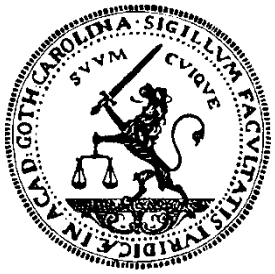

FACULTY OF LAW

LUND UNIVERSITY

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Rights on the Move

Climate induced migration and States' obligations under the ICCPR

JURM02 Graduate thesis

Graduate thesis, Master of Laws program

30 higher education credits

Supervisor: Ulf Linderfalk

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Humanity is on thin ice — and that ice is melting fast.[1]

[1] Secretary-General Antonio Guterres, *Secretary-General Calls on States to Tackle Climate Change 'Time Bomb' through New Solidarity Pact, Acceleration Agenda, at Launch of Intergovernmental Panel Report* (United Nations 2023)

Summary

Climate change is one of the most pressing threats to human rights. The adverse impacts of climate change affect peoples' mental and physical health and forces many to leave their countries. With hopes of a future where basic human rights are provided for, climate induced migration has become an adaptation form for those who suffer from climate change. Climate refugees are however yet to be included in the scope of the 1951 Refugee Convention and help must be sought elsewhere. Averting from international refugee law, international human rights law might instead offer the solution – specifically, the provisions of the International Covenant on Civil and Political Rights (ICCPR).

In 2020, the Human Rights Committee, the superior body monitoring the ICCPR, issued a landmark decision that pinpointed the nexus of climate change impacts, human rights and human mobility. In *Teitiota v. New Zealand*, a citizen from the small island nation Kiribati applied for asylum in New Zealand on the ground of climate change impacts. As he was denied the right to stay, he filed a complaint before the Human Rights Committee. The case raised several questions, regarding if environmental degradation can pose a threat to the right to life in article 6 ICCPR, or if it could trigger a non-refoulement obligation according to article 7 ICCPR. After careful consideration, the Human Rights Committee did not find a breach against the ICCPR. However, the decision explicitly expressed that environmental degradation can be severe enough to equal a breach under the ICCPR and trigger a non-refoulement obligation.

Even though the findings of the case are not binding, States must consider the effects of climate change to ensure the rights of individuals under the ICCPR. The fact that the case was not dismissed, but rather thoroughly assessed, indicates that the ICCPR is a useful tool to count on for protection beyond the Refugee Convention. The decision forces States to reflect on the effects of climate change on human rights and human mobility. The Human Rights Committee has started to expand the scope of the right to life in context of environmental degradation and States must be aware of how it affects their obligations under the ICCPR.

What the case of *Teitiota* will mean for future climate cases is yet to be determined. Bridges have however been built between international environmental law and human rights law, theory has been set into practice and States' obligations under the ICCPR have expanded. Climate induced migration has been put on the map of policymaking – increasing the complementary protection for victims of climate change.

Sammanfattning

Klimatförändringar är ett av de mest akuta problem som världen står inför idag. De snabba klimatförändringar som sker påverkar inte bara människors mentala och fysiska hälsa, för många är flykt över internationella gränser det enda alternativet. Med hopp om en framtid där mänskliga rättigheter tillgodoses har antalet klimatflyktingar drastiskt ökat och migration har blivit en form av anpassning till klimatförändringar. Då FN:s flyktingkonvention inte ger klimatflyktingar flyktingstatus, tvingas de drabbade vända sig till andra internationella ramverk i stället för kompletterande skydd. Med tanke på klimatförändringars påverkan på mänskliga rättigheter, aktualiseras den internationella konventionen om medborgerliga och politiska rättigheter (ICCPR).

År 2020 utfärdade FN:s kommitté för mänskliga rättigheter, FN-organet som överser implementeringen av ICCPR, ett banbrytande beslut som kom att belysa sambandet mellan klimatförändringar, mänskliga rättigheter och migration. I *Teitiota v. New Zealand*, flydde en medborgare från den lågtliggande ön Kiribati till Nya Zeeland för att söka asyl på grund av klimatförändringar. När hans asylansökan blev nekad överklagade han till kommittén för mänskliga rättigheter. De reflektioner som behandlades av kommittén innefattade klimatförändringars inverkan på rätten till liv (artikel 6 ICCPR) samt ifall klimatförändringar kan vara allvarliga nog för att trigga en stats skyldighet att inte skicka tillbaka asylsökande, enligt principen om non-refoulement och artikel 7 ICCPR. Efter noggranna överväganden blev den sökandes åberopande nekade även av kommittén, men beslutet uttrycker ett tydligt ställningstagande, nämligen att klimatförändringar i exceptionella fall kan utgöra en kränkning av rätten till liv och utlösa en non-refoulement skyldighet för stater, enligt ICCPR.

Kommitténs beslut är inte rättsligt bindande men medför ändå en skyldighet för stater att ta hänsyn till klimatförändringar för att säkerställa att mänskliga rättigheter kan åtnjutas. Faktumet att kommittén gjorde en grundlig utredning av omständigheterna i fallet tyder på att ICCPR kan utgöra ett viktigt verktyg för ett skydd bortom FN:s flyktingkonvention. Kommittén har börjat utöka ICCPR:s tillämpningsområde gällande rätten till liv i samband med klimatförändringar, vilket tvingar stater att reflektera kring hur klimatförändringar påverkar mänskliga rättigheter och hur det i sin tur påverkar deras skyldigheter enligt ICCPR.

Vad *Teitiota* kommer ha för inverkan på framtida klimatfall är ännu svårt att fastställa. Det har däremot lett till att broar byggts mellan internationell klimaträtt och mänskliga rättigheter, teori har satts på prov i praktiska fall och staters skyldigheter enligt ICCPR har utvidgats. Otvivelaktigt har migration orsakad av klimatförändringar satts på den globala kartan och skyddet för klimatflyktingar fortsätter att utöka.

Preface

Här sitter jag nu på tredje våningen i biblioteket och ska strax lämna in mitt examensarbete. Det är nästan så att jag drar mig för att lämna in för så fort jag har gjort det kommer allt vara över. Allt har gjorts för sista gången. Sista inlämningen, sista spexet, sista sittningen, sista våren i Lund, sista allt. Jag kan inte bestämma mig om det känns jobbigt, skönt, sorgligt, pirrigt, nervöst. Otroligt sentimentalt känns det i alla fall! Det får mig att tänka tillbaka på tiden på juristprogrammet och alla dem jag skulle vilja tacka för (vad jag tror är) den bästa tiden i mitt liv.

Tack till repan, min extrafamilj på Juridicum. Tack till min riktiga familj, för allt innan, under och efter juristprogrammet. Tack till alla i Dolusspexet, utan vilka jag hade haft olidligt tråkigt (och kanske hoppat av). Tack till mina klasskompisar, tillsammans med er har även de tuffaste terminerna varit roliga. Tack till alla mina andra kompisar, ord kan inte beskriva er betydelse men: ni är allt.

Juristprogrammet är det tydligaste exemplet på att resan är det egentliga målet och att jag får en juristexamen på köpet är bara en liten bonus. Vad bra allt har varit! Och vad bra allt kommer bli!

Med det sagt önskar jag er trevlig läsning, det ni ska få ta del av är något av det jag tycker varit mest intressant under de senaste 5 åren. Varsågoda!

Abbreviations

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
GC	Grand Chamber
IACHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IPCC	Intergovernmental Panel on Climate Change
Refugee Convention	The 1951 Refugee Convention
UDHR	Universal Declaration of Human Rights
UNFCCC	United Nations Framework Convention on Climate Change
VCLT	Vienna Convention on the Law of Treaties

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Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85

Immigration Act 2009 (New Zealand)

International Court of Justice Statute (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1996, entered into force 3 January 1976) 993 UNTS 3

Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UN General Assembly Res 63/117 (adopted 10 September 2008, entered into force 5 May 2013)

Optional Protocol to the International Covenant on Civil and Political Rights, UN General Assembly Res 2200A (adopted 16 December 1966, entered into force 23 March 1976)

United Nations Charter (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI

Universal Declaration of Human Rights, UNGA Res 217 A(III) (adopted 10 December 1948)

1 Introduction

1.1 Introducing the Topic

In 2010, the United Nations Framework Convention on Climate Change (UNFCCC) expressly invited its Parties to undertake measures to 'enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation'.[2]

For the first time, climate induced migration was addressed as a global issue that States need to take positive action against. Yet, the international protection for people crossing international borders due to climate change remains uncertain and calls for clarification.

The 1951 Refugee Convention[3] sets a clear frame for its applicability, with a well-established scope that covers those who have fled conflict and risk persecution based on discrimination. No matter how the international community wrings its hands, climate induced migration falls outside of the refugee definition, leaving those who are affected by it, without protection.[4]

Instead, hope is directed to international human rights law and the protection of basic human rights. Human rights law is relevant because climate change affects the enjoyment of human rights. The International Covenant on Civil and Political Rights (ICCPR)[5] regulates some of the most vital human rights, such as article 6 (the right to life) and article 7 (the right to not subjected to torture or to cruel, inhuman or degrading treatment or punishment), which are the core articles of this thesis.

A recent decision by the Human Rights Committee, the United Nations body monitoring the implementation of the ICCPR, has opened for a new perspective on climate induced migration. In *Teitiota v. New Zealand*[6], Ioane Teitiota, a Kiribati citizen, sought asylum in New Zealand on the base of his human rights being violated by climate change impacts. After being denied the right

[2] United Nations Framework Convention on Climate Change, 'Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010' (UN Doc FCCC/CP/2010/7/Add.1, 15 March 2011) para. 14f).

[3] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137. Hereinafter referred to as the Refugee Convention.

[4] European Parliament, 'Climate Change and Migration: Addressing the Impacts of Climate Change on Human Migration' 2021) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698753/EPRS_BRI(2021)698753_EN.pdf> accessed 22/5

[5] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171. Hereinafter referred to as the ICCPR.

[6] *Ioane Teitiota v. New Zealand*, CCPR/C/127/D/2728/2016, UN Human Rights Committee (HRC), 7 January 2020. Hereinafter referred to as *Teitiota v. New Zealand*.

to stay, Teitiota filed a complaint before the Human Rights Committee. The Human Rights Committee determined that environmental degradation could be severe enough to put a person's right to life at risk, triggering a non-refoulement obligation for States under the ICCPR. Suddenly, the global climate change agenda has expanded into the human rights sphere - opening for the possibility of complementary protection beyond the Refugee convention.[7]

Since the decision, no case has been brought before the Human Rights Committee regarding the legal status of people crossing international borders in the context of climate change. Discussions have however not seized, and scholars have different opinions on what the Human Rights Committee's decision will mean for the future and to what extent the scope of the ICCPR has expanded. It raises questions regarding States' obligations to protect the right to life of those who are exposed to climate change, and if these obligations can incorporate an element of non-refoulement.

1.2 Terminology and Delimitations

To facilitate the understanding of the thesis, I have chosen a terminology that I find best describes the context of climate induced migration and the affected States. The term 'State of origin' is used to describe the State that an individual leaves and crosses international borders to seek protection from climate change. The 'State of destination' is used to describe the State that an individual seeks asylum in, which activates the principle of non-refoulement.

In the thesis, the principle of non-refoulement refers to the customary international norm and is not to be confused with the expressed obligation in the Refugee Convention. A non-refoulement obligation is implicated in human rights treaties and prohibit States from returning individuals to a country where they face the risk of human rights violations.[8] As the Refugee Convention is not applicable in climate cases, when I refer to a non-refoulement obligation I am referring to the general principle that is reflected in international human rights law. In human rights law, a non-refoulement obligation can be triggered from severe human rights violations and does not, as in the Refugee Convention, require persecution based on a discriminatory ground.

Furthermore, throughout the thesis I use the term 'environmental degradation' as an umbrella term for climate change impacts. When referring to

[7] Alexander Betts, 'Climate Change as a Trigger of Non-Refoulement Obligations under International Human Rights Law' (2013) EJIL Talk!

[8] UN Office of the High Commissioner for Human Rights, 'The principle of non-refoulement under international human rights law' <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf> accessed 14/5

environmental degradation, I refer to the different effects on the environment derived from greenhouse gas emissions, caused by human induced climate change.

Regarding the relevant articles of the ICCPR, there are several more articles that can be affected by climate change. Specifically articles 17 and 27 are argued to have a connection with a healthy environment, but they are only briefly touched upon when actualized through *Billy v. Australia*[9], a climate case brought before the Committee. Together with article 6 and 7, no other articles will be addressed. This, however, does not mean that other articles would never be relevant in a context of climate change.

For my first research question I have chosen to only focus on article 6, the right to life, when looking at the obligations of the State of origin. There are of course other articles that can actualize obligations in a context of environmental degradation, however the Human Rights Committee has explicitly mentioned climate change impacts in combination with the right to life. The right to life is also at heart in *Teitiota*, which is why I find it to be the most relevant article for the thesis. For my second research question and the obligations of the State of destination, articles 7 is of relevance as it is the article mainly recognized to trigger a non-refoulement obligation. Article 6 is however also highlighted as it plays a role in the Human Rights Committee's decision in *Teitiota*.

1.3 Purpose and Research Questions

With background to *Teitiota v. New Zealand*, different questions have been actualized regarding States' obligations to ensure the rights of the ICCPR, when threatened by climate change impacts. The case highlights the different perspectives of climate induced migration, whether there exists an obligation to protect individuals against environmental degradation and/or a non-refoulement obligation triggered by future climate change impacts.

When an individual faces climate change impacts and chooses (or is forced) to leave the State, there are several risks for potential human rights violations. Although climate change action requires cooperation between States, considerable national action is necessary before international intervention. A State must first and foremost protect the individuals under its jurisdiction and take adequate measures to prevent environmental degradation from interfering with human rights. If failing, or unable, to do so, individuals might turn to migration as a solution – sparking obligations of the State of destination. The

[9] *Daniel Billy et al. v. Australia,* CCPR/C/135/D/3624/2019, UN Human Rights Committee (HRC), 22 September 2022.

State of destination must then protect the individuals from being returned to a place where they face irreparable harm.

Consequently, there are at least two States involved when dealing with climate induced migration. The purpose of the thesis is therefore to establish under what conditions these affected States have an obligation to protect individuals against environmental degradation, according to articles 6 and 7 of the ICCPR.

To fulfil the purpose of the thesis, and pinpoint the different obligations attributed to the State of origin and the State of destination, the following two questions will be researched:

- Under what conditions does the State of origin, affected by environmental degradation and in a context of climate induced migration, have an obligation to ensure the enjoyment of the right to life, according to article 6 of the ICCPR?

- Under what conditions can environmental degradation trigger a non-refoulement obligation for the State of destination, according to articles 6 and 7 of the ICCPR?

