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Non-Refoulement and Environmental Degradation:

Examining the Entry Points and Improving Access to Protection

Christopher Caskey

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Email: globalmigration@graduateinstitute.ch

Website: http://graduateinstitute.ch/globalmigration

Graduate Institute of International and Development Studies

BIOGRAPHY OF THE AUTHOR

Christopher Caskey is an international human rights lawyer and enrolled Barrister and Solicitor Te Kōti Matua o Aotearoa, based in Tāmaki Makaurau Auckland, Aotearoa New Zealand. Christopher holds an LL.M. in International Humanitarian Law and Human Rights from the Geneva Academy of International Humanitarian Law and Human Rights, and currently serves remotely as a Legal Consultant for the Centre for Civil and Political Rights NGO, based in Geneva.

Email: christopher.caskey@geneva-academy.ch
Twitter: http://www.twitter.com/chriskofski
LinkedIn: http://www.linkedin.com/in/chris-caskey

ABSTRACT

The impacts of climate change on our shared world cannot be understated. The Intergovernmental Panel on Climate Change predicts that increased salinisation, flooding and erosion of coastal areas is expected to significantly impact human and ecological systems, resulting in severe consequences for the enjoyment of human rights such as the right to food, to health, and to life. Shifting environmental conditions have long been a driver of migration throughout our history, and as states and communities continue to adapt to a changing world, we cannot underestimate climate change as an objective and autonomous factor in the decision to relocate (Borges).

If we understand climate change as a threat to the enjoyment of human rights, and consequently as a driver of migration, is reasonably foreseeable that environmental degradation in a country of origin may engage the principle of *non-refoulement* under international human rights law. This research paper seeks to articulate and project the legal and factual threshold(s) at which this occurs. It does so firstly by exploring the available entry points to protection, namely the absolute prohibition of torture or other inhuman or degrading treatment, the right to life, and the prohibition of causing irreparable harm, and then compares both emerging and established jurisprudence at the universal level with that of the Europe Court of Human Rights for regional contrast. In light of each approach, this paper then outlines practical recommendations for advocates looking to improve access to protection. These include advocating for a cumulative approach to the assessment of harm (McAdam), tailoring harm towards specific protections, and increasing awareness and consideration of indicators of individual vulnerability where appropriate.

This research paper was submitted in partial fulfillment for the requirements of the LL.M. in International Humanitarian Law and Human Rights at the Geneva Academy of International Humanitarian Law and Human Rights.

Keywords:

Climate change, migration, displacement, forced displacement, non-refoulement, environmental degradation, human rights, inhuman and degrading treatment, the right to life, irreparable harm.

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1. INTRODUCTION

The impact of climate change on our planet will be profound. In 2019, the Intergovernmental Panel on Climate Change ('IPCC') observed that across the world, oceanic climate changes are already increasing salinisation, flooding, and erosion to coastal areas, and are projected to seriously impact human and ecological systems such as "health, freshwater availability, biodiversity, agriculture and fisheries" over the next century.[1] While rising sea levels are likely to concentrate vulnerability on our coastal areas first, the warming of equatorial regions is expected to subject between 1-3 billion people to annual mean temperatures higher than the climate niche that has supported humanity for the past 6,000 years.[2]

Relocation due to environmental shifts has been a constant throughout our history.[3] Today, experts are cautious not to exaggerate the link between climate change and cross-border migration, however, scholars note that the failure of displaced persons to find security within their own territories is well documented, and is expected to lead to 'significant numbers' moving across borders as conditions worsen.[4] Globally, environmental conditions were recorded as the primary driver of 69 % of all internal displacements in the period 2015 to 2019 (by comparison, conflict drove the remaining 31 %)[5], with the trend disproportionately impacting the East Asia and Pacific region, accounting for some 9,601,000 forced displacements in the region in 2019 alone (over 38 % of the global total).[6] While the factors driving one to migrate are inter-related, complex, and climate change may not be the singular cause, it must not be underestimated as a "threat multiplier" and naturally an "objective and autonomous" factor in the decision to retreat.[7]

There are already a number of multilateral initiatives in development to protect persons displaced by environmental degradation,[8] however the complementary protection afforded by

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[1] Intergovernmental Panel on Climate Change, *Special Report: Global Warming of 1.5°C, Impacts of 1.5°C of Global Warming on Natural and Human Systems*, IPCC, 2019, available at https://www.ipcc.ch/sr15 (last visited 20 Jul. 2020), para. 3.4.5.1.

[2] C. Xu, T. Kohler, T. Lenton, J-S. Svenning, M. Scheffer, "Future of the human climate niche" *Proceedings of the National Academy of Sciences*, 117(21), 2020, 11350.

[3] I. M. Borges, *Environmental Change, Forced Displacement and International Law: From Legal Protection Gaps to Protection Solutions*, Milton, Routledge, 2018, 16.

[4] J. McAdam, "Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-Refoulement", American Journal of International Law, 114(4), 2020, 712; Internal Displacement Monitoring Centre (IDMC), *GRID 2019: Global Report on Internal Displacement*, 2019, available at https://www.internal-displacement.org/global-report/grid2019/ (last visited on 3 May 2020).

[5] Internal Displacement Monitoring Centre (IDMC), *GRID 2020: Global Report on Internal Displacement,* 2020, available at https://www.internal-displacement.org/global-report/grid2020/ (last visited on 2 May 2020).

[6] *Ibid*.

[7] Borges, *Environmental Change, Forced Displacement and International Law,* 18.

[8] *On sea-level rise, see* Committee on International Law and Sea Level Rise, *Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise,* International Law Association ILA res. 6/2018, annex, 19-24 Aug. 2018; *at the regional level, see the* African Union, African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa ('Kampala Convention'), 23 Oct. 2009 (entry into force 6 Dec. 2012); *on climate displacement within States, see* Displacement Solutions, *Peninsula Principles on Climate Displacement within States*, 18 Aug. 2013, available at http://displacementsolutions.org/wp-content/uploads/2014/12/Peninsula-Principles.pdf (last visited 22 May 2020); *on the protection of displacement*

international human rights law is also abundantly clear. In 2009, the Office of the High Commissioner for Human Rights ('OHCHR') recognised that climate change presents a risk to the enjoyment of human rights across multiple universal instruments – notably the International Covenant on Civil and Political Rights ('ICCPR') (the right to self-determination, the right to life, freedom from inhuman and degrading treatment, the right to culture) the International Covenant on Economic, Social and Cultural Rights ('ICESCR') (the right to health, the right to means of sustenance, the right to adequate housing) and the Convention Against Torture ('UNCAT') (freedom from inhuman and degrading treatment).[9] As the theory of positive obligations requires states to take basic steps to ensure the realisation of human rights, a consequential duty exists to protect persons at risk of being affected by climate change where it would infringe on such rights.[10] This duty exists as a scale, ranging from the positive obligation to take adaptation steps on one end, to the negative obligation to refrain from subjecting a person to displacement on the other. This paper seeks to explore three entry points to the latter through the legal principle of *non-refoulement*, which prohibits returning a person to a place of origin if they are at risk of facing qualifying types of harm.

The first entry point relates to the risk that a person may be subjected to torture, inhuman or degrading treatment. As a settled peremptory norm of international law, this prohibition applies to all persons in any territory. This claim requires either the particular environmental conditions to be severe enough to substantiate the real risk of inhuman or degrading treatment, or the presence of individual circumstances (distinguishing features) which may aggravate the risk. The second entry point relates to the risk that a person may be subject to arbitrary deprivation of life, or other serious human rights violations. This claim has arisen in emerging jurisprudence where human rights bodies have found an implicit duty of *non-refoulement* on the part of sending States, where the applicant can substantiate individual grounds for believing such a risk exists in the receiving territory. The final entry point relates to the notion of irreparable harm. This notion is present at the universal level and is deployed primarily in specialist protection areas such as the Committee on the Rights of the Child ('CtteRC'), however may prove increasingly useful in wider contexts going forward.[11]

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from disasters, see International Law Commission, *Report of the International Law Commission*, Sixty-eight session, Supplementary No. 10, UN. Doc. A/71/10, 2016, 12, 'Draft articles on the protection of persons in the event of disasters'.

[9] Office of the High Commissioner for Human Rights (OHCHR), *'Report on the Relationship Between Climate Change and Human Rights',* UN Doc. A/HRC/10/61, 15 Jan. 2009, 20-41; International Covenant on Civil and Political Rights, 999 UNTS 171, 16 Dec. 1966 (entry into force: 23 Mar. 1976), Arts. 2, 6, 7, and 27; International Covenant on Economic, Social and Cultural Rights, 999 UNTS 3, 16 Dec. 1966 (entry into force: 3 Jan. 1976), Arts. 11 and 12; United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 Dec. 1984 (entry into force: 26 Jun. 1987), Art. 2.

