

Cross-border pollution

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Introduction

Environmental pollution can be defined as '[a]ny alteration in the character or quality of the environment which renders it unfit, or less fit, for certain uses' (United Nations Economic and Social Commission for Western Asia (UN ESCWA) 2012). The environment can be affected by any of its components, including by the air, land, water, atmosphere, etc. Cross-border pollution is understood as the introduction, directly or indirectly, of hazardous substances into transboundary components of the environment (Economic Commission for Europe 1990, Definitions/1(c)) that causes harm 'in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border' (International Law Commission (ILC) 2001b, art. 2, Commentary para. 9). State practice has recognised the close connection between pollution, and more broadly environment degradation on the one hand, and human rights in general (UN Conference on the Human Environment 1972, para. 1; Inter-American Court of Human Rights (IACtHR) 2017, paras. 47–55), and economic, social and cultural rights in particular (International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, art. 12(2)(b); Committee on Economic, Social and Cultural Rights (CESCR) 2000, para. 15; African Commission on Human and Peoples' Rights (ACCommHPR) 2001, para. 51), on the other.

Various provisions of the 2011 *Maastricht Principles* on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights (MP) reflect the state practice on extraterritorial human rights obligations in respect of cross-border pollution, while others constitute progressive development of international law. There are finally few provisions that can be criticised and subject to further amendments. This is especially the case of Principles 24–27 that provide for the state's obligation to take preventive measures to ensure that non-state actors do not impair the enjoyment of the economic, social and cultural rights of any persons abroad. Taking into account the recent practice of treaty monitoring bodies, the extraterritorial obligation to protect against the conduct of non-state actors should be specified with clearer thresholds, especially to answer the question which human rights and against what kind of polluting corporate activities states are expected to protect.

The chapter argues that while the *Maastricht Principles* constitute a good basis for extraterritorial obligations regarding human rights violations arising from cross-border pollution, prescribing more punctual threshold criteria could have better reflected positive international law. The Chapter proceeds as follows. Section 2 explains, in the light of state practice, what kind of threshold criteria human rights obligations in matter of cross-border pollution should satisfy. Sections 3–5 analyse in detail what state conduct the obligations to respect (2), protect (3) and fulfil (4) require in matter of cross-border pollution under the MP and state practice. Among those obligations, the MP incorporate a detailed guidance as to the content of the states' obligations to protect against human rights violations by third parties (such as private persons, corporations, other states) that set a higher standard of regulation than that required by the present state of international law as reflected in existing state practice. Therefore, they reflect a progressive development of international law especially in interpreting the obligations to protect. The MP, however, are necessarily flexible and vague as they do not provide appropriate guidance as to the threshold criteria, especially as to the minimum severity of the risk of a human rights violation and causality.

Uncertainty about thresholds

As the minimum threshold of gravity of a harm that cross-border pollution produces cannot be determined with certain qualifications (e.g. 'significant', 'serious', 'grave') other than on a case-by-case basis (ILC 2001, art. 2, Commentary para. 4), legal instruments regulating cross-border pollution all have an inherent unease to define a minimum threshold of harm that instigates state obligations. In fact, not every level of environment pollution can instigate state obligations, especially if the pollution is detectable but does not result in a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other states (ILC 2001, art. 2, Commentary para. 4). The International Law Commission set this minimum threshold in its draft articles on prevention of transboundary harm from hazardous activities as activities causing a risk of 'significant transboundary harm' (ILC 2001, art. 1 and art. 2(a)). Likewise, the International Court of Justice has concluded in environmental law cases that the obligation of prevention arises when there is risk of 'significant damage' (International Court of Justice (ICJ) 2010, 55–56, para. 101; ICJ 2015, 720, para. 153).

International human rights monitoring bodies have also required a minimum threshold of severity of the human rights impact when addressing complaints about environmental pollution. When examining cases of alleged interference in private life caused by pollution, the European Court of Human Rights (ECtHR) found a violation in some exceptional cases even in the absence of any evidence of the serious danger to people's health if the pollution adversely affected the individual's quality of life, right to home or family life (ECtHR 1994, para. 51; 2012, paras. 104 and 108). Most often, however, the Court requires a certain minimum degree of the degradation of the individual's well-being, insofar as the ECHR does not include a right to a healthy environment (ECtHR 2005, para. 68; 2011, para. 105; 2016, para. 15). For the Court, the adverse effects of the environmental pollution on human rights must attain a certain minimum level if they are to be considered a violation of the ECHR; the assessment of that minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or mental effects (ECtHR 2005, para. 69; ECtHR 2011, para. 105; 2009, para. 100). For instance, the Court required 'a level of severity resulting in significant impairment of the applicant's ability to enjoy her home, private or family life' (ECtHR 2011, para. 58). Thus, the ECtHR has examined the impact of the environmental harm on the individual, rather than the risk that exists for the environment or the level of environmental