1.4 Method and Material

The thesis is based on a legal dogmatic method, aiming to establish when international human rights law is applicable in a context of climate induced migration. A legal dogmatic method concerns the research of existing positive law, as it appears in written and unwritten international rules.[10] The aim of the method is to find a solution for a legal issue through the use of universally accepted means for determination of international law.[11] The Statute of the International Court of Justice (ICJ Statute)[12], a part of the United Nations Charter[13], sets up a framework for means for determination of international law, by stating sources that are legally binding. Even though they are primarily directed to the work of the International Court of Justice (ICJ), the provisions of the ICJ Statute are considered applicable on a general level. According to article 38 of the ICJ Statute the primary sources of law consist of treaties (such as conventions), customary law and general principles. International customary law is developed when States behave in a specific way that

[10] Jan Vranken, 'Exciting Times for Legal Scholarship' (2012) 2 Law and Method 42, part 3.

[11] Jan Kleineman, 'Rättsdogmatisk metod' in Maria Nääv and Mauro Zamboni (eds), *Juridisk metodlära* (2 edn, Studentlitteratur AB 2021), page 21.

[12] International Court of Justice Statute (adopted 26 June 1945) 33 UNTS 993.

[13] United Nations Charter (adopted 26 June 1945) 1 UNTS XVI (entered into force 24 October 1945)

becomes a general practice among other States, followed by States accepting the behavior as legally binding. As subsidiary sources, the ICJ Statute recognizes judicial decisions and scholarly articles.[14] Being a subsidiary source essentially means that they will only be considered in second hand, if authority cannot be found in the primary sources.[15]

A judicial decision is subsidiary as it only binds the parties to the case. Even though no other State is formally bound, it does not necessarily mean that the case lacks importance for the creation of international law. In fact, many international courts, such as the ICJ, commonly refer to previous cases as an indication of the content of international law.[16] At heart of the essay, the case *Teitiota v. New Zealand* raises important questions for the protection of people crossing international borders due to climate change. The case is a key case in the development of environmental related obligations according to the ICCPR. Other cases are also evaluated as they either support or deviate from the outcomes in *Teitiota*. Together the cases add to the Committee's extensive jurisprudence and reflect how States handle human rights violations related to climate change. The Human Rights Committee is not a court and does not issue binding judgements. Even so, the decisions reflect current positive law according to the ICCPR, while considered subsidiary to the ICCPR's articles. All cases referred to are brought from different official databases, such as RefWorld for cases under the ICCPR and HUDOC for cases under the European Convention on Human Rights (ECHR)[17].

One of the most prominent scholars in the area is Jane McAdam, expert on climate change and refugees, who has done comprehensive research on the case of *Teitiota*, complementary protection and climate induced migration. Her articles have contributed greatly to this thesis and are referenced to when discussing Human Rights Committee's decision in *Teitiota*. Her comments also contribute to important aspects of the analysis. Apart from McAdam, others such as Ginevra Le Moli and Matthew Scott are leading scholars in the field of climate induced migration and protection beyond the Refugee Convention. The work of Le Moli and Schott has also added key perspectives to the thesis.

The ICCPR, mainly articles 6 and 7, is the prominent source used for the drafting of this paper, which argues for a legal dogmatic method being the

[14] International Court of Justice Statute, art. 38.

[15] Anders Henriksen, *International law* (Third edition. edn, Oxford University Press 2021), page 22.

[16] Christopher Greenwood, 'Sources of International Law: An Introduction' (*United Nations Office of Legal Affairs,* 2008)
<https://legal.un.org/avl/pdf/ls/greenwood_outline.pdf> accessed 22/5

[17] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)

most appropriate. Being a convention, the ICCPR is unarguably one of the main sources of international law and thus follows the requirements for the chosen method. Noticeable, however, is that the legal obligations following the ICCPR only apply to its State parties.

Although clearly a source of law, the meaning of a convention's content is instead what often gives rise to dispute. To help dissolve disagreements of the meaning and interpretation of a treaty's articles, rules of interpretation have been established and are reflected through the Vienna Convention on the Law of Treaties (VCLT). The rules of interpretation of the VCLT are considered customary international law and the content of the convention is thus applicable regardless of States being parties or not. According to articles 31-32, a treaty should be interpreted in good faith of the initial meaning, in the light of its purpose and object. The context of interpretation should consist of both the text and its preamble and annexes.[18]

Human rights conventions specifically, such as the ICCPR, are often interpreted in a more dynamic way and not so much in the light of the original meaning. This dynamic interpretation is necessary to ensure a real and effective protection of human rights, which the European Court of Human Rights (ECtHR) has stressed on several occasions. In reference to the European Convention on Human Rights (ECHR), the ECtHR emphasizes that it is a 'living instrument that must be interpreted in the light of present-day conditions'.[19] The ECtHR has also held that the failure to adapt a dynamic approach would prevent the possibility for change and improvement.[20] The Human Rights Committee has reasoned similarly and condemned States for interpreting article 6 and the right to life too narrowly, through literal interpretation instead of in spirit of current conditions in society.[21] A dynamic interpretation is necessary for the thesis as the research questions concern current situations that do not follow the literal meaning of the ICCPR. Present situations in society can be a factor in how States act and result in State practice that is a mean for interpretation.[22]

The positive law following the ICCPR should not only be interpretated through internationally accepted methods for interpretation, such as the

[18] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, article 31. Hereinafter referred to as the VCLT.

[19] Henriksen, *International law*, page 53.

[20] *Stafford v. the United Kingdom* [GC], App No 46295/99 European Court of Human Rights (ECtHR) 28 May 2002, para. 68.

[21] UN Human Rights Committee, *General Comment No. 6: The Right to Life (Article 6 of the International Covenant on Civil and Political Rights)* (United Nations 1982), para. 5. Hereinafter referred to as General comment 6 on Article 6.

[22] Article 31.3c) VCLT.

VCLT, but also needs to be seen through its own internal sources.[23] The Human Rights Committee, the superior body for interpreting the ICCPR, regularly issues views and general comments that expand the scope of the articles and thus guides States in their obligations as parties to the Covenant.[24] The Committee's views and general comments are used throughout the paper to analyze the applicability of the relevant articles in the context of environmental degradation. However, the Committee's statements and interpretations are used with caution as the legal significance is unclear, as they are generally not considered binding. They are however important for the development of the ICCPR as a dynamic instrument and generate strong indicators for States obligations, which is why they are commonly referred to. The ambiguity of the Committee's legal status is further discussed under *chapter 2.2.1*.

Following article 31.3c) VCLT, other applicable international rules should also be considered in accordance with the context, given that all parties are parties to all applicable rules. The Human Rights Committee commonly refers to other regional human rights treaties, such as the ECHR as well as case law by the ECtHR. Considering that not all parties to the ICCPR are parties to the ECHR, the ECHR does not qualify as a mean of interpretation of the ICCPR according to article 31.3c). However, the ECHR and other similar treaties, that are also mentioned in the Human Rights Committee's jurisprudence, are regional equivalents to the ICCPR as the treaties contain many of the same rights. When two or more treaties are *in pari materia*, dealing with the same subject matter, it is usually seen as a supplementary mean of interpretation which does not require party compliance.[25]

Therefore, the ECHR, among other human rights treaties, is of relevance for the thesis. This contributes to a comparative element, where the comparison lies in how different regional human rights instruments approach the right to life in a context of environmental degradation. The ECtHR's jurisprudence is more extensive than the Human Rights Committee's and it provides useful tools for interpreting the expansion of obligations implied by the rights of the ICCPR.

1.5 Structure of the Work

Chapter 2 begins by setting the scene for the problem at hand. Climate induced migration is addressed as a global issue, demanding States to take

[23] Vranken, 'Exciting Times for Legal Scholarship', part 3.

[24] Article 40 ICCPR. The content and legal status of the Human Rights Committee's views and general comments is explained and addressed in chapter 2.2.1.

[25] Ulf Linderfalk, 'Using The Context: The Elements Set Out in VCLT Article 31 § 3' in Ulf Linderfalk (ed), *On The Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer Netherlands 2007), pages 177-189.

immediate action. The chapter continues to give a brief overview of the case *Teitiota v. New Zealand*, as it lays the base for the thesis. To fully understand the opinion of the Human Rights Committee, and its legal status, the chapter thoroughly examines the role of the Committee on an international plane. As the Committee's statements are not considered a binding source of law, it is important to establish the legal significance early on.

Chapter 3 explains the background and circumstances necessary to answer the first research question, the obligations of the State of origin. The right to life in a context of environmental degradation, according to the ICCPR, is examined as well as compared to other regional human rights treaties. The chapter continues with the national court's judgement in *Teitiota*, as it reflects how the ICCPR is interpretated and implemented on a national level. The chapter continues to map the jurisdiction of climate cases brought before the Human Rights Committee, in order to map the expansion of the right to life in a context of climate change impacts.

Chapter 4 aims to provide a ground for answering the second research question and the obligations of the State of destination. In this chapter, the principle of non-refoulement and the obligation it poses for States is assessed through the lens of international human rights law. Whether environmental degradation can amount to ill-treatment is assessed through existing international jurisprudence on the subject. Furthermore, a final discussion on *Teitiota* is carried out, as the chapter provides a summary of the Human Rights Committee's decision in the case. To set the case in a contemporary context, different opinions on the outcome are compared.

Chapter 5 and *chapter 6* are the final chapters that summarize the findings of the previous chapters. By determining the conditions under which obligations may arise for protection against environmental degradation, a comprehensive picture of the ICCPR in a context of climate induced migration is established. The challenges and possibilities with obligations connected to environmental degradation are discussed and problematized. The chapters are analytical and lay out current positive law as it is, before culminating in a part with my own reflections and final remarks on what the current developments mean for the future of climate induced migration.

2 Setting the Scene for Climate Induced Migration

2.1 Climate Induced Migration as a Global Issue

According to the Intergovernmental Panel on Climate Change (IPCC) and their recent report issued in March of 2023, human activity has single-handedly been the driver of global warming the last 200 years. Human-caused climate change has led to adverse effects on the access to food and water and led to a deterioration in human health and human rights.[26] The fact that environmental degradation adversely affects the enjoyment of human rights has been firmly established on an international plane and is widely accepted as a fact.[27]

In the past 10 years, regions with high vulnerability, due to other societal circumstances, have faced a higher mortality rate from climate induced extreme weather than regions with low vulnerability.[28] The ones who are the most affected are also the ones who have contributed the least to greenhouse gas emissions, reflecting a disproportionality in the global climate agenda.[29]

Climate change not only affects physical and mental health globally, it also generates displacement and forced migration as a result of climate induced humanitarian crises.[30] While human mobility was not on the agenda at the 27th UN Climate Change Conference of the Parties (COP27), displaced people call for a seat at the up-coming COP28 – acknowledging the need for action on human mobility and climate change.[31]

In 2019, the General Assembly issued a resolution addressing global action against climate change impacts, called the *Global Compact for Safe, Orderly and Regular Migration*. In the resolution, all member States of the UN agreed to cooperate in the safe return of migrants, through the enforcement of non-refoulement where there is a real and foreseeable risk of irreparable harm.

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[26] Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2023: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, 2023), para. 2.1.

[27] UNGA '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 Human Rights Council, UN Doc. A/HRC/22/43 (2012), para. 34.

[28] Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2023: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, para. 2.1.2, page 17.

[29] Ibid, para. 2.1.

[30] Ibid, para. 2.1.2, page 16.

[31] Andrew Harper, *UNHCR: Refugees and displaced people need seats at COP28 table* (UN Office of the High Commissioner for Refugees 2022)

The resolution indicates that States are aware of the adverse impacts that climate change can have on human mobility. In summary, the resolution expresses that climate induced migration is a problem of global kind and is to be addressed cooperatively.[32]

In 2015, a report called the *Nansen Initiative on Disaster-Induced Cross-Border Displacement* (Nansen Initiative) was released, mapping the protection available for and the needs of people displaced across borders in the context of disasters and the adverse effects of climate change.[33] This State-led initiative was first of its kind, putting policymaking on human mobility caused by climate change on the map. The Nansen Initiative lifts the importance of migration with dignity and argues that internal displacement could be an adequate adaptation measure to tackle climate change. However, for many small island developing States (SIDS), who are some of the most vulnerable to climate change impacts, internal displacement is not an alternative as sea level rise caused by climate change threatens to submerge entire territories, making the States inhabitable. For the population of SIDS, crossing international borders might soon be the only option. With international movement due to climate change increasing, the Nansen Initiative also recognizes the lack of protection under international law and the uncertainty for climate migrants upon arrival in the State of destination.[34]

As the Refugee Convention is unapplicable, and the issue of climate induced migration being a fact, there is a need for complementary protection. As briefly mentioned, and further discussed under *chapter 4*, the principle of non-refoulement can be derived as a customary international norm in human rights law. The right to protection however corresponds to a State obligation, which is difficult to establish due to the uncertain role of climate change in human rights law. Although there is a vast amount of literature on the interaction between climate change and human rights, up until recently there has been a gap of legal jurisprudence in the area. This creates a methodological challenge, as it is unclear how the articles of the ICCPR, for example, should be interpreted in a context of climate change. The few climate cases that have emerged the past years are either national judgements or decisions from quasi-judicial procedures, which aggravates the possibility of determining a State's obligation to protect the enjoyment of human rights against environmental degradation. Following the articles of the VCLT, the method for interpretation is based on existing rules and principles in international law.

[32] Global Compact for Safe, Orderly and Regular Migration, UNGA Res 73/195 (19 December 2018).

[33] The Nansen Initiative, 'Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change ' 2013) <https://disasterdisplacement.org/wp-content/uploads/2014/08/EN_Protection_Agenda_Volume_I_-low_res.pdf> accessed 14/3.

[34] Ibid.

Jurisprudence and documents from treaty bodies can however help analyze the meaning of the law, in the light of current developments in the society.[35]

One such quasi-judicial procedure is the possibility to file an individual complaint before the UN Human Rights Committee (hereinafter referred to as 'the Committee'). The Committee is the superior body of the ICCPR, established to monitor its implementation. When facing a violation of a right under the ICCPR, individuals have the possibility to file a complaint, whereby the Committee evaluates the case and gives its opinion on the circumstances. As climate change adversely affects the enjoyment of human rights, it was just a question of time before a claim of violation due to climate change was brought before the Committee.

In 2016, Ioane Teitiota filed the first ever complaint concerning a violation on his right to life based on the adverse climate change impacts he faced in Kiribati. Teitiota was the first case of its kind but undoubtedly not the last. The case pinpoints the difference between States' obligations to protect human rights in a context of climate change, to protect the environment and to provide protection for people crossing international borders – together constructing the key aspects of the essay.

