvador) included the right of everyone to live in a healthy environment 'everyone shall have the right to live in a healthy environment' Art 11, para 1. In 2003, the African Union adopted the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa, which states that women 'shall have the right to live in a healthy and sustainable environment' in Art 18 and 'the right to fully enjoy their right to sustainable development' in Art 19.

8 Burger et al. 2017, p. 31.

9 The CRC makes a reference to environmental quality in Art 24. Art12 (2) b ICESCR requires states parties to improve 'all aspects of environmental and industrial hygiene'. Calls for a human right to an environment of a particular quality have found voice in a variety of UN declarations, resolutions and statements of principle, see for example the various declarations of principle which emerged from the 1972 Stockholm Conference and the 1992 Rio Conference. See Clark et al. 2007, p. 10.

In its collective dimension, as an autonomous right, it constitutes a universal value that is owed to both present and future generations. Even though the role of human rights in international environmental law has expanded enormously over the last two decades (e.g., references to human rights in the Paris Agreement) and will continue to do so,[10] the core international human rights treaties do not recognize a freestanding right to a clean environment, or to a stable climate. Human rights treaties 'still do not guarantee a universal right to a decent or satisfactory environment if that concept is understood in qualitative terms unrelated to impacts on the rights of specific humans.'[11]

### 10.1.1 A freestanding right to a healthy environment

A right to a healthy environment would allow for claims to protect the environment as such, without a necessary effect on humans. This would allow complainants to address environmental degradation in an earlier stage, thus preventing environmentally forced migration. This would be an improvement to the current possibilities to make claims after the damage has taken place for individuals. The right to a healthy environment encompasses not only an environment that is safe for humans, but one that is ecologically-balanced and sustainable in the long term. In her final report, the Special Rapporteur in the Sub-Commission on Prevention of Discrimination and Protection of Minorities Ksentini explained that: 'the term "healthy environment" has been generally interpreted to mean that the environment must be healthy in itself (ecological balance) as well as healthful, which requires that it is conducive to healthy living.'[12]

Articulating a new fundamental right to a healthy environment will require States to take measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources and provide an enforcement mechanism for affected communities.[13] However, what constitutes a decent environment

10 Knox stresses that 'the Principles [Framework Principles on Human Rights and the Environment 2018] provide a sturdy basis for understanding and implementing human rights obligations relating to the environment, but they are in no sense the final word. The relationship between human rights and the environment has countless facets, and it will continue to develop and evolve for many years to come.', HRC Framework Principles on Human Rights and the Environment, UN Doc A/HRC/37/59 annex 1, introduction.

11 Boyle 2012, p. 627.

12 Economic and Social Council, Review of further developments in fields with which the sub-commission has been concerned. Human Rights and the Environment. UN Doc E/CN.4/Sub.2/1994/9 1994.

13 Shelton 2008, p. 163 and 164 and Farkas, Kembabazi & Safdi 2013, p. 18. The ESCR Committee has stated in CESCR, General Comment No. 14 2000 that the right to a healthy environment includes, 'inter alia, preventive measures in respect of occupational accidents and diseases; the requirement to ensure an adequate supply of safe and potable water and basic

is a value judgment. Birnie and Boyle stated that: 'there is little international consensus on the correct terminology' in both global and regional human rights instruments, and that any attempt to define environmental rights in qualitative terms is 'bound to suffer from uncertainty […] and […] cultural relativism.'[14] Governments will have to strike a fair balance between for example natural resource exploitation and nature protection, to industrial development and air and water quality or land use development and conservation of forests and wetlands. This 'fair balance' is moderated only to some extent by international agreements on such matters as climate change and the conservation of biological diversity.[15]

As an extra complication factor, the environment is often impacted by cross-border pollution that is hard to control by the affected State. A freestanding human right to a clean environment would therefore be of limited use. As Limon pointed out: the universal declaration of a right to an environment of a certain quality 'could help individuals hold their own governments accountable for environmental degradation by enabling recourse to international human rights mechanisms (e.g., treaty bodies) and, linked to this might also facilitate or encourage the development of "novel theories of responsibility," such as the application of joint and several liability in human rights law (it could therefore help, for example, the Inuit vis-'a-vis their own governments).'[16] At the same time, he concludes that a freestanding right to nature is not helpful for cross-border pollution.[17]

### 10.1.2 Substantial rights presupposing a healthy environment

Human rights institutions have derived 'a right to a healthy environment indirectly as a component of other human rights that presuppose a healthy

sanitation; and the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health.'

14 Harmelen van, Leeuwen van & Vette de 2015, p. 78. The right to a healthy environment has achieved most attention in Latin America. For example, in the IACtHR, Kawas-Fernández v. Honduras case of 3 April 2009, the Court considred in para 148. 'in accordance with the case law of this Court 192 and the European Court of Human Rights, 193 there is an undeniable link between the protection of the environment and the enjoyment of other human rights. The ways in which the environmental degradation and the adverse effects of the climate change have impaired the effective enjoyment of human rights in the continent has been the subj ect of discussion by the General Assembly of the Organization of American States 194 and the United Nations. 195 It should also be noted that a considerable number of States Parties to the American Convention have adopted constitutional provisions which expressly recognize the right to a healthy environment.'

15 Boyle 2012, p. 627,

16 Limon 2009, p. 469-472.

17 *Ibid.*, p. 469-472.

environment.'[18] A benefit of this approach is that there is no need to define controversial notions as a satisfactory or decent environment. Boyle argues that:

> 'it may serve to secure higher standards of environmental quality, based on the obligation of states to take measures to control pollution affecting health and private life. Above all it helps to promote the rule of law in this context: governments become directly accountable for their failure to regulate and control environmental nuisances, including those caused by corporations, and for facilitating access to justice and enforcing environmental laws and judicial decisions.'[19]

In this paragraph a broadening of the scope of State obligations in the context of environmental degradation will be discussed for the right to life, property and health.

*Right to life*

A better identification of environmentally forced migration as a threat to life would improve protection possibilities as it would bring more cases of environmentally forced migration within the scope of the right to life. So far, human rights courts have put an emphasis on the procedural aspects and allow States a wide margin of appreciation in deciding on what measures to take. As long as minimum standards are not violated, courts are very reluctant to recall substantive decisions. The right to life however, does not instruct States how to respond. A more progressive approach for courts would be to actively judge the substantive decisions.

Another possibility to clarify the content of the right to life in relation to environmental refuge, will be when people who have in vain sought for refugee protection due to environmental degradation will be returned to their home States.[20] Under these circumstances, national courts of third States will be asked to make a judgement on the substantive element of the right to life. However, only very severe environmental degradation would prevent return due to non-refoulement considerations, so it would only cover a very small group of environmental refugees.

*Right to property*

Many housing, land and property rights will be affected by environmentally forced migration. Although most effectively dealt with in domestic settings, international law can provide guidance with setting minimum standards. A progressive interpretation of positive obligations under the right to property would require States to plan for and to take measures against foreseeable

18 See for example Ammer et al. 2010, p. 3 and Shelton 2008, p. 130.
19 Boyle 2012, p. 613.
20 See § 5.2.1 life.

threats to the right to property.[21] At a minimum, States should ensure full and genuine consultation with and participation by affected communities.[22]

*Right to health*
States are obliged to realize progressively the right to the highest attainable standard of health.[23] In its General Comment 14, the ESCR Committee lists some obligations that are at the very least minimum core obligations arising from the right to the highest attainable standard of health.[24] The wording of the General Comment suggests that the list is not exhaustive. This list could be extended with other minimum rights relevant for environmental refugees, such as a right to culture. Hunt and Khosla propose to adopt as a new core obligation the obligation 'to take reasonable steps to slow down and reverse climate change. For example, states have a core obligation to take reasonable steps to stabilize greenhouse gas concentrations in the atmosphere at a level that prevents dangerous anthropogenic interference with the climate system.'[25] It is very unclear however what the minimum obligation of this proposal would entail. The wording 'reasonable steps' ask for a value judgement that can only be judged in the wider context of the balance between environmental harm and the benefits of the activities causing it. A less ambitious goal would be to identify existing minimum obligations as being relevant for environmental refugees. When these connections will be better visible, States and human rights instruments will be more likely to apply these rules in the context of environmentally forced migration.