degradation. The Inter-American Court of Human Rights (IACtHR) has followed this logic and concluded that ‘States must take measures to prevent significant harm or damage to the environment, within or outside their territory’ (IACtHR 2017, para. 140). The IACtHR considered ‘[a]ny harm to the environment that may involve a violation of the rights to life and to personal integrity’ as significant harm (ibid). In a recent case concerning the positive obligations of the state within its own territory without any foreign element, the Court considered the ‘right to a healthy environment’, derived from Article 26 of the American Convention on Human Rights, as an autonomous right that protects the environment ‘even in the absence of the certainty or evidence of a risk to individuals’ (IACtHR 2020, paras. 202–203). The IACtHR generally recognised that environmental damage can cause a violation of additional human rights but did not require any threshold. It is unclear how this precedent, rendered in an extremely divided decision (three to three, with the President’s deciding vote), would be applied to extraterritorial cases that are likely to address the required degree of the impact of environmental pollution on human rights.

Another question of threshold is the link between the harm and the state conduct: not any state has extraterritorial obligations towards individuals affected by cross-border pollution outside its borders, but only the state whose conduct has certain causal connection to the harm to the victims (ECtHR 2019, para. 106). There are often complex factual links between the state’s conduct and its extraterritorial consequences, as other factors may influence the environmental pollution (ECtHR 2019, para. 160). Causation is linked to questions of foreseeability and proximity or direct harm (ILC 2006, 79, para. 16). Human rights monitoring bodies have applied certain tests to better specify this link: the ECtHR required ‘direct and immediate link’ in Article 8 cases; ‘direct and immediate cause’ (ECtHR 2008); ‘sufficiently proximate repercussions’ (ECtHR 2004, para. 317); ‘real and immediate risk’ (ECtHR 2010, paras. 286 and 296); while the Human Rights Committee required ‘a direct and reasonably foreseeable impact on the right to life’ (Human Rights Committee (HRC) 2019, para. 22). The IACtHR, in its Advisory Opinion on extraterritorial human rights obligations related to environmental pollution, required a threshold of ‘real and immediate risk’ (IACtHR 2017, para. 120), but only with respect to the protection of the right to life. To serve legal certainty, and in conformity with the Court’s intention to interpret cases of extraterritorial jurisdiction restrictively (IACtHR 2017, paras. 81 and 104), the minimum proximity of the factual/causal link should be formulated more generally as a threshold criterion of the required extraterritorial nexus.

The practice of treaty monitoring bodies, authoritative interpreters of the respective human rights treaties, thus confirms that cross-border pollution only instigates the state’s extraterritorial obligations when: (1) a direct link between the environmental pollution or degradation and an impairment of a protected right is established, and there is a causality between the action or omission of a state, on the one hand, and the pollution, on the other; (2) the adverse effects of the pollution on human rights must attain a certain minimum level if they are to fall within the scope of international human rights law (ILC 2017, para. 82). The assessment of that minimum standard is relative and depends on the content of the concerned right and all the relevant circumstances of the case, such as the intensity and duration of the nuisance, and its physical or mental effects.

Principle 13 MP seems to address, at least impliedly, the proximity threshold, but not severity when it refers to ‘a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially’ and ‘a foreseeable result’ of state conduct. To instigate extraterritorial obligations, the provision requires a ‘real risk’ as opposed to merely hypothetical or theoretical risks (De Schutter et al. 2012, p. 1113). The principle also implies that the threshold is not the strict *conditio sine qua non* theory but a state conduct that produces ‘foreseeable’ harm

‘even if other, intervening causes, also played a role in the violation’ (De Schutter et al. 2012, p. 1114). The link between the foreseeability of the harm and the risks of such harm is occurring is that only the foreseeable risk instigates the state’s obligations, while the state is not expected to prevent unforeseeable risk of human rights violations. Therefore, the proximity requirement complies with the case law of the above-mentioned international human rights monitoring bodies, although a more meticulous wording would be welcome. Such a more specific threshold could be that used by the Human Rights Committee as a universal standard, that of ‘direct and reasonably foreseeable’ harm, as it further highlights that a remote causal link is insufficient to instigate state obligations (ECtHR 1999).

