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Addressing Climate Change through International Human Rights Law: From (Extra)territoriality to Common Concern of Humankind

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Abstract:

International human rights law (IHRL) offers potential responses to the consequences of climate change. However, IHRL's focus on territorial jurisdiction and causation-based allocation of obligations does not match the global nature of climate change impacts and their indirect causation. The primary aim of this article is to respond to the jurisdictional challenge of IHRL in the context of climate change, including its indirect, slow-onset consequences such as climate change migration. It does so by suggesting a departure from (extra)territoriality and an embrace of global international cooperation obligations in IHRL. The notion of common concern of humankind (CCH) in international environmental law offers conceptual inspiration for the manner in which burden sharing between states may facilitate international cooperation in response to global problems. Such a reconfiguration of the jurisdictional tenets of IHRL is central to enabling a meaningful human rights response to climate change's harmful consequences.

List of keywords: climate change; international environmental law; international human rights law; common but differentiated responsibility; jurisdiction; common concern of humankind

1. Introduction

The dire consequences of climate change, including extreme weather events, rising sea levels and associated displacement, pose a considerable challenge for international environmental law (IEL).¹ IEL can make an important contribution to climate change adaptation and mitigation, but it is not well-suited to offering remedies to victims of the harmful consequences of climate change. International human rights law (IHRL) arguably may offer an alternative.²

IHRL allocates obligations to the territorial state concerned through the notion of jurisdiction and focuses on causation to establish responsibility for violations. However, climate change is caused by global phenomena, not limited to the territorial state, and it is often difficult to identify any direct causal link to certain acts or omissions by a particular state. The territorial tenets of IHRL have been identified as a major shortcoming in the context of the human rights-environment discourse.³ The doctrinal focus of IHRL on territoriality has undergone modest changes in restricted cases, where extraterritorial jurisdiction has been recognized. However, even an embrace by IHRL of extraterritorial jurisdiction would not allow for a suitable response to the consequences of climate change. Extraterritorial jurisdiction either requires control over territory or a person or, as a minimum, a direct causal link. Climate change impacts are characterized by the absence of any of these factors. Jurisdiction remains an inadequate attribution mechanism in the face of the global nature of climate change. Recourse to IHRL for the purpose of remedying climate change-related harm is therefore doomed to fail. As such, climate change fundamentally challenges the central tenets of IHRL.

¹ See Intergovernmental Panel on Climate Change (IPCC), *AR 5: Climate Change 2014 – Impacts, Adaptation, Mitigation and Vulnerability*, Working Group II, Summary for Policymakers (IPCC, 2014), available at: <https://www.ipcc.ch/report/ar5/wg2>. See also, C.P. Carlarne, K.R. Gray & R.G. Tarasofsky, 'International Climate Change Law: Mapping the Field' in C.P. Carlarne, K.R. Gray & R.G. Tarasofsky (eds), *The Oxford Handbook of International Environmental Law* (Oxford, 2016), pp. 3-25.

² J.H. Knox, 'Human Rights Principles and Climate Change', in Carlarne, Gray & Tarasofsky (eds), *ibid.*, pp. 213-38.

³ See Section 2.3 below.

As it is dominated by issues of a truly global nature, IEL has the potential to offer conceptual inspiration for moving beyond the constraints of jurisdiction that characterize IHRL. We argue that it is particularly the common concern of humankind (CCH) concept in IEL, geared towards the establishment of burden-sharing regimes based on the capacity to respond to global common interests, that warrants attention. The preambles of the United Nations Framework Convention on Climate Change (UNFCCC)⁴ and Paris Agreement⁵ designate the consequences of climate change as a CCH, and accordingly provide for differential treatment through the common but differentiated responsibilities and respective capabilities principle. The designation of climate change and its effects as a common concern imply that adverse effects on the observance of human rights fall under the purview of the common concern. This recognition points towards a conceptual link between the common concern and IHRL. A transposition of relevant facets of the CCH to IHRL may be useful to operationalize states' global human rights obligations.

This article responds to the jurisdictional challenge of IHRL in the context of the human rights-environment relationship, particularly on the issue of the consequences of climate change for victims of its harmful impacts. Accordingly, the second section of this article briefly introduces the relationship between human rights and environmental protection, in order to consider the potential contribution of IHRL for addressing climate change impacts. This section acknowledges the limitations of jurisdiction in IHRL, which diminishes the utility of the IHRL framework in the context of climate change. The recognition of the limitations of IHRL for environmental protection leads us to reflect, in the third section of this article, on the promise held by the global obligations concept in the Maastricht Principles. A need to clarify the content of global obligations then directs our gaze to the conceptual lessons offered by the

⁴ New York, NY (US), 9 May 1992, in force 21 Mar. 1994, available at: <http://unfccc.int>.

⁵ Paris (France), 12 Dec. 2015, in force 4 Nov. 2016 available at: http://unfccc.int/paris_agreement/items/9485.php.

burden-sharing mechanism in terms of the CCH concept in IEL. Thus, the fourth section explores how these notions could be integrated into IHRL. We argue for a reconfiguration of the jurisdictional tenets of IHRL, which moves beyond the notion of (extra-)territorial jurisdiction to respond to global challenges. It is only in this manner that IHRL may be able to respond to climate change in a meaningful way. As such, we advocate a revision of the doctrinal bedrock of IHRL, so that this field of law may be used to complement IEL. To support our discussion, the fifth section of this article uses a hypothetical case of gradual migration between developing states, in which the adverse impacts of climate change play a significant role. The phenomenon of climate change migration appropriately illustrates some of the problems with causation and territoriality under traditional IHRL models. Section six concludes the discussion.

2. International human rights law and international environmental law in the era of climate change: between resonance and dissonance

The complex relationship between environmental protection and IHRL has gained prominence in IEL.⁶ Treating environmental protection as a human rights issue implies that consequences of environmental degradation on individuals may be directly addressed through a human rights framework.⁷ Furthermore, the utilization of the human rights framework may

⁶ It is not the intent of the authors to reiterate the discourse on the relationship between human rights and environmental protection. For one of the first important scholarly contributions, see A.E. Boyle & M. Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press, 1996); For a recent authoritative discussion, see A.E. Boyle, 'Human Rights and the Environment: Where Next?' (2013) 23(3) *European Journal of International Law*, pp. 613-42. See also H. Leib, *Human Rights and the Environment Philosophical, Theoretical and Legal Perspectives* (Martinus Nijhoff Publishers, 2011); P.-M. Dupuy & J.E. Viñuales *International Environmental Law* (Cambridge University Press, 2018); ch. 4, pp. 107-46 & ch. 10, pp. 357-409; and J.R. May & E. Daly, *Human Rights and the Environment: Legality, Indivisibility, Dignity and Geography* (Edward Elgar, 2019).

⁷ Boyle, *ibid*, p. 613.

secure higher environmental standards that are based on state obligations to control pollution.⁸

Another aspect of the environmental dimension of IHRL is the idea that an environmental right should exist on the international plane.⁹

Environmental rights have been incorporated in various constitutions,¹⁰ as well as regional instruments such as the African Charter on Human and Peoples Rights,¹¹ but insufficient support exists for such a right at the international level.¹² The importance of the link between environmental protection and human rights was already recognized in the 1972 Stockholm Declaration.¹³ However, subsequent IEL instruments, particularly multilateral environmental agreements, ignored this link. A number of resolutions of the United Nations (UN) Human Rights Council (HRC) have dealt with the interrelationship between the environment and human rights.¹⁴ More recently, these have focused specifically on human rights and climate change.¹⁵ The international climate change regime has also taken note of the relationship between human rights and climate change.¹⁶ The Preamble to the Paris Agreement

⁸ Ibid.

⁹ See, e.g., M. Soveroski, 'Environmental Rights versus Environmental Wrongs: Forum over Substance' (2008) 16(3) *Review of European Community & International Environmental Law*, pp. 261-73.

¹⁰ See J.R. May & E. Daly, *Global Environmental Constitutionalism* (Cambridge University Press, 2014).

¹¹ Art. 24 reads: 'All peoples shall have the right to a general satisfactory environment favourable to their development'. See W. Scholtz, 'Human Rights and the Environment in the African Union Context', in A. Grear & L.J. Kotzé (eds), *Research Handbook on Human Rights and the Environment* (Edward Elgar, 2015), pp. 401-20; A. Meijknecht, 'The Contribution of the Inter-American Human Rights System to Sustainable Development', in W. Scholtz & J. Verschuuren (eds) *Regional Environmental Law: Transregional Comparative Lessons in Pursuit of Sustainable Development* (Edward Elgar, 2015), pp. 177-219.

¹² L.J. Kotzé, 'In Search of a Right to a Healthy Environment in International Law', in J.H. Knox & R. Pejan (eds), *Human Rights and a Healthy Environment* (Cambridge University Press, 2018) pp. 136-54.