### 10.1.3 Rights of nature

More progressively than the right to a healthy environment, several authors[26] argue for a right of nature. According to Borràs, this new approach is emerging. It recognizes the rights of nature itself. This implies 'a holistic approach to all ways of life, including all ecosystems.'[27] Nature is considered a subject of rights. Ecuador, Bolivia and a growing number of communities in the United States are basing their environmental protection policies on the premise that nature has inalienable rights, as have human beings. According to Borras, the recognition of the rights of nature implies a holistic approach to all ways of life, where human beings have the legal authority and responsibility to enforce

21 See for example ECtHR, *Öneryildiz v. Turkey* 2004, para 135.
22 See also § 3.1.3 the duty to facilitate public participation.
23 ICESCR, Article 21.
24 See § 3.1.2 the right to health.
25 Humphreys, Robinson 2010, p. 250.
26 See for a list of references and relevant legal frameworks Earth Law Center 2018.
27 Borràs 2017, p. 226.

these rights on behalf of nature.[28] Borras refers to the 2011 Wheeler versus Director de la Procuraduria General del Estado en Loja case.[29] This case is based on Article 71 of the Ecuadorian Constitution,[30] that protects the rights of nature. In this case, the project to widen the Vilcabamba-Quinara road deposited large quantities of rock and excavation material in the Vilcabamba River. Wheeler and Huddle successfully argued this directly violated the rights of nature by increasing the river flow and provoking a risk of disasters from the growth of the river with the winter rains, causing large floods that affected the riverside populations who utilize the river's resources. On March 30, the Provicial Court of Loja issued a Court decision

> 'which granted an injunction against the Provincial Government of Loja to stop violating the constitutional rights of the Vilcabama River to exist and to maintain its vital cycles, structure, functions and evolutionary processes […] The Chamber granted the motion, agreeing that "the action of protection is the only suitable and effective remedy to stop immediately and focused environmental damage" and applying the precautionary principle, the judges say [...] "until such time it is objectively proven that no probable or certain danger exists over works carried out in a particular area producing contamination or environmental damage, it is the constitutional duty of judges to immediately pay attention to safeguarding and enforcing the legal protection of the rights of Nature, avoiding contamination by whatever means, or ensuring remedy. Note that with relation to the environment we shall consider not only certain damage, but also indications of possibility"'[31]

As Borràs further pointed out: 'The Court also endorsed the intergenerational principle, recognizing the importance of nature to protect the interests of present and future generations'.[32] May pointed out that another interesting aspect of this case is that the plaintiffs could have built a 'regular' case due to the damage caused by erosion and flooding, but instead opted for building their claim on the rights of nature.[33] This case, although based on a national constitution that acknowledges a right to nature, demonstrates the possibilities under this approach. As a next step, Kotzé and Villavicencio Calzaldilla, suggest that the courts will have to 'reconcile the conflicting environmental provisions in the Constitution, to clarify the relationship between the environmental right and the rights of nature, and to give greater recognition to the

28 *Ibid.*, p. 227.

29 *Wheeler versus Director de la Procuraduria General Del Estado en Loja, 2011,* accessible in Spanish at https://mariomelo.files.wordpress.com/2011/04/proteccion-derechosnatura-loja-11.pdf.

30 For a background analysis of this right see Kotzé, Calzadilla 2017, p. 415 onwards. For the scope and content, see p. 422 onwards.

31 *Wheeler versus Director de la Procuraduria General Del Estado en Loja, 2011, §5). In* Borràs 2017, p. 244. The Court decision is accessible in Spanish at https://mariomelo.files.wordpress.com/2011/04/proteccion-derechosnatura-loja-11.pdf.

32 Borràs 2017, p. 244.

33 May 2011.

novelty of the rights of nature through a jurisprudential paradigm shift which conveys the importance, scope and autonomous basis of nature's rights.'[34]

Adopting a rights of nature approach would give the environment a central role in the decisions that affect the environment. As a consequence environmental degradation should be either prevented or mitigated or balanced against other interests, which in turn would lead to less environmental degradation and therefore less forced migration due to environmental degradation. However, the acceptance of rights of nature has gained little ground. It is unlikely that such a right would develop on a global scale in the near future.

### 10.1.4 The environment as a public good within the context of economic and social rights

Boyle takes a more modest approach and argues for a declaration or protocol that 'would recognize the link between a satisfactory environment and the achievement of other civil, political, economic, and social rights and would make more explicit the relationship between the environment, human rights, and sustainable development and address the conservation and sustainable use of nature and natural resources.'[35] Boyle argues that, to be meaningful, a right to a decent environment has to address the environment as a public good, within the context of economic and social rights.[36] In his opinion, the right to a healthy environment should be clarified within the context of economic, social, and cultural rights, 'which would entail giving greater weight to the global public interest in protecting the environment and promoting sustainable development.'[37] A substantive right to a healthy environment would add 'a broader and more explicit focus on environmental quality which could be balanced directly against the covenant's economic and developmental priorities.'[38] As a guideline for its content Boyle follows the general rule derived from case-law that: 'the right to pursue economic development is an attribute of a State's sovereignty over its own natural resources and territory, but it cannot lawfully be exercised without regard for the detrimental impact on the environment or on human rights.'[39] As Shelton puts it: 'In effect, the process of decision-making and compliance with environmental and human rights obligations, rather than the nature of the development itself, constitute

34 Kotzé, Calzadilla 2017, p. 429.
35 Boyle 2012, p. 616 and 617.
36 *Ibid.*, p. 628.
37 *Ibid.*, p. 641.
38 *Ibid.*, p. 628.
39 For example, in the ICJ Case concerning Pulp Mills on the River Uruguay, *Argentina v. Uruguay*, 2010, para 177, the Court noted that the 'interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection is the essence of sustainable development'.

the key legal tests of sustainable development in current international law.'[40] If a right to a decent environment would be addressed as a public good, within the context of economic and social rights, this would also have consequences for the positive extraterritorial obligations.[41] As the human rights institutions have already accepted the connection between various substantive rights and a healthy environment, this interpretation seems a feasible option to pursue.

## 10.2 PROCEDURAL RIGHTS

Human rights bodies have given substantive rights, such as the right to life and health and right to a healthy environment meaningful content by requiring the State to adopt various techniques of environmental protection, such as environmental impact assessment, public information and participation, access to justice for environmental harm, and monitoring of potentially harmful activities. The extent of these procedural obligations is still up for debate, and could provide enhanced protection.

### 10.2.1 Right to information

> 'A "right to information" can mean, narrowly, freedom to seek information, or, more broadly, a right of access to information, or even a right to receive it. Corresponding duties of the State can be limited to abstention from interfering with public efforts to obtain information from the State or from private entities, or expanded to require the State to obtain and disseminate all relevant information concerning both public and private projects that might affect the environment.'[42]

As environmentally forced migration is evidently a complex issue of environmental and economic policy, this seems to imply that appropriate investigation and studies are required. 'States must assess the potential environmental impacts of activities, monitor those impacts over time, and ensure that the affected public receives information about the activities and may participate in decisions concerning them.'[43] This requires a broad interpretation of the right to information.

