

The right to enjoy a life with dignity and the *non-refoulement* obligation in the context of climate-induced migration

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1. Introduction

The *non-refoulement* obligation has been the subject of in-depth analysis in both International and European Union Law.¹ While the *non-refoulement* obligation is firmly established in several international human rights instruments, the criteria defining the scope of protection *ratione personae* and *ratione materiae* are not always identical.² In this article, however, reference will be made to the *non-refoulement* obligation as established under general international law:³ the rule prohibits the removal of an individual to a third country or a country of origin where he/she may face persecution, severe ill-treatment or other serious violations of his/her fundamental rights.⁴ The concrete scope of application of the obligation,

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¹ See, among others, M Thiago de Souza, *Non-Refoulement. Alcance e reflexos na proteção aos refugiados* (Dialética 2023); M Penelope, 'Non-Refoulement' in C Costello, M Foster, J McAdam (eds) *The Oxford Handbook of International Refugee Law* (OUP 2021) 899.

² On this issue see J De Coninck, A Soete, 'Non-Refoulement and Climate Change-Induced Displacement: Regional and International Cross-Fertilization?' (2022) 31 *Review of Eur Comp & Intl Environmental L* 421, 422.

³ See, among others, GS Goodwin-Gill, *International Law and the Movement of Persons between States* (OUP 1978), 140-142; GS Goodwin-Gill, J McAdam, *The Refugee in International Law* (3rd edn, OUP 2007), 226-232 and 343-354 and F Salerno, 'L'obbligo internazionale di non-refoulement dei richiedenti asilo' in C Favilli (ed), *Procedure e garanzie del diritto di asilo* (Cedam 2011) 3, 7-10 and 16-20.

⁴ C Wouters, 'International Refugee and Human Rights Law: Partners in Ensuring International Protection and Asylum' in S Sheeran, N Rodley (eds) *Routledge Handbook of International Human Rights Law* (Routledge 2013) 232.

however, still appears uncertain in some situations,⁵ including climate-induced migration.

Climate change affects a wide range of human rights, including both economic and social rights, as well as civil rights, such as the right to life, the right to private life and the right not to be subjected to inhuman or degrading treatment. In its 2018 General Comment No 36, the Human Rights Committee (HRC) clearly stated that environmental degradation associated with climate change can be brought within the scope of a violation of the right to life under Article 6 of the International Covenant on Civil and Political Rights (ICCPR);⁶ furthermore, since *Teitiota v New Zealand*,⁷ the possible role for the *non-refoulement* obligation in the context of climate-induced migration has been addressed.⁸

However, the HRC has established a very high threshold regarding the violation of Article 6 ICCPR in the context of a removal,⁹ so that only in the direst of circumstances can an individual find concrete protection.¹⁰ First, the Committee stated that there must be ‘substantial grounds for believing that there is a real risk of irreparable harm such as that contemplated in Articles 6 and 7 of the Covenant’ and clarified that ‘there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists’. Second, it pointed out that ‘the risk must be personal’ and therefore it ‘cannot derive merely from the general conditions in the receiving State, except in the most extreme cases’.¹¹ Furthermore, the HRC has assessed the relevant ‘risk of harm’ as regards the right to life in its various components (access to water, food and other essential goods)

⁵ See, for example, L Salvadego, ‘Le principe de non-refoulement en mer’, in H Raspail (ed), *Les droits de l’homme et la mer. Actes du colloque du Mans, 24 et 25 mai 2018* (Pedone 2020) 165.

⁶ HRC, ‘General Comment No 36’ UN Doc CCPR/C/GC/36 (30 October 2018) para 62; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1967) 999 UNTS 171, Art 6.

⁷ HRC, *Teitiota v New Zealand*, Comm No 2728/2016 (24 October 2019).

⁸ *ibid*, paras 9.6-9.13, para 9.11.

⁹ In this regard, see also E Sommario, ‘When Climate Change and Human Rights Meet: A brief Comment on the UN Human Rights Committee’s *Teitiota* Decision’ (2021) 77 QIL-Questions Intl L 51 at 57-61; J McAdam, ‘Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of *Non-refoulement*’ (2020) 114 AJIL 709 at 714.

¹⁰ See also S Behrman, A Kent, ‘The *Teitiota* Case and the Limitations of the Human Rights Framework’ (2020) 75 QIL-Questions Intl L 33.

¹¹ HRC, *Teitiota v New Zealand* (n 7) para 9.3.



taken individually, putting on the applicant the full burden of proof concerning the ‘real risk of irreparable harm’ in case of *refoulement*.¹²

This outcome, however, does not seem coherent with the HRC finding that the right to life is not restricted to mere existence but encompasses a wider scope – the right ‘to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to *enjoy a life with dignity*’;¹³ furthermore, it does not seem coherent with recent developments in the context of both judicial and quasi-judicial systems for the protection of human rights.¹⁴

This article seeks precisely to explore the scope of application of the *non-refoulement* obligation in the context of climate-induced migration through the lens of the protection of ‘human dignity’. To this end, the analysis will first briefly focus on the legal nature of human dignity and its functions in the specific context of the international protection of human rights (section 2). The substance and extent of the right to enjoy a life with dignity will then be assessed in the context of climate change litigation before monitoring mechanisms for the protection of human rights, in order to gain insight into the precise extent of positive obligations established for States in particular situations of scarcity of resources (section 3). Finally, the right to enjoy a life with dignity will be discussed in the context of the *non-refoulement* obligation (section 4).

2. *Brief remarks on the legal nature of human dignity and its functions in international human rights law*

Although the concept of ‘human dignity’ has been the subject of extensive analysis in general legal theory,¹⁵ it has only recently assumed

¹² See again De Coninck, Soete, ‘*Non-Refoulement* and Climate Change-Induced Displacement: Regional and International Cross-Fertilization?’ (n 2), 428 and 431-432.

¹³ HRC, General Comment No 36 (n 6), para 3 (emphasis added).

¹⁴ On this issue, see sections 3 and 4 below.

¹⁵ See J Tasioulas, ‘Human Dignity and the Foundations of Human Rights’, in C McCrudden (ed), *Understanding Human Dignity* (OUP 2014) 291-313; B De Gaay Fortman, ‘Equal Dignity in International Human Rights’, in M Düwell, J Braarvig, R Brownsword, D Mieth (eds), *The Cambridge Handbook on Human Dignity* (CUP 2014) 355-36, J Waldron, *Dignity, Rank and Rights* (OUP 2012); P Capps, *Human Dignity and the Foundations of International Law* (OUP 2009).



wide prominence among international law scholars,¹⁶ who have highlighted its legal nature and functions in the context of international law.¹⁷

The recognition of dignity as an essential ‘quality’ of every human being lies at the core and foundation of the international protection of human rights.¹⁸ Dignity made its first appearance after the Second World War in the 1945 United Nations Charter¹⁹ and in the 1948 Universal Declaration of Human Rights (UDHR),²⁰ despite not being provided with a precise definition.²¹

Since its first appearance at the international level, ‘human dignity’ has been included in an impressive number of international conventions and soft law instruments,²² including those focusing on the protection of the environment.²³

Far from being an empty notion,²⁴ human dignity expresses a core

¹⁶ For a comprehensive legal analysis of the different meanings of human dignity, see P De Sena, ‘Dignité humaine et droit international’ forthcoming in *Recueil des Cours de l’Académie de Droit International* and A Gattini, R Garciandia, P Webb (eds), *Human Dignity and International Law* (Brill 2021). For previous studies on the issue, see C Le Bris, *L’humanité saisie par le droit international public* (LGDJ 2012) 101; JA Frowein, ‘Human Dignity in International Law’ in D Kretzmer, E Klein (eds), *The Concept of Human Dignity in Human Right Discourse* (Kluwer Law International 2002) 121; O Schachter, ‘Human Dignity as a Normative Concept’ (1983) 77 *AJIL* 848.

