# State Sovereignty and Responsibility in International Climate Change Law

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The question of state responsibility in climate change is becoming more and more relevant, as climate change continues to have detrimental effects on both the environment and the people. Sovereign states, however, cannot be forced to act. Sovereignty provides the states with a freedom to stay passive in the fight against climate change.

With climate change causing sea level rise and increasing the frequency of natural disasters, the universal human rights stand threatened by the effects. International human rights law does not mention climate change, but if it can be proven that it truly violates human rights, states would have a responsibility to address climate change, at least in the sense that they ought to protect the victims of disasters and slow onset events.

International environmental law provides with a responsibility to prevent environmental harm under the no-harm principle. The responsibility to prevent climate change would require that the connection between greenhouse gas emissions and climate change related environmental damage is sufficiently proven. The fact that climate change is partly natural and partly anthropological complicates this issue.

The current climate change law does not appropriately address the sharing of responsibility to prevent climate change and compensate for damages caused by it. There are some principles, such as the polluter pays, beneficiary pays and ability to pay principles, which address the responsibility of those who pollute, those who benefit from the pollution, and the different levels of abilities to pay. From them, it follows that developed states ought to have a broader responsibility to pay than developing states, since they have polluted more, benefit more from the pollution, and have the means to pay more.

The climate change regime is decades old, but it still fails to properly assign states with responsibilities to prevent climate change. Human rights law and environmental law compensate for some parts climate law lacks in, but the scientific uncertainties make the applicability controversial.

# Contents

# Abbreviations

| | |
|---|---|
| APP | Ability to pay -principle |
| BPP | Beneficiary pays -principle |
| ECHR | European Convention on Human Rights |
| ECtHR | European Court of Human Rights |
| GHG | Greenhouse gas |
| HRC | United Nations Human Rights Council |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social, and Cultural Rights |
| ICJ | International Court of Justice |
| ILC | International Law Commission |
| IPCC | Intergovernmental Panel on Climate Change |
| IRU | International Relief Union |
| OCHA | Office for the Coordination of Humanitarian Affairs |
| OECD | Organization for Economic Co-operation and Development |
| OHCHR | United Nations Office of the High Commissioner of human rights |
| PP | Precautionary principle |
| PPP | Polluter pays -principle |
| UN | United Nations |
| UNFCCC | United Nations Framework Convention on Climate Change |
| WMO | World Meteorological Organization |

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# Introduction

Some may argue that talking about a climate crisis is overreacting, or that the climate change is inevitable, no matter what us humans do. The current situation, however, constitutes a true crisis that needs addressing. Numerous scientists have given warnings that we must act now if we still want the Earth to be habitable for the generations to come.[1] Territories of states will become inhabitable, causing "climate refugees" to seek shelter from other countries.[2] Climate change -induced natural disasters and other consequences, such as sea level rise, will endanger fundamental human rights, such as the right to life.[3] Climate change also threaten the environment: species, animal and plant alike, will succumb to the phenomenon.[4]

The responsibility of climate change mitigation should fall on the international community of states, since the climate change and its effects are a global threat, as will be shown later in this thesis. The international community of states is dependent on the concept of sovereignty, but it is also exactly what seems to be hindering the fight against climate change, as each state has a sovereign right to non-interference. No state can be told what to do. This is why sovereignty is such a relevant concept in climate change mitigation on an international level, and it will be a recurring theme in this thesis.[5]

Special groups of people will also greatly suffer from the consequences of climate change. Small island states, such as Tuvalu and the Maldives, are at risk of submerging completely due to rising sea levels. Sea level rise is the result of climate change causing global warming, which is melting glaciers and causing thermal expansion.[6] The people's right to self-determination is under threat, as their home regions become submerged. It is not clear who has the responsibility to protect these people if their home states are unable to adapt to the various effects of climate change, which is one of the questions that will be addressed in this thesis.

[1] Ripple et al. 2019
[2] WMO 2020, p. 35
[3] A/HRC/10/61, 2009, p. 8
[4] https://www.edf.org/climate/how-climate-change-plunders-planet (referred on 12.2.2022)
[5] Christiansen 2016, p. 244
[6] IPCC 2007

People that rely on snow coverage and cold winters for their livelihood in the Arctic regions are going to be forced to find other means of work if climate change is not controlled enough. Climate change will cause decrease in snow coverage, shortening the season of skiing centres and dogsledding farms, among other sources of livelihoods.[7]

The people that will likely suffer the most from climate change are the ones that did least to cause it.[8] Developing states are less adaptive to the consequences of climate change, yet they are least at fault for the climate change resulting from the industrialization of developed countries. It is estimated that climate change could result in over a hundred million people falling below the poverty line in developing states by 2030.[9] It would be unacceptable that only the wealthy would be able to pay to adapt to climate change while the less fortunate ones are left to suffer.

The rate of climate change cannot continue if we want human rights to be protected for the coming generations also. But what can be done, if states are not willing to tackle the issue with enough of a sense of urgency? There are some obligations arising from climate treaties, and international environmental law also has relevance, such as the no-harm principle. Law related to climate change exists on a national level also, but this thesis will focus on the international law on the subject, as it has a more far-reaching applicability, which is key in the fight against climate change.

The United Nations General Assembly has declared climate change a common concern of mankind, with implications all around the globe.[10] Climate change is a threat to all humanity, not only the special groups of people. Climate change increases the frequency of natural disasters[11] and will thus endanger the human rights of the victims of those disasters, alongside with creating damages that are expensive to fix and rebuild.
The United Nations General Assembly report of the Secretary-General assessed the climate change's implications on security in 2009. It states that climate change will increase vulnerability by threatening food security and exposing humans to extreme events. It also

[7] Intergovernmental Panel on Climate Change 2007, p. 343-
[8] Global Commission on Adaptation 2019, p. 9
[9] Global Commission on Adaptation 2019, p. 3
[10] A/RES/43/53, 1988
[11] https://public.wmo.int/en/media/press-release/weather-related-disasters-increase-over-past-50-years-causing-more-damage-fewer (referred on 11.2.2022)

found that climate change could increase risks of both international and domestic conflicts through forced migration and creating competition on natural resources. These conflicts would have international repercussions.[12]

The Intergovernmental Panel on Climate Change (IPCC) found already in 2001 that the climate change is not all natural, but an anthropogenic influence is present, and this influence may have dangerous consequences compared to just natural climate change.[13] The climate crisis is too grand of an issue to be combated only on an individual level: choosing paper straws instead of plastic ones will not save the world on its own, when a third of all carbon emissions come from a mere 20 companies.[14] Action on a state level is required to control the companies, as each company is bound to its home state's law. But sovereign states cannot be forced to do anything they do not choose to do, enabling them to stay passive even when climate change mitigation is deemed necessary. Therefore, this thesis will examine the connection between state sovereignty and a state's responsibilities in international climate change law, to determine what kinds of obligations states have to respond to climate change, and what is sovereignty's role in climate change law.

Climate change mitigation requires the reducing of greenhouse gas (GHG) and other emissions, along with the development of processes to remove the emissions from the atmosphere, through so-called sinks.[15] The emissions do not stay within state limits, but have effects globally, even in states that have nothing to do with the emissions. This makes climate change a common concern for the international community, and the required actions ought to be taken on a global scale. While some action has been taken, it is mostly insufficient at slowing down climate change.[16] The commitments of states at the moment do not support a large enough reduction in emissions, as a halving of current level would be needed to reach the goal of limiting warming to +1,5°C by 2100.[17]

Most of climate change law is in the form of treaties, such as the United Nations Framework Convention on Climate Change (UNFCCC) from 1994 and its subsequent treaties. They

[12] A/64/350 2009
[13] Intergovernmental Panel on Climate Change 2001, p. 730
[14] Taylor et al. in The Guardian 2019
[15] Victor et al. in Edenhofer et al. 2014, p. 114
[16] Global Commission on Adaptation 2019, p. 2
[17] Intergovernmental Panel on Climate Change 2018

have had limited success, which will be elaborated on later. The treaties are of course optional to sign on to, and leaving a treaty is, while unusual, not unheard of. Getting a state to sign a treaty requires finding a political, financial, or moral motivation, which might not be the easiest task in terms of climate change treaties. Many states have already signed treaties such as the treaties under the UNFCCC, but it seems that those treaties lack concrete enough obligations for the participant states to actually be obligated to combat climate change in an effective way. Even if the target of limiting global warming to +2°C by 2100 as per the Paris agreement, climate change would still have significant effects globally, in some areas more severe than others.[18]

While some treaties, such as the Kyoto Protocol to the UNFCCC, have had moderate success in limiting pollution, the community of states are not particularly keen on increasing their responsibility on climate change, as was shown in the Conference of Parties to the Kyoto Protocol in Copenhagen in 2009, when it failed at setting targets for reduces of global greenhouse gas (GHG) emissions.[19]

Even the states that have signed the Paris Agreement Under the United Nations Framework Convention on Climate Change ("the Paris Agreement") seem to not be doing enough to meet the goals of the treaty they have willingly bound themselves to, as the Paris Agreement, for example, is quite general in their terms and does not set concrete goals for each participant state. The Paris agreement does not determine clear goals for each state but leaves it up to the states to decide how they take care of their fair share of the burden. The states are free to interpret the "fair share" in a way that is favourable to them. This leaves the courts without tools to enforce climate action, as any state may argue that they are doing their fair share, it is the other states that are not meeting the common goal.[20] Considering that the agreed goal is to limit global warming to 2°C by 2100 compared to pre-industrial levels, and the current increase in temperature being 1,2°C,[21] immediate actions seem needed. To prevent irreversible damage, the states should take rigorous action to mitigate climate change.

[18] Global Commission on Adaptation 2019, p. 9
[19] Copenhagen Climate Change Conference 2009
[20] Liston in Cambridge International Law Journal Vol 9 No 2 2020
[21] World Meteorological Organization 2020, p. 6

There are many reasons why states may not be excited to take measures to control climate change. It may seem that reducing GHG emissions and switching to a greener economy would mean a competitive disadvantage, as the "green premium" makes costs of manufacturing higher than manufacturing without restrictions on emissions.[22] It is true, that investing in renewable energy sources, such as windmills, can be costly. In the long run, however, preventing climate change will be more cost-efficient than merely reacting to the consequences once they have happened: the Carnegie Commission on Preventing Deadly Conflict found that while 200 billion dollars was used by the international community on managing major conflicts in the 90s, 130 billion dollars could have been saved with more effective prevention measures.[23] The Global Commission on Adaptation also found that investments in climate change adaptation might generate notable economic benefits.[24]

The economic interest would be to prepare now, rather than waiting to react and rebuild. Net benefits for investments could be as high as 4,2 trillion US dollars for an investment of 1 trillion dollars in the building of resilient infrastructure in developing states, due to avoided losses. Investing in climate change resiliency now would also decrease the vulnerability of areas, making them more desirable locations for investments.[25]

So, it seems there should be more than enough reason for states to be rigorously reducing their emissions and adapting to climate change. Why are they then not doing so? A lot of the reluctance has to do with the fact that the consequences of climate change are so uncertain. It is hard to say exactly when and where a natural disaster will hit, or when a deadly virus is released from the glacier, so states opt to take the chance of early adaptation proving unnecessary. For the moment, it is of course cheaper to not make those investments than making them, if we do not consider what may happen in the future and what kind of investments become necessary then.[26] Decision-making is focused on short-term losses and benefits, which favour not acting to mitigate climate change.

The interesting question is whether states already have that obligation based on existing climate change law, that they are just not fulfilling, or if the field of climate change law is

[22] https://www.gatesnotes.com/Energy/Introducing-the-Green-Premiums (referred on 14.2.2022)
[23] Carnegie Commission on Preventing Deadly Conflict 1997
[24] Global Commission on Adaptation 2019, p. 3
[25] Global Commission on Adaptation 2019, p. 14
[26] Global Commission on Adaptation 2019, p. 14

still in need of some additions to create such obligations. The difference between the two is that if states are failing to fulfil existing legal obligations, there are tools to make sure those obligations are fulfilled, but if there are none, states are not doing anything illegal by not taking action. Thus, the thesis will seek to find out if the responsibility to mitigate climate change is solely a political and moral one, or if there is a legal basis for holding states accountable.

The purpose of this thesis is to determine the relationship between state sovereignty, responsibility, and climate change. Essentially this means evaluating the possibilities of creating responsibilities to states regardless of their consent, and what that means to the concept of sovereignty. For a thorough evaluation, chapter 1 will first define sovereignty consider the relevance of it, generally and in the climate change context. The concept of sovereignty will be a recurring theme in the thesis, with chapter one being dedicated to explaining the definition and a bit of the history of sovereignty, its purpose and its relevance to climate change mitigation.

Chapter two of this thesis will consider humanitarian law in relation to climate change since human rights obligations are generally seen as such fundamental obligations that even sovereignty cannot fully protect a state from consequences of failing to fulfil them. The connection between human rights and climate change is not uncontested, but I will attempt to sufficiently argue why that connection should be considered now, rather than waiting until the connection is indisputable and human rights have already suffered immensely. The considering of this connection will be supported by relevant cases in different courts that have evaluated whether climate change threatens human rights, and thus if the states concerned are failing at their human rights obligations if they fail at mitigating climate change.

It seems that merely the states' own motivation to ensure a sustainable way of life and economy will not cause enough action to be taken to slow down climate change. Even though the effects of pollution have been more or less known for decades, states (and companies) remain rather passive on the issue.[27] The pollution continues and eventually the living conditions on Earth will be unbearable for humans. But what can be done? As long as states

[27] Global Commission on Adaptation 2019

are sovereign, no one can be forced to stop polluting, invest in a more sustainable way of operating or do anything to mitigate climate change, unless they willingly bind themselves to a treaty or accept customary law containing such obligations.[28] That is why I will be investigating whether states could be held responsible by any international law, and how that responsibility should be shared based on the existing law.

The thesis will evaluate both the responsibility to prevent climate change and responsibility to help the victims of the effects of climate change. By this I mean the difference between states having a responsibility to prevent the avoidable climate change from happening and having the responsibility to aid the victims of climate change that has already happened, such as offering shelter for the dislocated persons of low-lying states that are disappearing due to sea levels rising. The difference is important, because one of the biggest challenges in creating responsibility to prevent climate change is the uncertainty of the causal effects between actions and climate-related consequences. In a situation where the effects have already happened, it is not as relevant to determine what caused it: what matters is that there are people in dire need of help. The responsibility to prevent will be addressed in chapter three and the responsibility for the consequences of climate change will be discussed in chapter four.