¹³ United Nations Conference on the Human Environment 1972, Stockholm (Sweden), 16 Jun. 1972, UN Doc. A/Conf.48/14/Rev. 1 (1973), available at: <http://www.unep.org/documents.multilingual/default.asp?documentid=97&articleid=1503>. Principle 1 of the Stockholm Declaration refers to a human's 'fundamental right to ... adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being', whereas there is no similar formulation in the 1992 Rio Declaration, adopted by the UN Conference on Environment and Development, Rio de Janeiro (Brazil), 3-14 June 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. I), 14 June 1992, available at: <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>.

¹⁴ See n. 4 above.

¹⁵ Resolution 10/4 of the UNHRC ('Human Rights and Climate Change').

¹⁶ See para 8 of Decision 1/CP.16 adopted at the 16th Conference of the Parties (COP) of the UNFCCC, which emphasizes that 'parties should in all climate change related actions, fully respect human rights' Decision 1/CP.16, The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long Term Cooperative Action under the Convention, FCCC/CP/2010/7/Add.1, 15 March 2011.

of 2015 acknowledges that '[p]arties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights.'¹⁷

In his 2016 Annual Report to the UN HRC on human rights obligations relating to climate change, the (then) Special Rapporteur on human rights and the environment, John H. Knox, identified 'the obligation to protect against the infringement of human rights by climate change'.¹⁸ Given the foreseeable nature of climate change's adverse impacts on human rights, human rights obligations extend to climate protection measures, including those with respect to mitigation and adaptation.¹⁹ One other overture linking human rights to climate change may materialize if the right to a healthy and clean environment, as proposed by Knox in the context of the Framework Principles on Human Rights and the Environment, is recognized internationally by states.²⁰

In fact, the Inter-American Court of Human Rights (IACtHR) has already broken ground in this regard. In its 2017 Advisory Opinion OC 23/17 on the environment and human rights, the Court noted that the right to a healthy environment is 'included among the economic, social and cultural rights protected by Article 26 of the American Convention'.²¹ A more recent expression is included in the Court's 2020 judgment in the case of *Lhaka Honhat (Nuestra Tierra) v. Argentina*, where the Court recognized the right to a healthy environment and the obligations of states to respect and protect this right, particularly in respect of

¹⁷ N. 5 above.

¹⁸ UNHCR, *Annual Report of the Special Rapporteur on Human Rights and the Environment on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, A/HRC/31/52, 1 Feb. 2016, para 33.

¹⁹ Ibid.; see also UNHRC, *General Comment 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, CCPR/C/GC/36, 30 Oct. 2018, para. 7, 26 & 62; UNHRC, *Portillo Cáceres v. Paraguay*, CCPR/C/126/D/2751/2016, 25 Jul. 2019, par. 7.3. – 7.6. (regarding protection from environmental harm more generally); UNHRC, *Teitiota v. New Zealand*, CCPR/C/127/D/2728/2016, 24 Oct. 2019, par. 9.8. – 9.14. (implicitly, regarding protection from climate change effects in particular).

²⁰ J. Knox, *Framework Principles on Human Rights and the Environment* A/HRC/37/59, 24 February 2018.

²¹ Inter-American Court of Human Rights, Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia - The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of The Rights to Life and To Personal Integrity: Interpretation and Scope of Articles 4(1) And 5(1) in Relation to Articles 1(1) And 2 of The American Convention on Human Rights), 15 Nov. 2017, para 57.

communities that depend on the environment for their livelihoods and are therefore in a more vulnerable situation.²²

2.2. Contribution of international human rights law to international environmental law

Human rights law can serve to highlight the human aspects of predominantly environmental issues, such as climate change, and assist in formulating responses in three ways. Firstly, human rights law focuses on the rights-holder as its central concern in response to asymmetries and power imbalances. Secondly, rights-based approaches can bring non-discrimination, empowerment, participation and accountability as guiding principles to climate change-related issues. Thirdly, human rights law offers a more specific protection toolkit against vulnerability in the context of climate change, particularly in conceptualizing a right to effective remedy.

The conceptual basis of human rights rests on the centrality of the rights-holder. Being the holder of rights that should be respected, protected, fulfilled and promoted is important, as rights accord protections and entitlements, as well as remedies when such protections and

²² Inter-American Court of Human Rights, *Caso Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) v. Argentina*, Merits, Reparations and Costs, 6 Feb. 2020, paras 202 and 209. In paragraph 209, the judgment states: 'Además, la Corte ha tenido en cuenta que diversos derechos pueden verse afectados a partir de problemáticas ambientales, y que ello "puede darse con mayor intensidad en determinados grupos en situación de vulnerabilidad", entre los que se encuentran los pueblos indígenas y "las comunidades que dependen, económicamente o para su supervivencia, fundamentalmente de los recursos ambientales, [como] las áreas forestales o los dominios fluviales". Por lo dicho "con base en 'la normativa internacional de derechos humanos, los Estados están jurídicamente obligados a hacer frente a esas vulnerabilidades, de conformidad con el principio de igualdad y no discriminación'. [Footnotes omitted](Translation: In addition, the Court has taken into account the fact that various rights may be affected by environmental problems and that these "may be felt more intensively by certain groups that are in a vulnerable situation", among which are indigenous peoples and "communities that economically depend for their survival fundamentally on environmental resources, [such as] forested areas or river beds". For this reason, "States are under a legal obligation on the basis of international standards of human rights to deal with these vulnerabilities, in conformity with the principles of equality and non-discrimination").

entitlements are found wanting.²³ The centrality of the rights-holder in human rights, when extrapolated to climate change-related issues, may serve as a basis to guide human-centred responses.

Treating climate change as a human rights problem subject to a legal duty of cooperation helps ensure that governments do not lose sight of the effects climate change has on people and communities, including those abroad. IHRL illuminates the procedural requirements underlying global solutions to climate change. For instance, as Knox has noted, IHRL clarifies not only the standard that a climate agreement must meet, but also the process leading to that agreement.²⁴ In this regard, a human rights-based approach may provide human-centred principles to anchor policymaking, including in the domain of IEL, on issues such as climate change migration. A rights-based approach centres on the rights of the rights-holders and the corresponding obligations by duty-bearers, and seeks to empower rights-holders and demand accountability and transparency from duty-bearers.²⁵ The key features of a rights-based approach are participation, equality and non-discrimination, accountability and transparency, empowerment of rights-holders and legality (so-called PANEL principles).²⁶ As Boyle underscores, ‘the importance of public participation in environmental decision-making, access to information, and access to justice’ is a core component of the link between IHRL and IEL.²⁷

The adverse impacts of climate change are expected to fall disproportionately, earlier and more intensely on economically disadvantaged and marginalized people who have a lower ‘ability to cope and recover’.²⁸ A rights-based approach to climate change may in fact shine a

²³ J.H. Knox, ‘Climate Change and Human Rights Law’ (2009) 50(1) *Virginia Journal of International Law*, pp. 163-218, at 213.

²⁴ *Ibid.* at 213.

²⁵ Office of the High Commissioner for Human Rights (OHCHR), *Frequently Asked Questions On a Human Rights-Based Approach to Development Cooperation* (United Nations, 2006), p. 15.

²⁶ European Network of National Human Rights Institutions (ENNHRI), ‘Applying a Human Rights-Based Approach’, available at: <http://ennhri.org/Applying-a-Human-Rights-Based-Approach>.

²⁷ See Boyle, n. 6 above, p. 618.

²⁸ IPCC, *Climate Change 2014: Impacts, Adaptation and Vulnerability* (Cambridge University Press, 2014), pp. 796 and 5, respectively.

light on marginalization and intersectionality, and act as a corrective. Firstly, marginalization and intersectionality become visible through the perspective of rights. Disproportionate vulnerability to the impacts of climate change gives rise to corresponding obligations. Secondly, non-discrimination being a central tenet of the rights-based approach would mean that the rights of individuals and groups prone to marginalization are protected against falling through the cracks. At a more substantive level, a rights-based approach also emphasizes the applicability and the application of climate change-related obligations as put forth in the international human rights frameworks.

Finally, since the proclamation of the Universal Declaration of Human Rights (UDHR),²⁹ IHRL has espoused the right to an effective remedy, although its rise to prominence is much more recent.³⁰ The right to an effective remedy is recognized as a key component of accountability, which ensures the enforceability of norms and standards.³¹ The right to an effective remedy has featured prominently in responses to contemporary human rights problems - a prime example being the UN Guiding Principles on Business and Human Rights, which has designated remedy as one of its three pillars. The right to effective remedy has two facets: the procedural possibility for rights-holders to bring claims of rights violations before competent bodies, and the actual access to remediation or compensation.³² The recognition of a right to effective remedy is an important contribution that IHRL can make to IEL when dealing with the impacts of climate change.³³ In fact, the importance of access to remedy has already been recognized in IEL through the UN Economic Commission for Europe Convention

²⁹ Paris (France), 10 Dec. 1948, GA Res. 217A (III), UN Doc. A/810, 71, available at: <http://www.un.org/en/universal-declaration-human-rights>.