[10] United Nations Human Rights Committee, *General Comment No. 36: Article 6 (Right to life),* UN Doc. CCPR/C/GC/36, 3 Sep. 2019, para. 21.

[11] B. Cali, C. Costello, & S. Cunningham, "Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies", *German Law Journal*, 21, 2020, 370.

2. NON-REFOULEMENT IN INTERNATIONAL HUMAN RIGHTS LAW

2.1. Nature of the principle

The principle of *non-refoulement* refers to the principle of international law whereby a person must not be removed from a place of safety, to a place where there is a risk that they may face a qualifying type of harm. Lauterpacht and Bethlehem express the principle as "no person shall be rejected, returned, or expelled […], or to a territory, where substantial grounds can be shown for believing that he or she would face a real risk of being subjected" to torture or cruel inhuman or degrading treatment.[12]

The principle is present in both international refugee law and international human rights law, and while it forms the ideological basis behind the former, the human rights norm offers broader protection through a number of key differences.[13] Firstly, under human rights law, the principle operates without territorial or personal scoping restrictions, such as the five qualifying grounds of persecution – rather *refoulement* is prohibited where a person can substantiate a real risk of any qualifying type of harm, either prohibited by treaty or by customary international law.[14] Secondly, as the engaging of *non-refoulement* follows the construction of the underlying prohibition, it operates as an absolute prohibition in the context of torture, or cruel, inhuman, degrading treatment or punishment.[15] Finally, the application of human rights law is not subject to the same degree of latitude states enjoy in the implementation of the 1951 Convention in establishing and deciding domestic asylum procedures and outcomes.[16] On the contrary, obligations under human rights law directly bind states.

2.2. Sources in international human rights law

At the universal level, *non-refoulement* is present as an express prohibition in human rights treaties such as the Convention Against Torture and the International Convention for the Protection of All Persons from Enforced Disappearance, and has also been recognised as an implicit principle by the Human Rights Committee ('HRCttee') and the CtteeRC.[17] The principle is also frequently reflected as an express prohibition at the regional level, as well interpreted

[12] S. E. Lauterpacht & D. Bethlehem "The Scope and Content of the Principle of Non-Refoulement", in E. Feller, V. Türk, & F. Nicholson, (eds.), *Refugee Protection in International Law*, Cambridge, Cambridge University Press, 2003, 252.
[13] V. Chetail, "Are Refugee Rights Human Rights? An Unorthodox Questioning on the Relations between International Refugee Law and International Human Rights Law", in R. Rubio-Marin (ed.), *Human Rights and Immigration, Collected Courses of the Academy of European Law*, Oxford, Oxford University Press, 2014, 36; 1951 Geneva Convention Relating to the Status of Refugees, 189 UNTS 137, 28 Jul. 1951 (entry into force: 22 Apr. 1954), Art. 33(1).
[14] Chetail, *ibid,* 37.
[15] V. Chetail, *International Migration Law*, Oxford, Oxford University Press, 2019, 198; Lauterpacht & Bethlehem "The Scope and Content of the Principle", 250.
[16] Chetail, "Are Refugee Rights Human Rights?", 51.
[17] *Ibid,* 34; United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 Dec. 1984 (entry into force: 26 Jun. 1987), Art. 3; International Convention for the Protection of All Persons from Enforced Disappearance, 2716 UNTS 3, 20 Dec. 2006 (entry into force: 23 Dec. 2010), Art. 16.

as an implicit prohibition in the European Convention ('ECHR').[18] Vincent Chetail notes that the implicit duty of *non-refoulement* stems from the theory of positive obligations, and forms part of a State's obligation to prevent violations, in order to ensure the enjoyment of basic rights.[19] *Non-refoulement* is also considered a norm of customary international law, both as a foundational element of the absolute prohibition of torture or inhuman or degrading treatment and as a core principle of international migration law.[20] Chetail notes further that the general practice of states and widespread manifestations of *opinio juris* solidify the customary status of the norm, with few others attaining "such a degree of consensus".[21]

2.3. Scope and content of protection

The principle primarily conveys a negative obligation on states not to deport or extradite a person, however has also been interpreted to convey positive obligations.[22] At the universal level, the HRCttee views the construction of Covenant as precluding a state party from **deporting a person from its territory** where there are substantial grounds for believing there is a "real and significant risk of irreparable harm, such as that contemplated by articles 6 and 7".[23] The territorial and personal scope of the principle is determined by the jurisdictional clause of the ICCPR, applying to actions within the "territory and jurisdiction" of a state party.[24] This clause is read disjunctively and extends extra-territorially where jurisdiction can be established.[25]

The regional bodies follow a similar model, whereby the territorial and personal scope is defined by the jurisdictional approach of the treaty.[26] While all regional systems are relevant, this paper will only explore the European Convention as regional contrast to the universal system. This is primarily due to its role in developing customary norms, however also on the basis that over half of all *non-refoulement* cases at the universal level include a respondent state also party to the European Convention.[27] As such, the European Court of Human Rights

[18] Chetail, "Are Refugee Rights Human Rights?", 35; *as an express prohibition, see* Organization of American States, American Convention on Human Rights, 1144 UNTS 123, 22 Nov. 1969 (entry into force: 18 Jul. 1989), Art. 22(8); Charter of Fundamental Rights of the European Union, [2000] OJ C 364/1, 18 Dec. 2000 (entry into force: 1 Dec. 2009), Art. 19(2); *as an implicit prohibition, see* European Convention on Human Rights (ECHR), ETS No. 5, 4 Nov. 1950 (entry into force: 3 Sep. 1953), Art. 3.
[19] Chetail, *International Migration Law*, 197.
[20] Lauterpacht & Bethlehem "The Scope and Content of the Principle", 151; V. Chetail, "Are Refugee Rights Human Rights?", 29; Chetail, *International Migration Law*, 120; Declaration of States Parties to the 1951 Convention and or its 1967 Protocol relating to the Status of Refugees, UN Doc. HCR/MMSP/2001/09, 16 Jan. 2002., para. 4.
[21] Chetail, *International Migration Law*, 124.
[22] Chetail, "Are Refugee Rights Human Rights?", 30; Cali, Costello, & Cunningham, "Hard Protection through Soft Courts?", 365.
[23] United Nations Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 29 Mar. 2004, para. 12.
[24] International Covenant on Civil and Political Rights, 999 UNTS 171, 16 Dec. 1966 (entry into force: 23 Mar. 1976), Art. 2(1); Cali, Costello, & Cunningham, "Hard Protection through Soft Courts?", 363.
[25] *Ibid*.
[26] European Convention on Human Rights (ECHR), ETS No. 5, 4 Nov. 1950 (entry into force: 3 Sep. 1953), Art. 1.
[27] Cali, Costello, & Cunningham, "Hard Protection through Soft Courts?", 356; Chetail, "Are Refugee Rights Human Rights?", 34.

('ECtHR') applies extra-territoriality in a slightly more restrictive manner, limiting application to where the state party exercises effective control over the territory or persons.[28] Cali et al. note that it remains to be seen whether or not the ECtHR apply the principle of *non-refoulement* abroad beyond the maritime context, and consequently the implied prohibition in article 3 of the Convention does not yet protect persons who have not crossed yet a border.[29]

Under customary international law, the prohibition of *refoulement* works as an obligation of result and not of means, and as such **prohibits any act, regardless of the form**, **which would have the effect of placing an individual at risk** of being subject to torture, or cruel, inhuman or degrading treatment.[30] It is irrelevant where a prohibited act occurs, rather whether it was carried out (or not carried out) either by, or on behalf of a State, where principles of international law engage the responsibility of that State.[31] Similarly, the personal scope applies to any person that comes within the jurisdiction of the State, for instance where they are under effective control of the State.[32]

2.4. The true test – access and domestic implementation

Chetail notes that while the principle of *non-refoulement* is well established as a norm of international human rights law, its implementation as means of protection provides the widest contrast with refugee law.[33] In domestic asylum and refugee procedures established under international refugee law, States regain some of the sovereignty lost in agreeing to be bound by the 1951 Refugee Convention primarily due to its lack of procedural specificity.[34] Conversely, under human rights law there is no such latitude, and compliance is subject to routine international scrutiny by monitoring bodies established for this purpose.[35] While their Views do not directly bind States, they represent authoritative interpretations of the international obligations that do.[36] As such, while human rights law enlarges the implementation of refugee law by providing important procedural guarantees not included in the 1951 Refugee Convention, most States are yet to properly implement human rights norms as autonomous avenues for protection.[37] Where it is applied, inconsistency between movement at the international level and domestic implementation arises, as will be explored.[38]