This thesis will also evaluate different sources of international law to determine whether a responsibility not dependent on a state's willingness to be bound by it can be found in international law. Currently, most of international law that is explicitly climate change law is in the form of treaties. In addition to distinct climate change law, the subject is related to human rights law and environmental law. Human rights law is also codified mostly in treaties, but some of the human rights contained in those treaties have achieved the status of *jus cogens* norms, from which to derogation is permitted even by states not parties to the treaties.[29] Thus, the norms have a universal applicability, whereas climate treaties are only binding to the parties. International environmental law also offers a universal norm, the no-harm principle, which is a part of customary law, meaning it is an embodiment of a rule that states already abided by.[30] Chapters three and four will offer insight to these rules.

[28] Christiansen 2016, p. 244
[29] Vienna Convention on the Law of Treaties 1969, article 53; Crawford 2002
[30] Statute of the International Court of Justice 1945, article 38

The effectiveness of the existing climate change regime is also considered to see if they are not sufficient and something more is needed, or if it is just a question of getting states to comply to their already-existing obligations.

As will be shown in the chapters on state responsibility to prevent and responsibility for consequences, there is some international law that supports states having a responsibility in the issue of climate change. The issue becomes one of allocating the responsibility. Chapter five will attempt to bring clarity to this problem.

This thesis will be using a juridical method, meaning the thesis will be a look into the existing regime on the discussed topic.[31] There are arguments to be said about the moral obligations to mitigate climate change, but the thesis will only be investigating the legal obligations. Assessing the purposes of different legal tools and rules might include some discussion of the moral kind, but the thesis will attempt to keep strictly to the legal sources for the justification of my arguments. The human rights aspect of the issue, however, is closely tied to morality and moral obligations, such as protecting life, which is why morality can be mentioned.

For the structure of the thesis, it will first argue why state sovereignty is relevant in the forming of state responsibility in addressing climate change. The thesis will move on to evaluate the connection between climate change and human rights and humanitarian law, to establish whether there is a possibility of extending certain humanitarian law to apply to climate change as well. From there, the thesis will discuss the obligation of states to prevent climate change, evaluating both human rights law and environmental law. After that, the obligation of helping victims of climate change is considered along with the states' responsibility for environmental damages caused by climate change. Before drawing conclusions together, the thesis will discuss the sharing of the burden of responsibility for climate change. The conclusions chapter will crystallize the arguments and conclusions presented in the text.

Before going into the first chapter, the term "responsibility" should be defined, as it will be at the centre of this thesis. According to the Merriam-Webster dictionary, responsibility can

[31] Hirvonen 2011, p. 21–22

mean "something that you should do because it is morally right, legally required, etc."[32] So, responsibility can have both moral and legal attributions. For this thesis, I will focus on the legal side of the definition, although the two sides coexist.

# 1 Sovereign states and climate change

## 1.1 What is sovereignty?

Before going any further into inspecting how or if states can be held responsible regardless of their sovereignty in climate change related issues, I should explain what sovereignty is and how I have understood it for the purposes of this thesis, as sovereignty has traditionally been the reason why states cannot be forced to be bound to law they do not want to be bound to. States can, of course, be forced to comply to law they have willingly bound themselves to, such as a treaty.

This chapter will also include a brief introduction to the history of sovereignty, including the most important points in the context of this thesis. Going over the history of sovereignty will show that it is not a fixed concept, but it has and can develop over time to fit the needs of society.

Sovereignty can have different meanings and explanations depending on the point of view that is chosen, and it has also changed over time since the "birth" of sovereign states in the Peace of Westphalia in 1648 and even before it. A simplified definition of sovereignty is that it is a supreme authority within a territory.[33] The sovereign holds the highest authority within a defined territory and its people, and that authority is not contested or legitimately challenged by others. With authority comes the right to command and, subsequently, the right to be obeyed.[34]

[32] https://www.merriam-webster.com/dictionary/responsibility (referred on 12.2.22)
[33] Philpott in Klosko (ed.) 2011, p. 562–563
[34] Philpott in Journal of International Affairs Vol 48 No 2, 1995, p. 355

There can also be different types of sovereignty: for example, Krasner divides it into four different concepts. International legal sovereignty explains sovereignty through juridical independence and respect between territorial states, whereas Westphalian sovereignty refers to the perfect authority of an entity inside specific territorial borders. Domestic sovereignty is the political and other authority public entities exercise within a state. Interdependence sovereignty means the authority of controlling the flow of information, ideas, or other goods across state borders.[35] The different types of sovereignty are not distinct, they are complementary to each other.

The idea of sovereignty has a long history. Already Aristotle recognized the fact that a state must have a supreme power, although he did not speak of sovereignty.[36] In the Middle Ages, the sovereign's power was dependent on the consent of the governed, whereas the authority of the Pope was considered to be given by God.[37]

Jean Bodin could be considered to be the father of sovereignty. It was him that first brought on a discussion on sovereignty, during a time when his country, France, was moving on from feudalism to a centralized state. Bodin framed sovereignty as the supreme power over citizens, unrestricted by law.[38] There is no higher law for a sovereign, although Bodin did not mean for a sovereign to have no obligations whatsoever: the sovereign was to be morally answerable to God and divine law, the law of nature and the law of nations.[39] Essentially, it is up to the sovereign's conscience to obey these laws, as it would not be a legal obligation. Bodin's theory is fit for the sovereignty as a sovereign ruler: the idea of a sovereign state came later.

Hobbes was another central figure in the history of sovereignty. For Hobbes, sovereignty was the solution to civil wars. The legitimacy of sovereignty was born out of a contract, which people entered into by giving the sovereign full powers over them in exchange for the

[35] Krasner 2009, p. 179–180
[36] Aristotle 1946
[37] Merriam 2001, p. 6
[38] Bodin 1992(1576)
[39] Merriam 2001, p. 7

protection of their protection. The sovereign's unlimited powers made the achieving of peace possible, as the natural state of people would be chaos and conflict.[40]

Yet it was not before the emergence of national states that the theory of sovereignty fully developed.[41] The Peace of Westphalia in 1648 was a turning point in defining the territorial state, but the "sovereignty" granted by it was limited to the Christian states of Europe.[42] Imperialism still flourished, and it was not until the French Revolution in 1789 that national self-determination was recognized. After that, over time, former colonies gained independence of their host states, and by the 1960s, imperialism was pretty much history with the UN declaring colonies illegitimate.[43]

The current discussion of sovereignty takes on questions such as the relationship between humanitarian interventions taken on by the UN Security Council, and the formation of states in entities such as the European Union. And, as in this thesis, the relationship between state responsibility and sovereignty raises questions especially in the field of human rights.

According to constructivist theories, sovereignty is a social norm, that is constructed and reconstructed throughout history.[44] Thus, it cannot be appointed a fixed definition. It is not a brute fact, but rather an objective fact, dependent on the agreement between humans.[45] As an inherently social concept, state sovereignty is constantly going through transformations.[46] But this does not mean that sovereignty has no meaning or authority. Other states and sub-state actors all depend on the concept of sovereignty, similarly as people depend on the concept of money, which is also dependent on human agreement. If the social constructivist theory is accepted, the meaning of sovereignty is dependent on its status as an institutional fact.[47] This would mean that the concept of sovereignty can be altered within limits, so that its status is not lost, but it can still serve the purpose needed at the time. The consideration of constructivist theories is relevant in this thesis, because it helps clarify that I am not

[40] Philpott in Klosko (ed.) 2011, p. 566
[41] Merriam 2001, p. 7
[42] Philpott in Journal of International Affairs Vol 48 No 2 1995, p. 364
[43] Philpott in Journal of International Affairs Vol 48 No 2 1995, p. 365; Declaration on the Granting of Independence to Colonial Countries and Peoples 1960
[44] Glanville 2014, p. 15
[45] Berger et al. 1967
[46] Biersteker et al. 1996
[47] Zick 2005, p. 332

looking to lose sovereignty, but rather argue that its meaning is no longer what it was a couple centuries ago.

When discussing state sovereignty, the other question that demands answering is, what s state is. In most cases, it is fairly simple to say whether an entity is a state or not, but there are some borderline cases that are not as straightforward. The definition of a state as a person of international law is written in Article 1 of the Montevideo Convention of 1933: it requires a state to have a permanent population, a defined territory, a government, and capacity to enter relations with other states.[48] The fourth requirement means, that the existence of a state as an actor in international law is dependent on the recognition by other states. It's interesting to consider, what constitutes a recognition by another state, if the two states never enter an international relationship? Does the recognition have to be explicit, or if a state can be recognized through no other state resisting its statehood? Article 7 of the Montevideo Convention mentions that the recognition may be express or tacit through any act that implies it. I will not go into the details of interpretation, as it is not necessary for the purposes of this thesis. The most important part of the definition of a state in the context of this thesis is the requirement of a territory, which becomes an issue for states under threat of becoming submerged by sea level rise.

State sovereignty is a fundamental principle of international law, and it provides states with the right to non-interference. It is recognised, among other sources, in the UN Charter.[49] There has been some discussion about how the full protection of human rights might require the principle to be a bit more flexible. The protection of human rights is no longer seen as a strictly domestic issue, and sovereignty should arguably not prevent outside interference in situations of human rights violations. But how this argument is legitimized is far from clear and how this question of human rights relates to climate change is further discussed in chapter two.

## 1.2 The purpose of sovereignty

[48] Although the Montevideo Convention is only signed by American states, it is a part of customary international law and can therefore be referred to elsewhere as well.
[49] United Nations Charter 1949, article 2(1)

Sovereignty may have its issues, but it is still an integral part of the way the world works. Sovereignty allows states to have authority within their boundaries, meaning that they can protect their people from different threats to their well-being. It ensures the functioning of the international community, including international trade that makes possible the distribution of resources. The order of the international system of states is upheld by sovereignty. Perhaps its most important function, or at least one of them, is that it provides freedom to its people and protects them from outside forces.

Sovereignty is a two-way street. It provides its enjoyer perfect authority over a people and allows them to govern however they see fit. On the other hand, sovereignty was allowed because it ensured the protection of the people in a state. Therefore, it can be argued that the obligation to obey the sovereign's will is limited by the sovereign's ability to protect, which means that it is justifiable to demand sovereigns to protect their people.[50] Sovereignty should not be the enabler of human rights violations. Chapter 1.3 will discuss the idea of sovereignty as responsibility in more detail, but I mention it already here, as the background of sovereignty explains the background of that idea to some extent.

From the Hobbesian view of the natural state of ungoverned people being chaos, it follows that the sovereign that is granted unlimited power over the people, must use that power to achieve peace and order. For what is the purpose of having the power to stop atrocities like civil wars, if not stopping them? The concept of sovereignty as a social contract means, that the sovereign has a contractual obligation to protect the people it has power over.[51]

As all things do, sovereignty also has its problems. It could provide a state with a shield from outside intervention, allowing it to violate human rights freely.[52] To protect people from harm allowed to be done by their own government, the possibility of humanitarian interventions was presented in international law. The possibility of intervention regardless of a state's consent conflicts with absolute sovereignty and shows that the concept of sovereignty is evolving, and that evolving is necessary in the modern world.

[50] Berkowitz in Policy Review 2008, p. 18
[51] Philpott in Klosko (ed.) 2011, p. 566–567
[52] A/63/677 2009, p. 5

The principle of non-interference that grants sovereigns with the right to decide how to conduct politics within their territory exists also for the protection of the state's people. Post-colonialism, the principle enabled former colony states to build their own politics and relations, without interference from colonialists that had been at fault for many violations of human rights.[53] From the principle of non-interference it follows that states have a duty to not interfere in other states' affairs, meaning that they cannot conduct domestic affairs that have an impact on the other states: this would be an obligation arising from sovereignty itself. These domestic affairs include domestic climate change policy. The implications of this will be considered in chapter 1.3 and 1.4.

Sovereignty can no longer be absolute in practice because states are interdependent in the global community. Even if sovereignty is respected in the traditional sense, states can apply pressure on another state to act a certain way regardless of their will by placing embargos or political pressure on the state. There are very few, if any, states that are not dependent on other states in any way. Therefore, it would be possible to "force" a state to comply with a climate change regime, if enough states worked together to put such pressure on a state not willing to comply. It is another question entirely how enough states would be motivated to force another state in that way, especially if the state in question was a state of importance to the international community. It would be difficult to force a major state, such as the USA, to comply, when the state is rather the one that others depend on in international trade, among other things. Applying political or economic pressure only works if there is leverage to hold over the pressured state.

The next chapter will dive deeper into the purpose of sovereignty as a responsibility: this concept will have relevance in understanding the arguments that will be made later in this thesis.

[53] Glanville in Bellamy et al. (eds.) 2016, p. 158

## 1.3 Sovereignty as responsibility

The traditional definition of sovereignty describes sovereignty as the sovereign's absolute authority over a territory and its people.[54] The sovereignty is, according to some theories, only possible by the concession of the people over which the sovereign has authority.[55] It could follow, that the sovereign then ought to rule its people in an acceptable way to maintain their sovereignty.

Since the 1948 Declaration of Human Rights, steps have been taken towards establishing human rights that cannot be optional even for a sovereign state to uphold. Two international covenants, the ICESCR and the ICCPR, created legal obligations to protect the human rights contained in them, alongside with other treaties. More recently, in the 1990s, the International Criminal Court was established for the purpose of persecuting perpetrators of atrocious human rights violations. None of these advancements sought to interfere with sovereignty, but rather establish its role as a protector of people.[56] In more recent decades, the role of sovereignty has been argued more and more to include the responsibility to uphold the human rights of its people.[57]

Sovereignty can also be non-absolute. The non-absoluteness of sovereignty does not mean the lack of supremacy, as that would mean there would no longer be sovereignty, but it means that the sovereign is not the highest authority in some matters.[58] In the modern world, the sovereignty of some states suffering from gross human rights violations seems to be non-absolute. Some interventions of the UN in recent decades have proven that the sovereignty of the receiving states has been non-absolute, and at least in the field of human rights states might be subject to outside interference.[59]

The United Nations Security Council has taken it upon themselves to ensure global peace and security even if it means conflict with sovereignty in practice. Chapter VII of the United Nations Charter determines when and how action should be taken in the occurrence of a

[54] Philpott in Klosko (ed.) 2011, p. 561
[55] Merriam 2001, p. 6
[56] Philpott in Klosko (ed.) 2011, p. 570–571
[57] Annan in the Economist 18th September 1999
[58] Philpott in Journal of International Affairs Vol 48 No 2 1995, p. 358
[59] Philpott in Klosko (ed.) 2011, p. 563

threat to peace. This has usually meant taking military action to stop a humanitarian crisis, which is not a relevant measure against the climate crisis, but using it as an example will help determining when sovereignty-breaching measures are acceptable. The Security Council may even take military action to intervene in a state's affairs, which is a clear breach to the state's sovereignty.[60] For example, a humanitarian intervention does not require the intervened state to have accepted the UN's authority, as the Security Council claims to act for the international community. Even though the United Nations has 193 member states that have through the membership accepted the UN's authority, there are still 4 states recognised by the UN that have not done so,[61] and not every treaty made by the UN is ratified in every member state. A state might also in theory terminate its membership at the UN and be freed from the obligations in UN treaties. However, the human rights contained in some of the UN covenants and declarations have a status as general principles of international law and are thus binding to every state regardless of consent.[62]

### 1.4 Sovereignty and climate change responsibility

Sovereignty has both the role of enabling environmental destruction and environmental protection: on one hand, a state can use its sovereign authority to do what it wishes with its environment, but as a sovereign state in the international state system, it is obligated to not cause harm to other states.[63] Evaluating whether state sovereignty can be disrespected, diminished, or re-evaluated to ensure action against climate change is an interesting debate. It should be kept in mind, though, that not acting to stop climate change might mean that sovereignty is lost anyways. For example, as sea levels rise, the territories of low-lying island states will cease to exist, and the sovereignty of those states is threatened, as a territory is one requirement to be recognized as a state and therefore acquire sovereignty.