³⁰ S.B. Starr, 'The Right to an Effective Remedy: Balancing Realism and Aspiration', in M.A. Baderin & M. Ssenyojo (eds), *International Human Rights Law: Six Decades after the UDHR and Beyond* -(Routledge, 2010), pp. 477-98, at 477.

³¹ OHCHR & Center for Economic and Social Rights (CESR) (2013), *Who Will Be Accountable? Human Rights and The Post-2015 Development Agenda* (United Nations, 2013), https://www.cesr.org/sites/default/files/who_will_be_accountable.pdf

³² Ibid.

³³ M. Wewerinke-Singh 'Remedies for Human Rights Violations Caused by Climate Change' (2019) 9(3) *Climate Law*, pp. 224-43.

on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention).³⁴ One must concede, however, that the enforcement system of IHRL as it stands is far from perfect. There are restrictions on public interest litigation particularly because claimants need to be identified. The possibility of launching collective complaints on behalf of unidentified individuals or communities that are adversely affected by breaches of human rights duties remains limited. In addition, existing enforcement mechanisms often focus on individual remediation but not on collective reparations that can be offered to communities, although national climate change litigation has worked to circumvent this problem to an extent.³⁵

2.3. Challenges for IHRL in the context of climate change

Climate change is the quintessential border-defying governance problem. The application of a human rights approach to climate change is therefore not unproblematic. Knox aptly observes that ‘[f]or human rights law to require states to address the entire range of harms caused by climate change, it must impose duties on states with respect to those living outside their territory’.³⁶ The Analytical Study on the Relationship between Human Rights and the Environment by the Office of the High Commissioner for Human Rights (OHCHR) affirms that ‘the key question with regard to the extraterritorial dimension of human rights and

³⁴ Aarhus (Denmark), 25 June 1998, in force 30 Oct. 2001, available at: <http://www.unece.org/env/pp/treatytext.html>.

³⁵ E.g., Urgenda used Art. 3:305A of the Dutch Civil Code, allowing any foundation established in the Netherlands to bring a public interest claim before Dutch courts, using the European Convention on Human Rights (ECHR) as a basis. See Court of First Instance The Hague (Rechtbank Den Haag) 24 June 2015 Stichting Urgenda / Staat der Nederlanden ECLI:NL:RBDHA:2015:7145 (The Hague Court of First Instance *Urgenda*). See J. van Zeben, ‘Establishing a Governmental Duty of Care for Climate Change Mitigation: Will *Urgenda* Turn the Tide?’ (2015) 4(2) *Transnational Environmental Law*, pp. 339-57, and See B. Mayer, ‘*The State of the Netherlands v. Urgenda Foundation: Ruling of the Court of Appeal of The Hague (9 October 2018)*’ (2019) 8(1) *Transnational Environmental Law*, pp. 167-92.

³⁶ Knox, n. 23 above, p. 200.

environment is the spatial scope of the application of human rights law instruments'.³⁷ In the section on the 'extraterritorial dimensions of human rights and the environment',³⁸ the study stresses that this issue provides 'fertile ground for further inquiry'³⁹ in relation to global environmental issues such as climate change.⁴⁰ Hence, '[o]nly by addressing and generating greater understanding about these central questions will vulnerable states and international human rights mechanisms be able to more effectively leverage international human rights law as an effective additional means (outside the UNFCCC) of responding to climate change'.⁴¹ Thus, the utility of IHRL to protect the environment and address the consequences of climate change diminishes considerably if IHRL does not manage to speak to the fundamentally border-defying nature of climate change.

Jurisdiction, as the concept that denotes whether a state can be considered a duty-bearer,⁴² is considered to be primarily territorial in mainstream IHRL. If a state has jurisdiction over an individual or a situation, that state is considered a duty-bearer. The traditional case in which this happens is when an individual is within the territory of a state.

This primary territorial orientation clearly falls short in responding to a borderless challenge like climate change. Several impediments exist to the development of the extraterritorial dimension of human rights in the context of climate change.⁴³ Apart from the political opposition to such an extension, especially by developed states, the circumstances

³⁷ UN General Assembly, *Analytical Study on the Relationship between Human Rights and the Environment. Report of the United Nations High Commissioner of Human Rights, A/HRC/19/34*, 16 Dec. 2011, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-34_en.pdf. UN HRC Resolution 16/11 on human rights and the environment requested the OHCHR to conduct a detailed analytical study on the relationship between human rights and environmental law, A/HRC/RES/16/11, 12 Apr. 2011, available at: https://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.RES.16.11_en.pdf.

³⁸ *Ibid.*, section IX.

³⁹ *Ibid.*, para 64.

⁴⁰ *Ibid.*, para 66. The analytical study further affirms that extraterritorial economic, social and cultural rights are of particular importance in relation to environmental degradation. See para 68.

⁴¹ E. Cameron & M. Limon, 'Restoring the Climate by Realizing Rights: The Role of the International Human Rights System' (2012) 21(3) *Review of European and Comparative International Environmental Law*, pp. 204-19, at 209.

⁴² W. Vandenhoe, 'The J-Word: Driver or Spoiler of Change in Human Rights Law?', in S. Allen, et al. (eds), *The Oxford Handbook of Jurisdiction in International Law* (Oxford University Press, 2019), pp. 413-30.

⁴³ Knox, n. 23 above, p. 210.

surrounding responsibility for the adverse impacts of climate change cause difficulties. It is difficult to establish direct and conclusive causation by high-emitting states of the adverse human rights impacts of climate change in impacted states. Nonetheless, ‘the international community has already agreed that some states bear more responsibility for climate change than others.’⁴⁴ It is therefore highly problematic to locate human rights obligations exclusively within the territorial state, which in many instances has hardly (or not at all) contributed to the human rights threats arising from climate change. There is a clear need to revisit the understanding of who the duty-bearer is in IHRL, so as to be able to engage the responsibility of the emitting states.

In truth, the mainstream understanding of IHRL as being only concerned with the rights of individuals within a state’s borders has been challenged over the last decades through the notion of extraterritorial obligations - that is, human rights obligations of states outside their borders.⁴⁵ Human rights monitoring bodies too increasingly recognize the existence of such extraterritorial obligations.⁴⁶ Yet, human rights courts have mainly dealt with extraterritorial obligations in the field of civil and political rights, and have been reluctant to recognize such obligations outside exceptional circumstances. Such exceptional circumstances, in which the establishment of extraterritorial jurisdiction has been accepted, are only considered to exist when a foreign state exercises effective control over persons or territory outside its own borders

⁴⁴ E. Jakobson, ‘Norm Formalization in International Policy Cooperation: A framework for analysis’, in S. Behrman & A. Kent (eds), *Climate Refugees: Beyond the Legal Impasse?* (Routledge, 2018) at p. 65.

⁴⁵ F. E. G. Coomans & M. T. Kamminga, *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2006); S. Skogly, *Beyond National Borders: States’ Human Rights Obligations in International Cooperation* (Intersentia, 2006); M. E. Salomon, *Global Responsibility for Human Rights – World Poverty and the Development of International Law* (Oxford University Press, 2007); M. Langford, W. Vandenhole, M. Scheinin & W. van Genugten (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press, 2013); W. Vandenhole (ed.), *Challenging Territoriality in Human Rights Law: Building Blocks for a Plural and Diverse Duty-Bearer Regime* (Routledge, 2015).

⁴⁶ CESCR, *General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, E/C.12/GC/24, 10 Aug. 2017, paras 25-37, available at: <https://undocs.org/E/C.12/GC/24>.

- in particular, in the case law of the European Court of Human Rights (ECtHR).⁴⁷ A cause-and-effect approach to extraterritorial jurisdiction can be found primarily in the case law of other human rights enforcement bodies, in particular the UN HRC and the Inter-American Commission on Human Rights (IACHR). A cause-and-effect understanding of jurisdiction means that ‘anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State’.⁴⁸ In *Munaf*, the HRC submitted that a state:

may be responsible for extra-territorial violations of the [International] Covenant [on Civil and Political Rights], if it is a link in the causal chain that would make possible violations in another jurisdiction. Thus, the risk of an extra-territorial violation must be a necessary and foreseeable consequence and must be judged on the knowledge the State party had at the time ...⁴⁹

A state may also be ‘considered responsible as a result of a failure to exercise reasonable due diligence over the relevant extraterritorial activities of ... corporations [that are under that state’s jurisdiction]’.⁵⁰ For the IACHR too, what matters is ‘whether there is a causal nexus between the extraterritorial conduct of the State and the alleged violation’.⁵¹

A further step forward in conceptualizing the human rights obligations of foreign states in the field of economic, social and cultural (ESC) rights was taken with the adoption of the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic,

⁴⁷ See e.g. *Al Skeini and others v. UK* ECtHR App. No. 55721/07, 7 Jul. 2011, paras 130-42. For an extensive discussion of so-called spatial and personal models of jurisdiction, see M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (New York, OUP 2011).