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[28] Cali, Costello, & Cunningham, "Hard Protection through Soft Courts?", 380.
[29] *Ibid.*
[30] Chetail, *International Migration Law*, 119; Lauterpacht & Bethlehem "The Scope and Content of the Principle", 159.
[31] Lauterpacht & Bethlehem "The Scope and Content of the Principle", 160; United Nations General Assembly, *Responsibility of States for Internationally Wrongful Acts*, UN Doc. A/RES/56/83, 12 Dec. 2001, corrected by A/RES/56/49(Vol. I)/Corr.4, Annex, Arts. 1, 3.
[32] Lauterpacht & Bethlehem "The Scope and Content of the Principle", 160.
[33] Chetail, "Are Refugee Rights Human Rights?", 51.
[34] *Ibid.*
[35] *Ibid.*
[36] McAdam, "Protecting People Displaced by the Impacts of Climate Change", 708, fn. 2.
[37] Chetail, *International Migration Law*, 184-187, 199.
[38] *Ibid*, 400.

3. ENVIRONMENTAL DEGRADATION AS A DRIVER OF HARM

3.1. Purpose of enquiry

In order to engage the principle of *non-refoulement* in the context of environmental degradation, one must establish a nexus with the enjoyment of a right protected by customary international law or under an applicable treaty provision.[39] This inquiry mirrors the two-step test in international refugee law which requires a "well-founded fear of being persecuted".[40] In *Teitiota v. New Zealand*, the HRCttee articulated this test under the ICCPR as whether there were "substantial grounds for believing that there is a real risk of irreparable harm" to the enjoyment of a protected right.[41] Therefore, at least the universal level, one must establish (a) substantial grounds for believing there is a real risk, of (b) irreparable harm, in the form of impact on a particular protected right.[42]

3.2. Context and scientific observations

It is important to briefly contextualise the science. For our purposes, the IPCC notes that contemporary sea-level rise has already begun to operate as a background driver for extreme weather events and changes in wave patterns and tides.[43] Impact wise, the IPCC further notes that the effects of oceanic climate change are likely to be first felt through salinisation (increased saline water intrusion into coastal systems and surface waters), leading to flooding, land degradation and erosion.[44] This is expected to further impact freshwater availability, as well as vegetation production, with direct consequences for food security in areas heavily reliant on coastal agriculture.[45] Oceanic warming and acidification are also expected to impact access to fisheries and aquaculture, reducing access to sustenance for those who source it by traditional means.[46] In the Pacific, the IPCC also notes that ~57 % of island infrastructure is located in risk-prone areas.[47] This is demonstrated in territories such as the Republic of Kiribati, where migration from rural areas to densely populated low-lying capital

[39] V. Chetail, *International Migration Law*, 197.
[40] *Ibid*; 1951 Geneva Convention Relating to the Status of Refugees, 189 UNTS 137, 28 Jul. 1951 (entry into force: 22 Apr. 1954), Art. 1A(2).
[41] United Nations Human Rights Committee (HRCttee), *Teitiota v. New Zealand* (2019), UN Doc. CCPR/C/127/D/2728/2016, para. 9.3.
[42] *Ibid*.
[43] Intergovernmental Panel on Climate Change, *Special Report: Special Report on the Ocean and Cryosphere in a Changing Climate, Chapter 4 Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities,* IPCC, 2019, available at https://www.ipcc.ch/srocc/chapter/chapter-4-sea-level-rise-and-implications-for-low-lying-islands-coasts-and-communities (last visited 20 Jul. 2020), para. 4.3.3.1.
[44] Intergovernmental Panel on Climate Change, *Special Report: Global Warming of 1.5°C, Impacts of 1.5°C of Global Warming on Natural and Human Systems*, IPCC, 2019, available at https://www.ipcc.ch/sr15 (last visited 20 Jul. 2020), para. 3.4.5.3.
[45] Intergovernmental Panel on Climate Change, *Special Report: Special Report on the Ocean and Cryosphere in a Changing Climate, Chapter 4 Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities,* IPCC, 2019, available at https://www.ipcc.ch/srocc/chapter/chapter-4-sea-level-rise-and-implications-for-low-lying-islands-coasts-and-communities (last visited 20 Jul. 2020), paras. 4.3.3.1; 4.3.3.4.1, 4.3.3.6.1.
[46] *Ibid*, para. 4.3.3.6.3.
[47] *Ibid*, para. 4.3.2.2.

islands has quadrupled the built area <20m from the shoreline.[48] On the whole, various inter-related processes have systematically worked to concentrate vulnerability to climate change and sea-level rise along our coastal areas – with 11 % of the world's population recorded as residing in the Low Elevation Coastal Zone (coastal areas below 10m of elevation) in 2010.[49]

3.3. Overarching relationship between climate change and human rights

The connection between climate change and the enjoyment of human rights is well documented.[50] As early as 2008 the UN Human Rights Council unanimously recognised the relationship and noted that "climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights".[51] In 2009, the OHCHR recognised the impact on human rights such as the right to life, the enjoyment of which is closely linked to the fulfilment of the right to food, water, health and housing.[52] As it is universally accepted that environmental degradation has an impact on the enjoyment of recognised human rights, then the theory of positive obligations requires States to take active steps to respect, protect and fulfil them.[53] The prohibition of *refoulement*, as a negative obligation not to subject persons to a violation, must be understood as sitting at furthest, and most accessible end of this scale.

3.4. Determining which protected right is impacted

It is necessary to briefly contextualise how such harm manifests legally. Chetail argues that identifying specific human rights which engage *non-refoulement* is largely an academic exercise, as serious violations of any human right(s) would engage the principle where the gravity of violation would amount to inhuman or degrading treatment.[54] As such, while there will be natural overlap due to the inter-related nature of the rights, it is important to articulate the nature of the harm in a manner that meets requirements of the available entry point(s).[55]

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[48] *Ibid*.
[49] *Ibid*.
[50] United Nations Human Rights Council, *'Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment'*, UN Doc. A/HRC/25/53, 30 Dec. 2013, para. 17.
[51] United Nations Human Rights Council, *Resolution 7/23 on Human Rights and Climate Change*, UN Doc. A/HRC/RES/7/23, 28 Mar. 2008, preface.
[52] Office of the High Commissioner for Human Rights (OHCHR), *'Report on the Relationship Between Climate Change and Human Rights',* UN Doc. A/HRC/10/61, 15 Jan. 2009, paras. 22-24.
[53] I. M. Borges, "Protection Starts at Home But Does Not Stop There! The Dynamics of Human Rights Obligations of States For Protecting Environmentally Displaced Persons", *International Journal Law Revista Colombiana de Derecho Internacional*, 22, 2013, 42; United Nations Human Rights Council, *'Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and Secretary General, The Slow onset effects of climate change and human rights protection for cross-border migrants'*, UN Doc. A/HRC/37/CRP.4, 22 Mar. 2018, para. 36.
[54] Chetail, "Are Refugee Rights Human Rights?", 35.
[55] United Nations Human Rights Council, *'Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and Secretary General, The Slow onset effects of climate change and human rights protection for cross-border migrants'*, UN Doc. A/HRC/37/CRP.4, 22 Mar. 2018, paras. 36-45.

The OHCHR notes that the human rights expected to be impacted by climate change include the right to life, the right to adequate food, the right to water, the right to health, the right to adequate housing and the right to self-determination.[56] Intangible risks to social values and enjoyment of culture, as well as decreased overall public health, a feeling of safety, social belongingness, self-esteem, and self-actualisation have also been highlighted.[57] Selection of the entry point, however, will depend on the individual circumstances of the applicant. For instance, in advancing a claim for protection, alleging a real risk to the enjoyment of the right to life may be more favourable where there are environmental changes which pose a direct risk to conditions supporting life, such as where increased salinisation reduces the availability of freshwater. Conversely, slow onset environmental degradation caused by sea-level rise may pose a risk to the right to housing and health, which without proper adaptation may submit a person to inhuman or degrading treatment, particularly if the applicant is a member of a vulnerable group or otherwise protected.