Climate change regulation on the international level presents mostly in the form of treaties and conventions, such as the Paris Agreement and the United Nations Framework Convention on Climate Change. Climate change mitigation is therefore very strongly dependent on the will of states to act. This is, of course, true for most areas of international

[60] UN Charter 1945, article 45
[61] https://un.org/ referred on 3.10.2021
[62] Crawford 2002
[63] Eckersley in Barry et al. 2005, p. 159

law, but should it be different for climate change regulation? It poses a threat to the entire globe, so is it appropriate that there would be no common responsibility?

As I will be inspecting how states could be held responsible in fight against climate change, it is relevant to ask why state-level action would be the most efficient choice compared to, for example, international regulations for companies and other organizations, or individuals. It is certainly the big energy companies that are creating the most emissions alongside states. In our capitalist world,[64] private companies exist to make profit. For the most part, that is the first and foremost goal of theirs. States, on the other hand, should exist for the good of their people. This is one reason why the fight against climate change should be fought by states. It would be best, of course, if everyone would make their contribution, but realistically, it will be more efficient to argue that states must act. The actions could also mean creating regulations that force companies to go green as well, but I consider state action to be the more important step to start with.

I do not think climate change is an issue that can be tackled only on a national level by only the few states willing to do so, and this is shown also in the reports of the Intergovernmental Panel on Climate Change (IPCC). The implications of climate change have reached or will reach every bit of the globe, and no state has the means to fight it alone. Therefore, states as members of the international community ought to be responsible to mitigate climate change effects not only on their own soil, but everywhere. The actions causing climate change cannot be limited to only have an effect inside the acting state, and so the responsibility of the consequences shouldn't be limited by the state's borders either.

While sovereignty means that no state can be forced to be bound to a treaty it does not want to join, many states have ratified the Paris Agreement and other climate change treaties. So, does sovereignty in reality restrict the possibilities to fight climate change? It is indeed promising that so many states have willingly bound themselves to the Paris Agreement, but it is not a particularly effective or strict treaty. I will discuss it in more detail later, but overall it lacks specific goals for each state, and only defines the restriction of global warming to +2°C by the year 2100 as a clear goal. Sharing of the efforts is not effectively considered. The existing climate change regime will be further discussed in a later chapter.

[64] While capitalism is not the only type of economy in the world, most of the impactful actors function by the principles of capitalism

There is not much substantial climate change law, either on a national level or an international level. The formation of regulation would require states to use their sovereignty to enter an international climate treaty or exercise their domestic political sovereignty to create national climate law. Neither has happened in a meaningful way, though many states have taken steps to lessen their emissions or otherwise reduce their carbon footprint. The steps are just too small for the grandness of this issue. Even the regulation that has been created has not forced actors to take meaningful steps towards climate change mitigation, and even the states that have willingly joined treaties can buy their way out of responsibility through emissions trading.

It seems rather unlikely that states would willingly ratify treaties that would have grander restrictions on emissions, meaning states would have to make costly investments in greener technology and infrastructure, and restrict the companies that are bringing in tax money. For this reason, it is crucial to find a way of regulating the entire international community, so that no safe haven for polluters can exist. Taking climate change into consideration should not be a market disadvantage, which in practice means that every state should have a similar duty to fulfil.

The role of sovereignty is not only relevant in whether states can be held responsible for their inaction on climate change, but also in considering whether the states negatively affected by climate change need to accept aid from other states or NGOs. If a natural catastrophe is too grand to be tackled on a domestic level, must the state accept help offered by the international community? Is it not the state's sovereign right to refuse help? Even when help is accepted, it usually requires negotiations on the rights and immunities of the helping personnel, meaning immediate assistance is delayed.[65]

In certain humanitarian crises where help has not been initially accepted, the state has been criticised for their lack of acceptance, as it has led to more human suffering that could have been avoided with outside help. One example of this is the earthquake in India in 2005.[66] If a state cannot protect its people, is it obligated to accept help? Chapter four will consider this issue more in depth.

[65] Telec in Telesetky et al. (eds.) 2014, p. 271
[66] Sengupta in New York Times International 2005

As was already discussed in the previous chapter, there is an argument about sovereignty having an inherent responsibility to the people. If this definition of sovereignty as responsibility is accepted to a certain degree, sovereignty might not need to be disrespected at all. The concept of sovereignty as responsibility in international human rights law will be considered more in chapters three and four.

One central question needs to be answered for the thesis to make sense: How could sovereign states be forced to act? If we are considering whether sovereignty is absolute in a way that prevents climate change law from being binding to any state that has agreed to it, how would a state be forced to comply if sovereignty does not prevent it? Sovereignty in a traditional sense means that a state is independent of outside interference. In the modern day, this is true to a certain point: states are protected from the use of force, but even if sovereignty is still respected in theory, the global community has become so interdependent that a state is not totally free of interference. Global trade and politics have a huge impact on the actions of states, especially when major powers are involved.

Thus, the states not willing to comply to hypothetical universal climate obligations could be "forced" to comply through economic and political measures, such as embargoes and diplomatic sanctions.

# 2 The connection between climate change and human rights

## 2.1 Why should climate change be considered a human rights issue?

What human rights are and why they should be respected is more of a philosophical question and too broad to comprehensively answer in the scope of this text, but I will refer to the commonly recognized human rights, as per the Universal Declaration of Human Rights[67] and the International Covenant on Economic, Social and Cultural Rights[68] as well as the International Covenant on Civil and Political Rights[69] for the purposes of this thesis. If human rights are being threatened by climate change, that could constitute a duty to protect them from climate change, either by mitigating it or preparing for the consequences of it. The connection between climate change and human rights is relevant because some international law regarding human rights is binding even without explicit consent from a state, providing more opportunities to create obligations to states to address climate change.

Human rights law is concerned with the obligations that states owe to their people, whereas environmental law, which is the field of law more often associated with climate change, is concerned with obligations that states owe to each other. Defining a state's sovereignty in a way to create obligations in regard to climate change regulation could make the fight against climate change a bit more effective. Human rights law also is not dependent on compliance of other states like environmental law is, and implementation is therefore simpler in some respects.[70] The respect for human rights is not conditioned on other state's actions, and states cannot escape their responsibility by arguing that other states are not respecting human rights.

Investigating whether human rights are being violated by climate change will perhaps help with figuring out what kind of responsibility the states ought to have, as human rights have extensive international law regulations tied to them and they are an important value to the

[67] The Universal Declaration of Human Rights 1948
[68] International Covenant on Economic, Social and Cultural Rights 1976
[69] International Covenant on Civil and Political Rights 1976
[70] Bodansky et al. 2017, p. 299

international community. Human rights are connected to many international treaties and have some customary law tied to them also.

Human rights law also has more international courts, tribunals, and other forums to hold human rights violators accountable, whereas the environmental law field lacks such entities. It makes the implementation of law more effective, which would be essential in climate change mitigation. Human rights forums also provide the individual victims a place to ask for accountability, compared to environmental law where it is rather just states that can attempt to hold other states responsible. Presenting climate change as a human rights issue also gives it more of a sense of urgency than if it was "just" an environmental issue,[71] even though environmental issues are important exactly because of their implications to the enjoyment of human rights. It must be highlighted, though, that the fact that climate change interferes with the enjoyment of human rights is not alone sufficient to claim that any human rights law is violated by climate change.[72] The two claims are separate from each other, even though they have relevance to each other. The next chapters will consider the question of whether climate change violates human rights law.

## 2.2 Does climate change threaten human rights?

This chapter will consider the connection between climate change and human rights, focusing especially on the rights codified in the International Covenant on Economic, Social and Cultural Rights, which include, among others, the right to life and adequate standard to living.

Not only does climate change arguably cause weather conditions that claim lives, such as floods and extreme heat, but it also furthers inequality between different nationalities, as climate change has different effects around the globe: the states that are the biggest contributors to climate change are usually not the sufferers of the biggest climate catastrophes. Developing states are not as adaptive to the changing climate as developed ones and are likely to suffer more greatly from it, even though the developed states are the bigger contributors of climate change causing emissions. This question is considered in

[71] Bodansky et al. 2017, p. 300
[72] Knox in Carlarne et al. 2016, p. 214

different theories on how the burden of climate change mitigation should be shared among states, which is a question I attempt to answer in chapter 6.

In addition to extreme weather events, climate change may threaten human rights, such as the right to life, food, water, and health, through releasing viruses from the melting glaciers and decreasing the productivity of farming. The effects of climate change on the enjoyment on human rights are adverse.[73] Even with the global warming kept to the goal of +1,5°C-+2°C as per the Paris Agreement, there will be an increase of about 50% of people that are exposed to deadly heat for over 20 days per year.[74]

Climate change also threatens the right to gain a living by freely chosen work, which is protected under the ICESCR Article 6(1).[75] The increased changes in temperatures and rainfall expose more than 500 million small farms around the world to reduced productivity.[76]

The Office of the United Nations High Commissioner of Human Rights (OHCHR) investigated the connection between climate change and human rights in 2009.[77] It sought to answer two questions: whether climate change violates human rights and what obligations human rights law imposes on states regarding climate change, if any. According to its report, states have a responsibility to cooperate to ensure human rights in the global threat of climate change, but climate change in itself does not violate human rights law. This conclusion was quite surprising considering that the OHCHR report does indicate that climate change will have implications on the enjoyment of human rights.[78]

The decision was reached likely because the determination of the causal relationship between climate change and the events that violate human rights is not undeniably proven.[79] While scientists for the most part share the opinion that the increase in extreme weather conditions is linked to climate change, which is then linked to the greenhouse gas (GHG) emissions from states, the clarity of the causal relationship is not sufficient in a legal sense.

[73] A/HRC/RES/10/4 2009
[74] Global Commission on Adaptation 2019, p. 10
[75] International Covenant on Economic, Social, and Cultural Rights 1976
[76] Global Commission on Adaptation 2019, p. 9
[77] A/HRC/RES/10/4 2009
[78] Knox in Harvard Environmental Law Review Vol 33 no 2, 2009, p. 488
[79] Knox in Harvard Environmental Law Review Vol 33 no 2, 2009, p. 489

The states have a responsibility to protect their people and their human rights in the event of a natural catastrophe, regardless of whether it occurred as a result of anthropological climate change or not, but they do not have a responsibility to try to prevent the events from happening by reducing GHG emissions. The connection between states creating GHG emissions and those emissions causing global warming and that causing events that violate human rights needs to be proven further for it to be possible to claim that states producing emissions cause climate change that then violates human rights.

The connection between human rights and climate change has been considered in different courts around the world, and even though many of them have limited jurisdiction, their decisions can still provide answers to the question of whether climate change violates human rights. The human rights courts do not offer a way to hold a state responsible regardless of their sovereignty. However, considering how different courts have determined the connection of human rights and climate change will help argue that since there is somewhat of a consensus on the connection, human rights ought to be protected from climate change regardless of the states' will. For example, the European Court of Human Rights (ECtHR) has given decisions in cases such as Lopez Ostra v. Spain. In that case, the ECtHR found that severe environmental polluting may prevent individuals from the full enjoyment of their human rights.[80]

After the landmark decision, the ECtHR has given similar rulings in cases concerning severe pollution and human rights,[81] but it has emphasized that for accountability to arise, there needs to be a clear impact on the individual, the worsening of the environment alone is not enough.[82] That means that states could not be held responsible for failing to prevent the violations of human rights resulting from effects of climate change on the environment, only once the actions causing climate change (such as pollution from a factory) have an impact on an individual's enjoyment of human rights.

There is currently an interesting case pending in the ECtHR which was brought to the court by six Portuguese youth against 33 European states, alleging that the responding states are

[80] Lopez Ostra v. Spain 1994
[81] see for example Taskin v. Turkey 2007 and Dubetska and others v. Ukraine 2011
[82] Krytatos v. Greece 2003

violating human rights by not taking appropriate actions to mitigate climate change.[83] The complaint was filed in September 2020 and the ECtHR has yet to give a decision, but it will be an important decision on the determination of whether states have an obligation to take preventive measures against climate change based on human rights law, as that would open the door to arguing that such obligations exist under non-European human rights law as well.

The Committee on the Rights of the Child (CRC) considered the human rights dimension of climate change in its decision Sacchi et al v. Argentina et al (Communication 104/2019).[84] The petition was found inadmissible because the petitioners had not exhausted their national legal remedies, but the case includes some extremely interesting contentions on the effects climate change has on human rights. The CRC admitted that the respondent states are legally responsible for the harmful effects their emissions have on children even outside their borders, from within which the emissions originate. Even though the CRC only has jurisdiction in states that are parties to the Convention on the Rights of the Child, the rights in that convention have a fundamental human rights status, that could possibly extend the responsibility to all states of the international community.

Some decisions of human rights courts indicate that a state, that is under threat of natural disasters or other events that have human rights implications, has a responsibility to prepare for such events to protect the human rights of their citizens. This was the case in Kolyadenko and others v. Russia, where a state-owned water company released water from a dam after heavy rainfall, resulting in severe floods in the area where the water fell.[85] The authorities had failed to warn the residents of the area, endangering their right to life under article 2 of the European Convention on Human Rights (ECHR). The ECtHR found that the state-owned company that handled the dam must have known of the risk that water would have to be released in the case of heavy rainfall, and yet the residences had not been provided with any kind of protection from floods. Therefore, the Russian government was in violation of article 2 of the ECHR. The case was not precisely about climate change, but it confirmed that when there is knowledge of a risk of a human rights violation, that risk must be considered.

