

The Responsibility to Protect Haiti

By [Linda A. Malone](#)

Introduction



On January 12, 2010, a massive earthquake struck Haiti, essentially destroying the Haitian government infrastructure. According to remarks by Rene Magloire, former Minister of Justice and Special Advisor to the President and Ministry of Justice, the presidential palace, the ministry of justice building, and the legislative palace were destroyed. Police stations

and prisons were damaged, allowing thousands of detainees and prisoners to escape. More than 200 thousand died, more than 300 thousand were injured, more than 450 thousand became refugees, more than 400 thousand homes were destroyed, more than 120 thousand homes damaged, and more than a million people were left without shelter.^[1] For five years Magloire and other justice officials had been working on re-establishing the Haitian judicial system and the rule of law.

Earthquakes, tsunamis, and climate disruption have focused international attention on environmental disasters, natural and anthropogenic, and the ability of the global community to respond adequately and immediately. This Insight surveys the structures for consensual relief efforts by states and the United Nations, accepted international norms for humanitarian intervention in environmental disasters, and how these norms might be modified by international recognition of the responsibility to protect.

Consensual Relief Efforts

As early as 1991, the United Nations Environmental Program ("UNEP"), in response to mounting disquietude over environmental security, established the United Nations Center for Urgent Environmental Assistance ("UNCUEA") to assess and respond to man-made environmental emergencies in cooperation with other United Nations agencies. To address acute environmental emergencies specifically, UNEP has now coordinated with the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) to create the Joint UNEP/OCHA Environment Unit (JEU).^[2] A month after the earthquake in Haiti, John Holmes, the head of OCHA, wrote a confidential

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email to his top UN relief agency coordinators highly critical of the UN relief efforts and weak implementation of its humanitarian "cluster strategy" for delivering relief in twelve sectors of need, including water, health care, and shelter.^[3] He emphasized that "with the rainy season looming, these unmet needs are taking on additional urgency, not least from the health and protection points of view, and given the potential consequences in terms of both politics and security of large demonstrations in some sensitive places." He stated that there was an urgent need for better coordination "(1) to ensure close coordination with the efforts of national authorities; (2) to channel the contributions of the private sector; and (3) to make maximum use of the logistical support and other assistance provided by the military."

In a natural disaster like that in Haiti, there are significant logistical problems in coordination of UN and multilateral relief efforts, even with a totally cooperative and consenting state. Legal problems are less significant with a consenting state, as there is no need to justify relief efforts as lawful "intervention." Providing relief assistance in an uncooperative or failed state, however, may present legal problems. Even the Security Council is subject to the Article 2(7) prohibition on intervention in states' domestic jurisdiction when it recommends relief assistance under Chapter VI.^[4] If the state in which the environmental problem originates is uncooperative, the Security Council, instead of resorting to Chapter VII, might choose to issue precautionary and ameliorative recommendations for emergency response action applicable only in the territory of consenting states, but which could nevertheless be interpreted by the state of origin as "intervention" in its domestic jurisdiction. For example, routine monitoring or exchange of information on the transboundary effects of an environmental disaster, taken pursuant to a Security Council recommendation that there be such collection and exchange of information, might be objectionable to the state of origin. In this regard, it is relevant to note that Russian counter-intelligence agents in 1995 accused a "[w]estern ecological organization of divulging military secrets and . . . suggested that foreign environmental groups are fronts for espionage."^[5]

Environmental disasters with transboundary effects, loss of a vital global resource, or actions in violation of international environmental law may no longer be regarded as matters of "domestic" jurisdiction. An interpretation of "domestic" jurisdiction that excludes environmental disasters with international ramifications is also consistent with the current widespread recognition that "domestic" jurisdiction does not encompass large scale deprivation of basic human rights. Otherwise even the most well intended relief efforts by states or the UN might be characterized as unlawful intervention in uncooperative or failed states.

Humanitarian Intervention

Even when working with a fully cooperative government in Haiti, the head of UN relief operations has acknowledged a disturbing inadequacy of the UN to provide and coordinate voluntary relief assistance. In the first critical hours during the Haiti earthquake, or in the next environmental disaster, what government is available to consent to such efforts? Do the international community and the UN have to await consent from a state unable to respond? The Security Council may authorize action without consent if there

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is a "threat to peace," and recent precedents of humanitarian intervention and acknowledgment of refugee problems as a threat to peace may lend themselves to invocation of Chapter VII, but not decisively so.