¹⁷ See P De Sena, ‘Dignità umana in senso oggettivo e diritto internazionale’ (2017) 11 *Diritti umani e diritto internazionale* 573; P De Sena, ‘Dignità umana in senso statico e diritto internazionale’ (2023) 17 *Diritti umani e diritto internazionale* 507.

¹⁸ See J Waldron, ‘Dignity, Rank, and Rights: The 2009 Tanner Lectures at UC Berkeley’ (2009) New York University Public Law and Legal Theory Working Papers, Paper 151, available at [pers.ssrn.com](https://papers.ssrn.com); P Capps, *Human Dignity and the Foundations of International Law* (Oxford 2009).

¹⁹ See the UN Charter Preamble.

²⁰ Universal Declaration of Human Rights, adopted by the United Nations General Assembly, res 217 A, 10 December 1948.

²¹ In the UDHR Preamble, dignity is considered both as the ‘[...] foundation of freedom, justice and peace in the world [...]’ and the object of a common ‘faith’ of the ‘peoples of the United Nations’. According to Art 1(1) UDHR ‘[a]ll human beings are born free and equal in dignity and rights [...]’. Dignity is also mentioned in the UDHR under Art 22 on the right to social security and Art 23(3) on the right to work.

²² For an extensive list of references, see again De Sena, ‘Dignità umana in senso statico’ (n 17) 512-515 and 528.

²³ See e.g. Stockholm Declaration on the Human Environment, 1972, available in (1973) 14 *The Harvard Intl L J* 422, principle 1.

²⁴ According to Schachter, for example, dignity could be considered as no more than ‘an ideal that has not yet been given substantial specific content’: see O Schachter, ‘Human Dignity as a Normative Concept’ (1983) 77 *AJIL* 848, 852.



value of the contemporary international legal order and embodies a well-established principle of international law²⁵ in the specific fields of both international human rights law and international humanitarian law.²⁶

First, the recognition of human dignity implies a minimum standard of treatment to be observed by the State with respect to individuals finding themselves under the – *de jure* or *de facto* – jurisdiction of that State, with respect to both civil and political rights, and social, economic, and cultural rights.²⁷

Furthermore, human dignity also plays a crucial role in the framework of judicial interpretation, as it exercises a traditional expansive function in relation to individual rights.²⁸ From this perspective, according to some scholars, human dignity is a source of both individual rights and State obligations in the field of human rights law.²⁹ On the one hand, within the case law of both judicial and quasi-judicial systems for the protection of human rights, human dignity functions as a source from which all established human rights can be expanded in their concrete application.³⁰ It also underpins the extension of some civil and political rights to situations not expressly covered by the relevant treaty provisions.³¹ On the other hand, human dignity concerns both cases in which the violation of rights is the material expression of the activity performed by a State and cases in which it is the result of activities carried out by private individuals – in the absence of positive actions by the State to prevent and/or

²⁵ See ‘First Report by Special Rapporteur M Vázquez-Bermúdez on General Principles of Law’ UN Doc A/CN.4/732 (5 April 2019) 67 (specifically Draft Conclusion 3) and ‘Third Report on General Principles of Law’ UN Doc A/CN.4/753 (18 April 2022) 12.

²⁶ On this issue, see P De Sena, ‘Dignità umana in senso statico’ (n 17) 538-541.

²⁷ P De Sena, ‘Slaveries and New Slaveries: Which Role for Human Dignity?’ (2019) 64 QIL-Questions Intl L, Zoom-in 7; P De Sena, ‘Dignità umana in senso statico’ (n 17) 525.

²⁸ In this regard, see also C McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19 EJIL 655, 713.

²⁹ In this regard, see G Le Moli, *Human Dignity in International Law* (CUP 2021) 238.

³⁰ On the issue, see P De Sena, ‘Dignità umana in senso statico’ (n 17) 515 and the references to the case law cited in the paper.

³¹ See e.g. ECtHR, *Rantsev v Russia and Cyprus*, App No 25965/04 (7 January 2010); P De Sena, ‘Slaveries and new slaveries: Which role for human dignity?’ (n 27) 11.



investigate and repress the violations.³² The expansive role of human dignity does not only concern the scope of the obligations arising from individual rights; it also fosters an evolutionary interpretation of individual rights according to Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties (VCLT).³³

3. *The notion and the extent of the right to enjoy a life with dignity in the case law of human rights courts and bodies*

After briefly clarifying the role and the function of human dignity in the context of human rights protection,³⁴ it is now possible to assess the notion and the extent of the right to enjoy a life with dignity in the context of climate-induced migration. Limited guidance in this respect can be found in the advisory opinion of the Inter-American Court of Human Rights (I-ACtHR) on the environment and human rights.³⁵ Furthermore, climate change litigation has so far referred to the right to enjoy a life with dignity in only a few cases before judicial and quasi-judicial mechanisms for the protection of human rights, and without an appropriate elaboration.³⁶

Thus, for example, in *Toussaint v Canada*,³⁷ the HRC clarified that the right to life under Article 6 ICCPR cannot be intended in a restrictive manner, i.e. States Parties could violate Article 6 even in the absence of

³² See again P De Sena, 'Dignità umana in senso statico' (n 17) 527.

³³ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force on 27 January 1980) 1155 UNTS 331. On the role of human dignity for the evolution of individual rights, see also C McCrudden, 'Human Dignity in Human Rights Interpretation' (2008) EJIL 655, 724.

³⁴ See section 2 above.

³⁵ I-ACtHR, *The Environment and Human Rights* (Advisory Opinion OC-23/17 15 November 2017) paras 108-114. See also the African Commission on Human and Peoples' Rights, 'General Comment no 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)' (18 November 2015) para 3.

³⁶ See section 1 above. For the notion of dignity in the *Teitiota* case, see S Atapattu, 'Migrating with Dignity. Protecting the Rights of 'Climate Refugees' with the Non-refoulement Principle', in S Behrman, A Kent (eds), *Climate Refugees: Global, Local, and Critical Approaches* (CUP 2022) 127.