[83] Youth for Climate Justice v. Austria et al. 2020
[84] Sacchi et al. v. Argentina et al. 2019
[85] Kolyadenko and others v. Russia 2012

In another case against Russia, the ECtHR also confirmed the state's positive obligation to protect its citizens from other actors than the state itself in Budayeva and others v. Russia in 2008.[86] In the case, a mudslide had swept through a city, the residents receiving no emergency warning or information about when it was safe to return to the homes. The ECtHR reiterated in its decision that based on article 2 of the ECHR the states do not only have the obligation to ensure human rights are respected in the use of official forces, but also the positive obligation to protect the rights from threats posed by outside factors, such as natural disasters. In a climate change context, the decision would mean that states ought to acknowledge the risks associated with climate change, and prepare for them, but not reduce those risks. States would have the obligation to, for example, create building regulations strict enough to make sure houses in a flood-prone area are designed to withstand floods, but they would not have the obligation to reduce emissions causing climate change, even if that might reduce the frequency of floods.

There is a growing body of decisions by human rights courts recognizing the connection between climate change and human rights, and the responsibility of a state to protect human rights even when the violator is a natural phenomenon. There have been unsuccessful cases too. Courts have ruled cases inadmissible on the basis that the applicants were not personally affected by climate change,[87] and in another case, because domestic legal remedies had not been exhausted.[88] The decisions do show that states have a responsibility to prepare for risks that could have a negative impact on human rights, but there is yet to be a decision that would widely rule inaction in climate change mitigation a violation of any human rights law.

Of course, an obligation to prepare for threats to life posed even by climate change is better than no obligation at all but preparing for consequences can often be much less effective and more costly than reducing the risks of those consequences. Understandably, an obligation to prevent cannot exist if it is not certain that preventive measures are necessary, as if the preventive measures prove to have been of no need, the cost is much larger than doing nothing.

[86] Budayeva and others v. Russia 2008
[87] People's Climate Case 2019
[88] Sacchi et al. v. Argentina et al. 2019

Human rights need to also be considered in the taking of action against climate change. The responsibility imposed on a state cannot result in the conditions of the people of the state worsening below humane. Fighting climate change to secure future human rights cannot come at the expense of human rights being violated when a state cannot meet its responsibility without neglecting its responsibility to ensure the standard of living for its own people. This concern is relevant especially in the case of developing states that might not yet have reached a steady infrastructure that would ensure humane living conditions for their people. I have discussed this issue more in chapter five, which deals with the sharing of responsibility in climate change mitigation.

Even though human rights are related to climate change law, they are two different areas of law, and it seems there is a long way to go before climate change law could become a system of rules as ingrained in society as human rights law is.[89] On its own, climate change law will most likely not gain a similar status to human rights law but arguing that at least a part of climate change law is human rights law could help it secure its place in the international legal system, ensuring human rights are protected from threats posed by climate change. The climate change law system has a similar moral obligation tied to it as human rights law, since climate change law strives to limit the effects of anthropological climate change, which could have dangerous impact on the ecosystem supporting human welfare.

The current situation with the recognition of the impact climate change has on human rights seems to be that it is widely accepted that climate change has and will have a growing effect on the enjoyment on human rights. This does not mean, however, that states violate human rights law by not taking steps to prevent climate change. It just means that climate change is not a reason to let human rights be degraded, even if climate change itself is not bound to any human rights law.[90] States have the freedom to decide, what the correct balance of protecting human rights from climate change and other interests is. The question seems to be more an internal than an international one, but this thesis will later consider the situations where the state fails in its duty. The next chapter will focus on the special right to self-determination, which is threatened by climate change induced sea level rise and has clear implications on the international community.

[89] Zahar 2014, p. 11
[90] Knox in Carlarne et al. 2016, p. 220

## 2.3 Climate change and the right to self-determination

The right to self-determination is protected under the UN Charter[91] among other treaties. Categories of persons that qualify as "peoples" have the same human rights as other persons, but they have a few additional rights, the right to self-determination[92] being the most relevant one here. Climate change might threaten this right for example through rising sea levels submerging small island states, forcing the people to seek shelter elsewhere, or by warming winters enough to disappear the sources of livelihoods of people living in the Arctic.

Certainly, one major human rights issue arguably resulting from climate change is the displacement of people whose home regions become uninhabitable in the changing climate. The warming climate causes glaciers to melt, resulting in sea levels rising and loss of territory for low-lying states. In 2020, around 9.8 million displacements were recorded[93]. The situation has caused new types of questions to emerge, such as the obligations of states to receive migrants fleeing uninhabitable territories. The existing refugee treaties do not recognize these types of migrants as refugees, as they are not fleeing political persecution.[94] Planned migration is often available only to the most able persons, not the ones already vulnerable,[95] and it is dependent on the migration treaties that the concerned states have agreed to.

The rising sea levels could submerge entire states, which would make the state's responsibility to protect its citizens' human rights impossible. For them to be protected, outside help is needed. Should the submerged state be allowed to acquire land from another state, for its people to practice their right to self-determination? Which state would be required to give that land to the state? Or should the people stay as a people even without a territory to call their own? Another option would be to integrate with an existing state, while maintaining the right to self-determination within that state. All these options require the consent of other states, that might not be willing to comply, and of course the people that lost their territory might not have a consensus on the preferred option. The obligations to provide shelter to the displaced persons is further discussed in chapter four.

[91] UN Charter 1945 article 1(2)
[92] International Covenant on Civil and Political Rights 1976, article 1(1)
[93] World Meteorological Organization 2020, p. 5
[94] Convention relating to the Status of Refugees 1951, article 1(2)
[95] Willcox in Human Rights Quarterly Vol 38, 2016, p. 1023

The right to life and adequate living conditions is threatened as well, as climate change seems to cause extreme weather conditions which claim lives, such as hurricanes and floods. The effects of climate change are not felt equally around the globe: some states feel the effects earlier and in a greater capacity than others. As the protection of human rights is supposedly the state's responsibility, should only the states feeling the greatest effects be held responsible for the protection of their own people's human rights? What should happen, if they fail to do so, because they alone cannot stop climate change? These are interesting questions which are not simple to answer, and there is not too much time to consider them before decisions need to be made.

While states can be held responsible to protect their people's human rights in general, creating an obligation to reduce emissions in order to reduce climate change related extreme weather events would demand a direct, undeniable causal relationship between the acts or neglects of the state and the events violating human rights. Proving such a connection is not a simple thing to do, and it seems unlikely that it would be proven before the effects have become too great to reverse. It seems more likely that states will only have the responsibility to protect their people's human rights after such an event has happened.

The situation with low-lying islands is rather alarming. Climate change causes sea level rise and extreme weather conditions, which pose a risk for the inhabitants of such islands especially.[96] Some islands are at risk for losing their inhabitable territory altogether. Without territory to replace the lost land, the inhabitants' right to self-determination is under threat. As one requirement for being recognized as a state is territory, the sovereignty of these island states is also endangered.[97] The law on the disappearing state's right to their underwater territories and the resources is unclear as well.

Climate change will arguably increase the frequency of natural disasters and warm the climate. Territorial integrity is being threatened by the rising sea levels, and therefore also the sovereignty of the concerned states is threatened. While respect to sovereignty is an integral principle of international law, there's no specific person to tell off for disrespecting sovereignty when the threatener is a natural phenomenon. Who was the responsibility to

[96] A/HRC/RES/7/23
[97] Willcox in Essex Human Rights Review, Vol. 9 No. 1 2012, p. 2

ensure sovereignty? If a state fails to maintain its territory, does it then also lose its status as a sovereign state, even if the failure is not the result of another state invading it, but of an occurrence of nature?

The issue of climate change induced migration and its implications on the right to self-determination has been discussed more in many texts, which is why it is only briefly mentioned here.[98] I have still included it, because it has interesting implications on the sovereignty of the affected states, and it is an important issue on the sharing of the climate change burden, which this I will consider in chapter five.

# 3 States' responsibility to prevent and prepare for climate change

The prevention of climate change is an issue that is gaining more and more attention, as consequences of climate change start to become a reality. The prevention of anthropological climate change should be the interest for the global community, as it will be more cost-efficient than only reacting once the consequences are felt.[99] And, of course, as climate change may threaten human rights as seen in chapter two, preventing human rights violations should be a high priority. Along with discussing the sources of the obligation to prevent climate change, this chapter will briefly evaluate the effectiveness of the existing regime, to see whether it is sufficient.

The concept of state responsibility can be considered a general principle of international law, in the sense that states can become responsible for any act that violates an international obligation.[100] Whether failure to prevent climate change is a violation of any international obligation is the central question that the following chapters will hopefully answer.

[98] for further reading, see e.g. McAdam 2010
[99] Global Commission on Adaptation 2019, p. 12
[100] Brownlie 2008; Draft Articles on State Responsibility for Internationally Wrongful Acts 2001

## 3.1 Climate change prevention in climate treaties

The legal obligations to prevent climate change are for the most part codified in climate treaties, which are binding to the parties to those treaties and must be performed by them in good faith.[101] The treaties also form a part of the "state practice" that is part of the formation of international principles and customary law, and that way can be a part of forming obligations that are universally binding.[102] [103]

Treaties are an integral part of international law. They are an expression of international legal sovereignty, not the abandonment of it, even if a state being bound to a treaty might seem like a degradation to the state's sovereignty.[104] The principle of sovereignty can, however, have a restrictive effect on the interpretation of treaties.[105] By signing to a treaty a state may also become a member of an international community, such as the European Union, and with that, some of the legislative authority is ceded to the community. This does not mean that the sovereignty of the state is lost. It is precisely because of sovereignty that such communities are possible, and joining a community is an exercise of sovereignty.[106]

While international environmental agreements have increased in numbers during recent years, so has the criticism of their effectiveness. International treaties do not disrespect state sovereignty, as signing a treaty is a manifestation of international legal sovereignty. This chapter will discuss the treaties, along other sources of law, that create obligations for states to prevent climate change. The treaties I will go over include the Paris Agreement and the United Nations Framework Convention on Climate Change (UNFCCC), among others. Other sources of law on the subject include the no-harm principle, among others that will be considered in this chapter.

Before comprehensive climate change treaties, there have been some attempts at tackling specific issues regarding the use of natural resources. Perhaps the most successful one has been the Vienna Convention for the Protection of the Ozone Layer[107] and more specifically

[101] The Vienna Convention 1969, article 26
[102] Dupuy in Bodansky et al. (eds) 2008, p. 7
[103] Germany v. Netherlands 1969
[104] Britain et al. v. Germany 1923
[105] France v. Switzerland 1930
[106] Brownlie 2008, p. 291–292
[107] The Vienna Convention 1985

its Montreal Protocol on Substances that Deplete the Ozone Layer[108] from 1987. The Montreal Protocol managed to reduce emissions of many ozone-depleting substances by nearly 10 percent from 1994 to 2012. [109] The Montreal Protocol was also significant in that it spoke of the precautionary measures to reduce and eliminate the emissions of substances that deplete the ozone layer. [110]

The UNFCCC was the result of negotiations in the Intergovernmental Negotiating Committee, and it was presented at the UN Conference on Environment and Development. It was adopted on May 9th 1992[111]. Even though many of the original goals of making the convention did not make it to the final text, the convention was a remarkable step towards action in the climate crisis.[112] It recognizes climate change as a threat and sets reduced emissions as a goal.

The obligations arising from the UNFCCC are both obligations to prevent and to adapt to climate change. The concrete objective of the treaty was to stabilize GHG emissions to a level of concentration that would prevent dangerous anthropogenic interference on the climate system.[113]

The UNFCCC has not been entirely successful. Instead of bringing the greenhouse gas (GHG) emissions down to their 1990 levels by 2000, emissions had increased to a record high. The Kyoto Protocol was then created to ensure commitment to emissions reduction goals after it started to seem unlikely that the Annex I parties to the UNFCCC would meet their goal of bringing their GHG emissions back to 1990 levels by 2000.[114] The Protocol was adopted in 1997 and it came into force in 2005, with the years 2008 to 2012 set as the limit period for achieving the goals. It demanded that the developed industrialized states (Annex I parties) reduce their GHG emissions by 5,2 percent from 1990 levels by the year 2012.

[108] The Montreal Protocol 1987
[109] WMO 2014
[110] The Montreal Protocol 1987
[111] United Nations Framework Convention on Climate Change, article 3 (1), 1992 (hereinafter referred to as UNFCCC)
[112] Soltau 2009, p. 51
[113] United Nations Framework Convention on Climate Change 1992, article 2
[114] Soltau 2009, p. 60

Emissions of the industrialized states were reduced by 6,8 percent compared to emissions created a scenario where no Kyoto Protocol would have been created.[115] In that sense, the protocol was quite successful, but while the protocol does demand collective action and it defines climate change as a global problem, the targets set by it were mostly aimed at the industrialized state parties, as the developing states argued that according to the principle of common but differentiated responsibilities, they should not be given any additional commitments in the new protocol. The developed states' agreement to this made it possible to reach an agreement, but it possibly left the protocol with less impact.[116]

The Kyoto Protocol offered new ways of controlling GHGs, such as the emissions trading scheme. The Protocol used flexibility mechanisms to ensure that the states could choose the most efficient measures to achieve the goals. These mechanisms include joint implementation, clean development mechanism and the already mentioned emissions trading. Trading emissions allows states producing less than their allowed amount of emissions to profit by selling a part of their allowance to a buyer that is producing more than their allowed amount of emissions.

The Paris Agreement in 2015 was the next step for the UNFCCC after the Kyoto Protocol. It presented the ambitious goal of limiting global warming to +2,0°C, or preferably +1,5°C, by the year 2100 compared to pre-industrial levels. Notably, article 27 of the agreement prohibits any provisions. The Paris Agreement also differs from its predecessors in that it takes a new approach to the principle of common but differentiated responsibilities. It states that all parties shall take certain action towards the goal of the agreement, but in certain parts of the agreement the different national circumstances are taken into account.