The legality of unilateral and multilateral humanitarian intervention by states continues to be highly disputed, given the Charter limitation on states' use of force as "self-defense."^[6] It would be difficult for a state to justify military intervention in a natural disaster in another state as self-defense. Similarly, "breach of peace, threat to peace, or an act of aggression" under Chapter VII for purposes of Security Council authorization of enforcement measures does not effortlessly lend itself to authorizing humanitarian intervention, much less in natural disasters.

In the absence of real or threatened military conflict, can environmental destruction be sufficient to trigger the Council's Chapter VII powers? Is a threat to ecological security a threat to international peace and security? The Security Council has declared that non-military sources of instability in the economic, humanitarian, and ecological fields may become a threat to peace and security. Should environmental degradation threaten to lead to conflict between states or take place in an ongoing military conflict, there would be no need to resort to a separate notion of ecological security or humanitarian intervention in order to trigger authority in the Security Council under Chapter VII. Absent real or potential military conflict, however, there are many conceivable scenarios in which the state of origin of an environmental disaster might be unable or unwilling to cooperate with the Security Council or other states (e.g., the Soviet Union during Chernobyl and Myanmar after the tsunami), thereby exacerbating the transboundary effects of an environmental disaster and jeopardizing the lives of its own populace by refusing to cooperate with the international community in remedial action.

Security Council enforcement action with respect to preservation of human rights is analogous to Security Council enforcement action to protect individuals from environmental catastrophes. For example, the humanitarian mission to Somalia,^[7] the economic sanctions and authorization of a multinational force for Haiti in 1993,^[8] the placement of relief operations in Iraqi territory for the Kurdish population,^[9] and the establishment of the international criminal tribunals for Rwanda^[10] and the former Yugoslavia^[11] are examples of humanitarian intervention by the Security Council in order to remedy gross and systematic deprivation of human rights. Although each of these precedents (with the notable exception of Haiti) can be legitimized by pointing to the background conflicts present, such a position would ignore the humanitarian justifications given in the relevant resolutions for the Security Council's actions. Notably, the political tension created by mass migration of refugees has also been a factor in the Council's invocation of Chapter VII. These examples indicate that the Security Council members and the global community are at least somewhat receptive to a policy-oriented, constitutive approach to interpreting the Charter even when such interpretation expands the obligations and duties of member states beyond the original intent of the Charter.

Any analogy to the Security Council's exercise of humanitarian intervention under Chapter VII is complicated by the fact that, under international law, there has yet to be clear and unequivocal recognition of a right to a safe and

healthful environment.^[12] This lack of recognition is particularly troublesome in that whatever authority the Security Council might have under Chapter VII, the scope of its activities is confined by the stated purposes of the United Nations in Article 1.^[13] Article 1 explicitly mentions human rights as one of the fundamental purposes of the United Nations. Absent a threat to military peace and security, or recognition of the concept of ecological security, legitimacy of any Security Council enforcement measures in responding to natural disasters on humanitarian grounds will be attenuated so long as there is no explicit and clear recognition of a fundamental right to a safe and healthful environment.

The Responsibility to Protect

The gap between this periodic need for the international community to intervene in a state's management of environmental disasters and the prohibition on intervention could be filled by an extension of a relatively new norm to this situation. On September 16, 2005, the United Nations General Assembly adopted by consensus a resolution recognizing the "responsibility to protect".^[14] The core of the responsibility to protect is that "[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity."^[15] The international community has the responsibility to use diplomatic, humanitarian and other peaceful means, and if those fail, may take "collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis" when "national authorities are manifestly failing to protect their populations" from the four crimes.