As to the severity requirement, Principle 13 does not ‘establish a threshold of severity or intensity of the risk: it refers to the probability of the risk materializing, not to the consequences that might follow from such materialization of the risk’ (De Schutter et al. 2012, p. 1113). While it may imply that the MP allow, like the ECtHR, a case-by-case analysis of the impact of the environmental pollution on the individual, state practice shows that a certain minimum threshold of seriousness is necessary at the level of all economic, social and cultural rights (below). As the positive obligations to protect and fulfil will indicate (Sections 4–5), the instigation of extra-territorial human rights obligations with regard to the risk created by non-state actors is the most compelling in case of *jus cogens* norms and human rights protecting the physical integrity of the person.

Obligations to respect

Under the obligation to respect, states shall refrain from: (i) any practice or activity that denies or restricts access, in equal conditions, to the requisites of a dignified life, such as adequate food and water, and (ii) unlawfully polluting the environment in a way that has a negative impact on human rights; ‘for example, by dumping waste from state-owned facilities in ways that affect access to or the quality of potable water and/or sources of food’ (IACtHR 2017, para. 117).

These duties have an extraterritorial dimension too. Customary international law prohibits a state from allowing its territory to be used to cause damage on the territory of another state (USA–Canada Arbitral Tribunal 1941, 1965; ICJ 1949, p. 22; ICJ 2010, p. 55–56, para. 101). At the level of persons and bodies whose conduct is attributable to the state, this obligation imposes at the very least a negative conduct not to violate the rights of other states. In international human rights law, the obligation to respect has been interpreted as an obligation not to violate human rights of individuals outside the state’s territory. It requires the state to ‘refrain from unlawfully polluting air, water and soil, e.g. through industrial waste from state-owned facilities’ (CESCR 2000, para. 34).

Violations of the obligations to respect are ‘State actions, policies or laws that contravene the standards set out’ in binding international norms protecting socio-economic rights (CESCR 2000, para. 50). Examples include ‘the suspension of legislation or the adoption of laws or policies that interfere with the enjoyment of any of the components of the right to health’; or ‘the failure of the state to take into account its legal obligations regarding the right to health when entering into bilateral or multilateral agreements with other states, international organizations and other entities, such as multinational corporations’ (CESCR 2000, para. 50).

It is understandable that treaties on the protection of environment provide mainly on positive obligations of states parties ‘to prevent, reduce and control pollution’ rather than to refrain from polluting (Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region 1983, arts. 4(1)–(2), 5–10; Convention on the Protection of the Black Sea Against Pollution 1992, art. V(1), VII–XII;), as the latter are absorbed by the former.

Therefore, highlighting positive measures within the obligation to respect by the MP is a welcome development: beyond the principles 20–22 that focus on negative obligations, Principle 19 provides that

All states must take action, separately, and jointly through international cooperation, to respect the economic, social and cultural rights of persons within their territories and extraterritorially, as set out in Principles 20 to 22.

This principle cannot be read as amending the mainly negative conduct that obligations to respect require: the state shall refrain from polluting the environment that violates socio-economic rights, while taking measures against pollution by third parties is a conduct expected under the obligation to protect. If consistently reading the obligations to respect, ‘taking action’ under Principle 19 can be interpreted as ‘requiring that the state redress any violation attributable to it’ (Gould and Shelton 2013, p. 577). In other words, once the state violates its obligation to respect, it is required to take action to avoid, counter and mitigate the impact of the pollution (CRC Concluding observations: Islamic Republic of Iran 2016, para. 74; Special Rapporteur on the adverse effects of the illicit movement... 2008, para. 54). Due to the spill-over effect of cross-border pollution, joint coordination of positive measures to counter and mitigate the harm is crucial and is confirmed in international environmental law (UN Conference on the Human Environment 1972, Principle 24; ILC 2001b, art. 4). Human rights monitoring bodies have confirmed the mainly negative obligation not to violate human rights outside the state’s territory through transboundary pollution, together with a positive obligation to mitigate such a risk (CEDAW 2018, paras. 43 and 46(a); CRC Committee 2013, para. 31).

