
RESEARCH ARTICLE

Evolution of Non-Refoulement Principle - Enabler for Protection of Environmentally Displaced People

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ABSTRACT

Climate change, one of the biggest challenges of our time, is disproportionately affecting vulnerable populations who have least contributed to it, forcing them to leave their homes and to seek protection in other countries. This doctrinal study analyses the scope under which protection of such environmentally displaced people is being granted. The study shows that such a scope is broad, reflecting the principles of international human rights law. However, the safeguards granted under international human rights law are typically general, while more specific and adapted protection, similar to the international refugee regime, is still lacking. As a result, there is no guaranteed protection against refoulement. The study examines various catalysts, such as: climate-related legal cases, including the contributions of the *Teitiota v. New Zealand* (2019) case and the *Daniel Billy and Others v. Australia* (2022) case; Advisory Opinions of the judicial authorities; private sector initiatives; international institutions initiatives; as well as the Australia-Tuvalu Falepili Union Treaty. The analysis further demonstrates that the broader context and key insights from those catalysts lay the foundation for the progressive development of international law. Finally, the analysis highlights the evolutionary potential of the non-refoulement principle, operationalized through a "four-step test" mechanism as a robust platform for further development of a normative protection framework for environmentally displaced people.

KEYWORDS

non-refoulement, climate change, environmentally displaced people, human rights, *de lege ferenda* of international law, four-step test

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1. Introduction

As Wangari Maathai, Kenyan politician and environmental activist, observed in her Nobel Peace Prize lecture in 2004, "In the course of history, there comes a time when humanity is called to shift to a new level of consciousness, to reach a higher moral ground. A time when we have to shed our fear and give hope to each other. That time is now." (Maathai, 2004).

The impact of climate change following environmental disasters is rapidly increasing and intensifying, and has become an increasingly severe global issue. The Intergovernmental Panel on Climate Change (hereinafter IPCC) determined in its Climate Change 2023: Synthesis Report that human activities significantly contributed to increased temperatures in the atmosphere, ocean and land, underscoring that climate change is no longer just a future risk but a phenomenon with far-reaching implications for global ecosystems and human societies.

Such extreme climate conditions and severe environmental degradations are key causes of people's displacement worldwide, already significantly affecting the most vulnerable populations. According to the International Displacement Monitoring Centre's (hereinafter IDMC) 2023 Global Report on Internal Displacement, around 32.6 million people were internally displaced by disasters in 2022. For comparison, that same year the number of people internally displaced by conflicts and violence amounted to 28.3

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million. The World Bank's Groundswell Part II: acting on Internal Climate Migration Report estimates that due to climate change this number could increase almost tenfold by 2050, leading to migration of more than 216 million people within their own countries in the most impacted regions, which are Sub-Saharan Africa (with an estimated 86 million migrants); East Asia and the Pacific (with an estimated 49 million migrants); South Asia (with an estimated 40 million migrants); North Africa (with an estimated 19 million migrants); Latin America (with an estimated 17 million migrants); and Eastern Europe and Central Asia (with an estimated 5 million migrants). (Clement, Rigaud, de Sherbinin, Jones, Adamo, Schewe, Sadiq & Shabahat, 2021).

Such an expected increase in the number of displaced people due to climate change raises serious concerns on a global scale, presenting one of the biggest human rights challenges in the modern era. Addressing these issues will require urgent and unified international action, as well as the development of new normative frameworks, but most importantly, the adaptation of existing legal mechanisms and a rethink of their interpretation, aimed at the protection of fundamental human rights. One such legal mechanism is the non-refoulement principle. It has already proven to be crucial as the first step of protection in the context of human rights, and in the future (owing to its nature), its role will be even more pivotal.

In this text, we will analyse the non-refoulement principle from several angles. The first angle relates to the articulation of its formal definition as per the Convention relating to the Status of Refugees (1951) (hereinafter Refugee Convention 1951); and its Protocol Relating to the Status of Refugees (1967), which removed the temporal and geographical limitations contained in the Refugee Convention 1951. The second angle relates to the underlying values of the non-refoulement principle that form its ethical matrix, based on the protection of human dignity and the prohibition of torture or any other form of inhuman or degrading treatment. Those values are primarily embedded in other key international human rights instruments, such as: the European Convention on Human Rights (1950) (hereinafter ECHR); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (hereinafter CAT); and the International Covenant on Civil and Political Rights (1966) (hereinafter ICCPR). The third angle relates to the potential of the non-refoulement principle to adjust to emerging realities and to quickly develop and serve as a stepping stone in a further evolution of international law, aiming to address new challenges in a structured and normative way.