This broad interpretation of the right to information would be in line with the level of protection that has been required in the context of the protection of indigenous peoples. For indigenous peoples the right to information is

40 Shelton 2008, p. 163 and 164.
41 See § 10.3 obligation to provide humanitarian assistance.
42 *Ibid.*, p. 134.
43 Knox 2009, p. 16 and 17 and Ammer et al. 2010, p. 41.

explained to entail an obligation to actively inform those people on any decision that affects their physical and cultural survival.[44]

As has been mentioned above, the execution of the right to information involves choices and decisions about resource distribution and capacity, about what and how much to gather at what cost. An increased obligation to inform might weigh heavily on affected States, as the States most affected by climate change are generally developing States.

### 10.2.2 Right to public participation

The right to public participation in the context of environmental degradation is broadly accepted. The Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Knox concludes that:

> 'all States should ensure that their laws provide for effective public participation in climate and other environmental decision-making, including by marginalized and vulnerable groups, and that they fully implement their laws in this respect. Such participation not only helps to protect against abuses of other human rights; it also promotes development policies that are more sustainable and robust.'[45]

In order for the participation to be meaningful in the context of environmentally forced migration, public participation should take place before people are forced to leave. Decisions on mitigation or adaptation projects must be made with the informed participation of the people who would be affected by the projects.[46] As the exact content of State duties is unclear, the protection of environmental refugees would benefit from a further identification of the duties for States to actively seek for public participation and proper implementation.

For indigenous peoples the right to public participation is explained to entail an obligation to seek their 'FPIC'. This obligation is based on their special dependency on the land. Even though a similar justification cannot be constructed for most environmental refugees, they often do belong to vulnerable groups that are traditionally difficult to inform and often unable to seek the information themselves. A strengthening of the obligation to inform environmental refugees (especially before they are forced into migration) would substantially improve their possibilities to adapt or mitigate or make informed decisions when or where to migrate. Especially in the context of slow-onset disasters, early information would allow for time to adapt or mitigate and

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44 See § 3.1.4. indigenous peoples and vulnerable groups.

45 A/HRC/31/52 , Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 2016, at 58.

46 *Ibid.*, at 59.

might prevent forced migration altogether. Therefore, some authors have proposed a progressive interpretation of the right to public participation that would widen the scope of FPIC for specific other groups such as 'ethnic groups', 'minorities' and 'local communities'.[47] This would require governments to obtain FPIC before making a decision affecting these groups. The extent of the requirement of consent is still unclear, however the most acceptable explanation would require States to seek consent without a veto power for affected communities where the State has a margin of appreciation to balance the rights of the indigenous peoples against other rights. Some authors express concern about widening the scope of FPIC to 'simply and indiscriminately apply the indigenous rights framework to all local communities without justifiable legal grounds' (as their special attachment to the lands). This might undermine indigenous advocacy initiatives 'given their particular characteristics and needs.'[48] I agree that without a proper justifiable legal ground, the obligation to FPIC should not be implemented for all local communities. This would jeopardize the acceptance of the special position of indigenous peoples due to their attachment to the land. However, a more conservative approach where States are obliged to actively and demonstrably seek for consent of affected communities through providing the necessary information would solve the problem that vulnerable affected people often not have a de facto possibility to participate as information does not reach them (in time). This would not require the consent of affected people, but would require the State to actively seek for public participation.

Another possibility that has been raised is that NGO's should have a more prominent role in the protection of the environment. A legal basis for this extended role can be found in the Aarhus Convention which, unlike human rights treaties, provides for public interest activism by NGOs.[49] Environmental NGOs use access to information and lobbying to raise awareness of environmental concerns and they 'tend to have high success rates in enforcement actions and public interest litigation.'[50] Extending the possibilities for public interest activism by NGO's would empower affected people, but does not go far beyond current possibilities, as already NGO's can represent affected people. Boyle concludes that:

47 For an overview see Kanosue 2015, p. 656.

48 Forest Peoples Programme 2013.

49 Article 6, extends public participation rights to anyone having an 'interest' in the decision, including NGOs. 'Sufficient interest' is not defined by the Convention but, in its first ruling, the Aarhus Compliance Committee held that, 'although what constitutes a sufficient interest and impairment of a right shall be determined in accordance with national law, it must be decided "with the objective of giving the public concerned wide access to justice" within the scope of the Convention'. See Boyle 2012, p. 624-626.

50 Boyle 2012, p. 624-626.

> 'The further elaboration of procedural rights, based on the Aarhus Convention, would facilitate the implementation of a right to a healthy environment, and give greater prominence globally to the role of NGOs in public interest litigation and advocacy. These two developments go hand in hand and represent a logical extension of existing policies and would represent a real exercise in progressive development of the law.'[51]

### 10.2.3 Right to remedy

The possibilities of holding national governments to account are limited and the possibilities for holding third States to account even more so. This is one of the inherent weaknesses of the human rights system. However, existing possibilities can be put to better use. Shelton argues that the system of periodic reporting on human rights issues should be better utilized, as it offers 'a public forum for challenging State action or inaction on environmental protection as it affects the enjoyment of human rights.' In her opinion, 'UN treaty bodies, NGOs and activists have often overlooked the importance of participating in reporting procedures.' She pointed out that 'the periodic reporting procedure has been strengthened through the recent addition of follow-up procedures to monitor compliance.'[52] The current system allows for further participation in reporting procedures, so the effects of State decisions on the environment could be put forward in these procedures. This would at least put a spotlights on these issues and might encourage States to pay further attention to procedural obligations.

## 10.3 Positive extraterritorial State obligations

Limon notes that 'in the globalized world, individual human interaction and personal cause and effect no longer respect traditional concepts of sovereignty. As a consequence, the idea that harm and responsibility must both reside within a single state would, according to this view, become redundant (especially in the case of economic, social, and cultural rights).'[53] As Humphreys puts it: 'more than most other issues, climate change throws into relief the inadequacies of the international justice system, given the scale and intimacy of global interdependence that drives the problem and must also drive its solutions.'[54] Ziegler, the former Special Rapporteur on the right to food, clarified that:

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51 *Ibid.*, p. 642.
52 Shelton 2008, p. 144.
53 Limon 2009, p. 473.
54 Humphreys 2008, p. 64.

> 'The primary responsibility to ensure human rights will always rest with national governments. However, given the current context of globalization and strong international interdependence, national governments are not always able to protect their citizens from the impacts of decisions taken in other countries. All countries should therefore ensure that their policies do not contribute to human rights violations in other countries. In such a globalized, interconnected world, the actions taken by one Government may have negative impacts on the right to food of individuals living in other countries.'[55]

The drafters of the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights' (hereafter: Maastricht Principles) conclude that:

> 'Extraterritorial obligations (ETOs) are a missing link in the universal human rights protection system. Without ETOs, human rights cannot assume their proper role as the legal basis for regulating globalization and ensuring universal protection of all people and groups. A consistent realization of ETOs can generate an enabling environment for Economic, Social and Cultural Rights and guarantee the primacy of human rights among competing sources of international law. ETOs provide for State regulation of transnational corporations, State accountability for the actions and omissions of intergovernmental organizations in which they participate, set standards for the human rights obligations of IGOs, and are a tool needed to ultimately stop the destruction of eco-systems and climate change.'[56]

In 2019, the Committee on the Elimination of Discrimination Against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, the Committee on the Rights of the Child, and the Committee on the Rights of Persons with Disabilities gave a joint statement on human rights and climate change. The statement assesses the effect of climate change on human rights and underlines the State parties have obligations, including extra-territorial obligations, to respect, protect and fulfil all human rights of all peoples.[57] Currently, the extent of positive obligations, in particular the obligation to fulfil ESCR, is still widely disputed.[58] This paragraph explores to what extent States have extraterritorial obligations that can be used to enhance

55 UNGA UN Doc A/HRC/7/5, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development 2008, p. 9 and 10, para 21.

56 Michéle 2014, p. 5.

57 Joint Statement on "Human Rights and Climate Change" by the Committee on the Elimination of Discrimination Against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, the Committee on the Rights of the Child, and the Committee on the Rights of Persons with Disabilities, 16 September 2019, available at https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E.