⁴⁸ ECtHR, *Banković and others v Belgium and others* (adm), ECHR 2001-XII 333, para. 75.

⁴⁹ *Mohammad Munaf v Romania*, App. No. 1539/2006, HRC, 13 July 2009, CCPR/C/96/DR/1539/2006, para. 14.2.

⁵⁰ *Basem Ahmed Issa Yassin and Others v Canada*, App. No. 2285/2013, HRC, 26 Oct. 2017 (adm), CCPR/C/120/D/2285/2013, para 6.7.

⁵¹ *Franklin Guillermo Aisalla Molina and Ecuador v Colombia*, Inter-American Commission on Human Rights, 21 October 2010 (adm) Report no. 112/10, para. 98.

Social and Cultural Rights of 2011 (Maastricht Principles).⁵² These principles expand the notion of jurisdiction in IHRL, as they go beyond traditional jurisdictional allocation models of control over persons or territory to include situations in which state actions or omissions bring about foreseeable effects. This additional jurisdictional ‘hook’ allows for a cause-and-effect reading of jurisdiction. In its 2017 Advisory Opinion on the environment and human rights, the IACtHR accepted a similar additional jurisdictional link (beyond spatial and personal jurisdiction) based on the causal link between conduct on a state’s territory and a human rights violation occurring outside its borders.⁵³ The IACtHR did so in the context of recognizing the right to a healthy environment as an autonomous right and as part of the ESC rights guaranteed by the American Convention on Human Rights (ACHR).⁵⁴ This entails, for example, that states can - without necessarily occupying another state’s territory or controlling individuals in that state - violate the human right to water in other riparian states, for instance by reducing the quality or quantity of shared water resources.⁵⁵ Likewise, they can violate the right to a healthy environment without any action outside their territory, by failing to prevent transboundary environmental harm that originates in their territory.⁵⁶ In such instances, the spatial and personal models of jurisdiction fall short, as there is no previous link (be it control over persons or territory) between the state and the individual harmed. Even cause-and-effect jurisdiction falls short of addressing the borderless adverse effects of climate change on human rights, where causal links are much more remote. We therefore argue that in the context of climate change, there is a need for a new attribution ground rather than an artificial stretching of extraterritorial jurisdiction.

⁵² Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, 28 Sept. 2011, available at: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23

⁵³ IACtHR 15 Nov. 2017, Advisory Opinion OC-23/17 on the Environment and Human Rights, para. 101.

⁵⁴ *Ibid.*, paras 57 and 62.

⁵⁵ M.J. Chávarro, *The Human Right to Water: A Legal Comparative Perspective at the International, Regional and Domestic Level* (Intersentia, 2015).

⁵⁶ IACHR 15 Nov. 2017, Advisory Opinion OC-23/17 on the Environment and Human Rights.

3. Beyond extraterritoriality: global obligations

Over the last two decades, an initially territorial approach of jurisdiction has undergone a slow and only very limited expansion to circumscribed cases of extraterritorial jurisdiction.⁵⁷ Even recent developments towards a cause-and-effect jurisdiction do not capture the conceptual challenges posed by climate change, namely, to move beyond causation-based attribution.

Let us consider a hypothetical case of cross-border migration between developing states, to which slow-onset effects of anthropogenic climate change - such as intensifying droughts or recurring floods - are a significant contributing factor. Such a case of climate change migration aptly illustrates the shortcomings of the human rights framework in the instance of climate change, as the absence of an (extraterritorial) jurisdictional link will prevent climate change migrants from claiming fulfilment of their ESC rights from states that have contributed to greenhouse gas (GHG) emissions.⁵⁸ The authors acknowledge broader debates over how population movement related to climate change impacts is to be conceptualized, the characterization of the causal role of climate change, the relationship of these framings to political narratives and processes, and whether such migration represents a set of phenomena that should be addressed distinctly from other forms of migration and/or from other human rights impacts of climate change.⁵⁹ This article does not intend to revisit these debates, or to

⁵⁷ See for a discussion on the meaning of jurisdiction in Human Rights Law: M. den Heijer & R. Lawson, 'Extraterritorial Human Rights and the Concept of Jurisdiction' in M. Langford, W. Vandenhole, M. Scheinin & W. van Genugten (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press, 2013) pp. 153-91.

⁵⁸ U. Beyerlin, 'Environmental Migration and International Law' in H. P. Hestermeyer et. al. (eds), *Coexistence, Cooperation and Solidarity. Liber Amicorum Rüdiger Wolfrum* Volume I (Martinus Nijhoff Publishers, 2011) pp. 319-32, at 328.

⁵⁹ See e.g. B. Mayer, 'Migration in the UNFCCC Workstream on Loss and Damage: An Assessment of Alternative Framings and Conceivable Responses', (2017) 6(1) *Transnational Environmental Law*, pp. 107-29; J. McAdam,

assert that the form of migration described should be addressed as a priority over other human rights effects of climate change. Rather, the specific climate migration phenomenon described – which is already occurring and expected to grow, and which, while multi-causal, also bears a recognized relationship to the impacts of anthropogenic climate change⁶⁰ – has been chosen to illustrate a situation where difficulties in establishing emitting states’ international responsibilities under IHRL are revealed as especially problematic.

In a number of developing countries, rural people are suffering an erosion of their livelihoods as a result of slow-onset weather-related disasters which are intensifying with climate change. Therefore, many are gradually migrating in search of improved livelihood opportunities - mostly within their state of origin, but also across borders to neighbouring developing countries.⁶¹ When crossing an international border, they will not benefit from refugee status and often are not eligible for humanitarian protection arrangements for disaster-displaced persons⁶² - although the Nansen Initiative’s Agenda for Protection has aimed to address this gap by, inter alia, calling for increased use of these and other legal arrangements

Climate Change, Migration and International Law (Oxford University Press, 2012), pp. 15 – 38; F. Gemenne, ‘Climate-induced population displacements in a 4°C+ world’, (2011) 369(1934) *Philosophical Transactions of the Royal Society A*, pp. 182–95.

⁶⁰W. Kälin & H. Entwisle Chapuisat, ‘Displacement in the context of disasters and climate change’, in S. C. Breau & K.L.H. Samuel (eds), *Research Handbook on Disasters and International Law* (Edward Elgar, 2016), pp. 358-82, at 361. On the growing prevalence of this type of migration in future, see International Organization for Migration, ‘Migration, Climate Change and the Environment: A Complex Nexus’, available at <https://www.iom.int/complex-nexus> ; on the cross-border aspect in particular, see The Nansen Initiative, *Agenda for the protection of cross-border displaced persons in the context of disasters and climate change - Volume 1*, (The Nansen Initiative, 2015), paras 4-7, available at <https://nanseninitiative.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf>. On multi-causality, see E. Ferris, ‘Governance and climate change-induced mobility: international and regional frameworks’, in D. Manou et. Al. (eds), *Climate change, migration and human rights: law and policy perspectives* (Routledge, 2017), pp. 13-14; F. Crépeau, *Report of the Special Rapporteur on the human rights of migrants*, A/67/299, 13 Aug. 2012, paras 31-39.

⁶¹ See e.g. J. Heita, *Assessing the Evidence: Migration, Environment and Climate Change in Namibia* (International Organization for Migration, 2018), pp. 12-16; J.V. Henderson et. al., ‘Has climate change driven urbanization in Africa?’ (2017) 124 *Journal of Development Economics*, p. 77; M. Addaney et. al., ‘The Climate Change and Human Rights Nexus in Africa’ (2017) 9(3) *Amsterdam Law Forum*, pp. 13-14; M. Mastrotrillo et. al., ‘The influence of climate variability on internal migration flows in South Africa’ (2016) 39 *Global Environmental Change*, pp.160-161; on the cross-border aspect, see The Nansen Initiative, *ibid.*, paras 3-7.

⁶² See Ferris, n. 60 above, pp. 19-21; Kälin & Entwisle Chapuisat, n. 60 above, pp. 376-378.

for migration, this remains an entirely voluntary framework.⁶³ Any claims based on *non-refoulement* are unlikely to meet a very high required threshold of risk to the right to life (even though the possibility of such a risk arising from the impacts of climate change has been recognized in principle).⁶⁴ As such, the migrants in question may become particularly vulnerable to human rights abuses while migrating via an irregular process. Notions of extraterritorial jurisdiction will not, however, extend to engaging the responsibility of emitting states. In section 5 below, we circle back to this scenario to illustrate how our further analysis may address this situation.