While the existing treaties are successful in that they have managed to get numerous states to agree to somewhat ambitious climate goals, actual action is direly needed and lacking. The states can still find loopholes and exploit them if they are not inherently motivated to comply. What this means is that when constructing treaties, the only goal should not be to get states to sign them, but to make sure that the agreement is not just a compromise that no one is truly happy with implementing: the states need to consider the treaty fair. Joseph E. Aldy and Robert N. Stavins have set out seven points to deem a climate agreement credible:

[115] Maamoun in Journal of Environmental Economics and Management, Vol 95, 2019, ch. 4.1
[116] Soltau 2009, p. 61

An agreement should be equitable, cost-effective, able to facilitate significant technological change and technology transfer, consistent with the international trade regime, practical, attentive to short, medium- and long-term goals, and realistic.[117]

One of the major challenges with climate agreements is the question of burden sharing. When many states come together to form a treaty, agreeing to reduce their GHG emissions, it is essential that the goal of the treaty is realistically divided among the parties. Realistic sharing demands considering the political possibilities: the states should feel that they are doing their fair share and not more.[118] "Fairness" is obviously not a mathematical term that could be determined in an objective way, which makes this question even harder to solve. While it might be simple to decide that the burden is shared based on the per capita emissions of each state, since emissions are one of the biggest causes for climate change, but that will still be met with friction from developing states that claim that their share should be smaller, so they have the means to prioritize economic and social development. This is an interesting debate that I will be looking further into in chapter five.

One other issue with climate treaties is their shortfall in making climate policies compatible with trade policies. While trade and economic growth can often be of opposite goals with climate policies, the two cannot be detached from each other. Both exist in the same world and are co-dependent. Stricter climate policy in certain states that have entered a climate agreement will only cause companies to move their emission-creating businesses to states with looser climate policies.[119] This phenomenon erodes the goals of the restrictions on emissions and makes it harder for domestic produce to compete in the market. It also means that different provisions made in climate treaties may have undesirable effects on the global trade, for example making allowances for developing countries to focus on their economic development as a priority. This kind of situation might cause companies to take their production to those states not bound by as strict emission restrictions as the developed states.

Another problem with mitigating climate change with international treaties is also the fact that in theory, a treaty can be left, if a party so chooses, such as the case with the Paris Agreement and the USA in the Trump administration. There is not much international law

[117] Stavins et al. 2010, p. 927–928
[118] Stavins et al. 2010, p. 915
[119] Aldy – Stadins 2010, p. 925

regarding the state withdrawing from a treaty, but the Vienna Convention on the Law of Treaties[120] provides some basic rules for it. According to it, a treaty can be terminated according to the rules agreed to in the treaty, or with the consent of all parties to the treaty.[121] If a state leaves a treaty not in accordance with the Vienna Convention and the treaty in question, the other parties may seek an international court to rule the treaty to be no longer binding on the other parties.[122] It makes sense that one party violating a treaty would result in the other parties being frees of their treaty obligations as well, as the violating party will no longer fulfil their obligations towards the other parties, but with climate change treaties the obligations are not necessarily fulfilled for the other parties of the treaty, but for the international community and its people. They are not exactly parties to the treaty, so they do not have a right to demand anything regarding the existence of the treaty. The leaving party may become liable for damage caused by the breaking of the treaty, as per the general principle of state responsibility,[123] but with climate change treaties, determining a precise amount of damages caused is complicated.

Generally, states do stay parties to the climate treaties they have agreed to, but there are exceptions, such as the US with the Paris Agreement. The US leaving the Paris Agreement was done in accordance with Article 28 of the Paris Agreement, meaning that the exit took effect on November 4th in 2020, four years after the US start date of the treaty.[124] Now the Biden administration has re-joined the treaty, but the event was interesting in terms of the effectiveness of climate change treaties. If such a major party can free itself of obligations that it had already agreed to fulfil, can we trust that the climate treaties will be enough to mitigate climate change to safe levels? I think not. The states should have the freedom to enter treaties to choose the most favourable allocation of responsibility, but not entering a treaty should not mean that no responsibility can be formed.

It seems that time after time, the ambitious efforts to form a treaty to obligate states to mitigate climate change fall short of their goals, ending up as hazy guidelines which states may interpret the way that is most suitable to them. This might be a little bit of an over-exaggeration, but it is true that global warming has not slowed down enough to prevent

[120] The Vienna Convention 1969
[121] The Vienna Convention 1969, article 54
[122] The Vienna Convention 1969, article 27
[123] Draft Articles on State Responsibility for Internationally Wrongful Acts 2001, article 31
[124] Shear in New York Times 2017

severe consequences even since the UNFCCC first came into force.[125] Most states are not willing to sign a treaty that essentially demands them to restrict the companies that bring them money in taxes, especially if there are states outside the treaty that said companies could escape to.

I do still think that treaties are, and ought to be, the foremost tool in climate change mitigation. The principle of sovereignty should be respected as perfectly as it can be. Only, if effective enough treaties cannot be agreed on, should other tools come in to question. This is of course difficult to determine, as the effects of a treaty are not easy to calculate beforehand. Therefore, the treaties should be detailed enough to see the clear responsibilities it imposes on each state. Currently it seems that the climate treaties are not enough to prompt sufficient actions against climate change.[126]

There is, however, a promising decision that was made by the Dutch Supreme Court in 2019 in a case about the Netherlands meeting their goal, as per the goal in the Paris Agreement to keep global warming to a maximum of +2°C. The decision stated that the government's pledge of reducing GHG emissions by 17% by 2020 was insufficient, and instead ordered a reduction of 25%.[127] Hopefully, other courts will follow suit, so that at least the states that are parties to the climate treaty regime would take sufficient action.

## 3.2 Climate change prevention in human rights law

Chapter two established the connection between climate change and human rights law. What does it mean for the states' obligation to prevent climate change? This chapter is going to seek an answer to that question.

In addition to climate treaties, the international human rights regime has importance to the mitigation of climate change, as was shown in chapter two. Actual human rights treaties, such as the ICESCR or the ICCPR, have not been ratified by all states in the world, but because of the wide acceptance of the obligation to protect commonly recognized human

[125] Bhushan in Climate Home News 2019
[126] Hogue in Chemical & Engineering News Volume 98 Issue 6 2020
[127] Urgenda v. Netherlands 2019

rights, it can be said that everyone should respect and protect them.[128] These treaties do also have a limited applicability to the states that are parties, in the sense that they give the state the obligation to protect the rights contained in the treaty within their jurisdiction.[129] Jurisdiction would usually mean the state's territory, as granted by sovereignty.[130]

The question of jurisdiction has been considered by the International Court of Justice. The extraterritorial applicability has been affirmed in cases concerning states such as Uganda and Russia.[131] The extraterritorial dimension of the obligations is essential in the climate change context, because often the pollution of a state will not directly affect the enjoyment of human rights in that state, but in another state altogether.

So, states cannot escape their human rights obligations regarding climate change even if it is a question of extraterritorial effects. It is still difficult to establish an obligation to reduce emissions on this basis, because it is impossible to say which state's emissions caused the human rights violations felt in another state, since nearly every state is producing emissions, and the effects are felt in different parts of the world.

The draft articles on state responsibility determine that state responsibility can be invoked, when peremptory norms of international law are breached.[132] These "peremptory norms" are *ius cogens* norms, that are "accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[133] The commentary on the draft articles states that such norms include the basic rules of international humanitarian law.[134] Drawing on this, the states have a responsibility to protect basic human rights as a general principle of international law, meaning that the responsibility is not dependent on the state's status in human rights treaties. Therefore, if climate change threatens or violates human rights, state responsibility to protect human rights and ensure that they will not be violated in the future by the same conduct can be invoked.

[128] https://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx (referred on 11.2.2022
[129] e.g. The European Convention on Human Rights 1949, article 1; International Covenant on Civil and Political Rights 1976, article 2
[130] Wilde in Chinkin (ed.) 2015, p. 56
[131] Georgia v. Russia 2011; Wall and the Democratic Republic of Congo v. Uganda 2005
[132] Draft Articles on State Responsibility for Internationally Wrongful Acts 2001, articles 40 and 41
[133] Vienna Convention on the Law of Treaties 1969, article 53
[134] Crawford 2002

Climate change has, in some instances, been compared to warfare, linking climate change to the conflicts arising because of it. The scarcity of resources and forced migration resulting from climate change may lead to tensions between people, which can further lead to full-blown conflicts. Here, the international law on the use of force and other humanitarian law would come in question, but this issue is beyond the scope of this paper.[135]

The consideration of climate change as a threat to international peace would mean that the UN Security Council is responsible for eliminating that threat.[136] The Security Council is the only entity in the United Nations institution that can make legally binding decisions.[137] However, getting the Security Council to create decisions that would obligate member states to control and prevent climate change would require none of the major powers holding a veto right to use that right. Therefore, using the Security Council for climate change mitigation would demand a reform that does not seem likely in the near future.[138]

The argument that states should prevent climate change because it violates human rights is weakened by the fact that predicting the effects of anthropogenic climate change is complicated and not yet sound enough for a clear legal obligation to arise.

There are arguments to be made against the claim that climate change mitigation should not be taken because of scientific uncertainty. The Intergovernmental Panel on Climate Change (IPCC) represents the scientific consensus on the science of climate change, as its assessment reports must be unanimously approved by all member states of the World Health Organization or the United Nations Environment Program,[139] and it has stated that climate change will have dangerous consequences on human life.[140] There are, of course, scientific sceptics, but the overall view of relevant climate change scientists support the reports of the IPCC.[141]

The acceptance of uncertainty in a scientific sense will be discussed more in chapter 3.3, as environmental law has better dealt with the issue. I have included it briefly here, as it has importance also as a human rights question, since the argued effects of climate change have

[135] for further reading, see Christiansen 2016
[136] United Nations Charter 1945, articles 1(1) and 24(1)
[137] United Nations Charter 1945, article 25
[138] Pleuger in von Schorlemer et al. (eds.) 2014, p. 35
[139] https://www.ipcc.ch/about/history/ (referred on 13.2.2022)
[140] Intergovernmental Panel For Climate Change 2007
[141] Brown 2012, p. 93–96

implications on human rights. Natural sciences cannot, however, determine what is an acceptable risk. It can calculate likelihoods of consequences for certain actions, but it does not give guidance on how the risk should be regarded.[142] The acceptability of a risk becomes an ethical question, which is why climate change regulation should not be made on a strictly scientific basis: the ethics need to be considered also.[143]

### 3.3 Climate change prevention in environmental law: The no-harm principle

Alongside international treaties and general principles, international law consists of customary law. Customary international law is the evidence of "general practice accepted as law".[144] This source of law has not had a meaningful impact on the climate change questions,[145] but evaluating it will be helpful in determining what the future of climate change law should look like.

Customary law is the embodiment of already existing rules between states. It turns into law the rules that states abide by in their relations. It is, though, a tricky source of law to use as grounds, since one must first prove that such rules have been in place, and that those rules have not been persistently objected by the involved parties. Customary law is not the same as a moral obligation: it must invoke a legal obligation.[146]

There is no particular instance that could explicitly determine whether a practice has become binding custom or not, although the International Court of Justice exercises some power by deciding whether to apply a certain practice in its decision or not. However, some suggestions to how customary law is born have been made. For example, Lepard suggests in his book that customary international law is created through *opinio juris* and consistent state practice. *Opinio juris* means that the practice is generally seen as desirable by states: that they believe it to be a rule worth abiding by. In addition, the practice should be consistently used by states, either in actuality or through declarations, such as multilateral

[142] Brown 2012, p. 114
[143] for further reading, see Brown 2012
[144] Statute of the International Court of Justice 1945, article 38
[145] Baber – Bartlett in Dyzek et al., 2011 p. 654
[146] Baber – Bartlett in Dyzek et al., 2011 p. 655

UN declarations. If a norm of customary international law has an essential moral value to it, it could be considered a *jus cogens* norm.[147]

In regard to climate change, the most relevant customary law rule could be the rule in environmental law to not cause environmental harm on another state's territory, even if it limits the state's using of their own territory, known as the no-harm principle. States have the right to do what they please with their own land, but only to the extent that it does not interfere with the other states' use of their land. The principle is not dependent on the effect the actions have on the people, only what effect it has on the environment.

The no-harm principle is explicitly an environmental law principle. It obligates a state to refrain from the kind of use of its territory that causes harm outside its jurisdiction.[148] An arbitration case between the USA and Canada found that the party causing environmental harm outside its territory has the duty to compensate for damages done and prevent future damages.[149] The principle was confirmed by the ICJ as being a principle of customary international law instead of a general principle in 2010.[150] For this chapter, the essential point of that case is that the no-harm principle includes a duty to prevent harm.

The preventive aspect of the no-harm principle has due diligence at its core. It means that states need to assess risks of environmental harm and accurately respond to risks if they are found, to the best of their ability. The obligation of due diligence is dependent on the risks in question, and the state's abilities to mitigate the risks.[151] The failure to act in due diligence can result in a liability to compensate for harm caused to a state or a group of states.[152] If the state causing the harm does not comply, the suffering state can resort to measures of "self-help" that would be illegal under international law in another situation.[153]

The preventive aspect of the principle in an environmental sense and a human rights sense are different things. The no-harm principle obligates states to refrain from actions that pose

[147] Lepard 2002, p. 104
[148] United Nations Report of the Conference on the Human Environment 1972 p. 5 (principle 21)
[149] United States v Canada 1941
[150] Argentina v. Uruguay 2010
[151] Verheyen 2005, p. 224
[152] ILC Draft Articles on State Responsibility 2001, art. 42
[153] Bodansky et al. 2017, p. 45

a risk of environmental damage outside the state's borders, regardless of the implication of human rights. Many times, however, environmental harm has a clear link to the enjoyment of human rights: for example, contaminating a fresh water source can lead to scarcity of clean water for drinking. The connection speaks to the importance of the principle.

This principle meets the same problem as obligations arising from human rights law: it has not been proven beyond reasonable doubt that the acts of a state, such as pollution, lead to environmental harm, enough to create an obligation under the no-harm principle to mitigate climate change. Therefore, the no-harm principle's applicability is limited to only the situations in which the cause-effect relationship is clear and can be proven. It does limit the clearest harming of the environment, but in the climate change context the applicability leaves a lot to be desired, as the causal relationship between a state's actions and a weather event might never be fully proven, since any weather event could theoretically take place in an environment free of human interference.[154]

However, principle 15 of the Rio Declaration states that where "there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation".[155] How much may lack from full scientific certainty is not determined, and the international community remains undecided on whether the principle about uncertainty has a customary law status in international law.[156]

The no-harm principle is dependent on the states' consent, as it is a customary law principle rather than a general principle in international law. It means that a state could reject the principle, although in practice it seems to be already widely accepted and rejecting it now would be too late. If the principle was to be widened to apply to climate change induced environmental damages as well, it would probably rise some disapproval from states and thus result in the rejection of the principle in the climate change aspect. Customary law can only be enforced if the states concerned have not expressed their disapproval of the rule. It is not always clear how the disapproval should be expressed, but that conversation is too long to be had here.