Other rules of the MP further specify the obligations to refrain in various scenarios that might play a role in cross-border pollution. Principle 20 provides on this duty in situations where the conduct of the state has a potential impact on the enjoyment of economic, social and cultural rights without the involvement of any third party (other state or international organisation) in the situation that leads to nullification or impairment of the enjoyment of these rights (De Schutter et al. 2012, p. 1128). Principle 21 requires states to refrain from a conduct that impairs the ability of another state or international organisation to discharge their international obligations. It also expects states not to aid, assist, direct, control or coerce another state or international organisation in breaching its international obligations regarding economic, social and cultural rights. More relevant in cross-border pollution is Principle 22 which requires the state to refrain from adopting measures, such as embargoes or other economic sanctions, which would result in nullifying or impairing the enjoyment of economic, social and cultural rights. An example is the non-respect of obligations of the state under international humanitarian law protecting natural environment (CESCR 2002, para. 22), for instance, the use of chemical, incendiary or bacterial weapons (Protocol Additional I to the Geneva Conventions 1977, arts. 54(2) and 55).

Obligations to protect

The obligation to protect requires states parties to prevent third parties, that is other states, international organisations, non-state actors such as individuals, civil society organisations, national or transnational corporations from interfering in any way with the enjoyment of human rights (CESCR 1999, para. 15; CESCR 2000, para. 51; CESCR 2002, para. 23). Contrary to the obligations to respect as formulated in the MP which comply with state practice, its provisions on the obligations to protect human rights extraterritorially from the conduct of third parties have

been contested by several states. However, protection against non-state conduct is particularly important in cross-border pollution where most incidents result primarily from private conduct (Bodansky et al. 2008, p. 6).

Principle 24 provides that

[A]ll states must take necessary measures to ensure that non-state actors which they are in a position to regulate, as set out in Principle 25, such as private individuals and organisations, and transnational corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social and cultural rights. [...]

Under Principle 25, the state is required to adopt mainly regulatory measures in any of the following scenarios:

- a the harm or threat of harm originates or occurs on its territory;
- b where the non-state actor has the nationality of the state concerned;
- c as regards business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the state concerned;
- d where there is a reasonable link between the state concerned and the third party's conduct;
- e where the conduct impairing economic, social and cultural rights constitutes a *jus cogens* violation.

Among those principles, the last one, related to *jus cogens* violations is unproblematic as it is recognised in general international law that all states are obliged to cooperate to bring to an end through lawful means any serious breach of a peremptory norm (ILC 2001a, art. 41(1)). The other scenarios, however, are contested.

In general international law, the standard of due diligence is the legal basis for an obligation to protect the rights of other states where the state knew or should have known that activities unlawful under international law were perpetrated on its territory and caused damage to another state (ICJ 1949, p. 18). Compared to the standard of due diligence, also considered as a customary norm (ICJ 2010, pp. 55–56, para. 101) or general principle of law (ICJ 1949, p. 22), the MP performed two major moves: first, they protect not the rights of other states but human rights of individuals outside the territory of the state; and second, the harmful activities are not necessarily perpetrated entirely on its territory, but may be perpetrated (partly) abroad by a third party to which the state has certain nexus, such as the social centre of activity or the place of registration or other reasonable link.

As it is well-analysed, human rights obligations of the state towards persons outside its territory relate to the question of jurisdiction under human rights treaties, defined as the main criterion for the applicability of international human rights treaties, the nexus between the state and the individual's human rights violation, that is, factual control, power or authority that the state exercises over a given individual, territory or situation (De Schutter et al. 2012, p. 1102; Milanovic 2011, p. 39). In the dominant case law of international human rights law, the state can have extraterritorial jurisdiction if it has effective control over the territory where the violation occurs, or over the victim and/or the perpetrator, that is, state agents commit the human rights violation abroad (ECtHR 2011, paras. 133–140; IACtHR 2017, paras. 79–80). However, one might ask whether extraterritorial jurisdiction would cover cases where the state has control neither over the victim nor over the perpetrators, nor over foreign territory, but over activities within its own territory that lead to foreseeable harm being caused abroad. This is the scenario

of the home state's control over its corporate nationals that violate human rights abroad. In those cases, it is a third party (a non-state actor) and not the state's agents that violates human rights abroad, and one may ask how far such breaches may fall within the jurisdiction of the state.