³⁷ HRC, *Toussaint v Canada*, Comm No 2348/2014 (24 July 2018).



loss of life.³⁸ In *Portillo Cáceres and others v Paraguay*,³⁹ the HRC recognised that States parties should take all appropriate (positive) measures to address the general conditions in society giving rise to threats to the right to life or prevent individuals from enjoying their right to life with dignity, including environmental pollution.⁴⁰ In *Teitiota v New Zealand*, as said, the HRC further recalled that the obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life;⁴¹ the Committee also recognised 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.⁴² In *Billy and others v Australia*,⁴³ the Committee reiterated the duty of States to address the general conditions in society that can pose direct threats to individuals' right to life or preclude them from enjoying that right with dignity.⁴⁴

Even the European Court of Human Rights (ECtHR), in its recent judgments on climate change, has provided no clear guidance as regards the extent of the right to enjoy a life with dignity. In *KlimaSeniorinnen v Switzerland*,⁴⁵ the applicants claimed a violation of Articles 2, 8 and 6(1) ECHR in relation to the negative effects, specifically on elderly people,

³⁸ The HRC stated that, at a minimum, States parties are under an obligation to provide access to existing health-care services, since lack of access to such services would expose the individual to a reasonably foreseeable risk of death (HRC, *Toussaint v Canada* (n 37) para 11.3).

³⁹ HRC, *Portillo Cáceres and others v Paraguay*, Comm No 2751/2016 (9 August 2019), para 7.3.

⁴⁰ See also General Comment No 36, para 26.

⁴¹ See again HRC, *Teitiota v New Zealand* (n 7) para 9.4.

⁴² *Ibid.*

⁴³ HRC, *Daniel Billy and others v Australia (Torres Strait Islanders)*, Comm No 3624/2019 (22 September 2022). For a comment, see R Luporini, 'Climate Change Litigation before International Human Rights Bodies: Insights from Daniel Billy et al. v. Australia (Torres Strait Islanders Case) (2023) 3 Italian Rev Int Comp L 238.

⁴⁴ HRC, *Daniel Billy and others v Australia* (n 43) para 8.3.

⁴⁵ ECtHR, *Verein KlimaSeniorinnen Schweiz and others v Switzerland* (Judgment 9 April 2024); for a comment, see R Pisillo Mazzeschi, 'Diritti umani e cambiamento climatico: brevi note sulla sentenza KlimaSeniorinnen della Corte di Strasburgo' (2024) *Diritti umani e diritto internazionale* 383; A Hösli and M Rehmann, 'Verein KlimaSeniorinnen Schweiz and Others v. Switzerland: The European Court of Human Rights' Answer to Climate Change' (2024) 14 *Climate L* 263 and M Milanovic, 'A Quick Take on the European Court's Climate Change Judgments' *EJIL: Talk!* (9 April 2024).

of heatwaves due to climate change and the associated high risks of mortality and disease. The Court derived ‘from Article 8 a right for individuals to enjoy effective protection by the State authorities from serious adverse effects on their life, health, well-being and quality of life arising from the harmful effects and risks caused by climate change’,⁴⁶ without offering further clarifications.

Considering this background, it is therefore necessary to assess the precise meaning and extent of the right to enjoy a life with dignity in a broader context, while analysing the decisions adopted by judicial and quasi-judicial bodies tasked with monitoring the protection of human rights, in particular concerning other especially vulnerable individuals or groups. Similar considerations can also be applied to climate-induced migrants, who *de lege ferenda* should be considered a particularly vulnerable group.⁴⁷

The I-ACtHR has relied on a broad, dynamic interpretation of the right to life in its case law, mainly dedicated to minority groups (e.g. indigenous people) or vulnerable individuals (e.g. children and the elderly). The Court firstly referred to a ‘right to life in dignity’ in *Villagrán-Morales and others v Guatemala*,⁴⁸ where it stated that:

‘in essence, the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a *dignified existence*’.⁴⁹

⁴⁶ ECtHR, *Verein KlimaSeniorinnen Schweiz and others v Switzerland* (n 45) para 544.

⁴⁷ See Commission on Human Rights, ‘Human Rights of Migrants’ UN Doc E/CN.4/RES/2005/47 (20 April 2005) para 5; Committee on Economic, Cultural and Social Rights, ‘Maastricht Guidelines on Violations of Economic, Social and Cultural Rights’ UN Doc E/C.12/2000/13 (27 November 2000). For the notion of ‘vulnerability’ in ECtHR case law see, among others, ECtHR, *Dudgeon v the United Kingdom*, App No 7525/76 (Judgment 22 October 1981) para 47; *Chapman v the United Kingdom* (GC), App No 27238/95 (Judgment 18 January 2001) para 93; *D.H. and others v the Czech Republic* (GC), App No 57325/00 (Judgment 13 November 2007) para 181; *Alajos Kiss v Hungary*, App No 38832/06 (Judgment 20 May 2010) para 42; *Kiyutin v Russia*, App No 2700/10 (Judgment 10 March 2011) para 63; *M.S.S. v Belgium and Greece* (GC), App No 30696/09 (Judgment 21 January 2011) para 232.

⁴⁸ I-ACtHR, *Villagrán-Morales and others v Guatemala* (Case of the ‘Street Children’), (Judgment 19 November 1999).

⁴⁹ *ibid* para 144 (emphasis added).



This leading case⁵⁰ made it clear that States must create the conditions that guarantee an individual a dignified existence—which includes, at its minimum, a basic standard of living—including access to a minimum level of social and cultural rights, such as essential food, shelter and medical care,⁵¹ thus also emphasising the interrelation between and indivisibility of human rights.⁵²

In its case law related to claims of indigenous people alleging violations of their right to life, the Court has explicitly correlated the living conditions of the community with the right to life and it has clearly taken into consideration the link of indigenous communities with their ancestral lands as an element to be protected for the sake of their very survival.⁵³ In doing so, it has incorporated socio-economic and cultural rights into the enjoyment of the right to life.⁵⁴ According to some authors, the Court has thus ‘merged’ the (civil) right to life with socio-economic rights,⁵⁵ which are largely recognised as rights of progressive realisation.⁵⁶

In order to give effect to the right to a ‘dignified life’, the Court has also included a set of positive obligations for States.⁵⁷ These obligations extend to the realisation of certain socio-economic and cultural rights,

⁵⁰ On the importance of the case, see AA Cançado Trindade, ‘The Right to Cultural Identity in the Evolving Jurisprudential Construction of the Inter-American Court of Human Rights’ in S Yee, J-Y Morin (eds), *Multiculturalism and International Law. Essays in Honour of Edward McWhinney* (Martinus Nijhoff 2009) 479 and B Goldewijk and others (eds), *Dignity and Human Rights: The Implementation of Economic, Social and Cultural Rights* (Intersentia 2002) 48.

⁵¹ E Wicks, *The Right to Life and Conflicting Interests* (OUP 2010) 218.

⁵² P Morais Correa, ‘Poverty as a Violation of Human Rights: The Case of Street Children in Guatemala and Brazil’ (2013) 10 *Brazilian J Intl L* 334, 341.

⁵³ I-ACtHR, *Awas Tingni Community v Nicaragua (Mayagna Sumo)* (Judgment 31 August 2001).

⁵⁴ I-ACtHR, *Yakye Axa Indigenous Community v Paraguay* (Judgment 17 June 2005) para 161; see also *Sawboyamaxa Indigenous Community v Paraguay* (Judgment 29 March 2006).

⁵⁵ JM Pasqualucci, ‘Right to a Dignified Life (Vida Digna): The Integration of Economic and Social Rights with Civil and Political Rights in the Inter-American Human Rights System’ (2008) 31 *Hastings Intl & Comp L Rev* 3.

⁵⁶ Office of the High Commissioner for Human Rights, ‘Frequently Asked Questions on Economic, Social and Cultural Rights’, Factsheet No 33 (2008) 13.