A broader formulation of the responsibility to protect was included in the 2001 report, *The Responsibility to Protect*, from the International Commission on Intervention and State Sovereignty (ICISS Report). It concludes that "where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect."^[16] The elements of the responsibility include the responsibility to prevent, react, and rebuild, with the single most important priority being the responsibility to prevent.^[17] The ICISS Report also advises that military intervention is appropriate when there is "serious and irreparable harm occurring to human beings, or likely to occur," involving large scale loss of life (whether from "deliberate state action, or state neglect or inability to act, or a failed state situation") or large scale ethnic cleansing. While the ICISS Report favors intervention through the UN Security Council and General Assembly, it acknowledges the possibility of state intervention in a "conscience-shocking" situation if the UN fails to address the situation in a timely manner.

However, UN officials, including the Secretary-General, have been quick to deny that the responsibility to protect applies to environmental crises.

From State Security to Human Security

Would the responsibility to protect, if accepted as a norm of international law, alter the calculation by requiring the Security Council or states to act?

Ultimately, the difference between Chapter VII precedents, the UN formulation of the responsibility to protect, and ICISS Report may be one of affirmative obligation versus permissive authority, and timing. A natural disaster, which results in massive loss of life and population displacement, can be characterized as a "threat to peace" such that the Security Council may authorize enforcement action. The Security Council would not have an affirmative responsibility to protect, unless the situation deteriorates into the commission of war crimes, genocide, ethnic cleansing, or crimes against humanity. Under the ICISS formulation, states and the UN would have an affirmative obligation to respond whenever a population is suffering serious harm, and the UN would have an affirmative obligation to do so with military force when there is a large scale loss of life, "actual or apprehended which is the product of deliberate state action, neglect or inability to act, or a failed state situation" Haiti, seeking to "rise from the ashes," in the words of King Henri Christophe, the leader of the 1804 Haitian revolution, may provide a litmus test for which approach, prevention or remediation, is to be the international practice.^[18]

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Endnotes

[1] Rene Magloire and Louis Aucoin, Remarks at the William and Mary Law School Sponsored by the Program for Comparative Legal Studies and Post-Conflict Justice and the United States Institute of Peace (Feb. 15, 2010).

[2] United Nations Office for the Coordination of Humanitarian Affairs, *What is the Joint Environment Unit?*, <http://ochaonline.un.org/ToolsServices/EmergencyRelief/EnvironmentalEmergenciesandtheJEU/WhatistheJointEnvironmentUnit/tabid/1459/language/en-US/Default.aspx>; see also Megan M. Grew, *The Joint UNEP/OCHA Environmental Unit: A Global Environmental Response Team*, 25 SUFFOLK TRANSNAT'L L. REV. 687(2002).

[3] The text of the email is available at http://turtlebay.foreignpolicy.com/posts/2010/02/17/top_un_aid_official_critiques_haiti_aid_efforts_in_confidential_email.

[4] U.N. Charter Article 2(7) provides:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

U.N. Charter art. 2, para. 7.

[5] Lee Hockstader, *Ecologists Accused of Espionage*, WASH. POST, Oct. 22, 1995, at A26.

[6] See generally Linda A. Malone, 'Green Helmets': *The United Nations Security Council's Authority to Respond to Environmental Disaster*, 17 MICH. J. INT'L L. 515 (1996).

[7] S.C. Res. 794, ¶ 1, U.N. Doc. S/RES/794 (1992).

[8] S.C. Res. 841, ¶ 1, U.N. Doc. S/RES/841 (1993).

[9] S.C. Res. 688, ¶ 2, U.N. Doc. S/RES/688 (1991), *reprinted in* 30 I.L.M. 858 (1991).

[10] S.C. Res. 995, ¶ 2, U.N. Doc. S/RES/995 (1994).

[11] S.C. Res. 827, ¶¶ 1-2, U.N. Doc. S/RES/827 (1993).