The UN Guiding Principles on Business and Human Rights (UN HRC 2011a, Principle 1; UN HRC 2011b, para. 1) commented the idea of such an extraterritorial obligation to regulate the extraterritorial conduct of corporate nationals as follows:

At present states are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis.

(UN Human Rights Council 2011a, Principle 1)

Several states, especially developed home states, have opposed a recommended obligation to regulate the extraterritorial conduct of their corporate nationals, while other states, typically developing host states, expressly supported it.¹ The case law of the ECHR has never recognised such an obligation either (European Commission of Human Rights (ECmHR) 1995), especially as the Court avoids to admit 'a "cause-and-effect" notion of "jurisdiction"' (ECtHR 2010, para. 64; ECtHR 2001, para. 75).

Nonetheless, since the adoption of the MP, human rights monitoring bodies have gradually interpreted human rights treaties as entailing the home state's obligations to regulate such conducts (Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 2013, para. 12(b); CESCR 2017, paras. 25–35; CRC Committee 2013, paras. 43, 45 and 50). Recently, the Human Rights Committee provided in its General Comment no. 36 (2018) on the right to life that states parties:

[...] must also take appropriate legislative and other measures to ensure that all activities taking place in whole or in part within their territory and in other places subject to their jurisdiction, but having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory [...] are consistent with article 6.

(HRC 2019, para. 22)

This marks the recognition of the causality-based jurisdictional link by the most universal treaty body. In the domain of cross-border pollution, this entails, for instance, the state's obligation to take appropriate legislative and administrative measures to prevent acts of transnational corporations registered in the state party which negatively impact on the enjoyment of rights of indigenous peoples to health and an adequate standard of living in other states (e.g. CERD Concluding observations: UK 2011, para. 29; CERD Concluding observations: USA 2014, para. 10(d)).

In its Advisory Opinion on *The Environment and Human Rights*, the IACtHR was the first human rights court to recognise a new extraterritorial jurisdictional link based on effective control over domestic conducts. The Court accepted a jurisdictional link 'when the State of origin exercises effective control over the activities that caused the damage and the consequent human rights violation' (IACtHR 2017, para. 104(h)). It is based on the factual – or, as the Court formulates, 'causal' – nexus between conducts performed in the territory of the state and a human rights violation occurring abroad (IACtHR 2017, paras. 95, 101 and 102). As noted above, the Court limited its finding to interpret state obligations to respect and to ensure the rights to

life and to personal integrity in relation to damage to the environment. The African Commission on Human and Peoples' Rights also interprets the right to life as imposing extraterritorial obligations where 'the State engages in conduct which could reasonably be foreseen to result in an unlawful deprivation of life' (ACommHPR 2015, para. 14). This requires the state to adopt measures 'to protect individuals and groups from real and immediate risks to their lives caused either by actions or inactions of third parties', including 'preventive steps to preserve and protect the natural environment' (ACommHPR 2015, para. 41). In the *Issa Yassin and Others v. Canada* case (2017), the Human Rights Committee also confirmed that 'there are situations where a State party has an obligation to ensure that rights under the Covenant are not impaired by extraterritorial activities conducted by enterprises under its jurisdiction' (HRC 2017b, para. 6.5).

It is striking that the most authoritative treaty interpretation, especially the IACtHR advisory opinion and recent general comments, requires states parties to protect against extraterritorial violations by corporate nationals in the context of the right to life and the right to physical integrity. Given the general international law obligation to cooperate to bring to an end any serious breach of a peremptory norm (ILC 2001a, art. 41(1)), one can add the freedom from torture and the right to self-determination of people. For those human rights, an interpretation requiring the obligation to protect against extraterritorial corporate violations is not accepted by most states parties but constitutes the progressive development of international law. This means that the respective human rights treaties should be interpreted according to this authoritative reading of their monitoring bodies that may also contribute to the formation of a customary human rights norm. It is questionable whether treaty bodies will extend this reading beyond the protection of the right to life and the right to physical integrity to other rights affected by pollution such as the rights to adequate food, to water and to take part in cultural life – as the IACtHR interpreted an autonomous right to a healthy environment in a non-extraterritorial context (IACtHR 2020, para. 207).