⁵⁷ Cançado Trindade, ‘The Right to Cultural Identity in the Evolving Jurisprudential Construction of the Inter-American Court of Human Rights’ (n 50) 477, 489.



including a certain level of safety,⁵⁸ access to healthcare,⁵⁹ sanitation, education,⁶⁰ housing,⁶¹ nutrition,⁶² and respect for rooted cultural traditions.⁶³ However, an impossible burden is not imposed on the State; the Court, in fact, has made it clear that such obligations cannot lead to an absolute duty or an extreme burden on the State to provide certain living conditions, only resorting to this interpretation in extreme situations of great vulnerability.⁶⁴

The ECtHR does not seem to read Article 2 ECHR⁶⁵ as embracing socio-economic rights and continues to examine the right to life *stricto sensu*. In *Pretty v the United Kingdom*,⁶⁶ for example, the Court stated that the right to life does not include aspects related to the quality of living,⁶⁷ and it is rather under Article 8 that elements relevant for the quality of life take on significance.⁶⁸ This approach could diminish the protection provided under Article 2 of the European Convention on Human Rights (ECHR).

However, the Court has established a wide range of State obligations arising from Article 2 ECHR, both negative and positive in nature. That is, States must comply both with a negative obligation not to arbitrarily deprive an individual of his/her life and with positive obligations to take

⁵⁸ See again I-ACtHR, *Villagrán-Morales and others v Guatemala* (n 48) para 122; *Juvenile Reeducation Institute v Paraguay* (Judgment 2 September 2004) para 135.

⁵⁹ I-ACtHR, *Yakye Axa Indigenous Community v Paraguay* (n 53), para 164; *Sawboyamaxa Indigenous Community v Paraguay* (n 54), para 175.

⁶⁰ I-ACtHR, *Juvenile Reeducation Institute v Paraguay* (n 58) para 252.

⁶¹ I-ACtHR, *Sawboyamaxa Indigenous Community v Paraguay* (n 54) para 224.

⁶² I-ACtHR, *Yakye Axa Indigenous Community v Paraguay* (n 54) para 160; *Sawboyamaxa Indigenous Community v Paraguay* (n 54) para 145; *Saramaka People v Suriname* (Judgment 28 November 2007) para 77; *Awas Tingni Community v Nicaragua (Mayagna Sumo)* (n 53) para 156.

⁶³ I-ACtHR, *Yakye Axa Indigenous Community v Paraguay* (n 54) para 163; *Sawboyamaxa Indigenous Community v Paraguay* (n 54) para 116 ff.; *Saramaka People v Suriname* (n 62) para 87; *Awas Tingni Community v Nicaragua (Mayagna Sumo)* (n 53) para 142.

⁶⁴ I-ACtHR, *Sawboyamaxa Indigenous Community v Paraguay* (n 54) para 155.

⁶⁵ European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

⁶⁶ ECtHR, *Pretty v the United Kingdom*, App No 2346/02 (Judgment 29 July 2002).

⁶⁷ *ibid* para 39.

⁶⁸ *ibid* paras 37-39.



appropriate steps to safeguard the lives of those within its jurisdiction⁶⁹ and to investigate cases concerning an alleged arbitrary deprivation of life.⁷⁰ In *Osman v the United Kingdom*,⁷¹ the Court made a clear and explicit reference to positive obligations under Article 2 ECHR for the first time. Even though the Court did not find a violation, it identified and qualified the positive obligation of a State to protect individuals within its jurisdiction,⁷² while recognising that no positive obligation should impose an impossible or disproportionate burden on that State.⁷³

Notwithstanding the conclusions elaborated in *Pretty v the United Kingdom*, in *Cyprus v Turkey*⁷⁴ the Court adopted a different line, recognising that the denial of healthcare can amount to a violation of Article 2, and thus incorporating, to some extent, social rights into the context of the right to life.⁷⁵ Unfortunately, in this case the Court did not consider it necessary to examine the extent to which Article 2 of the Convention should impose an obligation on a Contracting State to ensure a certain standard of healthcare.⁷⁶ Consequently, even if it can be inferred that such an obligation does, in fact, exist in the context of Article 2 ECHR, its precise extent is not yet defined.⁷⁷ Bulgaria's inability to provide appropriate living conditions and prevent the deaths of children in a State-run mental health facility was considered a violation of Article 2 in *Nencheva and others v Bulgaria*.⁷⁸ Even though it was a case of loss of life of people dependent on the State, the deaths occurred because of the extremely poor living conditions in the centre; thus, the Court included

⁶⁹ ECtHR, *L.C.B v the United Kingdom*, App no 23413/94 (Judgment 9 June 1998) para 36.

⁷⁰ D Korff, 'The Right to Life. A Guide to the Implementation of Article 2 of the European Convention on Human Rights' (Council of Europe, Human Rights Handbook no 8, November 2006) 7.

⁷¹ ECtHR, *Osman v the United Kingdom* (GC), App no 23452/94 (Judgment 28 October 1998).

⁷² SE Hendin, 'The Evolution of the Right to Life by the European Court of Human Rights' (2004) *Baltic YB Intl L Online* 81.

⁷³ ECtHR, *Osman v the United Kingdom* (n 71) para 116.

⁷⁴ ECtHR, *Cyprus v Turkey* (GC), App No 25781/94 (Judgment 10 May 2001).

⁷⁵ *ibid* para 219.

⁷⁶ *ibid*.

⁷⁷ On this issue, see DJ Harris and others, *Law of the European Convention on Human Rights* (5th edn, OUP 2023), 219-220.

⁷⁸ ECtHR, *Nencheva and others v Bulgaria*, App No 48609/06 (Judgment 18 June 2013).



living conditions and aspects of social rights in its ruling in the context of Article 2.

In *Öneryıldız v Turkey*,⁷⁹ it became apparent that the State's obligation to protect the lives of people within its jurisdiction is extensive and also applies to dangerous activities that the State did not respond to appropriately.⁸⁰ The Court made it clear that Article 2 ECHR imposes a positive obligation on States to take preventive measures to avoid man-made disasters endangering human life.⁸¹ The Court thus expanded the obligation to protect the right to life to include healthcare, safety, and environmental law.⁸² The principles set in *Öneryıldız v Turkey* were upheld and expanded in the context of natural disasters in *Budayeva and others v Russia*,⁸³ where the Court stated that, in relation to dangerous activities, the scope of Article 2 overlaps with Article 8. Accordingly, the principles set by the Court for environmental matters affecting private and family life can also be applied to protect the right to life.⁸⁴

Human dignity has also come into play under Article 3 ECHR, prohibiting torture, inhuman and degrading treatment and closely related to Article 2 ECHR. Thus, in *M.S.S. v Belgium and Greece*,⁸⁵ the ECtHR included certain different socio-economic rights within the interpretation of Article 3. The applicant was an asylum-seeker who had entered the European Union through Greece and had reached Belgium. He applied for asylum in Belgium, but the authorities deemed that he could not be granted asylum there, as according to the Dublin II Regulation, he should have applied in Greece, his first point of entry. The applicant was thus sent back to Greece, where he was detained for an extensive period under bad conditions.⁸⁶ The Court examined the alleged violation of Article 3

⁷⁹ ECtHR, *Öneryıldız v Turkey*, App No 48939/99 (Judgment 30 November 2004).