Determining which entry point to pursue is also relevant when selecting a mechanism for protection. At the universal level, there are important nuances between the UN Treaty Bodies on the definition and application of the notion of harm, the analysis of the protected right, and the scope of applicability of the binding instrument.[58] For instance, Cali et al. note that the HRCttee has only found violations with respect to rights contemplated in article 6 and article 7 of the Covenant.[59] On the other hand, the CtteeRC considers a wider notion of harm, defining it in the inverse as expressly going beyond specific rights.[60] On territorial scope, the ECtHR adopts a more restrictive stance, which is arguably offset by a broader test for circumstances that constitute ill-treatment for the purposes of its Convention. Finally, on the basis that the Committee Against Torture only considers *refoulement* cases in the context of torture, this paper will focus on the approach of the HRCttee and the CtteeRC as the universal level, and the ECtHR at the regional level (for reasons outlined above). This paper will therefore

[56] Office of the High Commissioner for Human Rights (OHCHR), *'Report on the Relationship Between Climate Change and Human Rights',* UN Doc. A/HRC/10/61, 15 Jan. 2009*,* paras. 21, 25, 28, 31, 35 and 39; United Nations Human Rights Council, *'Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment'*, UN Doc. A/HRC/25/53, 30 Dec. 2013, paras. 17-22.

[57] Intergovernmental Panel on Climate Change, *Special Report: Special Report on the Ocean and Cryosphere in a Changing Climate, Chapter 4 Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities,* IPCC, 2019, available at https://www.ipcc.ch/srocc/chapter/chapter-4-sea-level-rise-and-implications-for-low-lying-islands-coasts-and-communities (last visited 20 Jul. 2020), para. 4.3.3.6.4.

[58] Cali, Costello, & Cunningham, "Hard Protection through Soft Courts?", 366.

[59] *Ibid*; HRCttee, *Teitiota v. New Zealand* (2019)*,* para. 9.3.

[60] Cali, Costello, & Cunningham, "Hard Protection through Soft Courts?", 370; United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families & United Nations Committee on the Rights of the Child, *Joint general comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration*, UN Doc. CMW/C/GC/3-CRC/C/GC/22, 16 Nov 2017, para. 46.

explore the following entry points: prohibition of inhuman or degrading treatment (section 4), the right to life (section 5) and the notion of irreparable harm (section 6).

4. ENTRY POINT 1: TORTURE, INHUMAN OR DEGRADING TREATMENT

4.1. Source and substance of the prohibition

The prohibition of torture is an absolute norm and is widely recognised as *jus cogens*.[61] The wider prohibition of torture or cruel, inhuman or degrading treatment or punishment is also reflected as an absolute prohibition in numerous universal and regional human rights instruments.[62] On the substance, the HRCttee views the norm as prohibiting any exposure of any persons "**by way of extradition, expulsion or refoulement**".[63] At the regional level, the European Court has repeatedly found that the norm precludes the '**extradition of a person'** to a State where they faced a real risk of treatment contrary to article 3 of the Convention.[64] In customary international law, the prohibition operates as an obligation of result and not of means, and therefore applies to **any act which has the effect** of removing an individual from a place of safety and subjecting them to the risk of the underlying prohibition.[65]

4.2. Absolute nature

As the effects of environmental degradation are unlikely to meet the definition of torture, (which requires, *inter alia,* pain and suffering which is intentionally inflicted on a person, by or with the consent of a public official), one must establish that the prohibition of inhuman or degrading treatment carries the same absolute legal status.[66] Lauterpacht and Bethlehem argue for the affirmative, firstly on the basis of its formulation in most international instruments, and secondly on the basis that "in no case has there been any suggestion there is a difference between the legal status" between torture, and inhuman and degrading treatment.[67] The only explicit difference in our context is the construction of article 3 of the UNCAT, however, the Committee Against Torture have noted that "measures required to prevent torture must be applied to prevent ill-treatment", and further that "the obligation to prevent ill-treatment in practice

[61] United Nations Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment),* UN Doc. HRI/GEN/1/Rev.1, 10 Mar. 1992, para. 10; S. E. Lauterpacht & D. Bethlehem "The Scope and Content of the Principle", 151.
[62] *At the universal level, see* United Nations General Assembly, *Universal Declaration of Human Rights*, UNGA res. 217 A(III), 10 Dec. 1948, Art. 5; International Covenant on Civil and Political Rights, 999 UNTS 171, 16 Dec. 1966 (entry into force: 23 Mar. 1976), Art. 7. *At the regional level, see* European Convention on Human Rights (ECHR), ETS No. 5, 4 Nov. 1950 (entry into force: 3 Sep. 1953), Art. 3; Organization of American States, American Convention on Human Rights, 1144 UNTS 123, 22 Nov. 1969 (entry into force: 18 Jul. 1989), Art 5(2); African Charter on Human and Peoples' Rights, 1520 UNTS 26, 27 Jun. 1981 (entry into force: 21 Oct. 1986), Art. 5.
[63] United Nations Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment),* UN Doc. HRI/GEN/1/Rev.1, 10 Mar. 1992, para. 9.
[64] European Court of Human Rights (ECtHR), *Soering v. United Kingdom* (Judgment), (1989), Application No. 14038/88, para. 88.
[65] Lauterpacht & Bethlehem "The Scope and Content of the Principle", 159; Chetail, *International Migration Law*, 119.
[66] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 Dec. 1984 (entry into force: 26 Jun. 1987), Art. 1.
[67] Lauterpacht & Bethlehem "The Scope and Content of the Principle", 152; International Covenant on Civil and Political Rights, 999 UNTS 171, 16 Dec. 1966 (entry into force: 23 Mar. 1976), Art. 7; European Convention on Human Rights (ECHR), ETS No. 5, 4 Nov. 1950 (entry into force: 3 Sep. 1953), Art. 3; Organization of American States, American Convention on Human Rights, 1144 UNTS 123, 22 Nov. 1969 (entry into force: 18 Jul. 1989), Art. 5(2).

overlaps with […] the obligation to prevent torture".[68] The HRCttee has further noted that it does not consider "sharp distinctions between the different kinds of punishment or treatment".[69] From this we can infer that the prohibition of both torture and inhuman or degrading treatment are both absolute norms, at least at the universal level. At the regional level, the ECtHR has explicitly endorsed the absolute nature of article 3, as well as the absolute engagement of *non-refoulement* (however, some of the Grand Chamber did dissent on this specific point).[70]

4.3. Substantiating a real risk of inhuman or degrading treatment – HRCttee

The HRCttee routinely addresses individual communications relating to *refoulement* on the basis of a risk of torture, inhuman or degrading treatment in the country of origin, and consequently views follow a set structure. In order to engage *non-refoulement*, the "risk […] must be personal in nature, and cannot be derived merely from the general conditions in the receiving State, except in the most extreme circumstances."[71] Procedurally, an applicant must prove clear arbitrariness amounting to a manifest error or denial of justice in the assessment of their application for protection by domestic authorities for the HRCttee to preclude removal.[72] The personal nature of the risk is paramount for the HRCttee, as can be demonstrated through two recent communications requesting protection by *non-refoulement* under article 7. Firstly, in *D.N. v. Canada* the HRCttee considered that an applicant fell short of the threshold required, despite substantiating past ill-treatment and a clear deteriorating human rights situation in the country of origin, on the basis that the applicant failed to show a "concrete link" of belonging to a particular persecuted group.[73] Absent such a link, the applicant failed to establish that the decision of the Canadian authorities was clearly arbitrary, or amounted to a manifest error or denial of justice.[74] On the other hand, in *A.B.H. v. Denmark*, the Committee considered the risk substantiated by an applicant who previously collaborated with international forces in Afghanistan, as he was able to demonstrate that all civilians who collaborated with international forces fell into a risk profile, and further that the Taliban sought to harm him personally.[75]

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[68] J. McAdam, *Complementary Protection in International Refugee Law*, Oxford, Oxford University Press, 2007, 114; United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 Dec. 1984 (entry into force: 26 Jun. 1987), Art. 3(1); United Nations Committee Against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties, UN Doc. CAT/C/GC/2*, 24 Jan. 2008, para. 3.

[69] Lauterpacht & Bethlehem "The Scope and Content of the Principle", 152; United Nations Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment),* UN Doc. HRI/GEN/1/Rev.1, 10 Mar. 1992, para. 4, 9.

[70] European Court of Human Rights (ECtHR), *Chahal v. United Kingdom* (Judgment), (1996), Application No. 22414/93, para. 96.

[71] HRCttee, *Teitiota v. New Zealand* (2019)*,* para. 9.3.