58 Ammer et al. 2010, p. 3.

protection possibilities for environmental refugees. The paragraph first analyses obligations for transboundary harm affecting civil and political rights.[59] The next part identifies obligations for transboundary cooperation: the duty to assist in achieving progressively the full realization of the rights recognized in the ICESCR and the duty to offer or provide humanitarian assistance.[60]

### 10.3.1 Transboundary harm

For environmentally forced migration due to pollution and climate change, the threat is often caused by diffuse actors, both public and private, many of whom are located in other countries.

> 'In order for human rights law to require States to address the entire range of harms caused by climate change, it would have to impose duties on States with respect to those living outside their. Human rights law arguably does require States to respect and to some extent, more controversially, to protect the rights of those outside their own territory or jurisdiction. But the extraterritorial application of the ICCPR, ICESCR, and other global human rights treaties is heavily contested and remains unclear.'[61]

First, it needs to be determined who falls within the extraterritorial jurisdiction of a State. 'Human rights instruments address jurisdiction in different ways.' Some 'contain no explicit jurisdictional limitations,' and others 'limit at least some of their protections to individuals subject to or within the jurisdiction of the State, leaving it unclear how far their protections extend beyond the State's territory.'[62] The dominant view on the extraterritorial jurisdiction of the ICCPR, adopted by the ICJ, the HRC, and most scholars, is that the ICCPR requires each party to respect and ensure the rights of both those within its territory and those subject to its jurisdiction.[63] In its General Comment on Art 2(1), the HRC said that 'a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.'[64] It is still controversial what entails this effective control. 'No authorit-

59 See § 10.3.1.

60 See § 10.3.2 obligations to provide assistance and obligations to provide humanitarian assistance.

61 McInerney-Lankford 2009, p. 40.

62 UNGA UN Doc A/HRC/25/53, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development 2013, para 63.

63 Knox 2009, p. 42. In CCPR, General Comment No. 31 2004, the HRC confirmed that – 'a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.'

64 CCPR, General Comment No. 31 2004.

ative body has addressed whether transboundary environmental harm may bring its victims within the effective control of the State where the harm originates.'[65]

For a lack of a decision of an authoritative body on effective control resulting in extraterritorial jurisdiction for transboundary environmental harm, direction needs to be found from regional human rights bodies. 'In Bankovic v. Belgium, the ECtHR rejected the argument that the NATO bombing of Serbia in 1999 amounted to effective control of the places bombed.'[66] 'The Inter-American Commission, however, has taken a more expansive view. In 1999, it held that by shooting down an unarmed plane over international waters, "placed the civilian pilots […] under their authority".'[67] In the context of climate change, Knox concludes that: 'it is hard to see how transboundary harm caused by climate change could meet the standard employed by the ECHR. If aerial bombardment does not give states effective control of the places affected, it seems unlikely that such control would result from the less immediate and drastic measure of allowing greenhouse gases to cross international borders.'[68] From the perspective of effective control, it is unlikely that States can be held to have positive duties to prevent environmentally forced migration in other States. Multiple actors from many countries together are responsible for human induced climate change, but have little influence over the final result, as if only they would stop polluting, nothing much would change.[69]

To increase protection possibilities, it could be argued that extreme cases could give rise to extraterritorial jurisdiction. For example, the jurisdictional limit in Art 2(1), does not seem to apply to the right of self-determination, small island States that may submerge due to climate change and sea-level rise may be subjected to extraterritorial jurisdiction. As the natural resources and means of subsistence of small island States are threatened, States have a duty to take the necessary steps to prevent climate change and sea-level rise.[70] According to Knox: 'This duty may provide a basis for the extension of the environmental human rights jurisprudence: states may be required to extend procedural safeguards (such as transboundary environmental impact assessments) to ensure that they take into account the possible effects of their policies on this right and, if they do, they may still have wide discretion to

65 McInerney-Lankford 2009, p. 41.

66 *Banković v. Belgium,* 2001-XII Eur. Ct. H.R. 333 in McInerney-Lankford 2009, p. 41.

67 IACmHR, IACmHR, *Alejandre v. Cuba* 1999 in McInerney-Lankford 2009, p. 41.

68 Knox 2009, p. 44.

69 However in the above mentioned case *Urgenda Foundation v. The State of the Netherlands,* the Hague Court of Appeal did not accept the defense by the State of the Netherlands that 'The State asserts that it is very much relevant that the Dutch emissions are minor in absolute terms and that the Netherlands cannot solve the global problem of climate change on its own.', para 30.

70 Knox 2009, p. 45 and 46.

decide for themselves which policies to adopt.'[71] Shelton argues that: a 'government of a State may, and, indeed, arguably has the duty to, assert and defend the rights of its inhabitants, rather than remaining passive and ultimately defending itself for alleged rights-violating acts and omissions. The premise of the approach is that in the international community […] governments exist for the purpose of protecting the sovereign rights of the state and the human rights of their inhabitants, present and future.'[72] Based thereon, she concludes that:

> 'it may be possible to recast the rights and duties involved when transboundary harm occurs, to achieve the goals of prevention and accountability, merging the law of state responsibility for transboundary environmental harm with international human rights law. Rather than individuals attempting to vindicate their rights, plaintiff states may represent those individuals as well as future generations in bringing claims against the responsible states, thus utilizing state sovereignty as a vehicle for implementing international human rights law and international environmental law.'[73]

She fails to describe how the law of State responsibility and international human rights should merge and how States would successfully vindicate their rights from other States. As even the SIDS have not taken their case to an international court, it seems unlikely that States will try and protect those people forced into migration due to environmental degradation with an ever more complex causal relation between the pollution and the migration, such as for example changing rains patterns.

If extraterritorial jurisdiction was to be extended, the most promising possibility is to extend procedural obligations. States could be held to 'conduct an environmental impact assessment of transboundary harm originating in the State and give all those affected, including non-residents, the ability to participate in the decision-making process.'[74] However, 'unless the extraterritorial victims of transboundary harm are given rights equivalent to those of the residents of the source country, including the right to vote, the source country will retain the sole authority to decide whether to proceed with the

71 *Ibid.*, p. 46.
72 Humphreys, Robinson 2010, p. 91.
73 *Ibid.*, p. 91.
74 Maastricht Principle 14 see § 10.3.2 the Maastricht Principles which attempts to clarify extraterritorial obligations of States on the basis of standing international law claims that these obligations already exists: 'States must conduct prior assessment, with public participation, of the risks and potential extraterritorial impacts of their laws, policies and practices on the enjoyment of economic, social and cultural rights. The results of the assessment must be made public. The assessment must also be undertaken to inform the measures that States must adopt to prevent violations or ensure their cessation as well as to ensure effective remedies.'