2.2 Teitiota v. New Zealand: an Overview

When the decision on *Teitiota v. New Zealand* was issued in 2020, the case was widely tributed and called 'historic' by the Office of High Commissioner of Human Rights (OHCHR),[36] a 'landmark case' by NGO Amnesty International[37] and a 'step forward' by notable scholars.[38] The case plays an important role in this essay and its different parts will be analyzed throughout the thesis, in relevance to the different topics it touches upon. A brief overview is however necessary to understand the background of the questions it actualizes.

Teitiota gained international attention in 2015, when Ioane Teitiota from the small island nation of Kiribati, sought asylum in New Zealand due to the adverse climate change impacts affecting his home country. Teitiota argued that

[35] Margaretha Wewerinke-Singh, *State responsibility, climate change and human rights under international law* (1 edn, Hart Publishing 2019), pages 8-10.

[36] UN Office of the High Commissioner for Human Rights, *Historic UN Human Rights case opens door to climate change asylum claims* (United Nations 2020).

[37] Amnesty International, 'UN landmark case for people displaced by climate change' 2020) <https://www.amnesty.org/en/latest/news/2020/01/un-landmark-case-for-people-displaced-by-climate-change/> accessed 23/5.

[38] Adaena Sinclair-Blakemore, 'Teitiota v New Zealand: A Step Forward in the Protection of Climate Refugees under International Human Rights Law?' (*Oxford Human Rights Hub,* 2020) <https://ohrh.law.ox.ac.uk/teitiota-v-new-zealand-a-step-forward-in-the-protection-of-climate-refugees-under-international-human-rights-law/> accessed 23/5.

he and his family were facing the effects of environmental degradation and sea-level rise, making it unsafe for them to return. However, his asylum claim was ultimately denied by the New Zealand courts, which ruled that his situation did not meet the criteria for refugee status under international law. Teitiota's situation did not either fall within the scope of the ICCPR, urging him to file a complaint before the UN Human Rights Committee.

The committee found that Teitiota's life and safety were at risk due to the impacts of climate change in Kiribati and that his forced return to his home country could constitute a violation of his right to life under the ICCPR. However, the Committee considered that Teitiota's situation was insufficiently severe for New Zealand to be in breach of the ICCPR. [39]

Regardless of the outcome, the decision was significant as it established that the effects of climate change can potentially fall within the scope of international human rights law and that governments have an obligation to protect the rights of individuals who are affected by such impacts. It highlights the complex legal and ethical challenges surrounding forced migration due to environmental factors, while underscoring the urgent need for action to address climate change and its impacts on vulnerable communities around the world.

The reflections in *Teitiota* are not entirely new, as scholars have long acknowledged the connections between climate change, human mobility and the risk for human rights violations. The legal principle of non-refoulement is also well-established through the Committee's jurisprudence.[40] Although a non-refoulement case triggered by climate change-induced environmental degradation is unprecedented, climate induced migration as a global problem has been addressed by the international community before. A nexus between human rights law and environmental law has developed, creating a new area of law that calls for extended interpretation and innovative solutions.

To understand what the Committee's decision means for future cases, the following part discusses the legal significance of the Committee's work. As a

[39] The case was brought before several instances of the New Zealand court system before a complaint was filed before the Human Rights Committee. The overview of the case is a summary of the findings in the following case documents: *AF (Kiribati)*, NZIPT 800413, Immigration and Protection Tribunal, New Zealand, 25 June 2013; *Ioane Teitiota*, NZHC 3125, The High Court of New Zealand Auckland Registry (NZHC), 26 November 2013; *Ioane Teitiota*, NZSC 107, The Supreme Court of New Zealand (NZSC), 20 July 2015; *Ioane Teitiota v. New Zealand*, CCPR/C/127/D/2728/2016, UN Human Rights Committee (HRC), 7 January 2020.

[40] For example, *Kindler v. Canada,* CCPR/C/48/D/470/1991, UN Human Rights Committee (HRC), 11 November 1993, para 13.1-13.2 and UN Human Rights Committee, *General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life* (United Nations 2018). These will be thoroughly discussed under chapter 3.

quasi-judicial body, it cannot provide binding judgements, but it nevertheless contributes to the development of international legislation.

2.3 The Role of the Human Rights Committee

The Human Rights Committee is one of ten human rights bodies of the UN. It was established through articles 28 to 39 of the ICCPR, as it entered into force in 1976. In its work, the Committee strives to guarantee the full enjoyment of the ICCPR and its civil and political rights, to all people without discrimination.[41]

The creation of the Committee derives from article 28 and it consists of 18 members, all independent experts on human rights. The members are nationals of different State Parties to the ICCPR and are elected through nomination of their State.[42] Ideally, the members elected should represent a fair distribution of the 'different forms of civilization and of the principal legal systems'[43] from all parts of the world.[44] Although chosen as nationals of a State Party, the members are not to represent their governments' views - they should act in their own personal capacity.[45]

In order to follow up on the implementation of the ICCPR, the Committee has several monitoring functions. The monitoring functions are stated in the articles 40 to 45 and further developed through the Committee's Rules of Procedure. The main functions are considering States' reports, issuing general comments as well as hearing complaints under the ICCPR and its First Optional Protocol to the International Covenant on Civil and Political Rights (hereby after 'the Optional Protocol')[46], before issuing views with its decisions.[47]

Regularly, State Pprties are obliged to submit reports on how they are currently working to implement civil and political rights. The reports should reflect the challenges and factors that affect the implementation, for the Committee to consider. After consideration, the content of the State reports is addressed by the Committee through recommendations and concerns in the form

[41] UN Office of the High Commissioner for Human Rights, 'Human Rights Committee - CCPR' <https://www.ohchr.org/en/treaty-bodies/ccpr> accessed 9/5.

[42] Article 29 ICCPR.

[43] Article 31.2 ICCPR.

[44] Sarah Joseph and Melissa Castan, *International Covenant on Civil and Political Rights : Cases, Materials, and Commentary* (3rd edn, Oxford University Press 2013), para. 1.32.

[45] Article 28.3 ICCPR.

[46] Optional Protocol to the International Covenant on Civil and Political Rights, UN General Assembly Res 2200A (XXI) (16 December 1966).

[47] Joseph and Castan, *International Covenant on Civil and Political Rights : Cases, Materials, and Commentary*, para. 1.36.

of concluding observations.[48] Sometimes the reports also lead to general comments made by the Committee.[49] General comments are issued to clarify or elaborate on specific topics related to the interpretation of the ICCPR. Compared to the individual complaints under the Optional Protocol and the concluding State observations, the general comments are in fact general and not directed to any specific State. The general comments are important as they explain the meaning of the ICCPR's provisions and thus help State parties to effectively fulfill their obligations.[50]

2.3.1 The Legal Significance of the General Comments

The Committee's general comments is an important source for the essay, it is therefore necessary to shortly establish their legal significance as they do not expressly fall within the definitions of the international legal sources according to the International Court of Justice (ICJ).

The ICJ recognizes judicial decisions as a subsidiary source of international law. With the Committee not being a judicial body, yet the superior (and only) body for interpreting the ICCPR, the legal significance of the Committee's statements is unclear. In the Committee's Views, containing the decision in an individual complaint, the Committee often refer to its general comments. A general comment is issued as a result of findings and experiences from State reports and complaints brought under the Optional Protocol. The general comments are not legally binding, according to both the ICJ and common acknowledgement. There are, however, different theories on their legal status, of which two main theories stand out.[51]

On one hand, general comments can be seen as generating subsequent practice.[52] This means that the work of the Committee, carried out after the ICCPR entered into force, overrules the textual meaning, if the practice is sufficiently clear and all parties consent to it.[53] Or as it is stated in the VCLT: 'any subsequent practice (…) which establishes the agreement of the parties'.[54] The general comments cannot be seen as subsequent practice in themselves, as subsequent practice derives from State practice. Yet, the Committee's work reflects the expectations of State action in the light of the original intent. With

[48] Ibid, para. 1.37 and 1.40; Article 40 ICCPR.

[49] Article 40.4 ICCPR.

[50] UN Office of the High Commissioner for Human Rights, 'General Comments - CCPR' <https://www.ohchr.org/en/treaty-bodies/ccpr/general-comments> accessed 9/5.

[51] Helen Keller and Leena Grover, 'General Comments of the Human Rights Committee and their legitimacy' in Geir Ulfstein and Helen Keller (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Studies on Human Rights Conventions, Cambridge University Press 2012).

[52] Article 31.3b) VCLT.

[53] Henriksen, *International law*, p. 51.

[54] Art. 31.3b) VCLT. Emphasis added.

this perspective, General comments issued earlier would not reflect the same level of consent compared the preceding, as the number of ratifications has increased. Depending on how States choose to use the general comments in their State practice, general comments could be seen to generate norms that reflect the agreement between the parties of the ICCPR.[55]

On the other hand, the general comments can be seen as authoritative interpretations of the ICCPR. This theory relies on the idea that the Committee has an inherent 'authoritativeness', in being the superior body of interpretation of the ICCPR. Authoritative interpretation can mean that States and decision makers turn to the jurisprudence of the Committee to get answers on uncertainties in the ICCPR. The members of the Committee are legal professionals, elected on their expertise on human rights. In order to carry out the duties that the ICCPR requires of them, general comments are necessary to adopt.[56]

Nonetheless, general comments are seen as means of interpretation, adding important reflections to the rights and obligations of the ICCPR. As seen in the Committee's jurisprudence, they play an important role as background principles when analyzing an article (which in its turn is a main source of international law). They are seen by both States and judges as important for convention interpretation and might even eventually result in customary legal norms. Regardless of their legal status, the general comments are extremely present in any case relating to the ICCPR - both in national case law and in the Committee's views.[57]

Although non-binding, they expand the meaning of the articles, are used as foundation for judicial decisions and feed into the idea that the ICCPR is a dynamic instrument that reflects the current societal developments.

2.3.2 The Procedure of an Individual Complaint

Apart from issuing general comments, the Committee is permitted to hear both inter-State complaints and complaints brought by individuals concerning violations of the rights of the ICCPR. The right to file a complaint as an individual is expressed in the Optional Protocol which was issued to further amplify the objectives of the Covenant.[58]

An individual complaint can be filed before the Committee if an individual feels that his or her rights under the ICCPR has been violated by a State Party.

[55] Keller and Grover, 'General Comments of the Human Rights Committee and their legitimacy', para. 2.3.2.
[56] Ibid, para. 2.3.3.
[57] Ibid, para. 2.3.1.
[58] Preamble to the Optional Protocol.

In General comment 33, the Committee reminds States that they, as Parties to the Optional Protocol, agree upon the Committee's competence to receive individual complaints and are therefore prohibited to hinder such a complaint. State Parties are also obliged to prevent any negative remedies for individuals who choose to seek the Committee's help.[59] The first step of the procedure is for the Committee to decide whether the complaint is admissible. Apart from the State Party needing to be part of the Optional Protocol, there is an aspect of personal and State jurisdiction to be considered. The complainant must be an individual victim, personally affected by an issue that relates to a matter within the State's jurisdiction. The issue must have taken place after the State ratified the Optional Protocol and relate to a substantive matter under the ICCPR, i.e., correspond to an expressed ICCPR right.[60]

Article 5 states some of the procedural requirements. Before submitting a complaint, all domestic remedies must be exhausted. The complaint cannot either be brought before another international tribunal simultaneously. If the complaint is ruled to be admissible, the Committee continues to examine the merits of the alleged violation. The Committee invites the receiving State to submit statements or evidence to clarify their point of view on the complaint. States are not obliged to cooperate or comment on the communication; however, they risk the Committee deciding to the State's disadvantage if they chose to neither confirm nor deny the allegations.

Together with evidence from the complainant, the Committee will then proceed to do a thorough evaluation of the situation before presenting their views.[61] In their views the Committee will rule out whether a violation of the individual's right has occurred or not.

2.3.3 The Legal Significance of the Views

The Committee's procedure when considering a complaint resembles that of a judicial body, such as a court. Even though their views are not to be confused with legally binding judgements, they do, however, share some important characteristics with a judicial decision. In examining the merits, the Committee evaluates evidence and determines whether a breach has occurred or not. As the Committee's members are sitting in their own capacity, they are to act without political agenda, with the aim of making the Committee impartial. The Committee is the most superior body interpreting ICCPR, which in

[59] UN Human Rights Committee, *General Comment No. 33: Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights* (2021), para. 4. Hereinafter referred to as the Optional Protocol.

[60] Joseph and Castan, *International Covenant on Civil and Political Rights : Cases, Materials, and Commentary*, para. 1.48 and forward; Optional Protocol articles 1-3.

[61] Optional Protocol, article 5.4; General comment 33, para. 12.

its turn is a binding instrument that prescribes obligations to its State parties.[62] The bindingness is clarified in General comment 33:

> The Views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument.[63]

The Committee's Views results in a decision, yet the decision contains no actual liability for the State in breach. Instead, the Committee publishes a public record in its annual reports to the General Assembly, where it is clear for all when States have failed to implement the recommendations of the views.[64] This is a remedy often seen in other international instruments, as it leads to public humiliation and a bad reputation. In especially urgent cases, the Committee is also permitted to prescribe interim measures before the views have been delivered - when dealing with death penalty or a violation of the duty of non-refoulement for example. According to the Committee's Rules of Procedure, a failure to implement such a measure would be incompatible with the obligations under the Optional Protocol, which argues for a slightly more binding imposition.[65]

Furthermore, the Committee is not obliged to follow its previous jurisprudence. On many occasions the Committee has expressly followed its own decisions, which on the one hand establishes a seriousness. On the other hand, ruling differently than prior views, only shows the dynamic character of the ICCPR and reflects the circulation of the Committee's members. Generally, the observations and views that differ from before tend to provide an extended interpretation of the rights and not the opposite.[66]

[62] Joseph and Castan, *International Covenant on Civil and Political Rights : Cases, Materials, and Commentary*, para. 1.60-1.61.

[63] General comment 33, para. 13.

[64] Joseph and Castan, *International Covenant on Civil and Political Rights : Cases, Materials, and Commentary*, para. 1.61.

[65] Ibid, para. 1.65.

[66] Ibid, para. 1.78–1.80.