At this point, it is worth mentioning that the Maastricht Principles also consider extraterritorial jurisdiction to be held by states beyond effective control. These include situations in which 'State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory' or when a state is (merely) in a position to exercise decisive influence or to take measures to realize human rights extraterritorially.⁶⁵ The jurisdictional hook regarding the capacity to realize human rights extraterritorially may be the most relevant in the context of climate change, as it allows the attribution of human rights obligations beyond any direct causal link, to address adverse human rights impacts of climate change. This jurisdictional hook was introduced to allow for what is considered a sub-category of extraterritorial obligations in the Maastricht Principles - that is, obligations of a global character 'to take action, separately, and jointly through international cooperation, to realize human rights universally' (Principle 8b).

We contend that these global obligations and the corresponding jurisdictional hook are of a qualitatively different nature, since they go beyond any directly causal relationship, and focus instead on ability to act. From a conceptual point of view, they have therefore

⁶³ See The Nansen Initiative, n. 60 above.

⁶⁴ See, e.g., UNHRC, *Teitiota v. New Zealand*, n. 19 above.

⁶⁵ Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, 28 September 2011 (Maastricht Principles), Principle 9(c) and (d), respectively.

inappropriately and somewhat misleadingly been subsumed under extraterritorial obligations by the drafters of the Maastricht Principles. In the Commentary to the Maastricht Principles, they are referred to as ‘obligations of international cooperation’.⁶⁶ The jurisdictional hook of ‘capacity to make a positive contribution’ opens up the possibility for attribution of an obligation regardless of causation, and thereby renders the jurisdictional link between the victim and the state(s) indeed rather remote. In our view, it would be better not to include these kinds of situations artificially in the notion of jurisdiction. Given the tradition of a highly restrictive interpretation of extraterritorial jurisdiction by human rights monitoring bodies, based on control or direct causation, we suggest an alternative attribution ground rather than an attempt at interpretative expansion of extraterritorial jurisdiction.

The issue of climate change is illustrative of such potentially remote or even absent links, as emitting states do not control the territory of the affected state or the individuals within the territory, nor do they directly cause, for example, climate change migration. Nevertheless, high-emitting states can negatively impact the environment in that state in a general and indirect way. They can also aid in mitigating negative impacts. In the context of capacity to make a positive contribution, such links are similarly absent. Thus, concepts of jurisdiction remain inadequate to explain what positive obligations states may have to protect or fulfil human rights abroad. Positive obligations beyond a state’s territory to protect or fulfil would typically be breached through an omission, thereby making it even more difficult to attribute these obligations to a particular state. Hence, there is a need for a different, additional attribution ground such as capacity, and the need for global obligations. Knox distinguishes not only an obligation to protect, but also a duty to cooperate internationally.⁶⁷ Knox’s conclusion on a duty to cooperate with respect to climate change centres squarely on the

⁶⁶ O. De Schutter, et al., ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights’ (2012) 34(4) *Human Rights Quarterly*, pp. 1084-169 at 1104.

⁶⁷ Knox, n. 20 above, paras 33 and 43, respectively.

transnational nature of the problem itself and the impossibility of tackling it within national borders.⁶⁸

International cooperation, as foreseen under Article 55 of the UN Charter⁶⁹ and in human rights treaties such as the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁷⁰ or the Convention on the Rights of the Child (CRC),⁷¹ is an indispensable component of any response to adverse climate change impacts.⁷² Under IHRL, the duty to cooperate internationally in addressing climate change is a logical consequence of the obligation to protect against the infringement of human rights by climate change. In essence, the obligation to protect cannot be considered confined by national borders, given the nature of climate change and the impossibility of formulating effective responses within any single territorial jurisdiction. As Knox aptly remarks, the duty to cooperate ‘requires states to create the equivalent of a single global polity to consider how to respond to the global threat to human rights posed by climate change’.⁷³

However, the content of global obligations is not yet clear and settled, and IHRL seems to face existential limits in defining such obligations. This is why, in the next section, we suggest turning to IEL for inspiration, especially as principles for the distributional allocation of obligations (and responsibility for violations) are still in their infancy. The implications in practice of the attribution of obligations to multiple states, as well as the consequences for responsibility for violations, require further elaboration. Which foreign states would be considered to have the capacity to act, and hence, to bear obligations for climate change? How would their obligations relate to the obligations of the territorial state? And how would

⁶⁸ Ibid., para. 41.

⁶⁹ San Francisco, CA (US), 26 June 1945, in force 24 Oct. 1945, available at: www.un.org/en/documents/charter.

⁷⁰ New York, NY (US), 16 Dec. 1966, in force 3 Jan. 1976, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx>

⁷¹ New York, NY (US), 20 Nov. 1989, entry into force 2 Sept. 1990, available at: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

⁷² Knox, n. 20 above, paras 43-4.

⁷³ Knox, n. 23 above, p. 168.

responsibility for violations be established and distributed? Would it be preferable to have a regime of independent responsibility (whereby each state can be held responsible *in solidum* for the full human rights violation), or rather one of common or shared responsibility (whereby each state is only responsible for its share in the violation)?

Several avenues may be explored to address the question of attribution of responsibility to a number of states. Scholars have begun to identify the problems that shared decision-making and joint action create for the notion of independent international responsibility as the sole basis for attributing responsibility. Independent responsibility is not able to accommodate the complexities of today's world: an era characterized by joint and coordinated (rather than independent) action, where responsibility therefore often needs to be allocated between multiple actors.⁷⁴ Van der Have has proposed a burden-sharing mechanism, 'on the basis of which it would become possible to ascertain what the scope of obligations of any given state is with regard to a certain situation, [which would undercut] difficulties related to establishing a causal link after a breach has taken place'.⁷⁵ A law of shared responsibility remains to be developed in order to provide answers to issues regarding (lack of) international cooperation between states. The existence of shared responsibility in instances where individuals are affected by climate change has been acknowledged to some extent. The OHCHR, for example, finds that:

States (duty-bearers) have an affirmative obligation to take effective measures to prevent and redress these climate impacts, and therefore, to mitigate climate change, and to ensure that all human beings (rights-holders) have the necessary capacity to adapt to the climate crisis.⁷⁶

⁷⁴ A. Nollkaemper & D. Jacobs (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press, 2014); A. Nollkaemper & D. Jacobs (eds), *Distribution of Responsibilities in International Law* (Cambridge University Press, 2015).

⁷⁵ N. van der Have, *The Right to Development and State Responsibility - Can States Be Held to Account?* (2013) SHARES Research Paper 23 Amsterdam Center for International Law.

⁷⁶ OHCHR, *Key Messages on Human Rights and Climate Change, Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change* (2015) available at: <https://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf>, accessed 26 November 2019.

In other words, the obligations of states in the context of climate change and other environmental harms extend to all rights-holders and to harm that occurs both inside and beyond boundaries. States should be accountable to rights-holders for their contributions to climate change, including for failure to adequately regulate the emissions of businesses under their jurisdiction, regardless of where such emissions or their harms actually occur.⁷⁷

International and regional human rights enforcement mechanisms have so far fallen short of establishing state responsibility for climate-related human rights violations, and the barriers are considerable.⁷⁸ In the domestic sphere, the Dutch *Urgenda* case shows nonetheless ‘how a Court can determine responsibilities of an individual state, notwithstanding the fact that climate change is caused by a multiplicity of other actors who share responsibility for its harmful effects.’⁷⁹ Regarding international cooperation to realize economic, social and cultural rights, the Committee on Economic, Social and Cultural Rights (CESCR) has stressed its mandatory nature, especially on states in a position to help others. However, some developed states have challenged this view, and enforcement would in any case be difficult.⁸⁰ Currently, two petitions pending before the UN human rights treaty bodies seek to establish the responsibility of states with significant GHG emissions for the harmful impacts of climate change.⁸¹ One of these – *Sacchi et al v. Argentina et al*, before the Committee on the Rights of the Child – seeks to invoke extraterritorial human rights obligations (based on a cause-and-

⁷⁷ Ibid.

⁷⁸ See Wewerinke-Singh, n. 33 above, pp. 229-34.

⁷⁹ N. 35 above. See also A. Nollkaemper & L. Burgers, ‘A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case’ *EJIL: Talk!*, 6 Jan. 2020, available at: <https://www.ejiltalk.org/a-new-classic-in-climate-change-litigation-the-dutch-supreme-court-decision-in-the-urgenda-case>.

⁸⁰ M. Hesselman, ‘Sharing International Responsibility for the Protection of Poor Migrants? An Analysis of Extraterritorial Socio-economic Human Rights Law’ (2013) 15(2) *European Journal of Social Security*, pp. 107-208, at 193.