[72] United Nations Human Rights Committee (HRCttee), *Lin v. Australia* (2013), UN Doc. CCPR/C/107/D/1957/2010, para. 9.3.

[73] United Nations Human Rights Committee (HRCttee), *D.N. v. Canada* (2019), UN Doc. CCPR/C/127/D/2276/2013, para. 8.6.

[74] *Ibid*.

[75] United Nations Human Rights Committee (HRCttee), *A.B.H. v. Denmark* (2019), UN Doc. CCPR/C/126/D/2603/2016, paras. 9.8, 9.10.

Notably, HRCttee members Marcia V.J. Kran, Vasilka Sancin and Yuval Shany issued a strong dissenting opinion outlining that while the author may face a "more difficult situation" than in Denmark, there must be substantial information advanced before the HRCttee in order to displace the risk assessment of the Danish authorities.[76]

While entirely plausible, it remains unproven whether or not a combination of environmental conditions in the country of origin, as well as the individual circumstances of an applicant, can meet the test for inhuman treatment. Unhelpfully, the HRCttee did not directly address the application of article 7 in *Teitiota v. New Zealand,* largely due to the fact that the communication was only filed under article 6, with the New Zealand authorities dismissing article 7 at the domestic level as requiring a "positive act or omission that transcended failure of the state's […] to provide for an adequate standard of living".[77] This omission requires scrutiny, as the HRCttee have expressly noted that it is unnecessary to draw sharp distinctions between different types of harm (especially as they consider violations of articles 6 and 7 as constituting irreparable harm), and further as prior jurisprudence has not required an act or omission to constitute "treatment".[78]

In practice, perhaps the closest documented effect of climate change equating to ill-treatment is the issue of forced evictions, which the HRCttee has previously found can reach this standard.[79] Following this reasoning, and the argument that such treatment does not require a positive act, it may be that the prohibition of *refoulement* arises where an applicant can substantiate the real risk of increased land salinisation forcing them to leave their residence, or of rising temperatures force the retreat from an area.

4.4. Substantiating a real risk of inhuman or degrading treatment – ECtHR

The threshold for the ECtHR is calculated by assessing both the generalised situation in the country of origin and the individual circumstances of the applicant.[80] On this, however, Hamdan notes that the balance of factors have evolved over time.[81] For instance, in *Vilvarajah and Others v. the UK* the European Court found that an applicant's removal to a State experiencing generalised violence would not violate article 3 as no "special distinguishing features" were

[76] *Ibid,* Individual opinion of Committee members Marcia V.J. Kran, Vasilka Sancin and Yuval Shany (dissenting), para. 2.
[77] McAdam, "Protecting People Displaced by the Impacts of Climate Change", 715.
[78] *Ibid.* 25; United Nations Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment),* UN Doc. HRI/GEN/1/Rev.1, 10 Mar. 1992, paras. 4, 10.
[79] World Bank, *Human Rights and Climate Change: A Review of the International Legal Dimensions*, Washington D.C., The World Bank, 2011, 23; United Nations Human Rights Committee, *Concluding Observations of the on the second periodic report of Israel,* UN Doc. CCPR/CO/78/ISR, 21 Aug. 2003., para. 16.
[80] E. Hamdan, *Non-Refoulement under the ECHR and the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* Leiden/Boston, Brill Nijhoff, 2016, 211.
[81] *Ibid*, 219.

presented to indicate that their situation would be worse than those in the respondent State.[82] However later in *NA. v. United Kingdom*, the Court expressly noted that the 'distinguishing features' element in *Vilvarajah* was not required if the applicant could show that the "general situation of violence […] is of sufficient intensity to make it likely that removal would necessarily violate article 3".[83] In the absence of generalised violence, the Court has generally rejected claims based on the 'human rights situation in the country of origin', except in the case where the Court can turn to individual aggravating circumstances, such as membership to a vulnerable group.[84] In these situations, the applicant must prove that the group is systematically subject to such treatment in violation of article 3, and that the applicant is a member of that group.[85]

While not directly raised at the ECtHR, the notion that environmental degradation is predominantly felt by vulnerable persons, and thus should be considered a protected category, is well established.[86] Further, although the approach of the European Court has focussed on a situation of violence or distinguishing features of a vulnerable group, the Court has signalled it is open to *other* distinguishing features, on a case-by-case basis, which may place an individual at risk of treatment contrary to article 3.[87] The Court noted in *NA. v. the United Kingdom* that the assessment must be made on "the basis of all relevant factors which may increase the risk of ill-treatment", and further that "due regard should also be given to the possibility that a number of individual factors may not, when considered separately, constitute a real risk; but when taken cumulatively […] may give rise to a real risk."[88] The Court later found in *Tarakhel v. Switzerland* that "living conditions" may meet this threshold.[89]

The flexible assessment of other 'distinguishing features' by the ECtHR also illustrates the development of the definition of inhuman or degrading treatment as an absolute prohibition in international law. On this basis, it may be that removal is absolutely precluded at the ECtHR where one can establish a generalised situation of environmental degradation that seriously

[82] *Ibid*; European Court of Human Rights (ECtHR), *Vilvarajah and Others v. United Kingdom* (Judgment), (1991), Application No. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, para. 111.
[83] E. Hamdan, *Non-Refoulement,* 219; European Court of Human Rights (ECtHR), *NA. v. The United Kingdom* (Judgment), (2008), Application No. 25904/07, paras. 115–116.
[84] E. Hamdan, *Non-Refoulement,* 227; European Court of Human Rights (ECtHR), *N. v. Sweden* (Judgment), (2010), Application No. 23505/09, paras. 54, 58.
[85] *Ibid.*
[86] United Nations Human Rights Council, *Resolution 16/11 on Human Rights and the environment*, UN Doc. A/HRC/RES/16/11, 12. Apr. 2011, preamble; United Nations Human Rights Council, *'Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment'*, UN Doc. A/HRC/25/53, 30 Dec. 2013, para. 69.
[87] E. Hamdan, *Non-Refoulement,* 245.
[88] *Ibid;* European Court of Human Rights (ECtHR), *NA. v. The United Kingdom* (Judgment), (2008), Application No. 25904/07, para. 130; J. McAdam, *Climate Change Displacement and International Law: Complementary Protection Standards: Background Paper,* Bellagio, Italy, UNHCR, 2011, available at https://www.unhcr.org/4dff16e99.pdf (last visited on 4 May 2020), 24.
[89] European Court of Human Rights (ECtHR), *Tarakhel v. Switzerland* (Judgment), (2014), Application No. 29217/12, paras. 111, 122.

impacts the enjoyment of human rights, and/or individual circumstances aggravating vulnerability.

4.5. Summary of Entry point 1: Substantiating a real risk of inhuman or degrading treatment

As demonstrated, framing the impacts of environmental degradation in a manner that would expose an individual to ill-treatment is complicated firstly by the case-by-case assessment to inhuman and degrading treatment, and further by differing approaches taken by universal and regional bodies. However, on the basis that both universal and regional bodies commit to reviewing all information presented, the exercise of extrapolating a 'generalised situation of violence of sufficient intensity' to 'environmental degradation rendering survival impossible' is not implausible, nor is the consideration of particular individual circumstances of those displaced by climate change as distinguishing features.

Chetail argues that this threshold may be met where "natural disasters and climate change seriously disturb public order."[90] As detailed, the approach of the ECtHR in balancing both the situation in the country of origin and distinguishing features offers potentially one of the most favourable entry points for this argument.[91] While frustrated slightly by the jurisdictional approach of the ECtHR and the geographic limitations of the Convention, the development of a norm considered absolute should influence its application at other international bodies, especially the one responsible for its universal application. At the very least, the approach of both bodies outlined above is directly relevant to the more than 150 States party to either the Covenant or Convention and should be applied in domestic risk assessments in a consistent manner.[92]

[90] V. Chetail, "Migration and International Law: A Short Introduction", in V. Chetail (ed.) *International Law and Migration*, Cheltenham, Edward Elgar Publishing, 2016, 26.
[91] European Court of Human Rights (ECtHR), *NA. v. The United Kingdom* (Judgment), (2008), Application No. 25904/07, para. 130.
[92] Lauterpacht & Bethlehem "The Scope and Content of the Principle", 158.