3 The Right to Life and the Risk of Environmental Degradation

The first thing to be addressed is whether a State has an obligation to ensure the right to life in a context of environmental degradation and address climate change impacts, according to article 6 of the ICCPR:

> Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.[67]

Article 6 contains a negative right, to not be arbitrarily or unlawfully deprived of life. Read together with article 2, it also contains a positive obligation for States to take active measures to 'respect and to ensure (…) the rights recognized in the present Covenant'.[68]

3.1 The Right to Life with Dignity

Due to the brief formulation of article 6, there is room for interpretation. The Committee interprets the articles of the ICCPR through its general comments.[69] Over the years, the definition of article 6 has significantly expanded. In one of the earliest general comments, General comment 6, the Committee underlined that the right to life should not be interpreted narrowly. States' obligation to take positive measures to ensure the right to life was emphasized, with focus on measures that increases life expectancy.[70]

The approach that the right to life implicates more than just existing, has been further established through the Committee's most recent general comment on the article, General comment 36. In the most expansive interpretation of article 6 yet, the Committee adopts a new definition of the right to life – the right to life with dignity.[71]

3.1.1 Human Dignity in General

Although unprecedented in previous general comments regarding the right to life, human dignity has long been an integral part of human rights law. Human dignity is generally seen as a quality attached to every human being,

[67] Article 6 ICCPR.
[68] Article 2 ICCPR.
[69] Article 40.4 ICCPR.
[70] UN Human Rights Committee, *General Comment No. 6: The Right to Life (Article 6 of the International Covenant on Civil and Political Rights)*, para. 5. Hereinafter referred to as General comment 6 on Article 6.
[71] UN Human Rights Committee, *General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life*, para. 3. Hereinafter referred to as General comment 36 on Article 6.

something that cannot be neither acquired nor lost.[72] The inherent dignity of the human person was first mentioned in the Universal Declaration of Human Rights (UDHR), influencing subsequent human rights treaties to incorporate the term in their provisions.[73] Human dignity is considered a universal foundation for the world order and a core principle for the enjoyment of all human rights.[74] The preamble of the ICCPR comes to mind as it recognizes that all rights derive from the inherent dignity of the human person. The reference to dignity can also be found in the jurisprudence of both the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACHR).

The definition of human dignity has been discussed by scholars. By looking at how dignity can be promoted and violated, the frame of the term can be stablished. The promotion of human dignity is recognized through the enjoyment of conditions that enables empowerment and self-determination. The liberty and freedom of choice incorporated in human dignity can however be limited according to what a State considers to be a civilized life – for example prohibiting prostitution and suicide.[75] The idea is that the human dignity consists of a main core, which is non-derogable, and an outer layer that is flexible and able adapt to different realities.[76] The reference to human dignity in relation to a specific human right implies that the right should be exercised in a certain way and thus develops the content of the right.[77]

3.1.2 Human Dignity According to the Human Rights Committee

The duty to consider human dignity depends on how the obligation is formulated. For example, human dignity can be the ultimate objective of the right, that the right is should be performed in order to guarantee human dignity.[78] Human dignity can also be reflected as the standard of implementation for a specific obligation, which is the case for article 6.[79]

According to General comment 36, the right to life entitles individuals to enjoy a life with dignity. This could indicate a shift towards stricter State liability, as the article contains a positive obligation to ensure dignity as opposed

[72] Ginevra Le Moli, 'Analytical Framework', *Human Dignity in International Law* (ASIL Studies in International Legal Theory, Cambridge University Press 2021), para. 1.2.3.

[73] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)

[74] Le Moli, 'Human Dignity in Human Rights Law', page 218.

[75] Le Moli, 'Analytical Framework', page 25.

[76] Ibid, page 24.

[77] Le Moli, 'Human Dignity in Human Rights Law', page 253; General comment 36 on Article 6, para. 9.

[78] Ibid, page 255.

[79] Ibid, page 256; General comment 36 on Article 6, para. 3.

to only being mentioned in the preamble of the ICCPR. Paragraph 26 specifically expresses:

> The duty to protect lift implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity.[80]

The content of the right to life with dignity is not explicitly defined by the Committee, yet it contains some socio-economic aspects. Among others, the right to the most basic needs and well-being are mentioned.[81] Socio-economic rights are normally regulated in the International Covenant on Economic, Social and Cultural Rights (ICESCR).[82] Fundamentally, the difference between the ICCPR and the ICESCR is that the ICCPR constitutes negative rights (acts that the State should refrain from undertaking), whereas the ICESCR constitutes positive rights (acts that the State must undertake to ensure the right). Through this expansion the Committee acknowledges that the right to life has a positive characteristic, through the phrase 'with dignity' States are expected to take positive measures. The Committee recognizes that the right to life interferes with a range of other rights that are typically seen as economic and social and how if these were violated the right to life would also inevitably be threatened. Furthermore, the General comment 36 establishes the fact that social aspects of civil and political rights can be adverse enough to equal a breach - making it easier for individuals to file a complaint under the Optional Protocol, even though their right to life has not been directly violated.[83]

The expansion does not stop at socio-economic rights, but also extends into the environmental sphere. As stated by the Special Rapporteur on Human Rights and the Environment, in absence of a healthy environment we lack access to the minimum standards of human dignity – 'a safe, clean, healthy and sustainable environment is integral to the full enjoyment of (…) the right to life'.[84] Unprecedented in a general comment before, the Committee addresses climate change as not only a potential threat in the future, but one of the currently most serious threats to the ability to enjoy the right to life. The recognition of a connection between climate change and human rights

[80] General comment 36 on Article 6, para. 26.

[81] Ibid.

[82] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1996, entered into force 3 January 1976) 993 UNTS 3 (ICESCR)

[83] Vincent Power, 'UN Human Rights Committee Brings New Vitality to the Right to Life' 2018) <https://www.openglobalrights.org/un-human-rights-committee-brings-new-vitality-to-the-right-to-life/> accessed 23/5

[84] UN Office of the High Commissioner for Human Rights, 'About human rights and the environment' <https://www.ohchr.org/en/special-procedures/sr-environment/about-human-rights-and-environment#:~:text=All%20human%20beings%20depend%20on,unable%20to%20fulfil%20our%20aspirations> accessed 9/5

imposes an obligation on States to protect and preserve the environment against climate change, following paragraph 62.[85] Climate change can constitute a direct threat to the right to life, e.g., through extreme weather such as flooding or droughts, or create conditions that eventually give rise to such threats, e.g., through pollution or sea level rise.[86]

Paragraph 62 should be read together with paragraph 26, reflecting articles 2 and 6 of the ICCPR; the right to life should be enjoyed with dignity and is to be protected by positive measures taken by the State. Consequently, the provisions of the general comment set out a highly authoritative obligation to protect human life from actual threats but also conditions that can result in direct threats.[87] By mitigating climate change impacts, the enjoyment of life increases.

3.2 Comparison with Other Regional Human Rights Instruments

As the Committee sometimes refers to other regional human rights treaties, it is of relevance to compare the right to life in a context of environmental degradation to corresponding articles of other regional human rights instruments. Although unique on a universal level, the Committee is not the first international body to refer to the right to life with dignity in terms of environmental degradation. It has been established by the African Commission on Humans and Peoples' Rights, through its General comment no. 3, that the State responsibility to protect the right to life requires a broad interpretation. The Commission recalls that in order to ensure a better life (i.e., a right to life with dignity), States must take positive action to guarantee economic, social and cultural rights, including preventive action to protect the natural environment.[88] Furthermore, the African Charter on Human and Peoples' Rights expressively refers to a right to a healthy environment.[89] In a case brought before the African Commission, Nigeria was found in breach of the African Charter, for acting carelessly when carrying out oil production. The government of Nigeria had failed to take adequate protection measures towards the people residing nearby, which violated their right to a healthy environment according to article 24. The African Commission stated that article 24 imposes clear

[85] General comment 36 on Article 6, para. 62.

[86] Ginevra Le Moli, 'THE HUMAN RIGHTS COMMITTEE, ENVIRONMENTAL PROTECTION AND THE RIGHT TO LIFE' (2020) 69 International & Comparative Law Quarterly page. 745.

[87] General comment 36 on Article 6, para. 26.

[88] African Commission on Humans and Peoples' Rights, *General Comment No. 3: The Right to Life* (African Commission on Human and Peoples' Rights 2019)

[89] African Charter on Human and Peoples' Rights 1981 (Organization of African Unity), Article 24.

obligations and further argued for a breach of article 16 and the right to enjoy a certain level of physical and mental health.[90]

In an advisory opinion by the Inter-American Court of Human Rights (IACHR), the court emphasizes that economic, social and cultural rights are intertwined with civil and political rights - constituting an indivisible whole that is based on the inherent dignity of the human being.[91] The IACHR further recognizes that the implementation of human rights presupposes the protection of the environment, as environmental degradation severely affects the enjoyment of human rights.[92]

The ECtHR has not been equally keen to combine economic, social and cultural rights with civil and political rights. Especially article 2.1 of the ECHR, expressing the right to life, has been clearly distinguished from economic, social and cultural rights. Some social rights have been considered as relevant to article 8.1 (the right to private life, family life and home), which advances towards a recognition of a right to life with dignity.[93] Even if a right to a healthy environment is not enshrined in the ECHR, the ECtHR has established through case law that environmental degradation can be severe enough to affect the well-being of an individual and lead to a violation of the right to life. A breach of article 2.1 was recognized in *Budayeva and others v. Russia*, as lives were lost due to failure of Russian authorities to take appropriate mitigation measures against mudslides.[94]

3.3 Climate Cases Brought Before the Human Rights Committee

Since the Committee issued General comment 36, it has been put into practice in a few cases. On several occasions, the inherent relationship between the right to life and dignity has been reaffirmed. The scope of the right to life has been expanded to include protection against situations of an environmental nature, even when loss of life has not occurred. Besides *Teitiota,* other cases such as *Portillo Caceres v. Paraguay* and *Daniel Billy v. Australia* make for important jurisprudence from the Committee concerning the right to a healthy

[90] *The Social and Economic Action Rights Centre v. Nigeria*, ACHPR/COMM/A044/1, African Commission on Human & Peoples' Rights (ACHPR), 27 May 2002, para. 50-54.

[91] *The Environment and Human Rights*, Advisory Opinion OC-23/17, Inter-American Court of Human Rights Series A No 23 (25 November 2017), para. 47.

[92] Ibid.

[93] Isabelle Berggren, *The Right to Life, Environmental Degradation, and Human Mobility* (2022)

[94] *Budayeva and Others v Russia* App No 15339/02 European Court of Human Rights (ECtHR) 20 March 2008.

environment.[95] Both decisions in *Billy* and *Caceres* come from the ruling of the Committee whereas *Teitiota*, as described in this chapter, comes from the national Immigration and Protection Tribunal of New Zealand. The cases reflect the scope of the right to life on both a national and international level. Despite *Teitiota* being a domestic case, applying domestic law, all of the cases contribute to the interpretation of States' obligations under article 6 of the ICCPR.

3.3.1 Cáceres v. Paraguay

Cáceres v. Paraguay was the first communication brought before the Committee after it issued General comment 36. The case marks the first time where the Committee has ruled on the right to life in a context of threats posed by climate change impacts – establishing the connection between environmental degradation and the right to life with dignity.[96]

As relatives to the deceased Rubén Portillo Cáceres, a group of Paraguayan citizens filed a complaint against the State of Paraguay, for causing the death of Cáceres. The family lives in a settlement for farming, managed by a governmental agency for land access. The settlement consists of large soybean plantations and many agribusinesses. The crops are regularly fumigated by agrochemicals, which not only breaches several domestic environmental laws but also creates an unhealthy environment. The excessive use of toxic agrochemicals has severely affected the claimants' health, as symptoms would arise around planting season. In their lack of policy making, management plans and supervision State agencies have failed to fulfil their obligations regarding the unlawful use of agrochemicals - in their lack of policy making, management plans and permits - eventually resulting in the death of Cáceres.[97]

In early 2011 Cáceres began to feel ill, experiencing symptoms that could be derived from the agrochemicals. He was rushed to hospital after his state of health worsened, but his life could not be saved. The claimants had regularly sent complaints to various authorities concerning the unlawful fumigation but received no reply. Along with Cáceres, another 22 inhabitants were hospitalized due to similar symptoms, and the claimants decided to file a criminal complaint against the State's handling of the situation.[98] As the national procedure took an unreasonable amount of time, a complaint was filed before the

[95] *Portillo Cáceres v. Paraguay*, CCPR/C/126/D/2751/2016, UN Human Rights Committee (HRC), 20 September 2019; *Daniel Billy et al. v. Australia,* CCPR/C/135/D/3624/2019, UN Human Rights Committee (HRC), 22 September 2022. Hereinafter referred to as *Caceres v. Paraguay* and *Billy v. Australia*.

[96] Le Moli, 'THE HUMAN RIGHTS COMMITTEE, ENVIRONMENTAL PROTECTION AND THE RIGHT TO LIFE', page 736.

[97] *Caceres v. Paraguay*, para. 2.1-2.6.

[98] Ibid, para. 2.7-2.8.

Committee with the following claim: in allowing the extensive use of agrochemicals, the State of Paraguay has failed its duty to protect the claimants from environmental degradation, resulting in a violation by omission of article 6. The claimants specifically refer to the right to life with dignity, as the uncontrolled crop fumigation, caused by the State, creates unsustainable living conditions and affects their access to fresh water and food. According to General comment 36, which the claimants addresses, State parties should actively avert threats to the right to life with dignity - including threats from environmental degradation.[99] In the State's submission to the claim of violation by omission, the State argues against a breach of article 6. They have indeed conducted enough due diligence and claim that the evidence on the death of Cáceres deriving from the agrochemicals in any way is insufficient.[100]

The Committee continues to give its opinion on the case and notes the poisonous effects the agrochemicals have had on water, food and the citizens' health. The agrochemicals are considered to pose a 'reasonably foreseeable threat' to the complainants' lives, which is the term used to determine whether a violation has occurred. In considering whether there is enough evidence of agrochemicals from the autopsy, the Committee argues that the burden of proof does not entirely rest on the shoulders of the claimants, as State parties sometimes have easier or even exclusive access to evidence.[101] Again, the Committee refers to General comment 36 and emphasizes the freedom from acts and omissions that cause an unnatural or premature death. The Committee also notes how the right to a healthy environment has become more and more prevalent in other international tribunals, in so that environmental degradation affects the full enjoyment of the right to life. In combination with the State's disregard towards the many complaints from the complainants and other authorities on the toxic fumigation, and the unwillingness to take further action after the death of Cáceres, the Committee finds the State guilty of omission resulting in a violation of article 6.[102]

3.3.2 Teitiota v. New Zealand: the National Court's Judgement

The judgement of the Immigration and Protection Tribunal of New Zealand (hereinafter referred to as 'the Tribunal') is important for the recent expansion of the right to life into the environmental sphere. It shows how national courts, and thus State parties, interpret the ICCPR's rights and reflects how States understand their corresponding obligations. The case brought before the national court essentially deals with Kiribati's potential violation of the right to

[99] *Caceres v. Paraguay*, para. 5.6.
[100] Ibid, para. 4.4.
[101] Ibid, para. 7.2.
[102] Ibid, para. 7.5.

life in a context of environmental degradation, whereas the views issued by the Committee concerns the potential violation by New Zealand and their non-refoulement obligation. Therefore, solely the judgement of the Tribunal and the following instances of appeal will be discussed in this chapter. The decision of the Committee is discussed under *chapter 4.2.2.2*, as it reflects more upon the non-refoulement elements of the case.