[154] Allen in Lord et al. (eds) 2011, p. 12–13
[155] Rio Declaration 1992, p. 3
[156] Birnie et al. 2009, p. 154-

I find it relevant to be mentioned that the ICJ, who holds quite a lot of the power to determining whether a rule has a customary law status or not, has been somewhat careful in the interpretation of state conduct as a customary rule. The ICJ of course consists of people, and the change of generation in the judges might result in a broader interpretation in the future. I would argue that as the new generation of lawmakers and users get in positions of power, the field of international climate change law could see some changes towards wider applicability, for example of the no-harm principle, since climate change is a topic that concerns younger people in particular.[157]

## 3.4 The precautionary principles in climate change law

The different precautionary principles (PP) come from many different sources, but they are not mentioned in any authoritative statement. The principle requires that precautionary measures are taken in situations where damages are likely, even if the scientific knowledge on the certainty of harmful consequences is lacking.[158] For example, in 1976, The US Federal Court of Appeals ruled the US Clean Air Act a "precautionary law", meaning an obligation to prevent foreseeable but uncertain damages.[159] This interpretation would be suitable for climate change, as the effects of GHG emissions are not proven beyond suspicion. There is not, however, sufficient proof that they would not be harmful, and that fact should grant an obligation to be careful.

One version of the PP is codified in the UN World Charter for Nature from 1982, which states that "Activities which are likely to pose a significant risk to nature shall be preceded by an exhaustive examination; their proponents shall demonstrate that expected benefits outweigh potential damage to nature, and where potential adverse effects are not fully understood, the activities should not proceed".[160] In context to climate change, this could be interpreted to require states to conduct the mentioned examinations regarding pollutants and emissions. The cost-benefit analysis should account for comparison of scenarios of not preventing climate change on the basis of economic benefits, which could lead to costly

[157] Harrabin in BBC News 2021 (available at https://www.bbc.com/news/world-58549373, referred on 13.2.2022)
[158] Wiener in Carlarne et al. (eds.) 2016, p. 165
[159] Ethyl Corp. v. EPA 1976
[160] United Nations World Charter for Nature 1982,

damage control after climate change causes harm, and of preventing climate change, even at the expense of the economy in the short run. As was already discussed in the introductory chapter, prevention is often more cost-efficient than damage-control.

When climate change became a reoccurring theme in international negotiations, the Bergen Declaration in 1990 took a step towards establishing the precautionary principle in climate change mitigation, stating that achieving sustainable development would require climate policies to be based on the precautionary principle.[161] Although there are sceptic arguments to be made about the effect this statement has had thus far, many domestic policies have considered it, and it will be up to the future to prove what the practice will be.[162]

The PP is a controversial topic, especially in environmental law. It might not have achieved a status as an international law principle, and suggestions of its applicability should be careful.[163] The principle, however, would be essential to abide by in climate change mitigation, as waiting to see the consequences before acting can mean it will be too late to act.[164] Hopefully it will be kept in mind in forming climate policies, but at present there is no legal obligation arising from it to address climate change.

While the PP is not a source of hard law by itself, I consider it to be an important tool to be used in climate change regulation. The prevention of climate change, as far as it is still possible, is the most important goal, and "damage control" should be secondary to it, because it is much better to prevent any damages or violations of human rights that try to mend to them after the damage is done. Of course, this is not always possible, and it is still important to also consider the responsibility for damages, which will be discussed in the next chapter.

All in all, it looks like there is no strict enough laws that would create an effective obligation for states to prevent climate change. Much is relied on the climate treaty regime, which does not have a lot to show for success. Even arguing that there is a moral obligation to protect the human rights that are threatened by climate change is not effective until the connection between climate change and human rights violations is proven beyond suspicion, as was discussed in chapter two. The connection would invoke the obligations in human rights law

[161] Bergen Declaration 1990
[162] Wiener in Carlarne et al. (eds.) 2016, p. 167
[163] Wiener in Carlarne et al. (eds.) 2016, p. 168-169
[164] National Research Council 1979

to protect human rights. Then, the obligation is the state's to protect its own people's human rights, even through preventing climate change by reducing emissions. There is not a clear obligation to assist states struggling to meet the standard, unless it becomes a question of a threat to security, in which case the UN Security Council would be obligated to act.

# 4 States' responsibility for climate change damages

## 4.1 Victims of climate change in international law

If prevention fails, climate change related incidents, such as floods, could produce victims in need of help. This chapter will answer the questions of whether there is a responsibility of the states to help the victims of climate change and compensate for damages and in what way.

First, I should define what I mean by "victims of climate change". Climate change is a phenomenon of various manifestations, and some of those manifestations can be detrimental to humans as well as the environment. The natural disasters that occur more frequently because of climate change[165] may cause violations of human rights of the affected people. These people become direct victims of climate change, through having perhaps their homes and livelihoods destroyed, and losing their self-determination.

This issue is closely related to human rights law, as the connection between human rights and climate change discussed in chapter 2 shows. Human rights law consists of treaties, but human rights are also considered to be part of such fundamental law, that even the non-parties are not allowed to violate them, as has been proved by action taken by the UN Security Council in accordance with the chapter VII in the UN Charter.

[165] https://public.wmo.int/en/media/press-release/weather-related-disasters-increase-over-past-50-years-causing-more-damage-fewer (referred on 11.2.2022)

Another area of law related to helping victims of climate change is disaster law, which is partly environmental law, partly human rights law. The contents of it will be discussed in these chapters as well, where relevant.

International environmental law was considered in light of the prevention of climate change in the previous chapter, but as this chapter will be focusing on the human victims of climate change, environmental law will only have a brief mention in chapter 4.4. It must be acknowledged, however, that state responsibility is an interesting issue in the response to environmental disasters, such as oil spills, too, but the length of this thesis does not allow for a deep enough dive into the topic to give it justice.

The international climate regime does not offer clear answers on how damages of climate change should be addressed. The UNFCCC regime has created the "Warsaw International Mechanism" for loss and damage associated with climate change, with the objective of, among other things, developing knowledge on loss and damage approaches and enhancing support in the form of finances and technology, and furthering the understanding of non-economic losses and damages.[166] The report on the Warsaw Mechanism states, that it is to fill the role of addressing loss and damage under treaties within the UNFCCC regime.[167] But, there is yet to be a decision on climate change loss or damage, so it is yet to see whether this mechanism is sufficient for the purpose.

## 4.2 Victims of climate change and human rights law

The nature of actions that are required to control and respond to the effects of climate change are diverse, but at least the immediate effects of a climate change induced natural disaster might call for humanitarian aid, which is a commonly used tool in protecting human rights internationally. But how is humanitarian aid regulated? Does someone have the responsibility to offer it, and does the state in need have an obligation to accept it? This chapter will discuss these questions. This chapter assumes the premise that there is at least a moral obligation to prevent human suffering and loss of life, whether it is under threat by a

[166] FCCC/CP/2013/10/Add.1
[167] FCCC/CP/2013/10/Add.1

case of armed conflict or natural disaster, and the goal is to find whether there also exists a legal obligation.

The following paragraphs will consider the status of victims of climate change in disaster law. The victims of natural disasters are not always victims of climate change, as natural disasters can happen even without climate change, but for the purposes of this chapter, I will not differentiate disasters to those born out of climate change and others. That is not necessary here, as this chapter is not about preventing climate change, but helping the victims after the fact. The same law applies whether the natural disaster was or was not impacted by climate change.

International disaster law is not codified in its own treaty. Disaster responses are regulated mostly by soft law.[168] There are different sources of law regarding different points of the disaster cycle (risk mitigation, disaster event, emergency response, compensation and insurance, rebuilding), and this chapter will consider the regulation related to emergency responses, compensation, and rebuilding. Risk mitigation is discussed in chapter three.

Back in 1758, three years after the earthquake in Lisbon, the duty to provide humanitarian aid was recognized as part of international law.[169] However, the evolution of that duty was patchy, with the International Relief Union (IRU) only existing until World War II and lacking in financing mechanisms.[170] After the war, disaster regulations evolved in domestic regulation and bilateral treaties, and the Office for Coordination Of Humanitarian Affairs (OCHA) was established, somewhat filling the gap left by the IRU.[171] There is yet to be a uniform regime relating to the response to a disaster, with states going by a case-by-case basis in helping victims of disasters.[172] The funding of disaster relief has come from the International Monetary Fund and the World Bank.[173] The fragmented regime of international disaster law will need development to make the response to natural disasters more efficient and timely.

[168] Saunders in Telesetky et al. (eds.) 2014, p. 29
[169] Fidler in Melbourne Journal of International Law 2005, p. 458
[170] Farber in Telesetky et al. (eds.) 2014
[171] Fidler in Melbourne Journal of International Law 2005, p. 464
[172] Farber in Telesetky et al. (eds.) 2014, p. 18
[173] Gold in the International Lawyer 24, 1990, p. 621–633

The UN Security Council has bound itself to maintain peace and security, and that could mean that it has a responsibility to intervene when armed conflict arises, but most likely not in, for example, cases of natural disaster, as was shown in the case of cyclone Nargis in Myanmar in 2008, when the Security Council refused to take action to help the victims failed by their own government in disaster relief.[174] The states do have an obligation to protect the human rights of their citizens as per the human rights conventions, but the situation is trickier when the state fails in that obligation, as there is not a clear obligation to protect the human rights of other states' citizens.

Provision of humanitarian aid has been regarded by the International Court of Justice (ICJ) as a not unlawful intervention, which is an exception to the rule of territorial integrity,[175] although getting the consent of the affected state for a humanitarian aid mission is the preferred situation. This ruling provides grounds for not allowing states to refuse humanitarian aid when their population is in distress and the state is unable or unwilling to help them. The states also have an obligation to protect human rights, and that obligation is not something that can be accepted or denied on a case-to-case basis. Therefore, the affected state ought to have an obligation to accept assistance when its own resources are not enough to protect its citizens. Of course, it still leaves the question of whether there is an obligation for the international community to provide humanitarian aid.

If a state fails to protect the internationally recognized human rights of its citizens, it could be brought to the ICJ for persecution by a state party to the ICJ Statute or certain UN organs. The ICJ recognizes human rights as peremptory norms on which it can base a decision.[176] A state could thus be held responsible for failing to protect human rights, but it does not automatically follow that other states should then take care of the former state's people. The state can be pressured to fulfil its obligations, but it is no use if it is simply unable to do so.

The right of the civilians to receive assistance and have their human rights protected is no use if there is no corresponding party that is allowed to provide said assistance. So, do the states of the international community have the right to demand that a state suffering from a disaster must give access to the victims in order to provide humanitarian assistance? As

[174] Seekins in Asian Journal of Social Science 2009
[175] Nicaragua v. United States of America 1986
[176] see chapter 3.2

discussed above, the ICJ has ruled that the provision of humanitarian aid is an exception to the rule of territorial sovereignty. Based on that, it could be said that states have the right to provide humanitarian assistance to the victims of a disaster, and any states whose territory will be used in the deliverance of said assistance have a duty to allow free passage to the shipment.[177] The decision of the ICJ was given in a case concerning armed conflict, so it is unclear whether it can be reached to cases of natural disasters occurring from climate change. The deliverance of aid must, however, be only to the victims: the offerors of humanitarian assistance should stay neutral in cases of armed conflict. Of course, in cases of natural disaster, there are no sides to take, just victims to help.

International human rights law can also be related to the regulation of rebuilding after a disaster occurs. The right to housing is established as a human right, and can therefore be enforced, if a natural disaster results in the loss of homes. The internal displacement of people is an issue not tackled by an international convention, leaving many people in a problematic status.[178] In larger disasters, people may become internationally displaced: this issue will be discussed in the following paragraphs.

As was already established in chapter two, global warming will cause sea level rise, which will have implications on the human rights of island states at risk of submerging. For example, over 80 percent of Maldives is lower than one meter above sea level and is at risk at submerging by 2050.[179] The people of those states and their right to self-determination stands at risk. As one of the requirements for being recognized as a state is a defined territory, the statehood of those states is also at question.[180] In the past, however, governments have been able to function even outside their territory, if there is still a defined population over which the government has jurisdiction.[181] The situation is a bit different in a case of a disappearing state, since the population will likely scatter to the territories of other states, and be subject to the jurisdiction of those states.

Even though the international community could, based on previous practice, accept, and recognize continued statehood even when the territory of the state is no longer habitable, the

[177] see also Dinstein in Naval War College Review Vol 53 No 4 2000, p. 78
[178] Farber in Telesetky et al. (eds.) 2014, p. 19
[179] A/64/350 2009, p. 20
[180] The Montevideo Convention 1933
[181] McAdam in McAdam 2010, p. 116-

people of the state will in practice need a different nationality. The Universal Declaration of Human Rights grants the people the right to a nationality, but there is no obligation for any state to grant a nationality to them: this is dependent on the state's domestic law on citizenship and its status in international treaties on the topic.[182]

The people's right to self-determination is a right recognized as a peremptory norm,[183] as was discussed in chapter 3.2. The states of the international community have an obligation to protect the right to self-determination, but there are not yet examples of how that obligation fits the issue of people in "disappearing states". Parties to the Convention Relating to the Status of Stateless Persons do have an obligation to provide stateless persons with their naturalization, as far as possible.[184] Whether the people of submerging states qualify for the status of a stateless person is another issue, as the statelessness question has mostly been dealt with in situations where a state is replaced by another state taking the former one's territory.[185] And, since refugee conventions do not recognize "climate refugees" because they are not fleeing political persecution,[186] the people of submerging states remain in an awkward status in international law.

## 4.3 Climate change damages in environmental law

The no-harm principle was already discussed at length in chapter 3.3. The principle is especially important as a source of a legal obligation for preventing climate change damages, but also as a basis for liability for damages caused, as per the draft articles on state responsibility.

According to the principle 22 of the Stockholm Declaration, "States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage".[187] Along with principle 21 of the declaration, it forms a basis for arguing that states are liable for damages they cause outside their territory,

[182] McAdam in McAdam 2010, p. 118
[183] Crawford 2002
[184] Convention Regarding to the Status of Stateless Persons 1954, article 32
[185] for further reading, see McAdam 2010
[186] Convention on the Status of Refugees 1951, article 1(2)
[187] United Nations Report of the Conference on the Human Environment 1972, principle 22

a basis which has been further developed in the draft articles on state responsibility by the ILC. The ICJ can give decisions on such matters.

The demand for liability after a climate change induced event, such as a flood that displaces people, should be issued to a specific state or a group of states, but it is impossible to determine whether the acts of a state were the exact ones that caused climate change to cause the flood, as there are numerous other possible causes. It cannot be said that the GHG emissions of state A were the ones that caused a flood in state B, and not the emissions of state C. Polluting states can always argue that since another state was polluting too, a single state cannot be held accountable alone. The state demanding compensation would also have to be able to prove that the other state was not exercising due diligence, which is a complicated task in terms of climate change.[188]

Suing a state for compensation in the ICJ requires the defendant's consent to be bound by the court's decision. In theory, a sovereign state could then simply refuse to have the case considered by the ICJ and no liability could be confirmed. An advisory opinion from the ICJ, however, does not need any individual state's consent, but the opinion would have to be requested as per the UN Charter, meaning no single state can ask for it. For the UN General Assembly to request an opinion, a 2/3 majority of votes is needed, which is not necessarily an easy task.