⁸¹ *Teitiota v. New Zealand*, the UN human rights treaty body system’s first individual petition relating to the human rights impact of climate change, did not directly address State responsibility for these impacts, but rather (unsuccessfully) challenged New Zealand’s fulfilment of *non-refoulement* obligations in respect of a migrant who was deported back to Kiribati, where it was asserted that those impacts posed a threat to the petitioner’s right to life (see UNHRC, *Teitiota v. New Zealand*, n. 19 above).

effect approach), as well as the duty of international cooperation.⁸² In a joint statement, five UN human rights treaty bodies have recognized these obligations as applicable in principle to the prevention and/or mitigation of the harms of climate change.⁸³ However, at the time of writing, it remains to be seen whether the elements of the claim based on extraterritorial or international cooperation obligations will be declared admissible.

In sum, some initial ideas have been developed on attributing human rights obligations in the context of climate change according to the capacity to act, rather than on the basis of harm caused, and on coining global obligations. All this is, however, in a very embryonic stage and by way of exception. So far, IHRL has fallen short of structurally rethinking who the duty-bearers are and how they may share responsibility for remote effects of climate change. It is therefore not yet well-equipped to play a role in protecting those affected by climate change. We therefore now turn to IEL for inspirational guidance.

4. Common concern of humankind in international environmental law

It is evident that the potential application of the human rights approach may not constitute a suitable response to the truly global nature of climate change, as it could result in reducing the problem to a ‘series of individual transboundary harms’ and a ‘state-by-state

⁸² *Sacchi et al v. Argentina et al*, Communication to the Committee on the Rights of the Child, 23 Sept. 2019, paras 176 - 182, available at: <https://childrenvsclimatecrisis.org/wp-content/uploads/2019/09/2019.09.23-CRC-communication-Sacchi-et-al-v.-Argentina-et-al-Redacted.pdf>; the other claim, submitted to the UN Human Rights Committee by a group of Torres Strait Islanders against Australia, does not appear to contain any extraterritorial element (see Client Earth, ‘Torres Strait Islander group submits response in historic climate case’, 30 September 2020, available at <https://www.clientearth.org/latest/latest-updates/news/torres-strait-islander-group-submits-response-in-historic-climate-case/>)

⁸³ Committee on the Elimination of Discrimination Against Women, Committee on Economic, Social and Cultural Rights, Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, Committee on the Rights of the Child, Committee on the Rights of Persons with Disabilities, *Joint Statement on Human Rights and Climate Change*, 16 Sept. 2019, available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E>

consideration of extraterritorial effects of domestic actions’.⁸⁴ In order to inform the further development of the human rights responsibility framework, it is useful to consider the CCH in IEL as embodied in the Preamble of the UNFCCC, which acknowledges that ‘change in the Earth's climate and its adverse effects are a common concern of humankind’.⁸⁵ The Preamble thus clearly designates the adverse effects of climate change as being subject to the CCH, and affirms the human rights dimension of environmental protection. CCH is a facet of ‘common interest’, which may induce normative development in relation to issues of common interest.⁸⁶ CCH provides the international community with a legitimate interest in global environmental resources and a common responsibility of assistance to ensure the sustainable development thereof.⁸⁷ The CCH concept aptly responds to a common problem through a global regime. One should, of course, be cautious in asserting the potential of the CCH, since it has been noted that:

current systems for the protection of global common interests are imperfect, and, when evaluated on their own merits, are only partially effective in achieving their objectives. Nevertheless, some aspects of these systems are of interest from a human rights perspective, particularly those dealing with the assignment, sharing and monitoring of responsibilities of various actors.⁸⁸

The common interest in international law indicates that there is more at stake in international law than the individual self-interest of states. One of the most important consequences of the CCH is the provision for differential burden-sharing.⁸⁹ Differentiation was conceived to foster increased participation of less capacitated states and to raise the

⁸⁴ Knox, n. 23 above, p. 211.

⁸⁵ N. 5 above, Preambular, para 1.

⁸⁶ For a discussion: W. Scholtz, ‘Human Rights and Climate Change: Extending the Extraterritorial Dimension Via the Common Concern’ in W. Benedek et al. (eds), *The Common Interest in International Law* (Intersentia, 2014), pp. 127-42, at p. 134..

⁸⁷ P. Birnie, A.E. Boyle & C. Redgwell, *International Law and the Environment* (Oxford University Press, 2009), p.128. The existence of such an interest does not depend on the existence of transboundary harm.

⁸⁸ K. De Feyter, ‘The Common Interest in International Law: Challenging Human Rights’ in W. Vandenhoe (ed.) *Challenging Territoriality in Human Rights Law. Building Blocks for a Plural and Diverse Duty-bearer Regime* (Routledge, 2015), pp. 158-87.

⁸⁹ Scholtz n. 86 above, p. 138.

effectiveness of international agreements. Both are pivotal elements in IEL and governance,⁹⁰ and hold particular relevance for addressing global commons problems or common concerns such as climate change.⁹¹

4.1. Common but differentiated responsibility (and respective capabilities) and the Paris Agreement

The principle which clearly reflects the essence of differential treatment in IEL is the principle of common but differentiated responsibility (CBDR).⁹² The factor of differentiation included in the principle's definition represents the aim of both addressing and bridging the gap between the formal sovereign equality of states – the point of departure in international law⁹³ – and the *de facto* deep inequalities that exist between states following decolonization.⁹⁴ This forms the normative basis for the burden-sharing agreements (and differential treatment) in the older UNFCCC and its Kyoto Protocol.⁹⁵ The newer principle of common but differentiated responsibility and respective capabilities (CBDRRC) reflects pragmatism, but also stems from the basic principle of equity.⁹⁶ The adherence of international law to formal equality and reciprocal obligations as per Article 2.1 of the UN Charter is not conducive to solving global environmental degradation, which requires the universal participation of states

⁹⁰ C. Voigt & F. Ferreira, “Dynamic Differentiation”: The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement’ (2016) 5(2) *Transnational Environmental Law*, pp. 285-303, at 286.

⁹¹ *Ibid.*, p. 287.

⁹² P. Cullet, ‘Differential Treatment in International Law: Towards a New Paradigm of Inter-state Relations’ (1999) 10(3) *European Journal of International Law*, pp. 549-582, at 577.

⁹³ Voigt & Ferreira, n. 90 above, p. 286.

⁹⁴ P. Cullet, ‘Differential Treatment in Environmental Law: Addressing Critiques and Conceptualizing the Next Steps’ (2016) 5(2) *Transnational Environmental Law*, pp. 305-328, at 307.

⁹⁵ N. 4 above. See L. Rajamani, ‘Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics’ (2016) 65(2) *International & Comparative Law Quarterly*, pp. 493-514, at 509.

⁹⁶ C.D. Stone, ‘Common but Differentiated Responsibilities in International Law’ (2004) 98(2) *American Journal of International Law*, pp. 276-301. See also J. Peel, ‘Foreword to the TEL Fifth Anniversary Issue Re-evaluating the Principle of Common But Differentiated Responsibilities in Transnational Climate Change Law’ (2016) 5(2) *Transnational Environmental Law*, pp. 245-54.

in accordance with differential capabilities and responsibilities. Hence, equity is required to remedy the adherence to formal equality.

Within the framework of international climate governance, the CBDR is articulated in Principle 7 of the Rio Declaration.⁹⁷

More recently, the suffix -RC (respective capabilities) was added to the principle, thereby putting the component of respective ‘capabilities’ on an equal footing with ‘responsibilities’ in the further conceptualization of CBDR in creating burden-sharing agreements.⁹⁸ This entails that the CBDRRC principle does not only address inequality related to ‘asymmetry in contribution’, but also those related to ‘capacity to mitigate’ and ‘power to decide’.⁹⁹

‘Common responsibility’ is included in both the mitigation and adaptation sections of the Paris Agreement.¹⁰⁰ With regard to mitigation, a common goal of ‘[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change’¹⁰¹ is established in the form of a collective obligation, entailing a duty on all parties to move towards this goal.¹⁰² However, by employing self-differentiation to determine the ‘level of responsibility’ within the established transnational objective, individual states have escaped the commonality of responsibility as defined by the Paris Agreement. States are allowed to define their own levels of contribution, flanked by procedural obligations. This results in an obligation of conduct, not

⁹⁷ N. 13 above.

⁹⁸ T. Honkonen, ‘CBDR and climate change’ in M. Fauré (ed.) *Elgar Encyclopedia of Environmental Law* (Edward Elgar, 2016) pp. 142-151, at 150.

⁹⁹ O. Edenhofer et. al. (eds), *IPCC: Mitigation of Climate Change 2014: Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2014) paras 3.10, 4.2.2, 4.6.2.

¹⁰⁰ Paris Agreement, n. 5 above, Arts 2.2 and 4.3. ; L. Rajamani, ‘The principle of common but differentiated responsibilities and respective capabilities in the international climate change regime’ in R. Lyster & R. Verchick, *Research Handbook on Climate Disaster Law* (Edward Elgar, 2018) pp. 46-60.

¹⁰¹ *Ibid.*, Art. 2.1 a).