5. ENTRY POINT 2: THE RIGHT TO LIFE

5.1. Source and substance of the right

The right to life is well recognised as the supreme right, to which enjoyment is a prerequisite for that of all other human rights.[93] It is reflected in most contemporary civil and political rights instruments, namely the ICCPR, the Convention on the Rights of the Child ('CRC'), as well as the ECHR, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights.[94] The impacts of environmental degradation have been closely linked to the right to life, with the HRCttee expressly recognizing that it constitutes one "of the most pressing and serious threats" to the enjoyment of the right.[95] On the substance, the HRCttee have explicitly noted that the duty to respect and ensure the right to life precludes States from **"deporting, extraditing or otherwise transferring"** persons to a territory where there are substantial grounds for believing that their rights under article 6 would be violated.[96] At the regional level, the ECtHR has been reluctant to extend the implied prohibition of *non-refoulement* beyond the scope of article 3, however has indicated that article 2 may carry similar weight.[97]

5.2. Substantiating a real risk to the right to life – HRCttee

As with inhuman and degrading treatment, in order to engage *non-refoulement* at the universal level through a risk to the right to life, the HRCttee has required that the "risk must be personal in nature, and cannot be derived merely from the general conditions in the receiving state, except in the most extreme circumstances."[98] In recent Concluding Observations, the HRCttee has expressly noted that in the event of environmental degradation, such conditions may become incompatible with the right to life, including to life with dignity, before the risk is realised.[99]

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[93] United Nations Human Rights Committee, *General Comment No. 36: Article 6 (Right to life),* UN Doc. CCPR/C/GC/36, 3 Sep. 2019, para. 2.
[94] United Nations General Assembly, *Universal Declaration of Human Rights*, UNGA res. 217 A(III), 10 Dec. 1948, Art. 3; International Covenant on Civil and Political Rights, 999 UNTS 171, 16 Dec. 1966 (entry into force: 23 Mar. 1976), Art. 6.1; Convention on the Rights of the Child, 1577 UNTS 3, 20 Nov. 1989 (entry into force: 2 Sep. 1990), Art. 6; European Convention on Human Rights (ECHR), ETS No. 5, 4 Nov. 1950 (entry into force: 3 Sep. 1953), Art. 2; Organization of American States, American Convention on Human Rights, 1144 UNTS 123, 22 Nov. 1969 (entry into force: 18 Jul. 1989), Art. 4; African Charter on Human and Peoples' Rights, 1520 UNTS 26, 27 Jun. 1981 (entry into force: 21 Oct. 1986), Art 4.
[95] World Bank, *Human Rights and Climate Change: A Review of the International Legal Dimensions*, Washington D.C., The World Bank, 2011, 13; Office of the High Commissioner for Human Rights (OHCHR), *'Report on the Relationship Between Climate Change and Human Rights',* UN Doc. A/HRC/10/61, 15 Jan. 2009, 22; 41; United Nations Human Rights Committee, *General Comment No. 36: Article 6 (Right to life),* UN Doc. CCPR/C/GC/36, 3 Sep. 2019, para. 62.
[96] United Nations Human Rights Committee, *General Comment No. 36: Article 6 (Right to life),* UN Doc. CCPR/C/GC/36, 3 Sep. 2019*,* para. 30.
[97] V. Chetail, "Are Refugee Rights Human Rights?", 35.
[98] HRCttee, *Teitiota v. New Zealand* (2019)*,* para. 9.3.
[99] United Nations Human Rights Committee, *Concluding Observations on the initial report of Cabo Verde*, UN Doc. CCPR/C/CPV/CO/1/Add.1, 7 Nov. 2019, paras. 17-18; HRCttee, *Teitiota v. New Zealand* (2019)*,* para. 9.11.

The views of the HRCttee in *Teitiota v. New Zealand* are useful as they articulate the Committee's approach to environmental degradation in the context of climate change as it pertains to the right to life.[100] The claim in *Teitiota* was twofold.[101] Firstly, that the situation of generalised violence in the territory caused by land disputes created a real risk to the applicant's life, and secondly, that increased salinization resulting in lack of access to freshwater would also create a real risk to the applicant's life.[102] On the former, the HRCttee noted that general situations of violence may constitute a real risk where they are of sufficient intensity, however only in the most extreme cases such as where the author is in a particularly vulnerable situation.[103] In this case, the evidence advanced relating to sporadic violence driven by land insecurity on Kiribati was deemed insufficient as could not be deemed to raise a personal risk.[104] Importantly, as it is procedurally for the sending State party authorities to conduct this risk assessment, the overall issue before the Committee was to assess whether there was clear arbitrariness or error in the evaluation completed by domestic authorities – which the majority did not find.[105]

However, the dissenting Views in this communication are perhaps as important as the majority. Committee Member Vasilka Sancin refused to join the majority on the basis that the State party had failed to present evidence of proper assessment with respect to the author, and his dependent children, having access to safe drinking water.[106] While New Zealand argued there was no evidence to suggest that the author was unable to obtain 'potable' drinking water, Sancin felt that the burden of proof must be reversed, and that the State Party must be able to demonstrate that the author would be able to "enjoy access to safe drinking (or even potable) water in Kiribati, to comply with its positive duty to protect life".[107] Sancin's explicit recognition of the authors family and dependent children is also noteworthy, as it speaks to the considering of aspects outside the direct scope of article 6 as constituting irreparable harm, even where they were not included in the individual communication.[108] Similarly, Committee Member Duncan Laki Muhumuza placed weight on Committee's position that the right to life includes enjoyment of a life with dignity, "free from acts or omissions that are expected to cause unnatural or premature death".[109] Muhumuza noted that the

[100] HRCttee, *Teitiota v. New Zealand* (2019), para. 3.
[101] *Ibid.*
[102] *Ibid,* para. 9.7, 9.8.
[103] *Ibid,* para. 9.7.
[104] *Ibid*.
[105] *Ibid,* para. 9.6.
[106] *Ibid,* Annex 1, Dissenting opinion of Committee member Vasilka Sancin, para. 1.
[107] *Ibid*, Annex 1, Dissenting opinion of Committee member Vasilka Sancin, para. 5.
[108] *Ibid,* Annex 1, Dissenting opinion of Committee member Vasilka Sancin, paras. 3, 5. *Member Sancin notes that the author's children have never been exposed to water conditions in Kiribati as implicit recognition of impact on the children's health*.
[109] *Ibid,* para. 9.4; Annex 1, Dissenting opinion of Committee member Vasilka Sancin, para. 4; Annex 2, Dissenting opinion of Committee member Duncan Laki Muhumuza, para. 4.

"considerable difficulty in accessing fresh water because of the environmental conditions, should be enough to reach the threshold of [real, personal and foreseeable] risk, without being a complete lack of fresh water", on the basis that it is counter-intuitive to the projection of life to wait for "deaths to be very frequent and considerable".[110]

5.3. Substantiating a real risk to the right to life – the ECtHR

The primary application of *non-refoulement* at the ECtHR is by way of reading an implied prohibition under article 3 of the Convention. Chetail notes that the ECtHR has been reluctant to expand this implied prohibition beyond article 3, however the Court has expressed that a risk to article 2 may suffice on the basis of its similar importance.[111] While an application may preclude removal on the basis of a risk to life alone, Jane McAdam notes that none has ever succeeded solely on this ground, and that typically when article 2 and article 3 are raised in the European Court, the analysis of the former falls away where there is a violation of the latter.[112] Notably, however, the ECtHR has indicated its willingness to adopt a similar approach to Member Sancin in reversing the burden of proof on States where a case for protection is substantiated by the author.[113]

5.4. Summary of Entry point 2: Substantiating a real risk to the enjoyment of the right to life

From the *Teitiota* decision, we see can see a clear legal path for protection by the principle of *non-refoulement* where the environmental degradation creates a real, personal risk to an applicant's enjoyment of the right to life. However, at least at the universal level, it is crucial for applicants to demonstrate that the risk to their enjoyment of the right to life is *personal in nature*. Procedurally, as the assessment before the Committee is an evaluation of the conduct of the State authorities, a claim should focus on substantiating (a) clear arbitrariness or error in the evaluation on the part of the authorities completing the assessment, and (b) that the causal impact of the environmental changes created a real and personal risk to the enjoyment of a protected right. Following the majority views in *Teitiota,* instances where the Committee articulated a threshold for environmental circumstances which may impact the right to life, are summarised as follows:

Claim	**Threshold**

[110] *Ibid,* Annex 2, Dissenting opinion of Committee member Duncan Laki Muhumuza, para. 5.
[111] Chetail, "Are Refugee Rights Human Rights?", 35; referring to European Court of Human Rights (ECtHR), *Z and T v. The United Kingdom* (Admissibility), (2006), Application No. 27034/05, 6.
[112] McAdam, "Protecting People Displaced by the Impacts of Climate Change", 713; McAdam, *Complementary Protection in International Refugee Law*, 20.
[113] Cali, Costello, & Cunningham, "Hard Protection through Soft Courts?", 381.