[12] See W. PAUL GORMLEY, *HUMAN RIGHTS AND THE ENVIRONMENT: THE NEED FOR INTERNATIONAL COOPERATION* (1976); ALEXANDRE KISS & DINAH SHELTON, *INTERNATIONAL ENVIRONMENTAL LAW* (1991); Gudmundur Alfredson & Alexander Ovsiouk, *Human Rights and the Environment*, 60 NORD. J. INT'L L. 19 (1991); Noralee Gibson, *The Right to a Clean Environment*, 54 SASK. L. REV. 5 (1990); W. Paul Gormley, *The Legal Obligation of the International Community to Guarantee a Pure and Decent Environment: The Expansion of Human Rights Norms*, 3 GEO. INT'L ENVTL. L. REV. 85 (1990); W. Paul Gormley, *The Right to a Safe and Decent Environment*, 28 INDIAN J. INT'L L. 1 (1988); W. Paul Gormley, *The Right of Individuals to be Guaranteed a Pure, Clean and Decent Environment: Future Programs of the Council of Europe*, 1 LEGAL ISSUES OF EUR. INTEGRATION 23 (1975); Gunther Handl, *Human Rights and Protection of the Environment: A Mildly 'Revisionist' View*, in *HUMAN RIGHTS, SUSTAINABLE DEVELOPMENT AND THE ENVIRONMENT* 117 (A. Cancado Trindade ed., 1992); Iveta Hodkova, *Is There a Right to a Healthy Environment in the International Legal Order?*, 7 CONN. J. INT'L L. 65 (1991); R.S. Pathak, *The Human Rights System As a Conceptual Framework for Environmental Law*, in *ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS* 205 (Edith B. Weiss ed., 1992); Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103 (1991); Dinah Shelton, *The Right to Environment*, in *THE FUTURE OF HUMAN RIGHTS PROTECTION IN A CHANGING WORLD: FIFTY YEARS SINCE THE FOUR FREEDOMS ADDRESS, ESSAYS IN HONOR OF TORHEL OPSAHL* 197 (Asbjorn Eide & Jan Helgesen eds., 1991); Heinhard Steiger et al., *The Fundamental Right to a Decent Environment*, in *TRENDS IN ENVIRONMENTAL POLICY AND LAW* 1 (Michael Bothe ed., 1980); Melissa Thorne, *Establishing Environment as a Human Right*, 19 DENY. J. INT'L L. & POL'Y 301 (1991); Henn-Juri Uibopuu, *The Internationally Guaranteed Right of an Individual to a Clean Environment*, in *HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION* 151 (Richard P. Claude & Bums H. Weston eds., 1989); David A. Wirth, *The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?*, 29 GA. L. REV. 599 (1995); Jennifer A. Downs,

Note, *A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right*, 3 DUKE J. COMP. & INT'L L. 351 (1993); James T. McClymonds, Note, *The Human Right to a Healthy Environment: An International Legal Perspective*, 37 N.Y.L. SCH. L. REV. 583 (1992); cf. World Charter for Nature, G.A. Res. 37/7, U.N. GAOR, 37th Sess., Supp. No. 51, at 17, U.N. Doc. A/37/51 (1982); 22 ILM 455 (1983), available at <http://www.un.org/documents/ga/res/37/a37r007.htm>; *World Charter for Nature Addendum*, U.N. GAOR, 37th Sess., Agenda Item 21, U.N. Doc. A/37/L.4/Add.I (1982); see generally Andrzej Makarewicz, *La protection internationale du droit i l'environnement*, in ENVIRONNEMENT ET DROITS DE L'HOMME 77, 79-82 (Pascale Kromarek ed., 1987).

[13] U.N. Charter art. 1.

[14] G.A. Res. A/RES/60/1, ¶ 138, U.N. Doc. A/RES/60/1 (Oct. 24, 2005); and S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006) (the Security Council reaffirmed the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect).

[15] See G.A. Res. A/RES/60/1, *supra* note 14.

[16] *Id.* ¶ 138.

[17] *Id.*

[18] As this article was going to press, one of the strongest earthquakes ever took place in Chile and Japan and Hawaii braced for a tsunami which fortunately did not materialize. Although much stronger than the Haitian earthquake, the loss of life and damage seemed much less severe, highlighting the correlation between poverty, inadequate infrastructures, and unsustainable population concentrations in attributing to natural disasters. *Poverty Predicts Quake Damage Better than Richter Scale*, AOL NEWS (Feb. 27, 2010), <http://www.aolnews.com/world/article/poverty-predicts-quake-damage-better-than-richter-scale/19376567?icid=main|htmlws-main-w|dl1|link3|http%3A%2F%2Fwww.aolnews.com%2Fworld%2Farticle%2Fpoverty-predicts-quake-damage-better-than-richter-scale%2F19376567>.