The question at hand for the Tribunal was to evaluate whether Kiribati, through act or omission, had violated Teitiota's rights under the ICCPR. Following New Zealand's national legislation on people who have crossed international borders, the scope is broader than the Refugee Convention alone. According to New Zealand's Immigration Act, a person is considered protected from deportation under the ICCPR if there are 'substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel [inhuman or degrading] treatment [or punishment]'.[103] Consequently, the concerned articles of the ICCPR are article 6 (the right to life) and article 7 (the right to not be subjected to subjected to torture or to cruel, inhuman or degrading treatment or punishment), which are assessed cumulatively by the Tribunal.[104]

Initially, the Tribunal found Teitiota to be entirely credible and agreed on the evidence put forward that life in Kiribati, and Tarawa specifically, was impacted negatively by the effects of climate change.[105] The Tribunal continues to discuss the connection between environmental degradation and international human rights law and recognizes that States have responsibilities related to the environment under human rights treaties.[106] Different participatory and substantive rights are mentioned, including articles 6 and 7, that could possibly create a framework for protection against environmental degradation.[107] However, the Tribunal avoids expressing an internationally recognized right to a healthy environment. Rather, it insists that there are no special rules for environmental protection, yet no presumption for non-applicability either - the legal criteria for protected persons must be met and assessed in each individual case.[108]

The Tribunal accepts that the ability to sustain life to some extent is expected to be negatively impacted by climate change. The Tribunal continues to discuss the general meaning of the right to life, emphasizing the fact that the right to life is indeed inherent, but not absolute, as it can be limited by non-

[103] Immigration Act 2009 (NZ), s 131.

[104] *AF (Kiribati)*, NZIPT 800413, Immigration and Protection Tribunal, New Zealand, 25 June 2013. Hereinafter referred to as *AF (Kiribati)*.

[105] *AF (Kiribati),* para. 39.

[106] Ibid, para. 60.

[107] Ibid, para. 61.

[108] Ibid, para. 65.

arbitrary laws.[109] Following statements from commentaries to the ICCPR and the Committee's general comments, the Tribunal draws the conclusion that the right to life invokes an obligation for States to take positive measures to protect life in areas where life is particularly endangered.[110] Following ECtHR case law and other relevant doctrine, the fact that States have a positive duty to protect life from natural disasters indicates that a violation of the right to life can derive from both a direct act and an omission when failing to prevent harm.[111]

The Tribunal bases its risk assessment on the wording of Section 131 of the Act, that a person should be protected when he/she can provide substantial grounds for being 'in danger' of being subjected to violations of the ICCPR.[112] Under the circumstances brought forward, the Tribunal did not find Kiribati to be guilty of either an act or omission that would indicate a risk for Teitiota to be arbitrarily deprived of his life. Following the positive measures being taken by government in Kiribati as well as the distant timeframe of the risk, Teitiota's situation fell 'well short' of the threshold for being in danger.[113] According to Kiribati's National Adaptation Program of Action (NAPA) from 2007, the government is highly aware of the challenges the island faces and is actively taking steps to protect its inhabitants from the sea-level rise.[114] Regarding the timeframe, the Tribunal refers to the jurisprudence of the Committee, where 'imminence' is required for an applicant to be considered a victim under the Optional Protocol.[115] The Tribunal's own definition of the imminent risk of a violation is 'something which is more than above mere speculation and conjecture but sitting below the civil balance of probability standard'.[116] In a careful consideration, the Tribunal accepts that the threat of global climate change indeed is imminent - however, not imminent enough in this case to create a risk for arbitrary deprivation of the applicant's life under article 6.[117]

The Tribunal also discusses article 7 and whether the return to Kiribati would amount to the cruel treatment prerequired. With reference to the ECtHR, the general opinion is that it would be inhuman to deport someone to a known situation of serious harm. The situation however requires a qualified

[109] *AF (Kiribati)*, para. 83.
[110] Ibid, para. 86.
[111] Ibid, para. 87.
[112] Immigration Act 2009 (NZ), s. 131.
[113] *AF (Kiribati)*, para. 91
[114] Ibid, para. 88.
[115] *Aalbersberg et al. v. Netherlands*, CCPR/C/87/D/1440/2005, UN Human Rights Committee (HRC), 12 July 2006.
[116] *AF (Kiribati),* para. 90.
[117] Ibid, para. 91.

treatment, meaning that there must be some sort of human agency and not the type of general treatment climate change impacts imposes.[118]

Therefore, the Tribunal draws the conclusion that Teitiota is not entitled protected person status under Section 131 of the Act, and thus does not fall within the scope of the ICCPR.[119]

After the dismissal, Teitiota appealed to the High Court of New Zealand. Mainly, Teitiota was concerned that his appeal was dismissed because all citizens of Kiribati suffer from the same climate change impacts. The Court of Appeal, however, only briefly discussed the Tribunal's assessment of the ICCPR, before confirming the decision of the Tribunal in its whole.[120]

Teitiota continued to seek appeal before the Supreme Court, who ruled accordingly with the lower instances. The Supreme Court did however put into words what the other courts had try to say. These decisions should not in any way mean that environmental degradation could never create a pathway into the protected person jurisdiction. They therefor leave the possibility open for a person to gain protected person status due to climate change, when dealing with an 'appropriate case'.[121]

Teitiota had now exhausted all domestic remedies and was facing deportation back to Kiribati. In 2015 he submitted a communication to the Human Rights Committee, where an assessment of New Zealand's non-refoulement obligation was carried through. A thorough discussion on the Committee's reasoning is found under *chapter 4.2.2.2*, as it relates to non-refoulement and the obligation of the State of destination, as opposed to the obligation of the State of origin as in the case on a national level.

3.3.3 Billy v. Australia

Billy v. Australia came after *Teitiota* and adds to the Committee's jurisprudence on the nexus of human rights and climate change. The Billy case does not touch upon non-refoulement and is therefore not entirely comparable with the *Teitiota*, although the Committee does make similar reflections and builds on the State obligation to provide a healthy environment to ensure the rights under the ICCPR.

[118] *AF (Kiribati),* para. 93.

[119] Ibid, para. 96.

[120] *Ioane Teitiota*, NZHC 3125, The High Court of New Zealand Auckland Registry (NZHC), 26 November 2013.

[121] *Ioane Teitiota*, NZSC 107, The Supreme Court of New Zealand (NZSC), 20 July 2015, para. 13.

Belonging to the indigenous minority group of the Torres Strait Islands, part of Australia, Daniel Billy and others filed a complaint against Australia, for failing to take action to deal with the effects of climate change. Torres consists of low-lying islands and is therefore highly sensitive to climate change. The threat of climate change affects the islands themselves as well as the vulnerable population, who's unique culture largely relies on nature and specific territories of the islands. Traditional means of gathering food has been affected by the rising sea level and climate induced weather such storms and heavy rainfall.[122]

These effects could have been remediated by State action, such as reducing greenhouse gas emissions and raising seawalls. In failing to address the climate change impacts with adequate mitigation measures, the plaintiffs argue that Australia violated their rights under ICCPR - the right to life being one.[123]

The findings of General comment 36 are present throughout the communication, addressed by both the claimants, the State and the Committee. In their claims, the claimants ascertained that the State has failed to protect their right to life with dignity, involving the right to a healthy environment, in not providing enough mitigation and adaptation measures. The State however does not share the view that an obligation to protect against the effects of climate change exists. Climate change effects, they mean, is a global issue and cannot be derived to a single act or omission of one State - therefor, they cannot be in violation of article 6, which postulates human agency. Furthermore, they accept the definition of right to life with dignity, but only recognize it under very specific circumstances (this case not being one).[124]

Regarding the information brought by the claimants and the State, the Committee notes a potential violation of the claimants' right to life with dignity. As comment to the State's argument that it is not obligated to prevent loss of life from climate change, the Committee underlines that the reasonably foreseeable threats States are obligated to protect the right to life from, may include climate change impacts. This includes taking positive measures to ensure a life with dignity, by addressing general conditions in the society that may be threatful.[125] The Committee notes the different climate change impacts imposed on the claimants - increasing temperatures, loss of availability of important food sources and seawall breaches.[126] However, the mere feelings of insecurity for the future, as mentioned, is not considered adverse

[122] *Daniel Billy et al. v. Australia,* CCPR/C/135/D/3624/2019, UN Human Rights Committee (HRC), 22 September 2022, para. 2.1-2.3. Hereinafter referred to as *Billy v. Australia*.
[123] *Billy v. Australia*, para. 2.7.
[124] Ibid, para. 3.1-3.7.
[125] Ibid, para. 8.3.
[126] Ibid, para. 8.5.

enough, as the claimants have not faced a 'real and reasonably foreseeable risk' to their own right to life.[127] Instead, the loss they have experienced is more related to the scope of other articles under the ICCPR, such as articles 17 and 27, stating the right to one's home and to enjoy one's culture.[128]

Furthermore, the Committee takes into consideration the promise of the State to address climate change impacts in the coming years and the plans for adaptation and mitigation that are already in place. 10 to 15 years is the timeframe suggested by the claimants before the climate change impacts become unbearable, which the Committee finds to be a reasonable amount of time for the State to intervene. Consequently, the Committee does not find the State of Australia to be in breach of article 6.[129]

3.4 Conclusion

As apparent, the scope of the right to life in a context of environmental degradation has significantly developed the past years. Since General comment 36 was issued, the right to life is now understood to contain an element of dignity. The words of the Committee are clear, in order to ensure the right to life a State must take positive measures to guarantee that life is enjoyed with dignity. What was before only implied in the preamble, is now a part of the obligation that follows article 6.

In affirming that climate change can and does pose a serious threat to human life, the Committee has created a direct link between the adverse risks of climate change and State liability. The State must not only protect individuals from harm caused by the environment, but also protect the environment from harm caused by humans. Accordingly, the duty to protect goes both ways so to ensure that no risk now, or in the future, becomes adverse enough to violate the ICCPR.

According to the climate cases brought before the Committee, it is evident that climate change can pose a real threat to the right to life and that States can be held accountable in exceptional cases. However, it leaves room for further discussion regarding causation, time frame and the threshold for the risk assessment – all of which are analyzed under *chapter 5*.

[127] *Billy v. Australia*, para. 8.6.
[128] Ibid, para. 8.7.
[129] Ibid, para. 8.8.

4 Non-refoulement Obligation Triggered by Environmental Degradation

The second question to be addressed is under what conditions a State's non-refoulement obligation can be triggered by climate change impacts, according to article 6 and 7 of the ICCPR.

The principle of non-refoulement has emerged through international human rights law and is applicable beyond the Refugee Convention.[130] In this chapter, the jurisprudence of the ECtHR will be used as a complementary source to the Committee's jurisprudence, to explain the scope of a non-refoulement obligation in international human rights law. The ECtHR's jurisprudence is more extensive in the area than the Committee's, which is why it becomes relevant to the interpretation of a non-refoulement obligation as a universally accepted norm. Usually, the ICCPR cannot be interpreted through the judgments of the ECtHR,[131] but as the Committee and the ECtHR often refer to each other's jurisprudence when reflecting upon the meaning of different articles,[132] I find the ECtHR's findings relevant for the issue at hand.

4.1 Non-refoulement as a Human Rights Principle

The principle of non-refoulement signifies protecting people from being returned to a State where they risk serious human rights violations. The principle consists of a violation in two steps. In order to trigger non-refoulement for the State of destination, there must be a risk of an adverse human rights violation in the State of origin. The principle derives from the Refugee Convention but has come to be recognized as a general principle under international human rights law as well, which is why it can be actualized even in situations where the Refugee Convention cannot.[133]

The non-refoulement principle is addressed in several human rights treaties. In some treaties the principle is expressed explicitly, such as article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading

[130] UN Office of the High Commissioner for Human Rights, 'The principle of non-refoulement under international human rights law'

[131] Linderfalk, 'Using The Context: The Elements Set Out in VCLT Article 31 § 3', page 178.

[132] For example, in footnote 46 in *Billy v. Australia*, the Committee refers to several cases from the ECtHR when considering the merits of the case.

[133] UN Office of the High Commissioner for Human Rights, 'The principle of non-refoulement under international human rights law'

Treatment or Punishment (CAT)[134], while others, such as the ICCPR and the ECHR, implicate the principle's existence through jurisprudence and commentaries. Over 150 States are part to one or more treaties that reflect the principle of non-refoulement, which indicates a universal acceptance of the norm as customary international law.[135]

The main distinction between non-refoulement as a customary norm and the definition in the Refugee convention lies in the nature of the violation. When the obligation derives from human rights law, the risk is predicated on violations in form of torture, cruel or inhuman treatment, whereas the risk in refugee law relates to the fear of persecution.[136] Essentially, this gives the non-refoulement principle a broader scope in human rights law than in refugee law and explains why human rights treaties, such as the ICCPR, can be applicable even for 'climate refugees' who are not considered refugees under the Refugee convention.

A non-refoulement obligation requires a balance of interests between the State of destination and the individual, therefore only the most severe violations give protection from refoulement. In *Soering v. United Kingdom* from 1989, the ECtHR affirmed that the guarantee of the human rights applies extraterritorially, although mainly in exceptional cases that rise under article 3 and the prohibition against ill-treatment. Despite the court's restrictive reference to extraterritorial protection, the case highlights that the reasoning behind a non-refoulement obligation has been a topical subject for a long time. *Soering v. UK* prevents States from returning an individual when there is a certain risk of human rights violations.[137]

Following the lead of the ECtHR the Committee has rendered that article 7 contains an element of non-refoulement. Article 7 expresses a prohibition against ill-treatment, torture and cruel or inhuman treatment or punishment. The Committee does not provide an extensive list of what such treatment could be, nor establishes a hierarchy of severity between the different

[134] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85

[135] Sir Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion' in Erika Feller, Frances Nicholson and Volker Türk (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003), para. 209.

[136] Ibid, para. 244.