Lack of access to freshwater, impacting the enjoyment of the right to life	"Sufficient information to indicate that the supply of freshwater is inaccessible, insufficient or unsafe so as to produce a reasonably foreseeable threat of a health risk that would impair his right to enjoy a life with dignity or cause his unnatural or premature death."[114]
Food security impacting enjoyment of the right to life	"A real and reasonably foreseeable risk that the author would be exposed to a situation of indigence, deprivation of food, and extreme precarity that could threaten his right to life, including to a life with dignity."[115]
Intense flooding, resulting in breaching of sea walls, impacting enjoyment of the right to life	Sea level rise that renders a territory inhabitable, without the possibility of (either time or State ability based) intervening acts by the State, or the international community, to protected and relocate the population where necessary.[116]

Figure 1: Thresholds engaging the principle of non-refoulement owing to a risk to the right to life.

[114] HRCttee, *Teitiota v. New Zealand* (2019), para. 9.8.
[115] *Ibid,* para. 9.9.
[116] *Ibid,* para. 9.12.

6. ENTRY POINT 3: IRREPARABLE HARM

6.1. Source and substance of the notion

The notion of 'irreparable harm' is not explicitly recognised in treaty law as a protected right, rather it is employed as an overarching term to refer to certain prohibitions and their contextual application.[117] The notion is referred to by a number of Treaty Bodies as well as other instruments at the international level, for instance, in the Global Compact for Safe, Orderly and Regular Migration ('Global Compact') the General Assembly expressly recognised the prohibition of returning migrants where there is a "real and foreseeable risk of death, torture and other cruel, inhuman and degrading treatment or punishment, or other irreparable harm".[118] Cali et al. note that while the HRCttee also prohibits *refoulement* where there is the risk of "irreparable harm", in practice the HRCttee has only found a violation of *non-refoulement* in relation to article 6 or 7 of the Covenant.[119] The CtteeRC also notes that in the context of *non-refoulement*, States must "**not reject a child at a border or return him or her to a country** where there are substantial grounds for believing that he or she is at real risk of irreparable harm".[120] Further, given that the CRC binds States to ensure the rights to each child within their jurisdiction without discrimination, the prohibited act of 'rejecting a child at a border' speaks to a more protective application, with explicit extra-territorial scope where a child is in another State and jurisdiction is established (for instance, when attempting to enter a State).[121]

6.2. Substantiating a risk of irreparable harm

In our context, the CtteeRC notes that *refoulement* is prohibited where "he or she is at real risk of irreparable harm, such as, but by no means limited to, those contemplated under articles 6 (1) (the right to life) and 37 (prohibition on torture, or other cruel, inhuman or degrading treatment) of the Convention".[122] Cali et al. note that this wider scope of harm may include "harm to the survival, development, or health (physical or mental) of the child".[123]

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[117] Cali, Costello, & Cunningham, "Hard Protection through Soft Courts?", 366.
[118] United Nations General Assembly, *Global Compact for Safe, Orderly and Regular Migration*, UN Doc. A/RES/73/195, 19 Dec. 2018, para. 37.
[119] Cali, Costello, & Cunningham, "Hard Protection through Soft Courts?", 366; United Nations Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 29 Mar. 2004, para. 12.
[120] Cali, Costello, & Cunningham, "Hard Protection through Soft Courts?", 370; United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families & United Nations Committee on the Rights of the Child, *Joint general comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration*, UN Doc. CMW/C/GC/3-CRC/C/GC/22, 16 Nov 2017, para, 46.
[121] Convention on the Rights of the Child, 1577 UNTS 3, 20 Nov. 1989 (entry into force: 2 Sep. 1990), Art. 2(1).
[122] Cali, Costello, & Cunningham, "Hard Protection through Soft Courts?", 366.
[123] *Ibid,* 370.

Applying this broader threshold in the context of environmental degradation, it is difficult to foresee an instance where the lack of enjoyment of any of the rights listed by the OHCHR as impacted by climate change, would not constitute irreparable harm to a child.[124] More specifically, for the CtteeRC it may be that reduced freshwater availability already presents the risk of a violation of the CRC, which may constitute irreparable harm.[125] However, in *Teitiota* the HRCttee largely omitted the circumstances of dependent children from its Views despite universal recognition that they apply, seemingly on the basis that filings included only the author as the sole applicant.[126] This omission requires scrutiny, as the failure of dependent children to enjoy certain family-related rights can clearly come within the scope of the Covenant.[127] On review of the dissenting opinions in *Teitiota*, one can infer that the inclusion of children in the risk assessment heavily influenced their position.[128]

At the universal level more broadly, given that 'irreparable harm' can be understood in a dynamic sense and recalling its inclusion in the Global Compact, one may also argue that a serious violation of one of the guiding principles articulated in the Resolution, or basic principles of migration law, could also constitute irreparable harm.[129] In the context of a family with dependent children, the risk of a violation of principles such as the right to family life and the best interests of the child, as well as customary law principles such as the principle of family reunification, may all constitute harm to the survival, development or health of dependent children.[130] Professor Chetail notes that such principles form indispensable components of customary international migration law, and bind States through multiple instruments.[131] Similarly, McAdam notes the near-universal ratification of the CRC should draw significant weight to the intention of States to consider dependent children in the assessment.[132] In sum, given the express inclusion in the Global Compact, it may be that the protective glow of the principle of *non-refoulement* where engaged by a risk of irreparable harm, informed by the approach of the CtteeRC and the near-universally ratified CRC, customary principles of migration law and the emphasis on the survival and health of children,

[124] Office of the High Commissioner for Human Rights (OHCHR), *'Report on the Relationship Between Climate Change and Human Rights',* UN Doc. A/HRC/10/61, 15 Jan. 2009, 22-24.
[125] Convention on the Rights of the Child, 1577 UNTS 3, 20 Nov. 1989 (entry into force: 2 Sep. 1990), Art. 24(c).
[126] McAdam, "Protecting People Displaced by the Impacts of Climate Change", 20.
[127] United Nations Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 29 Mar. 2004, para. 12.
[128] HRCttee, *Teitiota v. New Zealand* (2019)*,* Annex 1, Dissenting opinion of Committee member Vasilka Sancin, para. 4; Annex 2, Dissenting opinion of Committee member Duncan Laki Muhumuza, para. 4
[129] V. Chetail, "The Global Compact for Safe, Orderly and Regular Migration: A Kaleidoscope of International Law", *International Journal of Law in Context*, 2020 (Forthcoming), 11.
[130] Cali, Costello, & Cunningham, "Hard Protection through Soft Courts?", 370; United Nations General Assembly, *Global Compact for Safe, Orderly and Regular Migration*, UN Doc. A/RES/73/195, 19 Dec. 2018, para. 37; Chetail, *International Migration Law*, 124-125.
[131] Chetail, *International Migration Law*, 124-125.
[132] McAdam, *Complementary Protection in International Refugee Law*, 194; Chetail, *International Migration Law*, 129; Convention on the Rights of the Child, 1577 UNTS 3, 20 Nov. 1989 (entry into force: 2 Sep. 1990), Art. 37(1).

precludes the removal of any family members to a territory experiencing environmental degradation where dependent children are involved.

6.3. Summary of Entry point 3: substantiating a risk of irreparable harm

The broad notion of irreparable harm presents an ideal entry point to protection from *refoulement*. Its express reference as precluding removal by the HRCttee and the CtteeRC, as well as specific inclusion in the Global Compact, signals a clear approach by the universal bodies and the clear endorsement of States. At the very least, where an application for protection includes dependent children, the near-universal ratification of the CRC suggests that the dynamic approach taken by the CtteeRC should be deployed in assessing the risk of irreparable harm. Going forward, the notion of irreparable harm will continue to evolve as an important entry point, especially for families with dependent children seeking protection.

7. IMPROVING ACCESS TO PROTECTION

7.1. Purpose

This section aims to make practical recommendations which may improve access to protection. These can be categorised as challenging the application of the law, developing evidence and legal argumentation to better suit the nature of harm, or developing evidence and legal argumentation to highlight both individual and collective vulnerabilities.