⁸⁰ In *Öneryıldız v Turkey* the Turkish Government had failed to take preventive actions to avoid the loss of lives due to a methane explosion at a rubbish tip – the ensuing landslide engulfed several dwellings of a slum quarter situated near it – despite having learned of the risk years earlier and failing to act on it.

⁸¹ ECtHR, *Öneryıldız v Turkey* (n 79) para 89-90; see also *Özel and others v Turkey* (Judgment 17 November 2015) paras 173-175.

⁸² See again Harris and others, *Law of the European Convention on Human Rights* (n 77), 207.

⁸³ ECtHR, *Budayeva and others v Russia*, App Nos 15339/02 and others (Judgment 20 March 2008).

⁸⁴ *ibid* para 133.

⁸⁵ ECtHR, *M.S.S v Belgium and Greece* (GC) (n 47).

⁸⁶ *ibid* paras 9-53.



regarding the applicant's living conditions. It pointed out that Article 3 can in no way be interpreted as obliging a State to provide housing to everyone, and does not impose any obligation on the State to provide financial assistance to refugees in order to maintain a certain standard of living.⁸⁷ However, the Court did not exclude the possibility that a State's obligation might arise for 'treatment' where an applicant, in circumstances wholly dependent on State support, found himself or herself 'faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity'.⁸⁸ The Court thus found a violation of Article 3 because the living conditions in the Greek detention centre infringed the applicant's dignity and amounted to inhuman and degrading treatment.⁸⁹ In this case, therefore, the Court also took into consideration social and economic rights in assessing whether Article 3 ECHR had been breached.

In *N.H. and others v France*,⁹⁰ the Court similarly found a violation of Article 3 because the applicants—five asylum-seekers living in France—had been subjected to poor living conditions and degrading treatment that showed a lack of respect for their dignity.⁹¹ The Court further established that a violation of Article 3 occurs when public authorities ignore the situation of an individual totally dependent on public assistance and in a situation of extreme poverty, such that their existence is incompatible with human dignity.

The protection of the right to live with dignity through the acknowledgement of socio-economic and cultural rights is especially highlighted – sometimes even in the absence of an explicit reference to the right to a life with dignity – in the ECtHR's case law regarding Article 8 ECHR. As noted earlier, in *Pretty v the United Kingdom*, the Court incidentally stated that issues concerning the 'quality of life' fall under the scope of this provision. Furthermore, the Court has set standards for the respect for private and family life, which are tied to the realisation of socio-economic rights, and has invoked the concept of human dignity to underline

⁸⁷ *ibid* para 249.

⁸⁸ *ibid* para 253.

⁸⁹ G Clayton, 'Asylum Seekers in Europe: *M.S.S. v Belgium and Greece*' (2011) 11 Human Rights L Rev 758, 765.

⁹⁰ ECtHR, *N.H. and others v France*, App Nos 28820/13, 75547/13 and 13114/15 (Judgment 2 July 2020).

⁹¹ *ibid* para 163.

the need to ensure an individual's basic survival needs. Thus, in *Connors v the United Kingdom*⁹² the Court found a violation of Article 8 ECHR given the applicant's forceful eviction from the plot he (and family members) occupied under licence; this judgment highlighted a consideration of socio-economic and cultural policies, and more specifically the issue of housing, in the context of private and family life.⁹³

The ECtHR considered environmental aspects in light of Article 8. *López Ostra v Spain*⁹⁴ is the first case before the ECtHR where the Court found a violation of Article 8 based on environmental issues.⁹⁵ The applicant alleged a violation of her private and family life because of the State's failure to regulate the operation of a waste-treatment plant effectively. The Court stated that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in a manner that adversely affect their private and family life adversely.⁹⁶ It further stressed that a fair balance must be struck between the competing interests of the individual and the community as a whole.⁹⁷

In *Hatton and others v the United Kingdom*,⁹⁸ the applicants alleged a violation of Article 8 of the Convention due to the consequences, including health issues, of living in proximity to Heathrow Airport. The Court did not find a violation of Article 8 in this case; however, it reiterated that though there is no explicit right in the Convention to a clean and quiet environment, where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8, which may apply in environmental cases whether the pollution is directly caused by the State or whether State responsibility arises from the failure to regulate

⁹² ECtHR, *Connors v the United Kingdom*, App No 66746/01 (Judgment 27 May 2004).

⁹³ *ibid* paras 82-83.

⁹⁴ ECtHR, *López Ostra v Spain*, App No 16798/90 (Judgment 9 December 1994); for a comment, see A W Heringa, 'Private Life of the Protection of the Environment, Lopez-Ostra v. Spain' (1995) 2 Maastricht J Eur & Comp L 201 and R Desgagné, 'Integrating Environmental Values into the European Convention on Human Rights' (1995) 89 AJIL 263, 273.

⁹⁵ *ibid* para 58.

⁹⁶ *ibid* para 51.

⁹⁷ *ibid*.

⁹⁸ ECtHR, *Hatton and others v the United Kingdom* (GC), App No 36022/97 (Judgment 2 October 2001).



private industry properly.⁹⁹ The Court made it clear that Article 8 imposes a positive obligation on States Parties to assess the risks created for individuals by environmentally harmful activities and to take all appropriate measures to protect the right of individuals to respect for their private and family life.¹⁰⁰ In addition, the Court recognised the existence of a specific obligation for States to provide individuals with access to all relevant information, enabling them to assess potential environmental risks.¹⁰¹

In *Sidabras and Džiautas v Lithuania*,¹⁰² the applicants were two former KGB agents facing restrictions on their employment due to Lithuanian legislation. They brought the case before the Court for alleged violation of Article 8, taken alone and in conjunction with Article 14.¹⁰³ The Court emphasised that nothing prevented it from examining social and economic rights in the context of the Convention;¹⁰⁴ as a consequence, it included elements of the right to work within the right to private and family life.¹⁰⁵ In *Hudorovič and others v Slovenia*,¹⁰⁶ the Court recognised that a persistent and long-standing lack of access to safe drinking water can also be considered under the scope of Article 8 ECHR when it causes adverse consequences for health and human dignity, effectively eroding the core of private life.¹⁰⁷

⁹⁹ *ibid* paras 96-98.

¹⁰⁰ See also ECtHR, *Guerra and others v Italy*, App No 116/1996/735/932 (Judgment 19 February 1998) paras 56-60; *Kyrtatos v Greece*, App No 41666/98 (Judgment 22 August 2003) paras 51-55; *Tătar v Romania*, App no 67021/01 (Judgment 27 January 2009) paras 85-88, 125; *Di Sarno and others v Italy*, App No 30765/08 (Judgment 10 January 2012) paras 94-96, 104-107; *Jugheli and others v Georgia*, App No 38342/05 (Judgment 13 July 2017) paras 62-64, 73-78; *Cordella and others v Italy*, App Nos 54414/13 and 54264/15 (Judgment 24 January 2019) paras 157-160, 173-174; *Kotov and others v Russia*, App No 6142/18 and others (Judgment 11 October 2022) paras 123.

¹⁰¹ ECtHR, *Guerra and others v Italy* (n 100) para 60; *Roche v the United Kingdom*, App No 32555/96 (Judgment 19 October 2005) para 157.