¹⁰² *Ibid.*, Art. 4.3.

of result, and a good faith expectation of achieving progress, which may in time be incited by a tightening ambition cycle.¹⁰³

To identify the appropriate level of obligation, the principle of ‘highest possible ambition’ could be an important instrument in delineating individual states’ human rights responsibility for the harms of climate change.¹⁰⁴ The ‘highest possible ambition’ is also used as benchmark when assessing and relating it to a collective level of ambition through global stocktaking every five years.¹⁰⁵ Voigt and Fernandez have posited that ‘what constitutes an equitable and proportionate effort is still to be settled’, but combined with civil society assessments of the level of ambition and logic of improvement over time, it adds content to the substantive responsibility of states under the climate agreement.¹⁰⁶ Articles 7.13 and 9.1 of the Paris Agreement illustrate that developed countries have legally binding commitments under the Convention to provide financial resources to developing countries (adaptation and finance). While Article 8 on loss and damage avoids explicit wording that implies liability or compensation for loss and damage caused by climate change, it also does not exclude legally binding commitments.¹⁰⁷

In sum, the common responsibility of states derives from the nature of the shared environmental challenge. Fundamentally, in addressing the harms and vulnerabilities brought about by climate change, the component of common responsibility could inform IHRL on how to advance on assigning and distributing states’ extraterritorial human rights obligations and move from individual harms and responsibility to shared responsibility.¹⁰⁸ The next important issue relates to the determination of obligations of individual states under the shared responsibility matrix.

¹⁰³ Rajamani, n. 100 above, at 54.

¹⁰⁴ Paris Agreement, n. 5 above, Art 4.3.; Voigt & Ferreira, n. 90 above, pp. 295-96.

¹⁰⁵ *Ibid.*, p. 296.

¹⁰⁶ *Ibid.*

¹⁰⁷ Decision 1/CP.21, Adoption of the Paris Agreement, FCCC/CP/2015/10/Add.1 CP.21, 29 Jan. 2016, para. 51.

¹⁰⁸ Scholtz, n. 86 above, pp. 127-142.

The second element of CBDR-RC is the notion of differing circumstances of states. States' situations are different in relation to both their contribution to the environmental problem and their ability to address the problem for themselves or for others. The Paris Agreement therefore offers a varied array of approaches in respect of the uniquely different situation of every state. It dispenses with the binary separation between developed and developing states and tailors 'differentiation to the specificities of each of the Durban pillars: mitigation, adaptation, finance, technology, capacity building and transparency'.¹⁰⁹ For every specific mechanism in the Paris Agreement, different types of differentiation apply, either in the form of contextual obligations, grace periods for states, or obligations for states to assist others in implementation.¹¹⁰ For instance, Article 9 provides strong differentiation in terms of financial and other support for both mitigation and adaptation.

While the historical and static differentiation on the basis on development status¹¹¹ has been renounced, the phrase 'in the light of different national circumstances' still evokes deprecated forms of distinction and, by extension, introduces a wide array of new grounds for differentiation, such as 'variations of (historic) level of emissions, human development, financial, technological capabilities, population, and other criteria potentially relevant for a fair distribution of the benefits and costs of addressing climate change'.¹¹² Moreover, despite the omission of any definition or list of developing countries, the Agreement does name specific categories of states, such as 'least developed states', 'small developing island states' or 'states particularly vulnerable to the adverse effects of climate change', that can influence the determination of differentiation.¹¹³

¹⁰⁹ Rajamani, n. 95 above, at 509.

¹¹⁰ Ibid. at 493.

¹¹¹ Similar to the binary thinking in the Annex A-B division in the Kyoto Protocol on the basis of development status.

¹¹² S. Maljean-Dubois, 'The Paris Agreement: a new step in the gradual evolution of differential treatment in the climate regime?' (2016) 25(2) *Review of European, Comparative and International Environmental Law*, p. 154.

¹¹³ Ibid. p. 156.

Academic literature that has examined the development of CBDR-RC concludes that its application is context-based and remains legally open.¹¹⁴ Sands and Peel observed that ‘in practical terms differentiated responsibility may result in different legal obligations’,¹¹⁵ which entails the challenge of uncertain legal consequences.¹¹⁶ The latter is the new normal in light of the dynamic nature of burden sharing.

4.2. Dynamic nature and flexibility of burden sharing

The dynamic nature and progressive development of the CBDR-RC principle is a more recent phenomenon, and represents a move away from the static Annex B in the Kyoto Protocol towards a vast array of different circumstances that can change over time, as articulated in the Paris Agreement. The phrase ‘in the light of different national circumstances’ has been interpreted as implying flexibility and dynamism with regard to social, political, and economic circumstances that are constantly evolving.¹¹⁷ This innovation in the Paris Agreement was necessary because of the ‘hot situation’ created by climate change – characterized by complexity, with polycentric causes and impacts both locally and globally, and enmeshed in socio-political conflicts. As climate change is quite unpredictable and the exact nature of the (sub-)problem(s) and the corresponding obligations are hard to identify, it was difficult to agree on a fixed and fair burden sharing.¹¹⁸ Therefore, the Paris Agreement does not apply in a static manner, but evolves and is open to change.¹¹⁹ Its new formula opens up possibilities for establishing further evolutionary and flexible differentiations that are compatible with the changeable nature of national developments and dynamics. In this regard, Cullet has argued

¹¹⁴ Ibid., p. 143.

¹¹⁵ P. Sands & J. Peel, *Principles of international environmental law* (Cambridge University Press, 2012), p. 235.

¹¹⁶ Honkonen, n. 98 above, p. 142.

¹¹⁷ Maljean-Dubois, n. 112 above, pp. 151-60.

¹¹⁸ A. Huggins, ‘The Evolution of Differential Treatment in International Climate Law: Innovation, Experimentation, and ‘Hot’ Law’ (2018) 8(3-4) *Climate Law*, pp. 198-99.

¹¹⁹ Voigt & Ferreira, n. 90 above, p. 294.

that differentiation is ideally based on environmental and social indicators such as resilience, human development and environmental needs, instead of relying on a country's economic development strategy and a distribution of 'rights to pollute'.¹²⁰ These indicators and needs change over time and can be linked to funding needs.

The Planetary Security Initiative, a policy initiative of the Dutch government, emphasizes the importance of 'enhancing cooperation on migration and providing funding programmes' in Action 2 of its Hague Declaration on Planetary Security.¹²¹ Here, the understanding of burden sharing is based on notions of 'solidarity' and improving developing states' 'capacity to act', rather than on forms of responsibility derived from the state of the national economy or causation. Capacity and needs can change fast, hence related responsibility should evolve along the same lines, reflecting this aspect of dynamism.

4.3. Implications for human rights law

A human rights regime that allocates shared responsibility beyond territorial borders and narrowly constructed extraterritorial jurisdiction may be inspired by new, more relational or interactive interpretations of sovereignty, such as custodial sovereignty¹²² or states as sovereigns of humanity,¹²³ which brings in a much more explicit solidarity approach. In particular, the CCH, as a facet of common interest, may constitute a suitable basis for informing states' extraterritorial human rights obligations. It could inform IHRL on how to advance in assigning and distributing states' extraterritorial human rights obligations, moving from individual harms and responsibility to shared responsibility.¹²⁴ Operationally, IHRL can draw

¹²⁰ Cullet, n. 94 above, p. 319.

¹²¹ Planet Security Initiative, *The Hague Declaration, Action 2 on climate migration* (2017) available at: https://www.planetarysecurityinitiative.org/sites/default/files/2017-12/The_Hague_Declaration.pdf

¹²² W. Scholtz, 'Custodial Sovereignty: Reconciliation of Sovereignty and Global Environmental Challenges amongst the Vestiges of Colonialism' (2008) 55(3) *Netherlands International Law Review*, pp. 323-41.

¹²³ E. Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107(2) *American Journal of International Law*, pp. 295-333.

¹²⁴ Scholtz, n. 86 above, pp. 127-42.

lessons from the CBDR-RC principle in environmental and climate law on at least three levels. Firstly, CBDR-RC can contribute to structuring and conceptualizing a notion of common responsibility for common interest issues. The CBDR principle can be seen as a manifestation of the emerging principle of inter-state solidarity in IEL.¹²⁵ Solidarity in the human rights context is indicative of the interdependence of states and the need to take collective action to promote and protect human rights, as individual states do not have the capacity to solve common problems. The interdependence of states could constitute a basis for reconfiguring certain human rights obligations as not falling necessarily under the jurisdiction of a single state. Theoretically, both the concept of global obligations as elaborated in the Maastricht Principles, and the right to development capture this idea of solidarity. However, the notion of global obligations has remained theoretically underdeveloped, notwithstanding the groundbreaking work undertaken by Salomon.¹²⁶ The right to development, for its part, has focused on a developing-developed state binary, and negotiations on this right at the global level have, also for this reason, remained at a political deadlock.¹²⁷ Moreover, these concepts have often become strongly politicized, given the emphasis on past causation.