7.2. A cumulative approach to irreparable harm

McAdam suggests that in the context of environmental degradation, a cumulative approach may be a preferable method of substantiating the risk of harm, noting that in the refugee context, multiple "less severe risks" may amount to persecution when assessed cumulatively.[133] As such an approach argues for an examination of a wider set of rights, it may be that rights from other instruments, as well as customary norms, should be examined simultaneously by domestic authorities in determining whether irreparable harm exists. For instance, in the prior example of a family facing removal, it may be that certain rights of dependent children preclude their individual removal, and on the basis of the customary principle of family reunification and family rights protected by the ICCPR, a cumulative assessment concludes that removal of any of the family members would constitute overall irreparable harm.[134] Such an approach also recognises that the customary principle of family reunification and the wider respect for family life form an integral part of international migration law.[135] Further, on the basis that the determination of a 'well-founded fear' exists in the refugee context to establish lasting international protection, there is no reason that such a cumulative test could not be extrapolated to assessing harm for the purposes *non-refoulement* in the human rights context – as a lesser form of protection, it should demand a lower threshold for entry.

Recommendation 1: Applicants should highlight the full suite of rights at risk as a result of environmental degradation and argue that such cumulative effects amount to irreparable harm.

7.3. Ensuring domestic protection is absolute

At the domestic level, it must be reinforced that the prohibition of inhuman or degrading treatment is universally recognised as absolute. The tension between domestic implementation and the development of the norm in other regional systems was addressed by

[133] McAdam, "Protecting People Displaced by the Impacts of Climate Change", 714-715; United Nations High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/1P/4/ENG/REV, Apr. 2019, para. 53.
[134] International Covenant on Civil and Political Rights, 999 UNTS 171, 16 Dec. 1966 (entry into force: 23 Mar. 1976), Arts.17(1), 23(1).
[135] Chetail, *International Migration Law*, 124.

the New Zealand Immigration and Protection Tribunal in *AC (Tuvalu)*, with the Tribunal differentiating between an 'orthodox' approach [requiring a positive act], and a 'modified European approach' [where a sufficient level of suffering as a foreseeable consequence] could suffice defining inhuman or degrading treatment.[136] The Tribunal distinguished the European definition, noting that "to parachute this approach into New Zealand's legislative setting […] runs the risk of precipitously enlarging the protected person" definition for the purposes of the New Zealand Immigration Act. Such divergences on the elements of ill-treatment highlights one of the most common challenges in the application of international law, whereby customary developments fail to make their way into domestic protection mechanisms.[137] Nevertheless, the prohibition in article 7 of the ICCPR remains an absolute norm and must be advocated for as such and applied, at least, as an obligation of result.[138] As it directly relates to the function of international human rights bodies in monitoring the implementation of international norms, such bodies should drive this consistency.

Recommendation 2: Applicants should advocate for the absolute application of rights or prohibitions in domestic contexts, where they are recognised as such at the universal level.

7.4. Legal argumentation and evidence focused on particular rights

Procedurally, all bodies commit to reviewing all material placed before it, including the human rights situation in the country of origin.[139] Therefore, in addition to ensuring applicants claim the full suite of protected rights which may be at risk, applicants should tailor the articulation of specific harm to the elements of each protected right. For instance, as discussed earlier, where conditions on the ground force an evacuation or retreat, such evidence should be presented in the context of the risk of inhuman or degrading treatment. Similarly, where conditions impact freshwater availability, such evidence should be presented in the context of the risk to enjoyment of the right to life. Such impacts and rights will depend on the individual circumstances of the applicant.

Recommendation 3: Applicants should ensure that harm articulated in the application seeking protection is tailored to each specific right infringed on the ground.

7.5. A focus on vulnerability – towards a class presumption?

Professor Borges argues that vulnerability is one of the most important factors in framing environmental degradation and human rights.[140] While traditional notions of vulnerability

[136] McAdam, "Protecting People Displaced by the Impacts of Climate Change", 1; New Zealand Immigration and Protection Tribunal (NZIPT), *AC (Tuvalu)* (2014) 800517-520, paras. 77-78.
[137] Chetail, *International Migration Law*, 400.
[138] *Ibid*, 119.
[139] Hamdan, *Non-Refoulement,* 211; HRCttee, *Teitiota v. New Zealand* (2019), para. 9.3.
[140] Borges, *Environmental Change, Forced Displacement and International Law,* 21.

include age, health, disability, location, class, race, resources and available protections, Borges argues that assessments must identify, in the broadest possible sense, who is exposed and sensitive to the impacts of climate change.[141] It must also be recognised that multiple vulnerabilities create a snowball of exposure, each having a compounding effect on an individual's adaptive capacity to respond.[142] In our context, differences in adaptive capacity have a direct impact on the enjoyment of human rights – for instance, where internal retreat is an option, such capacity will directly impact whether or not a person enjoys the rights contemplated above.[143] Therefore, the recognition of individual circumstances and compounding vulnerabilities must form a crucial part of the assessment, both domestically and at the international level. States directly committed themselves to responding to the needs of migrants who face situations of vulnerability in the Global Compact, including those who face adverse conditions in their country of origin, by assisting them and protecting their human rights in accordance with international law.[144]

Additionally, and more broadly, given the repeated recognition at the universal level that the effects of climate change are disproportionately felt by the most vulnerable, climate change is therefore inherently discriminatory, and both universal and regional bodies should approach voluntary requests for protection with a presumption of vulnerability.[145] Such a presumption is rooted in the human rights based approach to development (recognising that the least developed countries are most likely to be affected), and acknowledges the inherent injustice of the causes of climate change.[146] At the very least, human rights bodies should place the burden of proof on sending States to substantiate that an applicant, and their dependent family, will enjoy all fundamental human rights contemplated above in the receiving State, and will not face irreparable harm.[147]

Recommendation 4: Applicants should ensure they highlight all traditional indicators of individual vulnerability as limits to adaptive capacity and enjoyment of basic rights, and advocate for both a presumption of vulnerability as a class in the context of climate change, and the requirement for sending States to establish all human rights are respected in the country of origin.

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[141] *Ibid,* 25.
[142] *Ibid,* 24
[143] *Ibid*.
[144] United Nations General Assembly, *Global Compact for Safe, Orderly and Regular Migration*, UN Doc. A/RES/73/195, 19 Dec. 2018, para. 23.
[145] United Nations Human Rights Council, *'Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment'*, UN Doc. A/HRC/25/53, 30 Dec. 2013, para. 81.
[146] Borges, *Environmental Change, Forced Displacement and International Law,* 20.
[147] *Such approach was advanced by Committee member Vasilka Sancin, see* HRCttee, *Teitiota v. New Zealand* (2019), Annex 1, Dissenting opinion of Committee member Vasilka Sancin, para. 5; *Also deployed by the ECtHR see* Cali, Costello, & Cunningham, "Hard Protection through Soft Courts?", 381

8. CONCLUSION AND OUTLOOK

8.1. Overall observations

Protection by the principle of *non-refoulement* in the context of environmental degradation is not a fallacy nor is the threshold too high to engage – on the contrary, it is reasonably foreseeable that another person in another geography may already have a valid claim on the rationale in *Teitiota*.[148] Going forward, one would hope that the frequent calls of the international community in recognising the nexus between climate change and the enjoyment of human rights starts to drive more compassionate domestic decision-making. Where this fails, and it will, future claims at the international level should draw on the absolute application of article 3 of the ECHR or article 7 of the ICCPR as well as the flexible assessment of 'distinguishing features' employed by the ECtHR. Applicants should also tailor filings or individual communications towards protected rights which best match conditions on the ground, and highlight vulnerabilities where appropriate, especially the circumstances of dependent children.

8.2. Outlook

If the situation on the ground continues to progress as predicted, the complementary protection provided by *non-refoulement* under international human rights law will continue to become increasingly relevant. While human rights will not grant asylum, the wider suite of rights afforded to supplement refugee law, namely procedural guarantees, the right to family unity, the rights of the child, and the right to an effective remedy will remain crucial.[149] In the context of environmental degradation and displacement, recognising that its effects are inherently discriminatory, and recognising the duty of positive obligations to protect, respect and fulfil human rights, including the absolute prohibition of inhuman and degrading treatment, it is incumbent on international human rights bodies to apply the prohibitions in their instruments in the protective manner they espouse them to be. As outlined by Committee member Duncan Laki Muhumuza in *Teitiota*, such bodies must consider the author's situation, including that of their family, and determine whether the circumstances reveal a livelihood short of the dignity that the Convention seeks to protect.[150]

[148] McAdam, "Protecting People Displaced by the Impacts of Climate Change", 709.
[149] Chetail, "Are Refugee Rights Human Rights?", 34.
[150] HRCttee, *Teitiota v. New Zealand* (2019), Annex 2, Individual opinion of Committee member Duncan Laki Muhumuza (dissenting), para. 5.

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