Instead of a bilateral view of liabilities between two states, many environmental questions have relevance to the international community as a whole. There might be some obligations towards the interests of the community instead of a single state that has suffered harm. The *erga omnes* obligations have yet to establish their status in the sphere of international environmental law,[189] but they could potentially provide solutions to the issues discussed earlier. The health of the environment having an *erga omnes* status would create an obligation of states to refrain from causing harm not only on other states' territories, but also on the high seas and atmosphere, which do not belong to any specific state.[190] Some interesting developments have been taken towards this, as is shown by the Hungary v.

[188] For case studies, see Verheyen 2005, chapter V(IV)
[189] Kiss et al. 2007
[190] Bodansky et al. 2017, p. 49

Slovakia case considered by the ICJ, where the Earth's ecological balance was recognized as an interest of the international community.[191]

Violations to *erga omnes* obligations can be brought to the ICJ for demands of compensation as violations to general principles of law recognized by civilized nations.[192] The ICJ can give advisory opinions on cases that do not have a specific state that has suffered but are rather important to the international community. This rises some new issues, such as the question of who has the right to speak for the international community? In an ICJ case between Australia and France concerning nuclear testing, some judges held the opinion that individual states did not have the jurisdiction to speak for the international community, meaning they cannot ask for an advisory opinion on states' responsibility and liability in climate change mitigation.[193] This question still needs some clarifying, and hopefully future decisions of the ICJ will enable climate change questions to be brought to the court as interests of the international community.

The obligation to compensate for climate change damages is struck with the problem of assessing the financial value of the damage. The death of coral reefs and imbalance caused to the ecosystem are severe consequences, but they are not easily measurable in monetary value. Where damage compensation has been given, the amount has been based on the costs of preventing and remedying damages.[194]

The defining issue of responsibility for climate change damages is that it is impossible to say which state's emissions caused the effects felt in the state that has suffered damages. Considering natural disasters, there is no way to tell whether an individual disaster would have happened without anthropological climate change, much less which state's emissions were the ones that caused the disaster in question. There is a regime for state responsibility for damages caused, but in the climate change context, evolution of the regime is needed to address these special issues.[195] The question of who is responsible and how responsibility should be shared will be discussed in the next chapter.

[191] Hungary v. Slovakia 1997
[192] Statute to the International Court of Justice 1945, article 38(1c); Tams 2005, p. 158
[193] Australia v. France 1974
[194] Voigt in Carlarne et al. 2016, p. 489–490
[195] Voigt in Carlarne et al. 2016, p. 491

# 5 Sharing responsibility

## 5.1 Who are responsible?

While I acknowledge that individuals and companies also act in a way that is harmful to the environment, it is up to the states to make regulations that will cause the objects of those regulations to change their behaviour towards greener ways. States have domestic sovereignty: they have created, and have the power to change, the regulations that have allowed individuals and companies function in a way that has caused GHG emissions and climate change. International law is also concerned with the obligations of states primarily since it is then the states' obligation to alter their domestic policies to fulfil their international obligations.

There are a lot of contributors to climate change, not all of them human. For the purposes of this chapter, I am focusing on the responsibility of the contributors to anthropogenically-driven climate change, which are people, in the form of individuals, states and other non-state actors, such as organizations. Individuals and national non-state actors are bound to the laws of their state, which means that the state has the power to control, to certain limits, the actions of them. The purpose of a state is to protect its people and uphold their human rights, as was discussed in chapter one, which is why I argue that it is the states' responsibility to control their contributions to climate change or provide humanitarian aid when a climate change -driven natural disaster causes human rights violations, as I my previous chapters show that there's no international human rights responsibility to address climate change before it has endangered human rights. The obligations contained in international environmental law can also only be invoked once the causal relationship between harmful acts and the damages are proven.

Climate change poses a threat to the entire humankind, making it a clearly global issue that ought to be dealt with by the international community.[196] The collectiveness of the issue of climate change ought not to free any state of their individual responsibility, but rather highlight that everyone must do their fair share. The responsibility to act is not easily divided, as there are many different views on how it should be shared, or if there even is a

[196] A/RES/43/53 1988

responsibility to begin with. Especially when the people feeling the effects of climate change most severely are not the people of the states that are the biggest contributors to climate change, the question is an interesting one from an international law standpoint.

Some may argue that responsibility for consequences of climate change cannot be created at all, because the contributors could not have foreseen the harmful consequences of their actions. It would not be fair to hold anyone responsible for doing something they did not know to have a negative impact. There's some truth to that, but in the context of climate change, responsibility should not be that easily avoided. No matter what was known when polluting started, the effects are felt now and not only by the contributors, but also by innocent states. Even though the damages may have been caused unintentionally, the contributors have benefited from their actions, while the victims have only felt the negative effects. It would be unfair to expect them to also clean up a mess made by others.[197]

Another issue is that industrialization is a centuries old phenomenon, meaning that most of the pollution has been caused by people that are no longer alive. Is it fair that the current generation is responsible for what their grandparents have caused? I would argue that it is to some extent, as the current generation still benefits from the actions of the previous ones, depending on where they live. The developed states have the industrialization and imperialism to thank for their richness, and even if the current generation did not necessarily ask for any of it, it is reasonable that they make up for it.

If we accept that states are responsible to some degree, next it should be determined if all states are responsible, or only the ones creating a certain amount of emissions. This presents another problem: Soundly determining what amount of emissions constitutes a meaningful contribution to climate change. This issue is perhaps more of a scientific problem than a legal one, but it cannot be ignored even in a legal discussion.

Developing states argue that they should not be responsible, and actions not expected of them because they need to focus on developing their economy first. Well, it could be argued that there will not be an economy to develop in some time if nothing is done to at least slow climate change. It is true, though, that the developing states do not have the same kind of

[197] Shue in International Affairs Vol 75 1999, p. 535–536

financial capability to invest in climate change hindering actions as developed states. Do the developed states then have a responsibility to help the developing ones in the common fight? According to the beneficiary pays principle (BPP), which will be further discussed later, the ones benefitting from pollution and climate change should be the ones to pay for the costs of climate change management. Seeing as the developed states have had the most benefits from actions that cause climate change, the BPP could be used as basis for developed states carrying a heavier burden than developing states.

When nationally large-scale disasters happen, it is usually the national government that is seen as the one responsible for disaster relief. But when the national government fails to meet this expectation, the international community could step in as an act of human solidarity, although this is rather a moral obligation, not a legal one.[198] The international community takes on different forms in different situations, and often it is an international organization such as the International Committee of the Red Cross that helps in times of disasters, but who represents the international community in the end? The United Nations Security Council has taken upon itself the responsibility to uphold security and peace and with the far-reaching representation of states in the members of the UN, it would be an easy choice, but not an unproblematic one, as the permanent members of the Security Council have veto powers that could be used for political advances (though this is an issue to be discussed in a different thesis).

Some principles have been created in international law to answer the question of who is responsible. One of these principles is the "polluter pays" principle (PPP), according to which the polluters are responsible for the costs and consequences of their contribution to climate change. On a practical level, this means that the costs would be included in the prices of goods and services that negatively impact the climate.[199] This means that the consumers would have to pay higher prices, and the companies manufacturing the goods and services should find a way to compensate for their environmental footprint. The desired result would be for the consumers to consider the environmental effects of their purchases and move towards a more sustainable way of consuming, forcing companies to alter their way of

[198] Farber in Telesetky et al. (eds.) 2014, p. 8
[199] Organization for Economic Co-operation and Development 2008, p. 13

functioning towards a more environmentally friendly way.[200] The PPP also tells how responsibility should be divided, but I will be discussing that more in the next chapter.

How does the polluter pays -principle then relate to state-level action, as it seems to apply to companies creating emissions in their manufacturing processes? States can of course also be the ones creating emissions first-hand through state-owned factories etc., but the most important role is as the creator of regulations. The states would be the ones that have the responsibility to create the regulations on a national level to ensure the implementation of this principle. International law is needed to ensure that enough states implement the principle to stop companies from moving to states with no restrictions on environmental impact.

The draft articles on the protection of persons in the event of disasters hold that states have the responsibility to reduce risks of disasters[201] and to cooperate with each other and international organizations in the response to a disaster.[202] They also hold that the affected state has the primary duty to coordinate and control assistance on their territory.[203] These articles are yet to achieve a status of hard law in the international community, but they can be used as guidelines when considering responsibility and the sharing of it.

The International Law Commission (ILC) in their draft articles on state responsibility[204] are part of customary law and therefore binding. They define the emergence of responsibility of a state after an internationally wrongful act, which is defined in article 2 as an action that "is attributable to the State under international law; and constitutes a breach of an international obligation of the State".[205] Therefore, state responsibility could be invoked if a state fails at its obligation to protect human rights from climate change.

Again, the proving of the single state being responsible for a specific human rights violation by, say, a natural disaster, is quite challenging. The pollution from one state can have effects all over the globe, so it is impossible to say what state contributed the specific emissions that

[200] Organization for Economic Co-operation and Development 2008, p. 16
[201] Draft articles on the Protection of People in the Event of Disasters 2016, article 9
[202] Draft Articles on the Protection of People in the Event of Disasters 2016, article 7
[203] Draft Articles on the Protection of People in the Event of Disasters 2016, article 10
[204] Draft Articles on State Responsibility for Internationally Wrongful Acts 2001
[205] Draft Articles on State Responsibility for Internationally Wrongful Acts 2001, article 2

caused a human rights violation in a state. On the topic of climate change, the article would have to be interpreted in a way that any state that could have caused a certain harmful situation, should bear the responsibility for it. How that responsibility is then shared will be discussed more in the next chapter.

In conclusion, I would say that the responsibility for mitigation ought to be of the international community only after individual states have failed to fulfil the responsibility. The current and historical actions and different qualities of states should determine how that responsibility is divided between the states of the international community, which is a question I will attempt to answer in the next chapter.

## 5.2 How should responsibility be shared?

One integral question demanding an answer in the fight against climate change is how the responsibility of mitigating climate change should be shared among states. Even if it could be agreed that states are responsible for their actions that cause climate change and ought to take action to keep anthropologically induced global warming below 2°C, there's still no consensus on what the responsibility of each state is. There are a lot of states in the world, and everyone has a different impact on climate change. Some of the biggest polluters do not seem that keen on switching to a greener way of operating if it will not bring them any financial gains. Does that mean that because they neglect their portion of reducing emissions, other states have no obligation to even try to make up for it? The responsibility needs to be divided fairly between the states, as many states have contributed to climate change.[206] What does "fairness" look like in this context? These are the questions I hope this chapter will shed light on.

Each state is responsible for protecting the human rights of their people, and the international community shall assist, if a state refuses or fails to do so, but the international community's obligation is only a moral one, unless we consider the climate change to be a threat to international peace and security, in which case the UN Security Council is responsible. In the climate change context, a state cannot escape responsibility by appealing to the fact that another state is failing to do their part, since the state's responsibility as part of the

[206] Nollkaemper et al. in European Journal of International Law Vol 31 Issue 1 2020, p. 16–17

international community (represented by the Security Council) would then be invoked. This is supported by the Draft Articles on the protection of people in the event of disasters, which gives the state affected by a disaster the primary responsibility to coordinate assistance from other states and ask for assistance if the state cannot handle the disaster on a national level.[207]

Fairness is a universal concept, and in simple examples it is easy to understand, but in more complex situations the fairest option is not easy to determine. According to egalitarianism, the fairest option is always an equal distribution.[208] That might not always be the fairest option in practice, but it can be used as a thought-provoker since then any unequal burden would require a justification. The fair sharing of burden between developed and developing states is a burning question on this topic, and it is also one of the reasons for some climate treaties struggling to keep their parties in the agreement, making the treaties' reach narrower.[209] There are some principles of fairness that can help solve the issue, and I will be discussing those later in this chapter.

The states suffering the most from climate change seem to also be the ones most vigorously demanding action. As the small island states, for example, are suffering among the first from an issue mostly caused by other states than them, it does not seem fair that they should be the ones doing the heaviest lifting. Since they are the ones feeling the effects first, though, the burden seems to fall on them, as nothing is physically forcing the biggest polluters to act yet. Many of the suffering states do not have the means to take efficient enough action to stop the effects of climate change in their territories. When the consequences are felt in the states of biggest contributions to climate change, it will be too late to act.

Sharing responsibility based on each state's share of the global greenhouse gas emissions could be a logical option. That would mean that for example the United States and China would have one-third of the responsibility and together with the EU they would have over half. Most states attribute by mere tenths of a precent. Then again, the emissions per capita are far different from total emissions from state in certain cases. Should that be considered?[210] The measuring of the impact of the actions is also not that simple, so it could

[207] Draft Articles on the Protection of People in the Event of Disasters 2016, article 10 and 11
[208] https://www.merriam-webster.com/dictionary/egalitarianism (referred on 14.2.2022)
[209] For example, Russia and Japan refused to join the Kyoto Protocol's second commitment period for this reason in 2011
[210] Knox 2009, p. 489 in Harvard Environmental Law Review Vol 33 no 2

prove impossible to determine what actions are sufficient to meet a state's allocated responsibility. Measuring in a simple unit like the cost of the actions taken might not be appropriate, because the costliest investments are not always the most efficient ones.

Another question is also how far into the history we should be looking, when measuring each state's contribution. Developing states are approaching the developed countries' GHG levels, but historically, since the beginning of industrialization, the developed countries are responsible for a massive share. As I discussed in the previous chapter, the developing states argue that allocating responsibility to them is not fair, as they should be allowed to build their economy first, as the developed states have been able to do. That is a valid point, especially considering that in many cases if not all of them, the delay in the development of their economy is the result of imperialism, which can be blamed on the developed states. But does it enable any state to argue that they shouldn't be held responsible, because they do not have the financial means? Would it encourage some states to spend their money, so they do not have any left for climate change actions? These scenarios should be considered when answering the questions of responsibility sharing.