International human rights treaty bodies have confirmed that the obligation to regulate requires, as Principle 25 MP provides, a wide range of measures such as 'administrative, legislative, investigative, adjudicatory and other measures'. In the matter of cross-border pollution, monitoring bodies specified that the right to health expects from states 'the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health' (CESCR 2000, para. 15). The IACtHR expects from states the obligation 'to supervise and monitor activities within their jurisdiction that may cause significant damage to the environment' (IACtHR 2017, para. 154). Preventive measures should be broadly conceived, as they should address both the source of the pollution, i.e., the environmental damage and its impact on human rights (ACommHPR 2015, para. 41). States were recommended

- 'to enact or enforce laws to prevent the pollution of water, air and soil by extractive and manufacturing industries' (CESCR 2000, para. 51);
- 'to take reasonable and other measures to prevent pollution and ecological degradation' (ACommHPR 2001, para. 52);
- 'to make use of a wide range of administrative and quasi-judicial mechanisms, many of which already regulate and adjudicate aspects of business activity in many States parties', such as 'consumer and environmental protection agencies' (CESCR 2017, para. 54) or 'environmental tribunals' (CRC Committee 2013, para. 30);
- to impose administrative sanctions on corporate national such as the denial of awarding of public contracts in public procurement regimes to companies that have not provided information on the environmental impacts of their activities (CRC Committee 2013, para. 50);

- to adopt preventive measures such as effective regulation and monitoring of the environmental impact of business (CRC Committee 2013, para. 20);
- to establish and implement regulations to ensure that the business sector complies with environment standards (CRC Committee Concluding observations: New Zealand 2016, para. 13(a));
- to hold corporate nationals ‘accountable for any adverse impacts on the rights of indigenous peoples and other ethnic groups, in conformity with the principles of social responsibility and the ethics code of corporations’ (CERD Concluding observations: Norway 2011, para. 17; CRC Committee Concluding observations: Canada 2012, para. 28).

This list of recommended best practices is non-exhaustive: according to the standard of due diligence, the state is expected to take all reasonable measures within its capacity. It is a case-by-case evaluation of what reasonably available measures the state can take to ensure the prevention of the environmental damage and its impact on human rights.

The drafters of the MP have thus remarked (De Schutter et al. 2012, pp. 1136–1137) and at the same time anticipated this progressive interpretation by international human rights treaty bodies. It is regrettable that the MP do not provide for any minimum threshold on the severity of the risk of environmental impact on economic, social and cultural rights. The above-mentioned limitation of those extraterritorial protective obligations to the rights protecting the physical integrity of the person and *jus cogens* norms would constitute a sound basis, while extending them to other rights such as the right to property (e.g. restriction of the communal property of indigenous people because of environmental pollution) or the right to adequate housing (e.g. housing estates damaged by environmental pollution) seem to run against the dominant practice of monitoring bodies and States. The reason for the priority given to rights protecting the physical integrity of the person and peremptory norms of human rights law is that they constitute the most fundamental human rights; human rights treaty monitoring bodies also recognised that certain rights, especially non-derogable human rights require a higher degree of diligence than other rights (ACommHPR 2006, para. 155; ECtHR 2004, para. 334). This would be in line with the focus of general international law on ‘significant transboundary harm’ or ‘significant damage’ in formulating the obligation to protect against cross-border pollution (Section 2). Therefore, the instigation of extraterritorial obligations to protect against polluting corporate activities is the most compelling in case of *jus cogens* norms and human rights protecting the physical integrity of the person. This would also create a legitimate compromise between an activist claim to oblige the state to protect any human rights anywhere around the world affected by the conduct of its corporate nationals, on the one hand, and the fear of developed home States of the restriction of their economic and investment policies, on the other.

Obligations to fulfil

The obligation to fulfil requires states to take necessary steps, to the maximum of their available resources, to facilitate and promote the enjoyment of human rights. It may require allocating resources to the elimination of cross-border pollution or seeking business cooperation and support to implement economic, social and cultural rights (CESCR 2017, para. 23). While these duties are programmatic as they depend on the state’s available resources and capacities – except the minimum core obligations – the state must move as expeditiously and effectively as possible towards ‘achieving progressively the full realization of’ economic, social and cultural rights’ (CESCR 1990, para. 9).