activities threatening transboundary harm.'[75] Knox suggests that: 'states could be given less discretion as to where to set levels of environmental protection. Human rights bodies have been willing to set minimum substantive standards for environmental protection; they could seek to make those standards more specific for transboundary harm.' However, he also warns that there are other good reasons for human rights bodies to hesitate to adopt highly specific environmental standards as they usually lack the technical expertise and the political mandate to do so.[76]

With regard to the obligations to respect and protect, 'a State presumably may comply with them in the environmental context by extending extraterritorially the procedural safeguards developed in the environmental human rights jurisprudence and by striking a balance between environmental protection and other policies, as long as the decisions do not result in the destruction of the human rights of those outside, as well as within, its jurisdiction.'[77] For environmental refugees, the duty to respect would oblige third States to take no measures (such as economical development projects in the domestic State) that may lead to the forced displacement in the domestic State and have a negative effect on the economic, social and cultural rights. Under the duty to protect, States are held to prevent private actors under their control to cause forced displacement due to economic development projects or pollution.[78]

Based on the procedural and substantive norms developed by human rights bodies in applying human rights law to environmental harm, States would be held to 'follow procedures designed to ensure full, well-informed participation by those most affected. On the substantive level, under no conditions could States allow climate change to destroy the human rights of the most vulnerable.'[79] While the obligation to provide information, may be met relatively easy,[80] the other procedural requirements of the environmental human rights jurisprudence are not as easily met. Those who may be forced to migrate due to environmental degradation 'should be able to participate in a full and informed manner in the international decision-making process as to how much environmental harm to allow.'[81] As the international law system is based on States as the representative of its inhabitants, it is unclear how individuals would affect or appeal decisions.[82]

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75 Knox 2009.
76 *Ibid.*, p. 51.
77 Knox 2009, p. 50.
78 Ammer et al. 2010, p. 58.
79 Knox 2009, p. 59.
80 Knox suggests that the work of the IPCC is a global effort to assess the environmental impacts of climate change and make the assessments public so that they can inform consideration of policy options. *Ibid.*, p. 52 onwards.
81 *Ibid.*, p. 56.
82 For a more extensive analyses see *Ibid.*, p. 52 onwards.

If the progressive decision of the IACtHR in the Saramaka People v. Suriname case[83] is followed, free, prior, and informed consent is required, with respect to large-scale development or investment projects that would have a major on indigenous peoples. Applied in the context of climate change, Knox reasons that: 'that approach would mean that states' decisions to emit levels of greenhouse gases that would cause major adverse consequences on vulnerable states would require prior consent by those vulnerable states.'[84] He underlines that 'the veto of the most vulnerable would be available only in extreme cases, to protect against interference that could otherwise destroy the rights of those affected, such as through obliteration of a State by rising sea levels.'[85] Even though it is unrealistic that States comply with this obligation, as States cannot be forced to do so, Knox suggests that:

> 'Given the massive threat climate change poses to human rights, it is not unrealistic to imagine that states will accept that they have a duty to cooperate to address it, that the content of the duty is informed by the jurisprudence of human rights bodies on environmental harm, and that at a minimum human rights law requires states not to cause the widespread destruction of the human rights of those most vulnerable to climate change.'[86]

In conclusion, extraterritorial jurisdiction over environmental degradation is difficult. The legal bases for extraterritorial jurisdiction over human rights are contested and the procedural approach is of limited use if specific minimum standards for environmental protection are not set. On top of this, especially for environmental degradation due to climate change, the complexity of the situation does not correspond with the environmental human rights jurisprudence of a single polity that experiences both the benefits of economic development and the environmental harm that it engenders. Obviously, it has the responsibility to decide where to strike the balance between the benefits and harms. As Knox pointed out:

> 'A state-by-state consideration of extraterritorial effects of domestic actions would also not […] clearly require states to coordinate their responses with one another. This is an obvious shortcoming with respect to a problem whose sources and victims are all over the world. Without assurances that other States are also reducing their emissions of greenhouse gases, it makes little sense for any State to reduce its own emissions, since doing so would impose economic burdens on the State with little prospect of compensating environmental benefits.'[87]

83 IACtHR, *Saramaka People v. Suriname* 2007.
84 Knox 2009, p. 57.
85 *Ibid.*, p. 58.
86 *Ibid.*, p. 52 onwards.
87 *Ibid.*, p. 52.

### 10.3.2 Duty of cooperation

In 2019 five UN human rights treaty bodies issued a joint statement on human rights and climate change. In this statement, the duty for international co-operation was clarified:

> 'As part of international assistance and co-operation towards the realization of human rights, high-income States should also support adaptation and mitigation efforts in developing countries, by facilitating transfers of green technologies, and by contributing to financing climate mitigation and adaptation. In addition, States must co-operate in good faith in the establishment of global responses addressing climate-related loss and damage suffered by the most vulnerable countries, paying particular attention to safeguarding the rights of those who are at particular risk of climate harm and addressing the devastating impact, including on women, children, persons with disabilties and indigenous peoples.'[88]

Knox concludes that the duty to cooperate is the best way to enhance protection for human rights violations due to climate change.[89] Under the co-operation principle, States have a duty to cooperate to prevent violations of human rights, including violations from global challenges such as climate change. Knox suggests that the duty of cooperation would require States to try to act as a single polity and therefore, 'the international community as a whole would be required to follow the procedural and substantive norms developed by human rights bodies in applying human rights law to environmental harm.'[90] The duty of cooperation will be assed in this paragraph for the general duty to assist in achieving progressively the full realization of the rights recognized in the Covenant and the duty to offer or provide humanitarian assistance.

*Obligations to provide assistance*

The United Nations Charter provides that States must cooperate with each other and the UN in promoting fundamental rights.[91] The duty of cooperation to assist in achieving progressively the full realization of human rights is

88 Joint Statement on "Human Rights and Climate Change" by the Committee on the Elimination of Discrimination Against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, the Committee on the Rights of the Child, and the Committee on the Rights of Persons with Disabilities, 16 September 2019, available at https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E.

89 Knox 2009, p. 5 and 6 and Christiansen 2016, p. 99.

90 *Ibid.*, p. 52 onwards.

91 See, e.g. Articles 55 and 56 UN Charter.

generally accepted under human rights law.[92] The United Nations Charter provides that States must cooperate with each other and the UN in promoting fundamental rights (Art 56, 55(c)) and the ICESCR refers explicitly to international assistance and cooperation as a means of realizing the rights contained therein (Art 2, 11, 15, 22 and 23). This has been reiterated by the CESCR in its general comments relating to the implementation of specific rights guaranteed by the Covenant[93] and by various UN special rapporteurs.[94] This obligation to cooperate is strengthened by the UNFCCC adaptation provisions which require that: All Parties shall:

> 'Cooperate in preparing for adaptation to the impacts of climate change; develop and elaborate appropriate and integrated plans for coastal zone management, water resources and agriculture, and for the protection and rehabilitation of areas, particularly in Africa, affected by drought and desertification, as well as floods' (Art 4.1(e)) and 'The developed country Parties shall also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects'[95]

Also the CRC (Art 4 and 24 (4)) and the CRPD (Art 32) contain obligations for international cooperation. Also Millennium Development Goal 8 calls for the development of a global partnership for development based on cooperation and support.[96] Also SDG 17:

> 'seeks to strengthen global partnerships to support and achieve the ambitious targets of the 2030 Agenda, bringing together national governments, the international community, civil society, the private sector and other actors. Despite advances in certain areas, more needs to be done to accelerate progress. All stakeholders will have to refocus and intensify their efforts on areas where progress has been slow.'[97]

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92 The OHCHR, Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights, UNGA UN Doc A/HRC/10/61, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, 2009 states that human rights law imposes extraterritorial duties. In para 84-91, the report refers to several CESCR general comments to identify 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 fulfilment of human rights' abroad; and 4 to ensure that international agreements do not adversely affect human rights. See also Knox 2009, p. 492-495.