¹⁰² ECtHR, *Sidabras and Džiautas v Lithuania*, App Nos 55480/00 and 59330/00 (Judgment 27 July 2004).

¹⁰³ *ibid* paras 10-32.

¹⁰⁴ *ibid* paras 42-50.

¹⁰⁵ V Mantouvalou, 'Work and Private Life: *Sidabras and Dziautas v. Lithuania*' (2005) 30 *Eur L Rev* 276, 579.

¹⁰⁶ ECtHR, *Hudorovič and others v Slovenia*, App Nos 24816/14 and 25140/14 (Judgment 7 September 2020).

¹⁰⁷ *ibid* para 116.



In conclusion, both judicial and quasi-judicial mechanisms for the protection of human rights consider the ‘right to life in dignity’ as encompassing not only mere existence but also a minimum level of enjoyment of economic, social and cultural rights.

More precisely, the IACtHR derives the ‘right to life in dignity’ directly from the right to life; in ECtHR case law, the right to life—under Article 2 alone and when read together with Articles 3 and/or 8 ECHR—can be interpreted as including some aspects tied to the quality of living. However, this circumstance does not seem to point to a differentiated standard of protection. In its case law,¹⁰⁸ the ECtHR indeed stressed that the Convention is intended to guarantee rights that are ‘practical and effective’ and not ‘theoretical or illusory’.¹⁰⁹ The Court thus referred to the principle of effectiveness for interpreting the ECHR, in the sense that individual rights should be interpreted in such a way as to ensure their effective enjoyment. Furthermore, the Court has also reiterated that ‘[t]he Convention must also be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions’.¹¹⁰ Since the Court employs an integrated¹¹¹ or holistic¹¹² approach to human rights, civil and political rights must be considered as having inherent socio-economic components, opening the possibility of implementing some elements of economic, social and cultural rights, as it appears from the extensive case law cited above.¹¹³

The minimum standard of treatment necessary to assure the right to enjoy a life with dignity – including, as seen, access to goods and services

¹⁰⁸ ECtHR, *Artico v Italy*, App No 6694/74 (Judgment 13 May 1980).

¹⁰⁹ *ibid* para 33.

¹¹⁰ ECtHR, *Stec and others v the United Kingdom* (GC), App Nos 65731/01 and 65900/01 (decision 6 July 2005) para 48.

¹¹¹ M Scheinin, ‘Economic and Social Rights as Legal Rights’, in A Eide and others, *Economic, Social and Cultural Rights: A Textbook* (2nd edn, Martinus Nijhoff 2001) 29, 32.

¹¹² VA Leary, ‘Lessons from the Experience of the International Labour Organisation’ in P Alston (ed), *The United Nations and Human Rights: A Critical Appraisal* (Clarendon 1992).

¹¹³ See again Mantouvalou, ‘Work and Private Life: Sidabras and Dziautas v. Lithuania’ (n 105) 579.



essential for people's survival, such as food,¹¹⁴ water,¹¹⁵ health¹¹⁶ and housing¹¹⁷ – must always be guaranteed by a State to individuals under its jurisdiction,¹¹⁸ also in situations of scarcity of resources,¹¹⁹ such as climate change-induced circumstances leading people to leave their country of residence. States are indeed obliged to ensure the satisfaction of at least the 'essential levels' of each guaranteed right and make the greatest possible effort to this end.¹²⁰

4. *The right to enjoy a life with dignity and the non-refoulement obligation in the context of climate-induced migration*

As highlighted above, recent climate change litigation before judicial and quasi-judicial human rights monitoring mechanisms suggests that a State may be responsible for the effects of climate change, when these give rise to violations of individual rights, including the right to life and the right to private and family life,¹²¹ within the territory of that State.¹²²

¹¹⁴ Committee on economic, social and cultural rights, 'General Comment No 12. The Right to Adequate Food (Art 11)' UN Doc E/C.12/1999/5 (12 May 1999).

¹¹⁵ Committee on economic, social and cultural rights, 'General Comment No 15. The Right to Water (Arts 11 and 12)' UN Doc E/C.12/2002/11 (20 January 2003).

¹¹⁶ Committee on economic, social and cultural rights, 'General Comment No 14. The Right to the Highest Attainable Standard of Health (Art 12)' UN Doc E/C.12/2000/4 (11 August 2000).

¹¹⁷ Committee on economic, social and cultural rights, 'General Comment No 4. The Right to Adequate Housing (Art 11(1))' UN Doc E/1992/23 (13 December 1991).

¹¹⁸ See section 2 above.

¹¹⁹ Committee on economic, social and cultural rights, 'General Comment No 3, The Nature of States Parties' Obligations (Art 2(1))' UN Doc E/1991/23 (14 December 1990).

¹²⁰ *ibid* para 10: '[...] the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party'; '[...] In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations'.

¹²¹ See again ECtHR, *Verein KlimaSeniorinnen Schweiz and others v Switzerland* (n 45) para 544.

¹²² On the issue of extra-territorial effects, see ECtHR, *Duarte Agostinho and others v Portugal and 32 others* (GC), App No 39371/20 (decision 9 April 2024) and, for a comment, A Ollino, 'Qualche riflessione sul caso Duarte Agostinho e sulla nozione di giurisdizione come "controllo sull'esercizio dei diritti umani"' (2024) 18 *Diritti umani e diritto internazionale* 401.

Furthermore, a certain level of economic, social, and cultural rights should also be recognised as inherent to these same (civil and political) rights. At this point in the analysis, it is possible to assess whether States can likewise be held responsible, under the same provisions governing such rights, for returning an individual to a third State where he or she would encounter those same risks.

Since the 1960s, several human rights monitoring bodies have recognised the existence of *non-refoulement* obligations implicit in treaties governing them.¹²³ The same bodies have, however, failed to provide a full and coherent explanation of the legal grounds underlying the principle in question. It has been increasingly admitted that *non-refoulement* obligations may arise from guarantees other than the right to life and the prohibition of torture and inhuman and degrading treatment; however, any expansion of the material scope of *non-refoulement* obligations has been based solely on risks of harm to other civil and political rights. Factors affecting economic, social and cultural rights have been addressed only indirectly, where the risks of socio-economic deprivation amount to inhuman and degrading treatment.¹²⁴ This has been recognised in cases where removal from the host State would expose the individuals concerned to risks of not receiving adequate medical treatment for a pre-existing illness, leading to severe deterioration of their health and life expectancy,¹²⁵ or to grave material destitution, including lack of access to proper food, shelter, sanitation, and medical care.¹²⁶

As clarified by the Committee on the Elimination of Discrimination against Women (CEDAW Committee), however, the *non-refoulement*

¹²³ See section 1 above.

¹²⁴ See, e.g., *M.S.S. v Belgium and Greece* (n 47), paras 49-264; I-ACoHR, *Andrea Mortlock v the United States*, Report No 63/08 (Judgment 25 July 2008) para 89; Committee on the Rights of Persons with Disabilities, *Z.H. v Sweden*, App No 58/2019 (6 September 2021) paras 10.4-10.11. On this issue, see again M Ferolla Vallandro do Valle, 'Fleeing Deprivation: Deducing *Non-Refoulement* Obligations from Economic, Social and Cultural Rights' (2024) 36 *Intl Jour Ref Law* 353.