[137] *Soering v. United Kingdom*, App No 14038/88 European Court of Human Rights (ECtHR) 7 July 1989, para. 91.

treatments. Instead, the Committee generically refers to such treatment as 'ill-treatment', which is a term that is used throughout this thesis.[138]

Prohibition against ill-treatment, following article 7, constitutes customary international law. As the principle of non-refoulement is an inherent part of article 7 further establishes its status as a customary norm.[139] The principle of non-refoulement applies to all forms of removal of everyone under a State's jurisdiction, irrespective of a person's migration status.[140] Article 7 provides that States must protect individuals under their jurisdiction from acts of ill-treatment. Therefore, States are prohibited from removing people when there is substantial ground for believing that the person upon return would be at risk of irreparable harm, according to the ICCPR. Together with article 7, the right to life has also clearly been recognized to trigger a non-refoulement obligation.[141]

4.2 Environmental Degradation as Ill-treatment

When establishing a State's non-refoulement obligation in a context of climate change, it is relevant to determine whether environmental degradation can amount to ill-treatment. The necessary threshold to reach for a breach of a non-refoulement obligation differs from different regional instruments but can be summarily described as 'circumstances in which substantial grounds can be shown for believing that the individual would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment'.[142] When looking at case law from the ECtHR, however, the court has opened for a more extensive interpretation and has in some cases found violations of socio-economic rights to be severe enough to be characterized as inhuman treatment.[143]

4.2.1 The ECtHR's Jurisprudence

In *M.S.S. v Belgium and Greece*, the ECtHR found that Greece was in breach of article 3 by detaining asylum seekers in overpopulated centers, without access to basic needs or information about the circumstances. The applicant

[138] Jane McAdam and Law Oxford Scholarship Online, *Complementary protection in international refugee law* (Oxford monographs in international law, Oxford University Press 2007), page 140.

[139] Lauterpacht and Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion', para. 221.

[140] UN Office of the High Commissioner for Human Rights, 'The principle of non-refoulement under international human rights law'

[141] Jane Mcadam, 'Climate Change-Related Movement and International Human Rights Law: The Role of Complementary Protection', *Climate Change, Forced Migration, and International Law* (Oxford University Press 2012), chapter 3.1.

[142] Lauterpacht and Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion', para. 249.

[143] *Paposhvili v. Belgium* [GC], App No 41738/10 European Court of Human Rights (ECtHR) 13 December 2016, para. 174.

before the ECtHR, had fled the centers in Greece to Belgium, but was sent back. Considering the conditions in the State of origin, the court found that also Belgium was in breach of article 3, based on the principle of non-refoulement. No lives had been lost, no torture had occurred, yet the degrading living conditions were enough to trigger a non-refoulement obligation.[144]

In other deportation cases, such as *Paposhvili v. Belgium* and *D. v. United Kingdom*[145], the applicants suffered from illnesses that required appropriate medical treatment, which in both cases could not be accessed in the State of origin. The applicants would upon return be at risk of inhuman treatment and premature death. In *D.* the applicant suffered from HIV and could demonstrate a direct causal link between the lack of treatment in the State of origin and an accelerated death. Therefore, the court found his situation sufficiently severe to generate a breach.[146] In a following case, *N. v. United Kingdom*, the ECtHR stated that a breach of article 3 in regards of inferior medical treatment in the State of origin, requires exceptional circumstances, such as those in the case of *D.*[147] The court further developed its reasoning in *Paposhvili*. The ECtHR stated that although not necessarily being at imminent risk of dying, a seriously ill migrant who faces a real risk of being exposed to an irreversible decrease in health, significantly reducing his/her life expectancy, should amount to a breach of a State's non-refoulement obligation.[148]

Considering the ECtHR's jurisprudence, it is not unimaginable to think that climate change impacts could be considered ill-treatment, as it affects the ability to live a life with dignity. The ECtHR is yet to rule in a climate induced non-refoulement case. In *M.S.S v. Belgium and Greece*, the court did however consider the lack of access to basic needs such as food and water, which are impacts that could also be triggered by climate change. They also considered how these impacts were related to the act of a State, an assessment that would be more difficult when dealing with climate change as it might not be directly linked to an act or omission. The court is clear that anything beyond an obvious violation of the right to life and the prohibition of ill-human treatment, can only be considered a non-refoulement violation in exceptional cases. According to the ruling that degrading living conditions and decreasing health

[144] Summary of *MSS v. Belgium and Greece*, App No 30696/09 European Court of Human Rights (ECtHR) 21 January 2011.

[145] *D v. United Kingdom*, App No 30240/96 European Court of Human Rights (ECtHR) 2 May 1997.

[146] Ibid, para. 54.

[147] *N v. United Kingdom*, App No 26565/05 European Court of Human Rights (ECtHR) 27 May 2008, para. 42.

[148] *Paposhvili v. Belgium*, para. 183.

could lead to a non-refoulement violation, environmental degradation might just trigger non-refoulement in an extraordinary case.[149]

4.2.2 The Committee's Jurisprudence

Even if the non-refoulement obligation has been developed in a certain direction by the ECtHR, and the Committee as a human rights instrument is influenced by its judgements, the non-refoulement obligation appears a bit different in the jurisprudence of the Committee.

Apart from article 7, the non-refoulement obligation also follows by article 2, explained through General comment 31. Article 2 reflects the general scope of obligations under the ICCPR, in that States are to ensure the rights of the ICCPR to all individuals under their jurisdiction.[150] The Committee continues to say that the obligation involves not removing a person from the State's territory, if there is cause to believe that the person faces a 'real risk of irreparable harm'. Irreparable harm is exemplified as situations that would fall under the scope of article 6 (right to life) and article 7 (right to be free from torture or other cruel, inhuman or degrading treatment or punishment).[151]

In its General comment 36 on article 6, the Committee acknowledges that the scope of the principle of non-refoulement is broader than defined in the Refugee Convention, as it protects even those who cannot attain refugee status. The Committee requires States to provide effective procedures of determination for everyone who claims a risk of irreparable harm in a receiving State upon return. This recent development of the non-refoulement principle derives from the concluding State observations of Tajikistan and Estonia and their legally uncertain asylum procedures. In Tajikistan asylum seekers would be denied based on circumstances beyond their control (such as late referrals by the border services),[152] whereas asylum seekers in Estonia would be denied based on them coming from countries pre-determined as 'safe' (without individual assessment)[153]. Consequently, the Committee found it necessary to clarify that State parties should consider claims by asylum seekers

[149] Mcadam, 'Climate Change-Related Movement and International Human Rights Law: The Role of Complementary Protection', chapter 3.3c).

[150] UN Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (United Nations 2004), para. 3. Hereinafter referred to as General comment 31 on Article 2.

[151] General comment 31 on Article 2, para. 12.

[152] Concluding observations on the second periodic report of Tajikistan, CCPR/C/TJK/CO/2, UN Human Rights Committee (HRC), 22 August 2013, para. 11.

[153] Concluding observations: Estonia, CCPR/CO/77/EST, UN Human Rights Committee (HRC), 15 April 2003, para. 13.

individually, in a thorough manner, regardless of the grounds falling out of the scope of the Refugee Convention.[154]

According to General comment 20 on article 7, States should not only prohibit inhuman treatment but must also take positive measures to prevent such treatment from occurring to anyone under the State's jurisdiction.[155] This includes refraining from exposing individuals to inhuman treatment outside of the State's jurisdiction, if the risk of inhumane treatment is the result of a deportation decision.[156]

4.2.2.1 The Risk Assessment for Non-refoulement Obligation

In assessing whether a non-refoulement obligation is at hand, the Committee must determine if a right under the ICCPR would be violated upon return. The assessment concerns a potential risk of a future breach, not the severity of an actual action. Initially, following the Optional Protocol, the risk of violation of a right under the ICCPR must be 'personal' for a complaint to be admissible. It cannot be a risk of general kind, except in extreme cases of individuals being especially vulnerable or if the State of origin is experiencing exceptional violence.[157] Despite the individual assessment requiring personal attribution, it must be seen in the light of the general human rights situation in the State of origin. Hence there is an interaction between personal risk and general conditions when doing the risk assessment.[158]

Normally, admissibility requires that an act or omission of a State has already adversely affected an individual's rights under the ICCPR. When concerning future victims, and the alleged risk of a future violation, the risk must be of 'imminent' character in order to attain admissibility.[159] Such risk can be actualized by a judicial decision, for example a decision on deportation.

The Committee has established a level of proof required by the applicant in a non-refoulement case. *Kindler v Canada* was one of the earliest cases related to non-refoulement, where the Committee established important rules for the

[154] General comment 36 on Article 6, para. 31.

[155] UN Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* (United Nations 1992), para. 8.

[156] Ibid, para. 9.

[157] See for example *Warda Osman Jasin v. Denmark*, CCPR/C/114/D/2360/2014, UN Human Rights Committee (HRC), 25 September 2015 and *Sufi and Elmi v. United Kingdom*, App nos. 8319/07 and 11449/07, European Court of Human Rights (ECtHR), 28 June 2011.

[158] Paul M. Taylor, 'Article 7: Torture, Cruel, Inhuman or Degrading Treatment or Punishment', *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge University Press 2020), pages 185-186.

[159] *Aalbersberg et al. v. Netherlands*, para. 6.3.

assessment.[160] The Committee expanded the requirement of victimhood needed for admissibility, by stating that a State indeed did not have an obligation to protect those outside of its jurisdiction. A State might, however, be in breach of the ICCPR if the State takes action towards a person under its jurisdiction and the necessary and foreseeable consequence is that his or her rights will be violated in another jurisdiction.[161] After determining that the applicant had victim status, the Committee introduced the term 'real risk' in the consideration of the merits. The Committee stated that for States to be in violation of the ICCPR, there must be a real risk of violation of the applicant's rights upon return in the State of origin.[162]

Following the decision in *A.R.J v. Australia*, the Committee developed its reasoning and affirmed the use of 'real risk' in connection with article 7. The real risk for ill-treatment means that it is the necessary and foreseeable consequence of a decision on deportation.[163] This point of view was further established in *Hamida v. Canada*, where the Committee held that the statement in *A.R.J* is the standard of proof to be reached in a non-refoulement case.[164]

4.2.2.2 Teitiota v. New Zealand: The Committee's Views

Teitiota is so far the only case brought before the Committee where the non-refoulement obligation is based on environmental degradation caused by climate change. The Committee addressed a non-refoulement obligation based on mainly article 6, as it was the only ground for claim raised by the applicant. The Committee briefly reflected upon article 7 as well, in combination with article 6, due to them often being mentioned together in statements made by the Committee. The views issued on Teitiota clearly show the procedure for risk assessment that the Committee undertakes to determine if a non-refoulement violation has occurred.

As a first step in the risk assessment, the Committee considers admissibility. The Committee recalls that if a threat has not yet been actualized, there must be an imminent risk of a violation occurring for the complaint to be admissible. The alleged risk must be more than just theoretically possible and, when considering article 6, must derive from an act of a State that imminently threatens the enjoyment of the right to life. In deportation cases the requirement of imminence is attached to the decision of removal, while the real risk assessment depends on the foreseeable harm in the State of origin upon return.

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[160] *Kindler v. Canada*, CCPR/C/48/D/470/1991, UN Human Rights Committee (HRC), 11 November 1993. Hereinafter referred to as *Kindler v. Canada*.

[161] *Kindler v. Canada*, para 6.4.

[162] Ibid, para 13.2.

[163] *A.R.J. v. Australia*, CCPR/C/60/D/692/1996, UN Human Rights Committee (HRC), 11 August 1997, para. 6.14.

[164] *Hamida v. Canada*, CCPR/C/98/D/1544/2007, UN Human Rights Committee (HRC), 11 May 2010, para. 8.7.

The Committee found that Teitiota in a sufficient way had shown that the risk he faced upon return was imminent enough for the complaint to be considered admissible, which allowed the Committee to proceed with the risk assessment of the merits.[165]

When considering the merits in a deportation case, the Committee is to determine if the State's assessment of the claimant facing a real, personal and reasonably foreseeable risk of a threat to the right to life was 'clearly arbitrary or amounted to a manifest error or a denial of justice'.[166] This follows the general idea that States themselves best can do the risk assessment - the Committee merely establishes that the assessment has been done thoroughly and correctly.[167]

The Committee also evaluates whether the State has provided Teitiota with an individualized assessment, based on the arguments raised on the different climate change impacts on Kiribati. Teitiota has brought up violent land disputes and sea level rise as some of the main issues. Although the general human rights situation in the State of origin is important to consider, a general state of violence is only considered attributable to the individual in exceptional cases.[168] Teitiota himself had not been involved in any land disputes and the Committee appointed that he had not sufficiently demonstrated a real and personal risk. Sea level rise however is considered a severe climate change impact, as it can lead to entire nations being submerged under water, and could probably be considered to be incompatible with the right to life even before the risk has been realized.[169]

Based on the assessment of the national court in the current case, the Committee estimated that Kiribati had at least 10-15 years before risking total submersion, which would be enough for the national authorities to take preventive measures.[170] Sea level rise also leads to salination of potable water, yet it was not demonstrated to have reached levels of unsafety or inaccessibility. Therefore, the sea level rise claim was not either severe enough to actualize a real, personal and reasonably foreseeable risk. In summary, the Committee found that New Zealand had not violated its non-refoulement obligation when deciding on deportation to Kiribati, as the court had done an individualized and adequate assessment.[171]

[165] *Teitiota v. New Zealand*, para. 8.5.
[166] *Teitiota v. New Zealand,* para. 9.3.
[167] Ibid, para. 9.3.
[168] Ibid, para. 9.7.
[169] Ibid, para. 9.11.
[170] Ibid, para. 9.12.
[171] Ibid, para. 10.

Despite the outcome of the case being to Teitiota's disadvantage, the Committee confirmed on several occasions that the risk of environmental degradation could potentially amount to a violation of the right to life. In fact, the Committee urged that:

> …environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.[172]

Furthermore, the Committee acknowledges the necessity of both national and international efforts to fight climate change. Without said efforts, there is a risk of individuals being exposed to violations of their rights under the ICCPR, due to climate change impacts in the State of origin, triggering a non-refoulement obligation for the State of destination.[173]

4.2.2.3 Different Opinions on the Outcome of Teitiota

Since the views were issued, different global actors have expressed different opinions on the outcome and not everyone agrees that the case is groundbreaking. Instead, they lift its limitations as well as offers other potential rulings.