While I understand that it is unfair that the developing states cannot develop and get wealthier the same way developed states have in the past, the planet simply does not have the resources to allow that. The developing states should not be free from responsibility but seeing as developed states have gotten where they are by exploiting natural resources and thus making it impossible for developing states to take the same route, the developed states ought to have a responsibility to help developing states in the effort.[211]

The UNFCCC regime is based on the principle of common but differentiated responsibility. The convention requires its Annex I parties (developed states) to financially help the non-Annex I parties (developing states) meet their climate goals and promote environmentally sustainable development in those countries with practical measures.[212] The principle takes into account the economic circumstances of each state to ensure that the required actions can be taken. The article containing the mention of common but differentiated responsibility is in the background of three different principles: the polluter pays principle, the ability to pay principle and the beneficiary pays principle, which can all be used in climate change law as

[211] Shue in International Affairs Vol 75 1999, p. 531
[212] United Nations Framework Convention on Climate Change 1992 art. 4(5)

guiding principles of sharing the burden.[213] I will examine these principles further to see if they can exhaustively answer the question of burden sharing in climate change responsibility.

The polluter pays principle (PPP) supports sharing responsibility based on the amount of pollution an actor is causing, but it does not consider the actors' histories with pollution. The principle only requires the actor to pay for the costs created after the implementation of the principle, meaning the earliest polluters would have a relatively smaller responsibility, as they wouldn't have to pay for the previous pollutions. In practice, the PPP can be implemented as a Pigouvian tax, meaning that any market activity having a negative impact on the climate is taxed to compensate for that impact.[214] It might be possible to extend the applicability to history, if it can be argued that the obligations to compensate for pollution already existed and states have failed to fulfil them until now.

The PPP has other problems too. While it seems efficient as an idea, in practice the efficiency is not always achieved. For example, the principle does not tell how much the polluters should pay.[215] Which costs should be allocated to them? This question ties into the larger problem affecting climate change law as a whole: the exact effect on climate change of a certain action is pretty much impossible to calculate reliably, much less what was caused by anthropological climate change as opposed to natural climate change. States can, after all, only be held responsible for damages they cause, not damages that happen outside of their control. The ambiguity in the principle can result in different levels of strictness in the regulations, causing imbalance in the international trade sector.

The policies based on the PPP also may not be too efficient in practice, especially in cases of monopoly markets.[216] The principle also does not include a cost-benefit analysis of the policies chosen, which could mean that a more efficient policy is not used, and unnecessary costs are created. It does, however, clearly allocate the responsibility to those that pollute the atmosphere, even though other questions are not as appropriately considered. But are the first-hand polluters the only ones responsible? Are consumers not responsible for supporting

[213] Heyward in Norsk Filosofisk Tidskrift 2–3/2021, p. 126
[214] Enders 2011, p. 93-
[215] Schmidtchen et al. in Environmental Economics and Policy Studies 23, 2021 p. 117
[216] Schmidtchen et al. in Environmental Economics and Policy Studies 23, 2021 p. 137

the companies that pollute, or the states that allow the pollution to continue? I think that a responsibility from the PPP can be extended to states, as their role in implementing a policy to fulfil the principle is so crucial.

The beneficiary pays principle (BPP) allocates the costs of certain actions to the entities that benefit from said actions, regardless of their active contributions to the issue.[217] The benefiters should compensate the ones suffering from such actions to ensure justice between them.[218] When implementing this principle, it is possible that some actors currently create an equal amount of pollution, but one of them would have a broader responsibility because they have benefitted more.

Unlike the polluter pays -principle, BPP does not require a party to be at fault for polluting for responsibility to emerge, it is enough that the party benefits from it. Thus, responsibility cannot be avoided even by blaming the previous generations for polluting, as the current generation is still benefitting from their actions. Then again, the PPP does not require a party to benefit from their actions for responsibility to emerge, whereas BPP would not create a responsibility for a polluting party if they do not benefit from their actions. That kind of situation would probably result in the polluter stopping on their own if there was truly nothing to gain from continuing.

The BPP has been critiqued for the fact that it imposes responsibility on a party that is totally innocent to the harmful act that has resulted in their gains. It certainly seems to go against our moral compass that someone could be "held responsible" for an act they had no part in. But, since the party has had gains from said act, is it not only fair that the balance between the parties harmed by the act, and the parties who benefitted from it, is restored? The duty to not accept the benefits from a harmful act could stem from our morality opposing the harmful act.[219] Even though one might not be the one that initiated the harmful act, accepting the benefits allows the harmful act to continue. From a legal viewpoint, the principle can be compared to the duty to return unjust enrichment: just because money ends up in one's bank account, does not mean one is entitled to it.

[217] Page in The Monist Vol 94 2011, p. 420–421
[218] Page in International Theory Vol 4 No 2 2012, p. 304
[219] Barry et al. 2017, p. 286

Applying the BPP to anthropological climate change requires the detecting of persons that have benefitted, and persons that have been harmed by acts causing climate change. In the grand scheme of things, this would mean the group that has benefitted from industrialization, since industrialization is linked to climate change.[220] Determining whether an individual has benefitted from industrialization is not simple, as it cannot be said that a certain individual would have been born at all in a non-industrialized scenario.[221] Does this mean that the BPP cannot be applied to the issue of anthropological climate change? I think this problem is an important one to note, but it does not prevent the application of BPP. Indeed, it is perhaps not possible to say that a certain individual is better off with industrialization, but it is possible to look at the industrialized world and see how policies deriving from industrialization are still giving benefits to others and harming others. The use of fossil fuels, for example, allows cheaper travel, but in the long run causes sea level rise, meaning possible loss of homes.

According to the ability to pay principle (APP) the ones that have the most resources should make the biggest contributions: in practice, a progressive rate of payment in accordance with the payer's resources.[222] The principle differs from the PPP in that it does not neglect to consider the histories of the polluters.[223] The principle supports the developing states' argument that they should be allowed to focus on building their economy first, before having to act on climate change. The difference between the BPP and the APP is that the former does not consider the resources of the benefiters in the creation of responsibility.[224]

At face value, the APP might seem unfair: why should some states be essentially punished for having accumulated more wealth than others? If we consider a simple example of the APP, like that a person that earns 1 400 euros a month is required to make a payment of 400 euros and a person that earns 140 000 euros a month is also required to make a payment of 400 euros, having everyone pay the same amount regardless of their circumstances does not seem so fair. The situation is the same with states: some have a better economic situation than others. As was already discussed earlier about the beneficiary pays principle, the differences in the wealth of states have been achieved at the cost of the climate: as a rule of

[220] McNall 2011, p. 1
[221] Barry et al. 2017, p. 287
[222] Shue 1999, p. 537
[223] Shue 1999, p. 534
[224] Page in the Monist Vol 94 2011, p. 422

thumb, industrialized states are significantly wealthier than the non- or less industrialized states. Some of the wealthiest states have also accumulated their wealth by exploiting the developing states in the era of imperialism. Giving the same treatment to everyone is not always the fairest or equal option.

These three principles provide a sound explanation for how responsibility should be shared for the fairest possible outcome. They explain why wealthier states ought to bear a larger responsibility than states with less resources, and why responsibility is fair even if many of the actions that have worsened the climate were taken before the lives of the current generations.

The combination of the principles also somewhat solves the issue discussed earlier, where the failure of too poor or no longer existing parties to comply would mean a failure of the entire mitigation of climate change. Even if the PPP wouldn't be able to impose a responsibility because the party has ceased to exist, the BPP would ensure that there would still be a responsible party. And it that party is not able to pay, the APP would ensure that the ones able to pay would bear the responsibility.[225] This is, of course, a simplification of the situation, and many nuances affect the actual implementation of the principles, but they do offer something to build on.

These principles offer an example to be used to form a universal custom of sharing the burden related to preventing climate change and compensating for the damages. Usually, responsibility for damages covers the specific damage caused by an individual actor, but in climate change related damages, determining specific damages caused by a state is impossible, as has been realized throughout this thesis. Thus, additional rules for sharing the burden are needed.

The sharing of burden in climate change mitigation is a topic that requires more research and regulations to clarify the field. Since even the question of whether states have a responsibility to mitigate climate change is still under debate, sharing the responsibility is only a secondary question. I think it is still worth considering, as determining how the

[225] Heyward 2021, p. 126

responsibility would be shared can offer clarity to the states that are reluctant on accepting responsibility because of the uncertainty of what their share of the burden would be.

# 6 Conclusions

This thesis began with explaining why climate change action ought to be taken yesterday. The introduction also went over some of the main reasons why states are not doing more to mitigate climate change: it is more expensive in the short term than staying with the polluting ways.

The chapter on sovereignty discussed the meaning, history, and purpose of sovereignty, showing that sovereignty might no longer grant the sovereign with unlimited power without anyone to answer to. The role of sovereignty in climate change responsibility was also discussed, drawing the conclusion that sovereignty can enable states to stay passive in the fight against climate change, but the notion of sovereignty as responsibility may offer a way of creating a universal responsibility without disrespecting sovereignty.

Chapter two sought to establish the causal relationship between climate change and human rights, as the concept of sovereignty as responsibility essentially refers to responsibility to protect human rights. The chapter found that there certainly is a connection between human rights and climate change but establishing clear cause-and-effect relationships proves difficult, especially since the emissions of states all merge and have consequences all over the globe, so it is impossible to say which individual state caused the effects felt in another individual state.

Chapters three and four focused on finding out what kind of obligations states currently have under international law for climate change damages and to prevent climate change. An obligation to prevent climate change is found in climate change treaties, but as the chapter showed, they are often vague and fail to set clear goals for each state and have thus had only limited success. The obligations arising from international human rights law to protect human rights from climate change could be promising, but because of the problems with proving causal relationships, they are not a viable option at the moment. International

environmental law shows more promise, as it takes the scientific uncertainty better into account, and the no-harm principle, which is the most relevant source of law here, is already binding as rule of customary law. But, there is yet to be a decision to confirm its applicability to climate change related harm.

Chapter four discussed the obligations to help victims of climate change and compensate for damages caused by it. Again, we run into the problem of not being able to attribute a specific damage to a specific state, because the emissions mix together. For human rights violations, there is an obligation of the affected state to protect the human rights of its people, but international law seems to remain quite silent in the event that the state fails in its duty. Of course, the ICJ may give a decision confirming the states duty to protect its citizens, but there is no direct obligation for the other states to aid the struggling state. The UN Security Council, however, has taken on the responsibility of maintaining international security and peace, so if the effects of climate change threaten security or peace, the Security Council would be obligated to act. In international environmental law, states could in theory become obligated to compensate for damages caused on the basis of violating the no-harm principle, but in practice, it is difficult to prove which state caused the damages in the state demanding compensation.

Chapter five assumed the premises that states have at least some degree of responsibility, based on the previous chapters. The questions of who are responsible for climate change (only some states of all of them) and how the responsibility should be shared were under examination in the chapter. The principles on which the sharing of responsibility could be based on were explained, but it was seen that there is not much hard law to how responsibility should be shared. The chapter concluded that much more development on the regulations on responsibility sharing is needed, and at least the treaties on climate change should answer the question more clearly.

The research in this thesis has shown that states could be held responsible regardless of their will to aid the victims of climate change when gross human rights violations are present, but it seems unlikely that states could be forced to take any actions to hinder climate change. Even though preventive actions would probably prove less costly than damage-control after the fact, the uncertainness in the causal relationships of climate change and its effects on the

human population makes it practically impossible to hold states responsible for their actions or the lack of them.

At the moment, international environmental law seems to answer better to the need for regulation to prevent climate change. The no-harm principle is binding to all states, and there is literature on it to suggest that states must consider risks for environmental harm and mitigate those risks. Even scientific uncertainty to some degree cannot be used as grounds to ignore a risk. But, there is not a fixed marginal on how much uncertainty is allowed or how unlikely the consequences must be before the state has no obligation to mitigate the risk.

Human rights law and environmental law go hand in hand, since the degradation of the environment can, and often does, have implications on the enjoyment of human rights. I think highlighting this fact and "branding" climate change as a human rights issue is going to be an important tool in getting people and states to get worried about it and demand action, as human rights may be seen as more important than environmental well-being.

Legal developments alone will not be sufficient in fighting climate change. Technological developments and developments of the scientific research of climate change are crucial, for example in the sense that if the causal relationship between certain events and climate change was proven, legal measurement could take place. In the existing climate change regime, the most appropriate source of law might be the no-harm principle once it is proven that certain actions and inactions do cause environmental harm outside state borders, but without enough evidence to prove that there is a definite connection between GHG emissions and environmental harm caused, the principle will not have much effect on climate change mitigation.

The international legal system is dependent on state sovereignty, so exceptions to it need to be incredibly well justified. Even though there might be a moral obligation for states to try and prevent suffering by mitigating climate change, the international law on the subject does not support the existence a legal obligation to mitigate climate change by reducing GHG emissions outside climate treaties.

Many states are taking steps to address climate change, but it seems that the states consider just doing "something" to be enough to fulfil their fair share of responsibility on climate change. The states with the means to make biggest contributions have no pressing motivation to act, as the gravest effects of climate change are yet to reach them, and they also have better means to adapt to a changing climate. The states that are the loudest in asking for action, such as the small island states, do not have the means to make an impact on the global level, but are also struggling the most to adapt to their rapidly changing climate and sea levels.

Climate treaties remain the most relevant source of obligations to reduce emissions and take other mitigation measures. The human rights obligations offer a promising direction of expansion of the responsibility, but for now, the connection between human rights violations and climate change are not clear enough to support the existence of such obligation.

It seems more plausible that a sufficient number of states will sign and implement climate treaties and mitigate climate change that way, than that a way of ordering states to act regardless of their sovereignty would be found. Overall, people seem to be more and more concerned about the climate change.[226] The general atmosphere of consumers seems to be shifting towards taking the ecological impact of goods and services into account, which means more pressure on states and companies to implement more eco-friendly processes. This change will probably take a longer time than what would be required to prevent catastrophical consequences of anthropological climate change, but it is the best choice we have got at the moment.

It will be interesting to see, however, how cases related to climate change will be handled at courts. The consensus thus far seems to be very careful and narrow in implementing human rights law in climate change cases. The case of Sacchi et al. v. Argentina et al. decided by the Children's Rights Committee shows a promising start to courts recognizing the responsibility of states even outside their borders, but the future will show will others follow in the same direction.

[226] Fagan et al. 2019

Another option to go about climate change mitigation is to not try and regulate emissions, but instead trust that scientific developments will lead us to a future, where no-emissions options become more cost-efficient than their emission-creating counterparts. In the capitalist economy, this would lead to companies and consumers alike to switch to those options, creating an emission-free economy. This idea is quite utopistic, as at the moment the "green premium" (which means the difference in the cost of choosing emission-free and emission-causing technology).[227] is still significant, and scientific development takes time. I do not think we can rely on this option alone, but legal regulations are also required.

[227] https://www.gatesnotes.com/Energy/Introducing-the-Green-Premiums (referred on 13.2.2022)