93 See, in particular, CESCR General comment No. 2 1990, CESCR General Comment No. 3 1990, CESCR, General Comment No. 7 1997, CESCR, General Comment No. 14 2000, and CESCR, General Comment No. 15 2003.

94 For an overview see Oslo Principles on Global Climate Change Obligations. Commentary, p. 47.

95 Art 4.4 UNFCCC.

96 Ammer et al. 2010, p. 56.

97 Sustainable Development Goals Knowledge Platform 2019.

According to de Schutter, 'when read in conjunction with the Charter of the United Nations and the Vienna Declaration, the ICESCR can be understood as establishing obligations by States to uphold the human rights of populations in other States.'[98] He argues that: 'There is a growing recognition […] that the fact of the interdependency of States should lead to impose an extended understanding of State obligations, or an obligation on all States to act jointly in face of collective action problems faced by the international community of States.'[99] The 2009 Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights clarifies that: 'International cooperation to promote and protect human rights lies at the heart of the Charter of the United Nations' and 'States have also committed themselves not only to implement the treaties within their jurisdiction, but also to contribute, through international cooperation, to global implementation. Developed States have a particular responsibility and interest to assist the poorer developing States.'[100]

Several levels of obligations have been suggested. A (conservative) interpretation based on the duty to respect by Craven suggests to recognize that each State is required to ensure that it does not undermine the enjoyment of rights of those in foreign territory.[101] A third possibility, based on the duty to protect, requires 'each State to prevent private actors under its jurisdiction or control from harming human rights in other States.'[102]

Another progressive 'interpretation is that while the primary responsibility for meeting the obligations under the ICESCR remains on the State with jurisdiction over the people concerned, States in a position to assist other States to meet those obligations are required to do so.'[103] This interpretation is very progressive, as it is open ended (as it depends on the availability of resources) and implies positive duties. It can entail both obligations to provide long-term assistance and to respond to emergencies.[104] This 'duty to provide international assistance may be an extension of the duty to fulfil, which may have

98 Schutter de 2006, p. 18 and 19.
99 *Ibid.*, p. 18 and 19.
100 UNGA UN Doc A/HRC/10/61, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, para 85.
101 The CESCR has regularly applied this duty of non-interference, with particular reference to the rights to health, food, and water. See CESCR, General Comment No. 15 2003, and CESCR, General Comment No. 14 2000, and CESCR, General Comment No. 12 1999.
102 Oslo Principles on Global Climate Change Obligations. Commentary, p. 49. See for example see CESCR General Comment 14 2000: 'States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means.'
103 Knox 2009, p. 47.
104 See § 10.3.3.

less political support than more widely accepted duties to respect or protect.'[105] This duty to provide international assistance as an extension of the duty to fulfil, has been considered controversial, given its emphasis on positive State action in other countries. However, it is gaining acceptance in the human rights community as a secondary or subsidiary obligation that applies if the domestic State for reasons beyond its control fails to fulfil economic, social and cultural rights and when measures taken to respect and protect are not sufficient.[106]

Ammer, Nowak and Hafner identify three additional limitations: (1) the domestic State needs to ask for assistance of third States; (2) the extraterritorial obligations only have to be accomplished progressively; and (3) the obligation to assist only applies for achieving minimum standards of basic human rights.[107] In the case of climate change, this could be the foundation of an obligation for high carbon emitting States to adopt mitigation policies, and to assist poorer States in adopting mitigation and adaptation measures.

*The Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*

The Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights[108] constitute an international expert opinion, restating human rights law on extraterritorial obligations. They were issued on 28 September 2011 by 40 international law experts from all regions of the world, including current and former members of international human rights treaty bodies, regional human rights bodies, as well as former and current Special Rapporteurs of the United Nations Human Rights Council. The Maastricht Principles clarify extraterritorial obligations of States on the basis of current international law.[109]

The Maastricht Principles confirm that all States have obligations to respect, protect and fulfil human rights, both within their territories and extraterri-

105 *Ibid.*, p. 48.

106 See for example Economic and Social Council UN Doc E/CN.4/2005/47, The right to food. Report of the Special Rapporteur on the right to food, Jean Ziegler, 24 January 2005, para 44: 'States which do not have sufficient resources at their disposal to ensure economic, social and cultural rights, including the right to food, have an obligation to seek international support, and States which are in a position to assist others have a obligation to do so.' And para 45: 'States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required.' Ziegler also points out that States have further recognized their collective responsibility In the United Nations Millennium Declaration, as well as in the World Food Summit Declaration and Plan of Action (1996) and the United Nations Millennium Declaration, paras. 2 and 19.

107 Ammer et al. 2010, p. 56.

108 Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights 2011, available at: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23.

109 Michéle 2014.

torially (Principle 3). These 'extraterritorial obligations encompass: a) obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory;[110] and b) obligations to take action, separately, and jointly through international cooperation, to realize human rights universally.' (Principle 8). The scope of the jurisdiction, supported by the Maastricht Principles is much wider than the 'effective control' criterium that is applied in the context of transboundary harm. The Maastricht Principles presume jurisdiction in

> '(a) situations over which the State exercises authority or effective control; (b) situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory; and (c) situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law.' (Principle 9).

With respect to the obligation to fulfil economic, social and cultural rights extraterritorially the Maastricht Principles hold that 'All States must take action, separately, and jointly through international cooperation.' (principle 28).

> 'States must: a) prioritize the realisation of the rights of disadvantaged, marginalized and vulnerable groups; b) prioritize core obligations to realize minimum essential levels of economic, social and cultural rights, and move as expeditiously and effectively as possible towards the full realization of economic, social and cultural rights; c) observe international human rights standards, including the right to self-determination and the right to participate in decision-making, as well as the principles of non-discrimination and equality, including gender equality, transparency, and accountability; and d) avoid any retrogressive measures or else discharge their burden to demonstrate that such measures are duly justified by reference to the full range of human rights obligations, and are only taken after a comprehensive examination of alternatives.' (Principle 32).

'As part of the broader obligation of international cooperation, States, acting separately and jointly, that are in a position to do so, must provide international assistance to contribute to the fulfilment of economic, social and cultural rights in other States' (Principle 33). The Maastricht Principles are often quoted in academic literature and human rights reports. However, few States have endorsed these. Therefore, their status in international law remains uncertain, if not controversial.

110 See § 10.3.1.

*Obligations to provide humanitarian assistance*

Ammer et al. pointed out that: 'An obligation […] to claim [or accept] humanitarian aid does not exist de lege lata. However, a current trend towards changing this position can be observed.'[111] Various non-binding instruments call for the recognition of a right to humanitarian aid and the responsibility to provide it.[112] 'Some argue that the right to humanitarian aid is part of the common law, however this is controversial.'[113] 'While a general international legal obligation of the international community has not yet been established, it is argued that third States should contribute – in accordance to their capacities – to the mitigation of disasters. Third States have the right to offer aid.'[114] In his report to the Commission on Human Rights, the Representative of the Secretary-General, Deng concludes that: 'a refusal to accept an offer of international cooperation and assistance where necessary to realizing subsistence rights recognized under the treaty could be considered to constitute, at the least, "a deliberately retrogressive measure" and, at most, a breach of treaty obligations.'[115]

The international community, however, has been cautious to recognize a duty of a State to accept offers of humanitarian assistance. The right to offer humanitarian assistance to other States in case of disaster or similar emergency is implicitly recognized. At the same time, it is underlined that 'the sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations. In this context, humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country'.[116] Despite the widely held view that sovereignty is in decline it continues to define the context of human rights.[117]

With regard to cooperation in the context of disaster relief assistance, the General Assembly recognized, in Resolution 46/182, that: 'The magnitude and duration of many emergencies may be beyond the response capacity of many affected countries. International cooperation to address emergency situations and to strengthen the response capacity of affected countries is thus of great importance. Such cooperation should be provided in accordance with inter-

111 See Ammer et al. 2010, p. 7.

112 For example, the Mohonk Criteria for Humanitarian Assistance in Complex Emergencies, the Principles and Rules for Red Cross and Red Crescent Disaster Relief and the Guiding Principles on the Right to Humanitarian Assistance. On the obligation to seek international assistance and cooperation, see Principle 34 Maastricht Principles.