Principle 29 on the obligation to create an international enabling environment has found also echo in the practice of human rights monitoring bodies. The Committee on Economic, Social and Cultural Rights confirmed that states shall undertake to encourage corporate actors whose conduct they are in a position to influence to ensure that they do not undermine the efforts of the states in which they operate to fully realize (CESCR 2017, para. 37; CESCR 2011, para. 6). International frameworks to fulfil might be, for instance, the environment standards of the OECD Guidelines for Multinational Enterprises (OECD 2011, pp. 42–46) or the European Pollutant Release and Transfer Register (EU 2006). The measures taken under Principle 29 aim at leading to the universal fulfilment of socio-economic rights also in matter of environmental protection. For instance, the right to health has been interpreted as including an obligation of states to ‘formulate and implement national policies aimed at reducing and eliminating pollution of air, water and soil, including pollution by heavy metals such as lead from gasoline’ (CESCR 2000, para. 36). The right of the child to the enjoyment of the highest attainable standard of health entails an obligation to ‘combat disease and malnutrition [...] through, *inter alia*, [...] taking into consideration the dangers and risks of environmental pollution’ (Convention on the Rights of the Child 1989, art. 24(2)(c)).

Principle 34 provides on the obligation to seek international assistance and cooperation as a means to fulfil socio-economic rights. This has a strong positive law basis as certain human rights treaties provide on the obligation to implement the convention ‘through international assistance and co-operation, especially economic and technical’ (ICESCR 1966, art. 2(1); American Convention on Human Rights 1969, art. 26). In case of cross-border pollution, the duty to internationally cooperate is recognised in international environment law and constitutes a customary international norm (IACtHR 2017, paras. 183–184).

While one can criticise the MP on the obligations to fulfil by saying that their programmatic and resource-dependent character makes them empty, in fact they follow the logic of state practice in matters of economic, social and cultural rights. The emphasis on extraterritorial obligations to fulfil reflects certain realism: Principle 31 provides that ‘the fulfilment of economic, social and cultural rights extraterritorially’ is ‘commensurate with, *inter alia*, its economic, technical and technological capacities, available resources, and influence in international decision-making processes’. This standard, ‘commensurate with’ capacities, is as flexible as the state’s obligation to fulfil economic, social and cultural rights in its territory ‘to the maximum of its ability’ (MP 31), as both depend on the state’s capacity to assist and cooperate. As opposed to the obligation to fulfil in the state’s own territory, however, the extraterritorial one ‘cannot be achieved by any one state on its own’ (De Schutter et al. 2012, p. 1151), but expects the state to ‘cooperate to mobilize the maximum of available resources for the universal fulfilment’ (MP 31).

Conclusions

Cross-border pollution is a clear global challenge as it requires by definition positive action by more than one state: beyond the state of origin, all states affected by the pollution are potentially human rights duty-bearers, given the connection between environmental pollution and socio-economic rights. The MP provide in detail on extraterritorial obligations to respect, protect and fulfil economic, social and cultural rights outside the state’s territory. Its principles provide a sound and detailed framework for the obligations to respect (Principles 19–22) and fulfil (especially Principles 29, 31 and 34), and thus reflect the dominant state practice in international environment law and international human rights law.

Other rules of the MP, however, incorporate a progressive development of international law especially in interpreting the obligations to protect, in line with the evolving interpretation by

most international human rights treaty bodies. However, the obligation to regulate corporate nationals' conduct abroad lacks appropriate guidance as to the threshold criteria, in particular as to the severity. Principles providing on the 'risk' of a harm (Principles 13–14) should be read as referring to a clear, direct and reasonably foreseeable negative impact of the pollution on economic, social and cultural rights abroad. Furthermore, the required threshold of severity should be expressed. Principles 24–27 provide for the state's obligation to take preventive measures to ensure that non-state actors do not impair the enjoyment of the economic, social and cultural rights of any persons abroad. Taking into account the recent practice of treaty monitoring bodies, the extraterritorial obligation to protect against the conduct of non-state actors should apply to polluting conducts that have a clear, direct and reasonably foreseeable negative impact on the rights protecting the physical integrity of the person and *jus cogens* norms.

Note

1. See, opposing: CEDAW (2017b) General Recommendation No. 35 written comments of states: Australia, paras. 13–16; Norway; HRC (2017a) General Comment no. 36 Written comments of States: Austria; Canada, para. 7; Germany, para. 21; Netherlands, paras. 18 and 29; France Comment submitted after the adoption of the General Comment, paras. 16–18; Norway; U.S.A., para. 13; in support of: WTO Communication from China, Cuba, India, Kenya, Pakistan and Zimbabwe 2002, para. 21.

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