¹²⁵ See, e.g., ECtHR, *Paposhvili v Belgium* (GC), App No 41738/10 (Judgment 13 December 2016) paras 181-83; I-ACoHR, *Andrea Mortlock v the United States* (n 124) para 89; HRC, *K.S. and M.S. v Denmark*, Comm No 2594/2015, 7 November 2017, paras 7.5-7.7; Committee on the Rights of Persons with Disabilities, *Z.H. v Sweden* (n 124) paras 10.4-10.11.

¹²⁶ See again ECtHR, *M.S.S. v Belgium and Greece* (n 47) paras 249-64, 366-68; HRC, *Osman Jasim v Denmark*, Comm No 2360/2014 (22 July 2015) paras 8.4, 8.9-8.10.



obligation includes a positive duty, which is part of the obligation to protect.¹²⁷ Though other human rights bodies have not taken a clear-cut analogous position,¹²⁸ the link between *non-refoulement* and positive obligations to prevent human rights abuses is well-established. Thus, for example, in *Soering v the United Kingdom*,¹²⁹ the ECtHR recognised that States can be held responsible for foreseeable consequences of an individual's removal.¹³⁰ Similarly, the HRC framed *non-refoulement* as a due diligence obligation in *Abani v Canada*.¹³¹

A core feature of the *non-refoulement* obligation, connected to its nature as a positive obligation, is that a State can be held responsible for exposing an individual to a risk of harm outside its jurisdiction, even if the harm never materialises in the receiving country. Moreover, in *non-refoulement* cases, the removing State exposes the individual to a risk of harm (potentially) generated by a third party, including the receiving State's authorities, non-State actors therein, or other factors, such as adverse consequences of climate change.

This structure of the principle of *non-refoulement* is consistent with the positive obligation to prevent third parties from violating human rights.¹³² When a State knows, or should have known, about the existence

¹²⁷ See CEDAW Committee, *Y.W. v Denmark*, Comm No 51/2013 (2 March 2015) para 8.7.

¹²⁸ *Non-refoulement* is often described as a negative obligation not to remove a person to a country where they might face ill-treatment: see, e.g., ECtHR, *Paposhvili v Belgium* (n 125) para 188; on this issue, see B Khan, 'From *D v UK* to *Paposhvili v Belgium*: Assessing the Strasbourg Court's Legal and Institutional Approach to the Expulsion of Seriously Ill Migrants under Article 3 of the European Convention on Human Rights' (2019) 25 *Columbia J Eur L* 222, 234. Some commentators suggest that *non-refoulement* is a 'hybrid' obligation and maintain that the norm's positive aspect refers to States' duty to conduct a risk assessment before removing someone to another country and still frame the duty to prevent removal as a negative one: see M den Heijer, 'Whose Rights and Which Rights? The Continuing Story of Non-Refoulement under the European Convention on Human Rights' (2008) 10 *Eur J Migration and L* 277, 291; F de Weck, *Non-Refoulement under the European Convention on Human Rights and the UN Convention against Torture. The Assessment of Individual Complaints by the European Court of Human Rights under Article 3 ECHR and the United Nations Committee against Torture under Article 3 CAT* (Brill Nijhoff 2017) 137-38.

¹²⁹ ECtHR, *Soering v the United Kingdom*, App No 14038/88 (Judgment 7 July 1989).

¹³⁰ *ibid* para 86.

¹³¹ HRC, *Abani v Canada*, Comm No 1051/2002 (15 June 2004) para 10.6.

¹³² As also maintained, among others, by V Chetail, 'Le droit des réfugiés à l'épreuve des droits de l'homme: Bilan de la jurisprudence de la Cour européenne des droits de l'homme sur l'interdiction du renvoi des étrangers menacés de torture et de traitements

of a real risk of serious harm to an individual, regardless of the source of the harm, that State has a duty to take reasonable measures to avoid that risk.¹³³ Decisions finding no violation of the duty to prevent have indeed been based on the lack of foreseeability of the risk¹³⁴ and the adoption of reasonable preventive measures, even where the risk ultimately materialised.¹³⁵

Given the positive nature of the *non-refoulement* obligation, some scholars have considered it to be implicitly included not only within the framework of civil and political rights but also in the context of economic, social, and cultural rights.¹³⁶ Positive obligations indeed flow from all individual rights; furthermore, economic, social, and cultural rights also imply obligations that States must observe immediately, regardless of their available resources.¹³⁷ However, the practice is not yet well-established in this respect.

For example, in September 2021, the Committee on the Rights of the Child (CRC Committee), in *A.M. v Switzerland*,¹³⁸ established the responsibility of Switzerland because the removal of the applicant's son to Bulgaria would expose him to a real risk of harm and the violation of several rights enshrined in the Convention on the Rights of the Child

inhumains ou dégradants' (2004) 37 *Revue belge de droit international* 155, 168–69; V Stoyanova, 'How Exceptional Must "Very Exceptional" Be? Non-Refoulement, Socio-Economic Deprivation, and Paposhvili v Belgium' (2017) 29 *Intl J Refugee L* 580, 593.

¹³³ ECtHR, *Buturugă v Romania*, App No 56867/15 (Judgment 11 February 2020) para 61; I-ACtHR, *Velásquez Paiz and others v Guatemala* (Judgment 19 November 2015) para 109; African Commission on Human and Peoples Rights, *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia*, App No 341/2007 (16 November 2015) paras 124–25; HRC, *Portillo Cáceres v Paraguay* (n 39) paras 7.3, 7.5.

¹³⁴ See, e.g., ECtHR, *Ceesay v Austria*, App No 72126/14 (Judgment 16 November 2017) para 119; *Malik Babayev v Azerbaijan*, App No 30500/11 (Judgment 1 September 2017) para 75.

¹³⁵ See, e.g., ECtHR, *Watts v the United Kingdom*, App No 1534/89 (decision 4 May 2010) para 92; *Keenan v the United Kingdom*, App No 27229/95 (Judgment 3 April 2001) paras 99–102.

¹³⁶ On this issue, see again Ferolla Vallandro do Valle, 'Fleeing Deprivation: Deducing *Non-Refoulement* Obligations from Economic, Social and Cultural Rights' (n 124) 362.

¹³⁷ See again CESCR, 'General Comment No 3: The Nature of States Parties' Obligations (Art 2, Par 1)' UN Doc HRI/GEN/1/Rev6 (14 December 1990) paras 1–2.

¹³⁸ CRC Committee, *A.M. v Switzerland*, App No 95/2019 (22 September 2021).



(CRC).¹³⁹ More precisely, the CRC Committee found that the reception conditions in Bulgaria would expose the child to a real risk of harm, and cited in this regard both the prohibition of inhuman and degrading treatment under Article 37(a), and the rights to an adequate standard of living, education, and physical, psychological recovery and social integration.¹⁴⁰ Nevertheless, the CRC Committee analysed these provisions in a cluster and did not clarify how the potential violations of the economic, social, and cultural rights at stake amounted to an irreparable harm.