113 See Ammer et al. 2010, p. 60.

114 *Ibid.*, p. 7.

115 Economic and Social Council, UN Doc E/CN.4/1996/52/Add.2, Report, Compilation and analysis of legal norms, 1995, at 354.

116 General Assembly, Strengthening of the coordination of humanitarian emergency assistance of the United Nations, UN Doc A/RES/46/182 1991 and Economic and Social Council, UN Doc E/CN.4/1996/52/Add.2.

117 Humphreys, Robinson 2010, p. 159 and 160.

national law and national laws.'[118] As is reflected in the Sendai Framework's guiding principles, paragraph 19 (a), indicate that: 'Each State has the primary responsibility to prevent and reduce disaster risk, including through international, regional, subregional, transboundary and bilateral cooperation.' The duty to prevent disaster risks is also recognized in the Cancún Adaptation Framework, which invites Parties to enhance action on adaptation, taking into account their common but differentiated responsibilities and capacities as well as their priorities and circumstances.[119] The Draft Articles on the Protection of Persons in the Event of Disasters underline that the obligation to reduce risk implies measures primarily taken at the domestic level and rejects any implication of a collective obligation.[120] However, cooperation is enshrined in general terms in draft Article 7 and more in detail in draft Article 8 that covers the phase following the onset of a disaster or in the post-disaster recovery phase and focuses on cooperation of a reciprocal nature.[121]

### 10.3.3 R2P

The concept of R2P[122] focuses on the responsibility of every State towards protection of its own population from certain threats.[123] If a State is unable or unwilling to take its responsibility, the international community should bear the responsibility.[124] Some have argued that when assistance after major disasters is blocked, stalled, or otherwise held up by governments that fear such assistance would somehow jeopardize their control or violate their sovereignty, this may invoke the R2P for the international community.[125]

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118 General Assembly, Strengthening of the coordination of humanitarian emergency assistance of the United Nations, UN Doc A/RES/46/182 1991, Annex, para 5.

119 The Cancun Adaptation Framework 2010, para 14.

120 ILC, Draft Articles on the Protection of Persons in the Event of Disasters, with commentaries 2016, comment 8 on Article 9. See also § 4.1.1 and 4.2.1.

121 *Ibid.*

122 This text is based on a previous article 'Environmental Degradation and the Role of the International Community: Is there a lesson to be learnt from R2P? Vliet van der 2014a.

123 The original document is the World Summit Outcome, UN Res. A/60/1, 24 October 2005 para 138 and 139.

124 Kraler, Noack & Cernei 2011, p. 65.

125 Deng, former Representative of the UN Secretary-General on Internally Displaced Persons, stated that 'International concern with these fundamental human rights issues is in full accord with the cardinal principle of sovereignty. No Government can legitimately invoke sovereignty for the deliberate purpose of starving its population to death or otherwise denying them access to protection and resources vital to their survival and well-being. The presumption that if a Government is incapable of providing protection and assistance then the international community should act, either on the invitation of the host country or with international consensus, to fill the vacuum is in consonance with the principle of sovereignty.' UN Commission on Human Rights, E/CN.4/1993/35 1993, para 151. See also Mooney 2008.

An example often referred to is that of the Cyclone Nargis that hit Burma and the regime refused to allow international aid to the victims.[126]

The initial concept of R2P included phenomena such as famines and 'overwhelming natural or environmental catastrophes, where the State concerned is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened'. However, the UN Security Council endorsed a narrow understanding of the concept in its resolution 1674 and considers only 'genocide, war crimes, ethnic cleansing and crimes against humanity'.[127] As it is very difficult to qualify environmental degradation as one of these causes, I argue that R2P does not apply for environmentally forced migration and does not allow interference by the international community with the national sovereignty of the State hit by disaster. This however does not leave the concept of R2P useless in the context of environmentally forced migration, as an obligation to protect environmental refugees could be based on the same obligation that forms the basis of the establishment of the R2P regime itself: the international obligation to prevent large scale suffering. This obligation corresponds with changed notions regarding State sovereignty and with the moral and legal obligations emanating from various human rights treaties.

The system of R2P is based on the assumption that the severity and scale of the suffering forms an adequate basis for the responsibility of the international community to protect the victims. R2P demonstrates the political will of the international community to accept responsibility when large scale suffering goes unanswered. This could serve as a basis for protection against large scale suffering due to environmental degradation (as was included in the original draft).

A system for the protection of environmental refugees, based on the blueprint of R2P would have to reflect the same pillar framework as the concept of R2P. Under each pillar, there is a continuum of graduated policy instruments focusing on three different stages: the responsibility to prevent,[128] to react[129] and to rebuild.[130] The primary responsibility for protection of environmental refugees must lie with the national State (pillar 1). States should for example do field based research, set up proper systems of compensation, emergency

126 See for example Ford 2009.

127 UNSC UN Doc S/RES/1674 2006, Resolution 1674, 2006, para 4.

128 Prevention in environmental degradation will entail the prevention of the environmental degradation itself mitigation and prevention of forced migration as a result of environmental degradation adaptation.

129 The reaction to forced migration entails offering protection during the flight or while waiting for a possible returnpreferably in the same region. If return is not possible the reaction would extend to a responsibility to resettle those people.

130 The phase of rebuilding will focus on prepping areas to make them fit for habitation, in order to make it possible for people to return home. If it is not possible to return home, the international community has a responsibility to rebuild a community in a different place.

relief, or compensation and establish other forms of good governance. The assistance of the international community encouraging States to meet their responsibilities under pillar one can be expressed through dialogue, education and training on human rights and humanitarian standards and norms.[131] If national States are unable to deal with the problem of environmental refugees by themselves, the international community should help the national State to protect its (potential[132]) environmental refugees. The national State would be monitoring the action, while the international community is assisting for example by protecting environmental refugees during their flight, to operate refugee camps or to offer emergency relief (pillar 2). The international community only takes over the responsibility from the national State if the national State is unable to protect its environmental refugees and request for help[133] (pillar 3). Interventions without request is conceivable under extreme circumstances, for example when States adopt a strategy to negatively affect minorities by not protecting them or expelling them to areas prone to degradation.[134] In that case the international community will be responsible for protecting the environmental refugees and to work towards their return home or to resettlement. As with R2P the focus with environmental refugees should be on prevention. As the highest impact of environmental degradation occurs in developing countries, unable to carry the burden, the role of the international community herein is crucial.