Individual Committee members Duncan Laki Muhumuza and Vasilka Sancin both found the applicant to have sufficient ground for a violation of article 6.[174] Muhumuza stated that the State had set an unreasonably high threshold for the burden of proof on the applicant. The conditions of life on Kiribati, brought by the applicant, were, according to Muhumuza, significantly severe enough to fall within the scope of article 6.[175] Although agreeing that the general situation in the State of origin only in exceptional cases can pose a risk, and acknowledging that the threshold for a personal risk has historically been set high according to the Committee's jurisprudence, Muhumuza insisted that this time the threshold was too high.[176] He raised interesting questions regarding access to basic needs - is it not enough for fresh water to be considerably difficult to access? Must we reach a level of total lack of fresh water in order to reach the threshold?[177] Sancin not only raises concern of low access to potable water, but also holds that potable water does not equate to safe drinking

[172] *Teitiota v. New Zealand*, para. 9.4.
[173] Ibid, para. 9.11.
[174] Individual opinion of Committee member Duncan Laki Muhumuza (dissenting) and Vasilka Sancin in *Teitiota v. New Zealand*. Hereinafter referred to as *Individual opinion: Muhumuza* or *Individual opinion: Sancin*.
[175] *Individual opinion: Muhumuza*, para. 1.
[176] Ibid, para. 3.
[177] Ibid, para. 5.

water.[178] She insists that the water question alone is severe enough to affect the applicant's health and consequently put his life at risk.[179]

Muhumuza recalls that a right to life with dignity is the standard of the Committee, as well as deaths not being necessary to amount to a violation of the right to life. The environmental situation in Kiribati does not provide living conditions that guarantee a life with dignity. Just because the situation is general for many inhabitants of Kiribati, does not make the conditions dignified.[180] Although Kiribati has adopted a National Action Plan and is therefore taking measures against climate change, Sancin lifted the fact that the National Action Plan is yet to be implemented.[181]

Muhumuza concludes his dissenting opinion by stating that the decision taken by New Zealand is 'more like forcing a drowning person back into a sinking vessel, with the "justification" that after all, there are other passengers on board'.[182]

Furthermore, scholar Jane McAdam, also criticizes the Committee's decision on several points. In her recent report, *Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-refoulement*, McAdam agrees with the dissenting Committee members that the threshold is set too high for Teitiota and argues that the threshold would be enough if only one of the circumstances had been at hand. As Teitiota would be exposed to difficulty of growing crops and accessing drinking water, among other conditions, McAdam suggests a cumulative assessment instead. She refers to the approach used in the Refugee Convention and the idea that a person can have a fear of being persecuted on account of one serious risk but also based on several less severe risks. Cumulatively, the risks can amount to persecution – or in the case of complementary protection, amount to ill-treatment.[183] According to the Committee's previous jurisprudence, a cumulative approach has been the assessment procedure in other deportation cases. In *R.A.A and Z.M v Denmark* as well as *Y.A.A and F.H.M v Denmark,* the Committee considers that the circumstances together amount to a breach of the non-refoulement obligation following article 7.[184] Scholar

[178] *Individual opinion: Sancin*, para. 3.
[179] Ibid, para. 6.
[180] *Individual opinion: Muhumuza,* para. 6.
[181] *Individual opinion: Sancin*, para. 4-5.
[182] *Individual opinion: Muhumuza,* para. 6.
[183] Jane McAdam, 'Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-refoulement' (2020) 114 American Journal of International Law 708, page 714.
[184] *R.A.A and Z.M v. Denmark*, CCPR/C/118/D/2608/2015, UN Human Rights Committee (HRC), 28 October 2016, para 7.8; *Y.A.A. and F.H.M. v. Denmark,* CCPR/C/119/D/2681/2015, UN Human Rights Committee (HRC), 21 April 2017, para. 7.9.

Matthew Scott has similar views but instead lifts the possibility of a holistic approach. He defines the risk of irreparable harm as a 'condition of existence, as distinct from an isolated act or accumulation of measures'.[185]

McAdam further holds that it would have been interesting to see how the Committee would have approached a claim on article 7, since the claim only considered article 6. The Tribunal in New Zealand dismissed article 7, with the argument that Kiribati's mere lack of capacity to address climate change was insufficient to be considered inhuman treatment.[186] This reasoning follows the Tribunal's previous decision in *AC Tuvalu*, stating that it would be too much of a burden on a State to expect environmental mitigation efforts far out of their power or otherwise risk violating human rights.[187] Compared to the national laws of New Zealand however, inhuman or degrading treatment does not require a positive act or omission according to the Committee's jurisprudence. An evaluation of the conditions being inhuman or degrading, might have given a different outcome compared to the assessment of whether Teitiota's right to life was at risk in Kiribati. McAdam, by referring to scholar Walter Kälin, suggests that the act of removal could itself be seen as a necessary element of a chain of events, if it engenders a violation of a person's human rights.[188]

McAdam lastly opposes to the Committee's use of the 'imminence' requirement. Following the Optional Protocol to the ICCPR, imminence is only to be considered in regards of admissibility and not when assessing whether a real risk upon return is at hand. McAdam clearly states that the assessment relies on 'the likelihood of harm resulting from such removal, and arguably not on precisely how soon after removal it may manifest'.[189] McAdam argues that the confusing use of imminence in the not only the procedural assessment but also the substantive assessment of a potential violation, is regrettable.[190] It insinuates that before the right to life is imminently threatened there is no

[185] Matthew Scott, 'The Temporal Scope of Being Persecuted', *Climate Change, Disasters, and the Refugee Convention* (Cambridge Asylum and Migration Studies, Cambridge University Press 2020)

[186] McAdam, 'Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-refoulement', page 715.

[187] *AF (Kiribati),* para. 75.

[188] McAdam, 'Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-refoulement', page 716; Walter Kälin and Jörg Künzli, *The law of international human rights protection* (Oxford public international law, Second edition. edn, Oxford University Press 2019), page 533.

[189] Adrienne Anderson and others, 'IMMINENCE IN REFUGEE AND HUMAN RIGHTS LAW: A MISPLACED NOTION FOR INTERNATIONAL PROTECTION' (2019) 68 International & Comparative Law Quarterly 125

[190] McAdam, 'Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-refoulement', see footnote 91 in the article.

need for protection, which again points to an unreasonably high threshold for the applicant.[191]

[191] Ibid, page 720.

5 Discussion on States Different Obligations in a Context of Environmental Degradation

5.1 The Obligation of the State of Origin

The first part of this chapter analyzes the first research question and what conditions must lie for the State of origin to have an obligation to protect the right to life against environmental degradation.

5.1.1 The Legal Obligation Following the ICCPR

According to article 2 of the ICCPR, a State has a legal obligation to ensure and protect the rights of the ICCPR to all individuals under their jurisdiction. This is the main legal obligation of the ICCPR, and it contains a negative and a positive element. States should not only refrain from acts that violate a person's rights, but also take positive action to guarantee that said rights can be enjoyed.

With States being obliged to take measures to reduce the risk for harm, the key question in a context of environmental degradation is whether climate change can amount to such harm. If so, States would have an obligation to mitigate climate change impacts in order to avoid harm. General comment 36 has expanded the notion of environmental degradation and the Committee underlines that climate change does pose one of the biggest threats to the enjoyment of the right. Although not binding, the expression in the general comment is an indication that climate change threatens the right to life, and it is up to the State to address the threat.

According to scholar Le Moli, the expansion of the right to life through General comment 36, and cases that have followed, creates bridges on several points. Climate change is ascertained to be a threat to the right to life and following article 6, States have an obligation to take appropriate measures to respect and ensure the right to life. Consequently, it generates an implicit obligation for States to protect and preserve the environment. This understanding of the right to life containing a right to a healthy environment has been established on a universal level, which before only explicitly existed on a regional level. A bridge has also been built between theory and practice, as General comment 36 has been the ground for the Committee’s decisions in several cases. Most importantly, a concrete link between environmental degradation and the right to life has been demonstrated through the jurisprudence

of the Committee and opened for a possibility to claim a breach of the right to life based on climate change.[192]

However, the problem does not lie here, as it is relatively clear that climate change can constitute a violation of a right under the ICCPR. The problem is rather found in the next steps of the assessment – finding the causal link between climate change impacts and State action, establishing victimhood on an individual level despite the general effects of climate change and determining under what conditions climate change amounts to the level of harm required.

5.1.2 Causation Between State Action, Climate Change and Human Rights Violations

One of the most difficult parts in climate cases is establishing a causal link between environmental degradation, affected rights and the act or omission of a State. Not only must the perceived effects be caused by climate change, but the climate change impacts must also directly affect an individual's rights. The way climate change hinders the enjoyment of the rights under the ICCPR is diffuse and, following the reasoning of the Tribunal in *Teitiota*, it might be too much of a burden to attribute the effects of climate change to a State, as not even the most extensive litigation measures guarantee a seize in climate change impacts.[193]

Continuing with the necessities of a causal link, the specific effects on the individual must have been caused by State conduct – as in the State failing to mitigate climate change – and not derive from historic greenhouse gas emissions or emissions from other States.[194] The emissions of other States, and the reference to climate change impacts as an issue caused by global contribution, was lifted by Australia in *Billy*. The Committee argued that Australia is one of the greatest emitters of greenhouse gases, now and historically. The Committee emphasized the obligation under article 2 of the ICCPR to protect everyone under the State's jurisdiction from violations. The obligation includes life-threatening climate change impacts caused by other States or non-state actors, if the effects are felt under the State's jurisdiction.[195]

Even if a positive act cannot be attributed to the State, liability also follows if the State has failed to take necessary due diligence measures to prevent the

[192] Le Moli, 'THE HUMAN RIGHTS COMMITTEE, ENVIRONMENTAL PROTECTION AND THE RIGHT TO LIFE', pages 751-752.

[193] Benoit Mayer, 'Obligations Implied from Human Rights Treaties', *International Law Obligations on Climate Change Mitigation* (Oxford University Press 2022), page 154.

[194] Ibid, page 145.

[195] *Billy v. Australia*, para. 7.7-7.9.

harm caused by others.[196] General comment 36 clearly states, on several occasions, that an omission can generate a violation of the right to life just as much as an act. In *Caceres*, the Committee expressed that States should 'take all appropriate measures to address the general conditions in society that may give rise to threats to the right to life (…) and these conditions include environmental pollution'[197] – implying that human agency is not necessary for a State to be in breach of article 6.

Consequently, States have an obligation under the ICCPR to take positive action against climate change impacts, when affecting the rights of the individuals under the State's jurisdiction. In order to successfully claim a breach before the Committee, the applicant must be considered a victim and demonstrate personal effects of climate change, on a level severe enough to be considered life-threatening. The effects must also be a consequence of a State's act or omission.

5.1.3 Defining the Right to Life with Dignity

Since the issuing of General comment 36, and its reference to a right to life with dignity, the use of the article has significantly developed. Human dignity has been present in the background through both the preamble to the ICCPR and the formulation in the Universal Declaration on Human Rights but was seldom referred to in the Committee's case law, prior to General comment 36. Perhaps the term was self-evident enough to be discarded until it was explicitly referred to in connection with article 6. The reference has made it possible to bring claims of a violation of the right to life based on 'less severe' conditions, such as lack of access to water and difficulty to grow crops, as in *Teitiota* and *Billy*.

Still, the Committee avoids describing to what extent States must ensure a right to life with dignity, which raises questions of whether only the most basic needs must be guaranteed and who, in that case, gets to decide the content of those needs. As Sancin lifted in the dissenting opinion to *Teitiota*, the access to potable water does not mean that the water is safe to drink yet if looking at the majority's opinion, lack of access to drinkable water is not considered undignified. Neither is an increasing difficulty to grow crops, as long as it is not impossible.

The opening to the rights of the ICCPR containing also socio-economic aspects is positive for the possibility to claim a breach of the right to life based on climate change as it broadens scope of effects that can be felt by an

[196] Joseph and Castan, *International Covenant on Civil and Political Rights : Cases, Materials, and Commentary*, page 41.

[197] *Caceres v. Paraguay*, para. 7.3; General comment 36 on Article 6, para. 26.

individual. It also expands the legal obligation of States, as they are obliged to take measures that increase the life expectancy of the right bearers, protect them from direct, indirect and potential threats in the society as well as provide for the needs that lead to a life with dignity. From a climate change perspective, the intertwining of different rights is a step forward as climate change impacts often affect other rights before the right to life, it seldom leads to mortality but rather to an undignified life not far from.

The definition of the right to life with dignity is seemingly the right to something beyond merely existing. The Committee has stressed before that a risk resulting in actual death is not necessary for a violation to have occurred.[198] However, when looking at case law from the Committee concerning the right to life in a context of environmental degradation, the only case where the Committee found a State to be in breach is *Caceres*, which is also the only case were an actual death occurred. At the same time, the Committee did not find a breach of article 6 in *Billy* but held that articles 27 (the right to one's culture) and 17 (the right to family and home, inter alia) were violated. It is questionable how a right to life with dignity can mean anything less than a life encompassing a family, home and culture. As Muhumuza stated in the dissenting opinion in *Teitiota*, it would be 'counter-intuitive to the protection of life to wait for deaths to be very frequent and considerable in number in order to consider the threshold of risk as met'.[199] In *Billy*, the ICCPR was however applicable as violations were found, even if it did not amount to a violation of the right to life, and the remedy available could be attained. The expansion to socio-economic aspects is more crucial for individuals claiming a breach of article 7, as it can lead to a non-refoulement obligation. A further discussion on the expansion to socio-economic rights under article 7 is carried out under *chapter 5.2.3*.

5.2 The Obligation of the State of Destination

The second part of this chapter deals with the second research question and whether environmental degradation could trigger a non-refoulement obligation for the State of destination.

5.2.1 The Legal Obligation Following the ICCPR

The obligation of a State to protect the rights of the individuals under their jurisdiction, extends to protection against harm occurring under another States' jurisdiction. According to General comment 31 on article 2, the extended duty includes not deporting individuals to a place where there is a real risk for irreparable harm – reflecting a principle of non-refoulement. The non-

[198] General comment 36 on Article 6, para. 7; *Caceres v. Paraguay*, para. 7.3; *Teitiota v. New Zealand*, para. 9.4.

[199] *Individual opinion: Muhumuza,* para. 5; *Teitiota v. New Zealand*, para. 5.

refoulement obligation under the ICCPR prohibits the type of treatment expressed in article 7 and is considered a norm of customary international law. The principle has been recognized on a regional and a global level and thus offers protection for a broader group of people than those who fall under the scope of the Refugee Convention.

The existence of a non-refoulement obligation under the ICCPR is commonly accepted and has been applied in deportation cases brought before the Committee. In a context of environmental degradation the question rather is whether climate change impacts can amount to irreparable harm that can trigger a non-refoulement obligation.

In *Teitiota*, the only climate induced non-refoulement case under the ICCPR yet, the Committee did not consider article 7. As McAdam stated, it would have been interesting to see the evaluation of article 7 as it indicates a slightly lower threshold than article 6 that was at center of the claim. Climate change is established to be one of the most pressing issues the world faces right now and following case law from the ECtHR, generally degrading living conditions can equal a breach of article 3 ECHR (equivalent to article 7 ICCPR). Despite the outcome in *Teitiota*, the Committee, and the national court of New Zealand, were clear that the case should not be seen as though environmental degradation could never trigger a non-refoulement obligation. It just requires certain circumstances and exceptional conditions in the individual case. The evaluation that the Tribunal in New Zealand did is important for the development of climate cases. It shows that national courts are willing to consider climate change as a cause for migration and further give significance to the Committee's general comments. The authoritativeness of the Committee's decision might give rise to a climate-induced non-refoulement obligation that State parties choose to implement in national migration cases, creating precedential obligations on a national level. Only when States apply the general comments and views of the Committee in their practice, can the extended interpretation of the articles in the ICCPR be considered binding. Therefore, the general comments and views can play a big role in international legislation, if State parties act accordingly.