The HRC, the CRC, CEDAW and the Committee on the Rights of Persons with Disabilities (CRPD) have framed the *non-refoulement* obligation in open-ended terms, by reference to a particular level of harm ('irreparable harm') to individual rights rather than through an established and immutable set of human rights. These bodies have all suggested that the *non-refoulement* obligation applies whenever removal would expose an individual to a risk of irreparable harm, such as, but not limited to, harm arising from violations of the right to life and from inhuman and degrading treatment.¹⁴¹ Thus, one may observe a general tendency among human rights bodies to frame *non-refoulement* obligations as applicable whenever a potential human rights violation attains a given level of severity.¹⁴² However, the *non-refoulement* obligation can hardly be effectively enforced when the precise content of the rights depends on States' available resources.¹⁴³ It thus seems preferable to consider the

¹³⁹ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

¹⁴⁰ Arts 27, 28 and 39 Convention on the Rights of the Child; see *A.M. v Switzerland* (n 138) paras 10.7-11.

¹⁴¹ See, in particular, HRC, 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' UN Doc CCPR/C/21/Rev.1/Add. 13 (26 May 2004) para 12; CRC, 'General Comment No 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin' UN Doc CRC/GC/2005/6 (1 September 2005) para 27; CEDAW Committee, 'General Recommendation No 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women' UN Doc CEDAW/C/GC/32 (14 November 2014) para 21; CRPD, *N.L. v Sweden*, 28 August 2020, para 6.4.

¹⁴² See Office of the United Nations High Commissioner for Human Rights, 'Expert Meeting on Protecting the Human Rights of Migrants in the context of Return' (Concept note 6 March 2018) according to which the principle of *non-refoulement* applies to a range of human rights violations beyond persecution and torture.

¹⁴³ HRC, *Giri v Nepal*, Comm No 1761/2008 (24 March 2011) para 7.9; I-ACtHR, *Vélez Loor v Panama* (Judgment 23 November 2010) para 198.



non-refoulement obligation in relation to the right to a dignified life in the sense highlighted earlier and largely accepted by both judicial and quasi-judicial mechanisms for the protection of human rights – namely, where the right to life (and/or the right to private life) is interpreted as also including a minimum level of economic-social and cultural rights.¹⁴⁴

Another fundamental issue relates to the severity threshold for triggering the *non-refoulement* obligation. In this regard, as said, the HRC in *Teitiota* adopted a very high threshold, while assessing – through a disjunctive approach – each risk factor for the applicant’s rights independently.¹⁴⁵ This interpretation, however, does not seem coherent with the need to grant the right to a dignified life that encompasses a wide range of essential human needs. The ‘real risk of irreparable harm’ for the applicant in climate-induced cases should indeed be assessed holistically, while examining the combined or cumulative effect of risk factors that would trigger a *non-refoulement* obligation for the relevant State.

As previously noted, the scope of the protection afforded by the *non-refoulement* obligation is not identical in all human rights treaties,¹⁴⁶ there is significant terminological convergence between the European and American systems as regards the protection of human rights and the ICCPR.¹⁴⁷ Thus, it should not be overlooked that by both the ECtHR¹⁴⁸

¹⁴⁴ See section 3 above. *Contra* see M Di Filippo, ‘Garanzia di *non-refoulement* per i migranti ambientali e riconoscimento della protezione complementare: un contributo al dibattito’, in F Amato and others, *Climate Change, Human Rights and International Migration* (Editoriale Scientifica 2025) 169, 182.

¹⁴⁵ See section 1 above.

¹⁴⁶ *ibid.*

¹⁴⁷ See Arts 6 and 7 ICCPR and HRC, ‘General Comment No. 31’ (n 141) paras 10 and 12 and ECtHR, *Hirsi Jamaa and others v Italy*, App No 27765/09 (Judgment 23 February 2012) para 115 and I-ACtHR, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection* (Advisory Opinion OC-21/14 19 August 2014) para 226; I-ACtHR, *Wong Ho Wing v Peru* (Judgment 30 June 2015) para 127; on this issue, see also De Coninck, Soete, ‘*Non-Refoulement* and Climate Change-Induced Displacement: Regional and International Cross-Fertilization?’ (n 2) 423 and 425.

¹⁴⁸ On this issue, see again Sommaro, ‘When Climate Change and Human Rights Meet: A brief Comment on the UN Human Rights Committee’s *Teitiota* Decision’ (n 9) 60 and McAdam, ‘Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of *Non-refoulement*’ (n 9) 714.



and the I-ACtHR have endorsed the integrated approach. Thus, for example, in *J.K. and others v Sweden*,¹⁴⁹ the ECtHR adopted a conjunctive approach to determine whether the severity threshold capable of triggering the *non-refoulement* obligation was attained.¹⁵⁰ A similar overall expansive approach has also been endorsed by the I-ACtHR; the Court, indeed, established that the circumstances invoked by the claimant to trigger the *non-refoulement* obligation on a whole must be ‘credible, convincing or consistent’.¹⁵¹

5. Concluding remarks

The concrete scope of application of the *non-refoulement* obligation in the context of climate-induced migration has not been fully explored by the judicial and quasi-judicial mechanisms set up for the protection of human rights. However, the conclusion reached by the HRC in *Teitiota v New Zealand* seems to be inconsistent with well-established case-law as regards the notion and content of ‘the right to enjoy a life with dignity’ and with the recognised traditional role of the notion of human dignity in judicial reasoning. On the one hand, indeed, according to ‘the right to enjoy a life with dignity’, States should always guarantee a minimum level of both civil and political rights and economic and social rights to all individuals within their jurisdiction, including in situations of environmental degradation associated with climate change, which can affect a wide range of human rights. Even though it is acknowledged that an impossible burden cannot be imposed on the State, the latter is also bound by a positive obligation to protect individuals in situations of potential re-

¹⁴⁹ ECtHR, *J.K. and others v Sweden* (GC), App No 59166/12 (Judgment 23 August 2016).

¹⁵⁰ See again ECtHR, *J.K. and others v Sweden* (n 149), para 95; see also ECtHR, *Sufi and Elmi v the United Kingdom*, App Nos 8319/07 and 11449/07 (Judgment 28 June 2011) paras 192-193 and 303. In this case the Court considered that the general conditions in two camps in Somalia were sufficiently dire to amount to treatment reaching the threshold of Art 3 ECHR, thus preventing the responding state from deporting the applicant to his country of origin.

¹⁵¹ I-ACtHR, *The Institution of Asylum and its Recognition as a Human Right in the Inter-American System of Protection* (Advisory Opinion OC-25/18 30 May 2018) para 196. On this issue, see again De Coninck, Soete, ‘Non-Refoulement and Climate Change-Induced Displacement: Regional and International Cross-Fertilization?’ (n 2) 428.



removal against factors that risk undermining their right to enjoy a dignified life; such risk factors would trigger a *non-refoulement* obligation. This is a complex assessment that can only be made on a case-by-case basis, also considering the impact of removal on the enjoyment of a decent life as a whole. The respect for human dignity, which represents a core value for the contemporary international legal order, as well as a well-established principle of international human rights law, entails an extensive and evolutionary interpretation of the *non-refoulement* obligation in the context of climate-induced migration according to Article 31(3)(c) VCLT.¹⁵²

¹⁵² On the role of human dignity for the evolution of individual rights, see also C McCrudden, 'Human Dignity in Human Rights Interpretation' (2008) *EJIL* 655, 724.