An important aspect of the R2P is that the actions under the different pillars are interwoven and can take place at the same time. This integral approach could offer huge advantages in the field of environmental refugees. While a State can put in the effort to protect environmental refugees by its best abilities, the international community might assist with financial or technical support (under pillar 2) and take over the protection of refugee camps or coordinate emergency relief if the national State is unable to do so (pillar 3). The strength of the R2P approach is that it puts an emphasis on forging common strategy rather than on proposing costly new strategies. There are many tools available under R2P, that can be used in a coordinated way to address environmental

131 UNGA UN Doc A/63/677 Implementing the Responsibility to Protect. Report of the Secretary General, 12 January 2009.

132 As with R2P the focus with environmental refugees should be on prevention, for example: by establishing legal rules to prevent pollution, establishing early warning systems, doing field research and putting up systems of good governance. As the highest impact of environmental degradation occurs in developing countries, unable to carry the burden, the role of the international community herein is crucial. If the R2P model would be partially adopted, the assistance of states in the prevention of environmentally forced migration would be -much more than the current support in the form of development aid- a legal obligation. van der Vliet 2014, p. 75.

133 In the original R2P concept this request for help is not required, but it would be hard to find support for intervention of the international community without consent of the host state.

134 Some authors argue that in this situation R2P applies, e.g. Ford 2009.

degradation. R2P is therefore instrumental as a regulatory framework for co-operation between and action by States and non-State actors.[135]

Applying the systematics and tools of R2P to environmental degradation can lead to the following toolbox:

Figure 12: Toolbox for the protection of victims of environmental degradation[136]

| | *Responsibility* | *Action* | *Tools: Prevent* | *Tools: React* | *Tools: Rebuild* |
|---|---|---|---|---|---|
| Pillar 1 | State | Protect | - Good governance<br>- Economic development<br>- Detailed field based analysis | - Emergency relief<br>- Protect human rights | - Political system<br>- Economic and social services<br>- Constitutional and legal sector<br>- Security sector |
| Pillar 2 | International community | Assist | - International assistance for domestic measures<br>- Early warning mechanisms<br>- Good governance<br>- Economic development | - Emergency relief<br>- Protect human rights | - Economic reconstruction<br>- Refugee return<br>- Planned and voluntary resettlement over longer periods of time |
| Pillar 3 | International community | Take collective action | - Climate treaties<br>- Funds | - Emergency assistance<br>- Ending violence<br>- Safe havens<br>- Protection of human rights<br>- Protection of aid<br>- Military protection of refugee camps | - Economic reconstruction<br>- Refugee return<br>- Transnational justice<br>- Legal order<br>- UN peace building operations<br>- UN interim administration |

135 As is one of the functions of international law, see Schrijver 2012, p. 1296.

136 Table designed by the author and Rademaker and based on Biermann, Boas 2010, p. 60-88; Evans 2009, and Voorhoeve 2007. Table has previously been published in Vliet van der 2014.

## 10.4 INTERNALLY DISPLACED PERSONS

Given the likelihood that internally forced displacement will predominate, the Guiding Principles fulfil a crucial role. The Guiding Principles mainly focus on the responsibilities of home States. In practice, some elements of the Guiding Principles still need clarification. For example, it is unclear when, if and how those displaced as a result of slow-onset disasters will be protected. Protection will be enhanced by clarifying the concept and different types of environmentally forced migration. Also a better rate of embedding of the Guiding Principles is required.[137] Efforts should be made for better national embedding and implementation. This falls outside the scope of this research, as these initiatives take place at the national level. However, as the States with the most IDPs are generally developing States, a logical next step is to assess how international institutions can support home States in protecting IDPs.

The concept of environmentally forced migration is more and more reflected in the actions of these international institutions. The '"Review of UN Entities" Mandates' study found either direct and indirect references to displacement and migration issues to climate change in over half of the forty UN entities' recent strategic policy documents.'[138] 'Several UN entities specifically highlight climate change, displacement and migration-related issues in their strategy documents.'[139] References include both durable solutions for displacement and preparations for potential displacement. Also, in practice, several UN institutions provide assistance to displaced people in disasters, recognizing climate change as contributing to hazards that lead to disasters (for example ILC, OCHA, UN-Habitat).[140] 'ESCAP, ILO, OHCHR, UNESCO and UNU-EHS have made significant contributions in the areas of research and advocacy to increase

137 Field research in four countries has indicated that the Guiding Principles are very weakly embedded Bangladesh, Kenya and Ghana and were not implemented in Vietnam. In all four countries and compliance was extremely poor. Zetter 2011, p. 58.

138 'UN entities ILC, IOM, ISDR, OCHA, UNDP, UNFCCC, UNESCO, UN-Habitat, UNHCR also act as secretariats and provide substantive support to States for international agreements and processes relevant to disaster displacement and climate change.' In The Warsaw International Mechanism For Loss And Damage Associated With Climate Change Impacts. Task Force on Displacement. 2018, p. 5, available at: https://unfccc.int/sites/default/files/resource/WIM%20TFD%20II.3%20Output.pdf.

139 *Ibid.*, p. 5. ESCAP, FAO, ILO, IOM, OHCHR, UNHCR, UNESCO, UNFCCC, UNU-EHS

140 'Or their strategies identify displaced people as a vulnerable group requiring specific attention in their broader work related to climate change, humanitarian response to disasters, or disaster risk reduction: UNDP, UNFPA, UNICEF, UNISDR, UN Women, WFP, WHO, World Bank. Disaster displacement, including related to climate change, is addressed system-wide through a spectrum of activities, such as: disaster risk reduction, infrastructure development, livelihoods to build resilience, emergency assistance, human rights protection, addressing cultural loss, migration management, planned relocation assistance, and assistance to access climate finance.' In The Warsaw International Mechanism For Loss And Damage Associated With Climate Change Impacts. Task Force on Displacement. 2018, p. 5 and 6.

understanding about how climate change impacts human mobility.'[141] Furthermore, key development actors, such as 'UNDP and the World Bank, have also more clearly emphasized their important role in addressing displacement.'[142] All these actions reflect a growing awareness of a global responsibility for environmentally forced migration. The recognition of the topic by such a broad array of international institutions shows at least an awareness that some of the affected States will be unable to deal with the consequences of disasters on a national scale.

The Platform on Disaster Displacement concludes that there is a 'gap in terms of dedicated responsibility for normative and policy development on the specific protection needs of disaster displaced people, including related to climate change.' It also concludes that 'the UN currently lacks a system-wide lead, coordination mechanism, or strategy on internal and cross-border disaster displacement, including related to climate change.'[143] Therefore, improved coordination to assist States could improve protection possibilities. In the words of the Platform on Disaster Displacement: 'The lack of overall leadership also has implications for the UN system's ability to provide coordinated programme country-level support for States most affected by displacement related to climate change, and to ensure coordinated contributions to the implementation of relevant international frameworks and processes.'[144] However, it is unclear which institution should take the lead and coordinate actions, as environmentally forced migration is a problem with a root in so many different areas that are relevant to a broad spectrum of international institutions. According to the Mary Robinson Foundation, this policy coherence can be established for example by ensuring that OHCHR has a role in engaging on the Taskforce on Displacement under the UNFCCC as well as developing the UNFCCC's role, and hence the climate dimension, of migration instruments. The Foundation pointed out that: currently 'country delegations to the UNFCCC, whose members make up the decision making apparatus, including the Executive Committee of the Warsaw Mechanism, do not necessarily include human rights experts as part of their delegations.'[145] Policy coherence may be one of the most effective ways to deal with the consequences of environmentally forced migration. It will be very difficult however to achieve the integration of a broad range of instruments with very different focus, aim and enforcement mechanisms (see also part IV).

141 *Ibid.*, p. 6.
142 *Ibid.*, p. 6.
143 *Ibid.*, p. 7.
144 *Ibid.*, p. 8.
145 Mary Robinson Foundation – Climate Justice 2016, p. 8.