Even if *Teitiota* has opened for a new type of reasoning under the ICCPR, the high threshold set by the Committee might hinder future applicants from gaining non-refoulement privileges. The circumstances in *Teitiota* concerned lack of drinking water, decreased ability to grow crops, regular flooding, submersion of some island territories and health issues of the applicant's children - it is hard to think of another more pressing situation, apart from actual death. Nonetheless, it is up to the States themselves to do the risk assessment and evaluate the evidence brought by the applicant, following the State's margin of appreciation. Except the idea that environmental degradation could trigger

non-refoulement in a future case, the Committee also established the importance that States do a thorough investigation and individualized assessment in deportation cases.

5.2.2 The Human Rights Committee's Inconsistent Language Use

I find McAdam's argument regarding the use of the term 'imminent' important for the issue at hand, as it highlights an unclarity in the applicability of the ICCPR. In the national judgement in *Teitiota*, the Tribunal used the threshold for imminence in the consideration of the merits, by referring to the Committee's case law. The Committee however, following the Optional Protocol to the ICCPR, should only use the imminence requirement when considering admissibility. Following General comment 31, when doing the risk assessment, the risk must be real and reasonably foreseeable to equal a breach of the non-refoulement obligation. Consequently, the wording appears lighter than required for admissibility (which is an imminent risk).

Considering the risk assessment in the climate cases discussed under *chapter 3.3*, the threshold is different in all three cases. In *Billy*, the Committee considers that the applicants have already suffered from climate change impacts and weighs it together with the high probability of climate change impacts in the future. In total, the Committee finds that the applicants have experienced an actual, and face a potential, violation of their rights under the ICCPR.[200] Although for the assessment of whether a breach of the right to life has occurred, the Committee chose the higher threshold used in *Teitiota* – namely, a real and reasonably foreseeable risk.[201] In *Caceres*, which circumstances are analogously closer to *Billy*, the Committee sets a lower threshold – simply a reasonably foreseeable risk.[202] This lower threshold is also mentioned in General comment 36 and thus seems to be the established level of proof.[203]

The higher threshold, of not only a reasonably foreseeable risk but also a real risk, has been established solely in deportation cases such as *A.R.J v. Australia* and is expressed in combination with article 7 in General comment 31.[204] Therefore, a real risk is to be used foremost in non-refoulement cases, which *Billy* is not. As the Committee did not find a breach of the right to life in *Billy*, when applying the higher threshold, maybe a breach would be found if the lower threshold was used.

[200] *Billy v. Australia*, para. 7.10.
[201] *Teitiota v. New Zealand*, para. 9.4.
[202] *Caceres v. Paraguay*, para.
[203] The reference to 'reasonably foreseeable threats' occurs in several paragraphs in General comment 36 on Article 6, for example paragraphs 7 and 18.
[204] *A.R.J v. Australia*, para. 6.14; General comment 31 on Article 7, para. 12.

This is an example of the inconsistent use of language in the Committee's decisions. It not only makes it difficult for States to determine their obligations under the ICCPR, but mainly leads to a legal uncertainty for the individuals who file complaints. The inconsistent use of the imminence requirement creates an unreasonably high thresholds for individuals, especially for individuals who suffer from climate change impacts, as these effects are often distant, diffuse and difficult to attribute to State action.

5.2.3 Socio-economic Aspects of Non-refoulement

The ICESCR provides a similar mechanism to file an individual complaint as the ICCPR does.[205] However, to trigger a non-refoulement obligation there must be a certain level of severity, leading to the lack of non-refoulement cases brought before the committee monitoring the ICESCR. Given that the ICCPR seems to have expanded into the socio-economic sphere, through the Committee's jurisprudence, claims that concern rights under the ICESCR could instead be brought under the ICCPR. Necessary though is that the violations of socio-economic rights are adverse enough to be considered a threat to the right to life or the prohibition against ill-treatment. Only then can the circumstances fall under the scope of the non-refoulement obligation following the ICCPR.[206]

Regarding the corresponding articles of the ECHR to the right to life and the prohibition against ill-treatment, the ECtHR has been restrictive in letting people claim the right to stay in a country based on socio-economic reasons. The court wishes to avoid people benefiting from the higher standards provided for in the State of destination than in the State of origin – the inability to provide equal standards as the State of destination should not trigger a non-refoulement obligation. In a few exceptional cases, the ECtHR has considered generally degrading living conditions to trigger a non-refoulement obligation. Nevertheless, it requires compelling humanitarian considerations to result in a breach. The Committee of the ICCPR has reasoned similarly and established a level of severity to reach for a non-refoulement obligation to exist. According to General comment 31, substantial grounds must lay at hand to prove a real risk of irreparable harm.[207]

No case has yet been examined by an international court or quasi-judicial body regarding if climate change can equal ill-treatment and we are yet to find out what it would eventually lead to. It is relevant for the development

[205] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UNGA Res 63/117 (5 March 2009) UNTS 2922

[206] UN Office of the High Commissioner for Human Rights, 'The principle of non-refoulement under international human rights law'

[207] McAdam and Oxford Scholarship Online, *Complementary protection in international refugee law*, page 167.

of climate induced migration cases, as ill-treatment is the clearest form of harm to trigger a non-refoulement obligation as a customary norm in international human rights law.

5.2.4 Migration as an Adaptation Measure

As this paper derives from the ICCPR, a human rights-based approach is natural. However, as the question at hand concerns climate change it is of relevance to briefly shift focus and approach the issue from an environmental perspective.

According to the ICCPR, States are obliged to take measures to reduce or prevent harm. If climate change can equal such harm, States are obligated to take measures to litigate climate change impacts. This has been confirmed by General comment 36, which, as mentioned before, holds that climate change is a threat to the enjoyment of rights under the ICCPR. The goal of the ICCPR is to protect the rights of people and not the objectives that the rights might concern. However, with climate change posing such an immediate threat to human rights, States are also obliged to preserve and protect the environment from degradation in order to avoid human rights violations. Thus, climate change litigation is important for the realization of the ICCPR. Climate change litigation can consist of either adaptation or mitigation. Adaptation are measures that adapt to the present impacts of climate change, for example developing crops that better endure drought, while mitigation are measures that slow down climate change, such as cutting greenhouse gas emissions. Adaptation is insufficient by itself and must be complemented by mitigation measures to fully target climate change impacts.[208]

Migration is a good example of an adaptation strategy.[209] Evidently, Teitiota sought asylum in New Zealand as a way to adapt to the climate change impacts in Kiribati – simply by moving to a country less affected. In regards of protecting human rights, adaptation is more tangible and a direct solution for the people affected. Mitigation will hardly be noticeable on an individual level yet is an overall better approach to climate change and the survival of the entire planet.[210] Although, the best approach would be to address climate change with both mitigation and adaptation measures as it would cover the impacts on a short-, medium- and long-term basis. People who today are affected by climate change will get the help they need, people in the future will not have to turn to migration for adaptation as mitigating efforts will have,

[208] Mayer, 'Obligations Implied from Human Rights Treaties'

[209] The Nansen Initiative, 'Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change '

[210] Mayer, 'Obligations Implied from Human Rights Treaties'

hopefully, stalled the impacts and provided a better living situation in the State of origin.

In denying Teitiota the right to stay, the Committee chose a mitigation measure instead of adaptation. The Committee argued that Kiribati's National Action Plan would lead to a reduction in climate change impacts. The time frame set to 10-15 years was an estimation on the time left for Kiribati to act and provide better living standards for its citizens – reflecting the idea of national action before international intervention. From a human rights perspective however, Teitiota would probably have benefited more from staying in New Zealand. It would be a more tangible improvement of his and his family's lives, than waiting for Kiribati to take climate action in 15 years.[211]

McAdam, however, lifts in her report that according to science there is support to the time frame set by the Tribunal and the Committee. Innovations and climate change adaptation plans will only develop over the years and contribute to more efficient solutions. The idea that Kiribati and Australia will have time to take adequate measures before submersion is, according to science, not completely far off.[212]

[211] *Teitiota v. New Zealand,* para. 9.12.

[212] McAdam, 'Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-refoulement', page 719.

6 Summary of Findings

There is a distinction in obligation for the State of origin and the State of destination when dealing with climate induced migration, yet they both derive from the duty to protect, respect and ensure individuals' right to life and right to not be exposed to ill-treatment.

General comment 36 is to date the most prominent document for the connection between the ICCPR and environmental degradation. The Committee clearly states that human rights law and environmental law are inherently reciprocal, that the protection of human rights requires the protection of the environment and vice versa. The ICCPR is fundamentally a human rights treaty and the obligation to cooperate on climate change mitigation can therefore only be invoked when there are foreseeable benefits for the enjoyment of the right in question. It requires a consideration of interests – State interest versus the interest of the individual. In summary, States have an obligation to cooperate, but the nature of the obligation depends on the right concerned.

According to paragraphs 26 and 62 of General comment 36, environmental degradation poses both a direct threat to the right to life and a potential threat in the future. In order for States to protect and ensure the right to life, especially a life with dignity, measures to protect the environment must be taken. These measures include providing adequate living conditions such as access to food and water as well as increased preparedness for natural and manmade disasters. Consequently, the State of origin has an obligation to protect those under its jurisdiction from environmental degradation and take adequate mitigation measures. With the obligation expanding from international environmental law into human rights law, hopefully States will take measures that focus on protecting people from climate change impacts that will lead to a decrease in climate induced migration.

Following the decision in *Teitiota*, environmental degradation can amount to a breach of article 6, triggering a non-refoulement obligation for the State of destination. It does, however, require exceptional circumstances that are not only generally applicable to the inhabitants of the State of origin. Regarding General comment 31, on article 7 and the prohibition against ill-treatment, the principle of non-refoulement is mainly attributed to treatment expressed in article 7. The scope of non-refoulement under human rights law has been expanded through the jurisdiction of the ECtHR and reflected upon in the Committee's jurisdiction. Although the prerequisites should be interpreted in a more restrictive way, general degrading conditions have been considered to trigger a non-refoulement obligation. Yet, there has not been any case before the Committee where article 7 has been evaluated in the context of

environmental degradation. Regarding the Committee's conclusion that article 6 can trigger a non-refoulement obligation due to climate change impacts, it is imaginable that a similar evaluation would be made for article 7. It does, however, set a higher threshold for the applicant when invoking article 7, as he or she must show a real and reasonably foreseeable risk as opposed to only a reasonably foreseeable risk.

Even if the Committee's decisions in its recent climate cases make for groundbreaking jurisprudence, it is important to remember that none of the Committee's statements are binding. The views and general comments are guiding in the interpretation of the ICCPR but cannot be seen as legislation. However, the Committee's work contributes to a mapping of the current situation. The concluding observations of State reports and the reasoning in individual complaints show the current human rights situation in a State, as well as how climate change affects different communities. Even if an individual complaint does not generate direct consequences for the State in breach, the evidence brought forward shines light on the circumstances which people live in. Maybe the outcome in Teitiota inspires others to file similar complaints, which would further reflect the scale of climate induced migration. The opening also pressures States to at least reflect upon how climate change affects human rights and how it affects their obligations under the ICCPR.

6.1 Outlook for the Future

Initially when starting my research for this thesis, my firm opinion was that the outcome of *Teitiota* was wrong. As climate change is a global issue, its consequences, such as climate induced migration, should also be dealt with cooperatively. It is difficult to establish a causal link between State acts and personal effects due to climate change, yet it is established that all States are responsible for greenhouse gas emissions and that climate change poses a real threat to human rights. With background to this reasoning, a complaint should be met with support and understanding, when invoking environmental degradation as a violation of a right under the ICCPR.

I also agree with the dissenting opinions of *Teitiota*, that the circumstances were sufficiently severe to amount to a breach of article 6 and that anything more severe only could mean death. I am in favor of the expansion the Committee has done through article 36 and hope to see States acting accordingly, despite it not being binding.

Along the way, I have however come to understand more and more the reasoning behind the Committee's decision and started to question to what extent environmental degradation can and should take place in human rights law. My own reflection on why the Committee reasoned as they did is that it opened a door by accepting that environmental degradation adversely affects

human rights but if Teitiota was granted to stay in New Zealand the door would probably be opened too wide. As the Tribunal of New Zealand lifted, the effects Teitiota felt in Kiribati was felt equally by all the citizens of Kiribati. If New Zealand was prohibited from sending Teitiota back, would it not allow any Kiribati citizen to stay in New Zealand by building a case on the same conditions as in *Teitiota*? Perhaps it would put an unreasonable burden on States, such as New Zealand, that are the closest located States to many small island developing States facing adverse climate change impacts. Sweden, for example, is situated far from the most affected countries and would probably not be affected by climate induced migration to the same extent as New Zealand and Australia – demonstrating how climate change is a global issue that affects disproportionally.

On the one hand, as migration is considered a mean of adaptation, establishing a general prohibition on non-refoulement due to environmental degradation would not target the root cause (being climate change) but rather only mitigate the symptoms. It is possibly better then to stick with the Committee's line and assess the risk in each individual case, so to avoid increasing climate induced migration. This approach however requires vigorous action and cooperation from States to actively mitigate climate change impacts and come to terms with the effects on human rights.

On the other hand, it is important to remember the aim of the ICCPR – namely, to protect the rights of individuals. The ICCPR is not an instrument intended to deal directly with environmental degradation, it only recognizes climate change as harm when affecting human rights. The ICCPR sets obligations for States that protect people – and should protect the environment when necessary for fulfilling these obligations – but does not itself contribute to reduced climate change impacts. It is interesting to see how the Committee's decision in *Teitiota* is more directed to mitigating climate change, by encouraging Kiribati to implement its climate action plan, than ensuring the enjoyment of Teitiota's human rights, by allowing him to stay. Even if the Committee avoids being clear about the possibility to claim a violation of a right due to environmental degradation, climate induced migration will continue to be an issue and people's human rights will continue to be affected.

The expansion of human rights into the environmental and socio-economic sphere is welcome but might give too high hopes for a solution for people crossing international borders due to climate change. It is not a question of if, but when the next climate induced non-refoulement case will arise – only then will we see how Teitiota has formed the scope of article 6 and 7 in a context of environmental degradation.

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