Therefore, a detailed differentiation of human rights obligations based on restorative, distributive and procedural justice (depending on the category of operation) may be needed, and the recent clarification under the Paris Agreement of what a dynamic and flexible scheme of burden sharing could look like is most useful. Whereas the acknowledgment of the inequalities among countries provides the basis for redistributive measures pursuant to distributive justice,¹²⁸ it does so in a less polarizing way by moving beyond the binary categorization of developed and developing states. To the extent that direct and linear causation

¹²⁵ P. Dann, 'Solidarity and the Law of Development' in R. Wolfrum & C. Kojima (eds), *Solidarity: A Structural Principle of International Law* (Springer, 2010), pp. 55-91.

¹²⁶ Salomon, n 45 above.

¹²⁷ It is too early to assess the success of the current attempt to draft a treaty on the right to development.

¹²⁸ P. Cullet, 'Principle 7. Common but Differentiated Responsibilities' in J.E. Viñuales (ed.), *The Rio Declaration on Environment and Development. A Commentary* (Oxford University Press, 2015) pp. 229-44.

is difficult or impossible to establish, the shift in emphasis to particular vulnerabilities and capacity to act may be a more fruitful way forward. However, questions of causation and power should not be silenced, and unequal power to take political decisions should be part of the analysis.

Furthermore, the dynamic nature of the allocation and differentiation of obligations shows a system that can adapt to new circumstances. An abstract and static distributional allocation of obligations may indeed not be possible or desirable. On the other hand, the dynamic nature of the exercise means that the allocation of obligations (and the corresponding responsibility for violations) is constantly negotiated (between states) or decided (by a mechanism), which means that power inequalities may be constantly in play.

Thus, despite the lack of a human rights-based approach in the Paris Agreement,¹²⁹ the instrument could inspire a regime of dynamic global human rights obligations for ESC rights as part of CBDR-RC in the field of climate change migration.

5. Illustration: addressing economic, social and cultural rights in cross-border climate migration situations among developing states

In the gradual, cross-border climate migration scenario outlined in Section 2, both the destination state and state of origin, as developing states, may lack capacity to address the situation without international cooperation, and neither is likely to bear significant responsibility for the harmful impacts of climate change which contributed to the situation. Furthermore, as these harmful impacts of climate change count among multiple factors leading to migration, and are disconnected from any specific, localized activity, it is problematic to

¹²⁹ S. Adelman, 'Human Rights in the Paris Agreement: Too Little, Too Late?' (2018) 7(1) *Transnational Environmental Law*, pp. 17-36.

locate a duty-bearer among emitting states, or to establish causation of associated harms under the traditional model of state responsibility.¹³⁰

As outlined, IEL – as opposed to IHRL – is not equipped to provide protection or remedy for individuals and groups who are exposed to the harms of climate change. In such a situation, how can IHRL alleviate the situation of migrants, if neither the state of origin nor the destination state have the capacity to do so, and neither have contributed significantly to creating the significant conditions that pushed migrants to leave their homes?

This scenario illustrates the key challenges for IHRL and IEL in addressing the harms of climate change. The prevailing human rights-environment approach would not be very helpful in this instance, as the territorial nature of jurisdiction does not allow for the allocation of responsibility to foreign states that have contributed to the emission of GHGs or to foreign states that have the capacity to alleviate the plight of the migrants through, for example, financial assistance. While Principle 9 of the Maastricht Principles may form the basis for a determination of jurisdiction based on capacity (grounded in solidarity), this is not considered to represent binding law yet; furthermore, the attribution of responsibility among a multitude of potentially responsible states remains difficult. The international cooperation obligation contained in ICESCR may prove similarly challenging to invoke as a basis for responsibility, given that some states refute its binding nature, as well as the very limited avenues for enforcement.

The potential of – and need for – a burden-sharing approach becomes evident in relation to such a transboundary scenario, which lacks a traditional jurisdictional link to the states responsible. The CCH regime in IEL presents interesting insights in this regard. One of the

¹³⁰ See M. Wewerinke-Singh, ‘State Responsibility for Human Rights Violations Associated With Climate Change’, in S. Duyck, S. Jodoin & A. Johl (eds) *Routledge Handbook of Human Rights and Climate Governance* (Routledge, 2018), pp. 83-4; c.f., e.g., UNHRC, *Portillo Cáceres v. Paraguay*, n. 19 above, where environmental harm could be linked to a specific, localized activity.

central aspects of this regime is the globalization of a response to a common concern through burden sharing in response to a common interest. The preambles of the UNFCCC and Paris Agreement affirm that the plight of climate migrants is a common concern, as climate change is a contributing factor to migration. The CBDR-RC principle constitutes the central approach to the determination of differential burden sharing in relation to common interest. CBDR-RC places a specific focus on the differential capabilities that exist in relation to a common concern. CBDR-RC recognizes inequality and strives for equity on the basis of solidarity. The inclusion of a ‘tweaked’ version of CBDR-RC in the Paris Agreement points to the flexible nature thereof and the potential to provide valuable insights in relation to the distributional allocation of obligations in terms of burden sharing on ESC rights. This implies that states with the capacity to act must respond to the adaptation needs of the rural climate migrants through, for example, financial assistance to pursue sustainable development. In respect of cross-border climate migration particularly, the CBDR-RC principle may thus provide a compelling basis for arguments as to why emitting states must more actively cooperate with affected states to realize measures such as those proposed in the voluntary Nansen Initiative Agenda for Protection – for example, improving disaster risk management in countries of origin, including by facilitating adaptive migration with dignity, and improving planned relocation processes.¹³¹ Thus, the call to action in the Agenda for Protection, based on a need for greater solidarity and cooperation in this area, may be solidified and operationalized in legal terms.

¹³¹ The Nansen Initiative, n. 60 above, paras 116-122; see also a corresponding commitment to address cross-border displacement by reducing disaster risks in UN General Assembly, *Global Compact for Safe, Orderly and Regular Migration*, A/RES/73/195, 19 Dec. 2018, para 18(b). However, for caveats on forms of assistance which may unduly open affected countries to the imposition of foreign political agendas, see Mayer, n. 59 above, pp. 127-128.

6. Conclusion

IHRL has already permeated IEL as environmental protection, in particular concerning climate change, is viewed as a human rights issue. The human rights-environment nexus means that IHRL may be used to address directly the consequences of climate change. We have indicated that IHRL may indeed play a meaningful role in this regard. However, the human rights-environment project may be doomed from the outset due to the jurisdictional tenets of IHRL. Climate change is a truly global issue that requires global cooperation of all states to respond to this dire problem. The requirement for direct causality between state and the victim does not accord with the scenario of climate change. As such, territorial jurisdiction poses a considerable hurdle to the utilisation of IHRL in response to climate change. The gradual development of extraterritorial jurisdiction may be promising but still does not go far enough to respond to the complex climate change scenario. The territorial mould of IHRL is not up to the task. It is evident that IHRL developed in response to human rights problems linked to control over territory or people, and this shaped the theoretical tenets of this subject field. IEL developed in response to global environmental degradation and therefore has a more global outlook. The global basis of IEL is abundantly evident in the CCH regime, which constitutes the basis for burden-sharing concerning global environmental problems. In IHRL, the Maastricht Principles include global obligations that exceed the territorial focus and are more in line with the gist of the CCH regime. These proposed global obligations present an amphora that may facilitate the fermentation of human rights obligations attuned to the needs of a climate change response. The CCH regime provides the catalyst for such development through the CBDRRRC, which operationalizes burden sharing. CCH focuses on international cooperation based on differential capacity. The tweaked version of CBDRRRC in the Paris Agreement attests to the embrace of a dynamic and flexible approach grounded in the moral principle of

solidarity. Hence, this approach could be useful to further develop the proposed IHRL global obligations.

The foregoing discussion affirms the need for the progressive development of IHRL to respond to the harms of climate change. It is only in this manner that the human rights-environment nexus may come to fruition. We are fully aware that our proposal hinges on the conceptual development of a notion that is *de lege ferenda* and that may encounter resistance from doctrinal corners. However, addressing climate change is an urgent imperative that requires global cooperation. This implies that states must have the political will to accept burden sharing that deviates from the doctrinal tenets of IHRL. It is only in this manner that a global solution may be found for a growing crisis and imminent human catastrophe. IHRL must undergo a radical reform to permit the human rights-environment nexus to contribute to saving current and succeeding generations from the scourge of climate change, which will bring untold sorrow to humankind.¹³²

¹³² This statement is reminiscent of the preamble of the UN Charter, which declares the determination of the UN to save generations from the scourge of war. See Charter of the United Nations, San Francisco (USA), 26 June 1945, in force 24 Oct. 1945. Available at: <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>