2. Literature Review

The literature review begins with reflection on the scientific evidence demonstrating the progression of climate change over decades and reflecting on early scientific warnings regarding climate change risks, especially with regards to connection between CO2 emissions and global warming. Also, attention is being paid to unequal responsibility for climate change and inequalities between those mostly responsible for carbon emissions on one side, and the ones mostly suffering from the climate change consequences on the other side. (Allafta & Opp, 2024). The literature review furthermore highlights the urgency of finding responses to address climate challenges and to establish international legal framework tailored to individuals fleeing their homes due to climate change risks.

Considering this context, the literature review further examines the need for progressive development of international law, identifying the need to reflect on specific mechanisms in the context of protection of such individuals. In that sense, the adaptation of the non-refoulement principle was identified as one possible path to commence establishment of a more concrete international protection of environmentally displaced people (hereinafter EDP). This literature review starts with the review of the existing international protection framework, in particular of the non-refoulement principle as stipulated in the Refugee Convention 1951. In its essence, the non-refoulement principle prohibits countries from returning or expelling individuals to a territory where they would face any form of persecution, torture or irreparable harm. Although rooted in the Refugee Convention 1951, the non-refoulement principle is strongly embedded in a wider human rights framework and as such is being recognized also by other human rights instruments, such as: ECHR, CAT and ICCPR.

Further focus of the literature review is on the definition of the non-refoulement principle, including its scope and its key elements. The literature review continues with a reflection on broader protection against refoulement granted by wider human rights protection mechanisms, and consistently emphasised by the European Court of Human Rights (hereinafter ECtHR), especially in the context of absolute prohibition of torture or of any other form of inhuman degrading treatment, and therefore of wider application of the non-refoulement principle under international human rights regime. (Soering v. the United Kingdom, 1989).

The literature review also contains an examination of the relevant jurisprudence with regards to the non-refoulement principle, precisely: 1) reaffirming the principle (Hirsi Jamaa and Others v. Italy, 2012; M.S.S. v. Belgium and Greece, 2011); 2) reaffirming the need to perform a detailed analysis of individual circumstances (M.S.S. v. Belgium and Greece, 2011); and reaffirming the prohibition of indirect or so-called "chain" refoulement. (T.I. v. the United Kingdom, 2000; Hirsi Jamaa and Others v. Italy, 2012). The literature review also focuses on the *Daniel Billy and Others v. Australia* (2022) case, illustrating a progressive approach and recognizing that climate change-related harm can be attributed to an individual state and its conduct. (Kahl, 2022). Furthermore,

additional cases against states, in particular: *Urgenda foundation v. State of the Netherlands* (2019) case; and *Association Oxfam France et al. v. État français* (2021) case; as well as the Advisory Opinions of the international judicial bodies, in particular: the International Court of Justice's (hereinafter ICJ) Advisory Opinion in *Obligations of States in Respect of Climate Change* (2025) (hereinafter ICJ Advisory Opinion 2025); and the International Tribunal for the Law of the Sea's (hereinafter ITLOS) in *Request for an Advisory Opinion Submitted by the Commission of Small States on Climate Change and International Law* (2024) (hereinafter ITLOS Advisory Opinion 2024) were examined. Those cases demonstrated a tendency towards an emerging recognition of the responsibility of states when it comes to their acts or omissions in the context of climate change. Further analysis of the Australia-Tuvalu Falepili Union Treaty (2023) (hereinafter Falepili Union Treaty), the first bilateral agreement designed to address some of the key challenges related to climate change mobility, is being performed, demonstrating the unique approach towards establishing a specific mobility mechanism and safeguarding the continuity of statehood. The literature review also examines Soderstrom's assessment of geopolitical considerations with regards to the Australian influence in the region. (Soderstrom, 2024).

The literature review also examines scholars' views on the non-refoulement principle. In particular, Goodwin-Gill, McAdam and Dunlop emphasize the broader scope of the non-refoulement principle, which has evolved beyond just the refugee protection regime and its formulation in the Refugee Convention 1951. (Goodwin-Gill, McAdam & Dunlop, 2021). The literature review further examines analyses of Graf and Katsoni, reflecting in particular on the positive obligations of the non-refoulement principle, which require states to proactively take actions in order to ensure effective application of the non-refoulement principle. (Graf & Katsoni, 2021).

The literature review further examines the argumentation provided by Kolmannskog and Myrstad, who argue that environmental harm and persecution can interact. Therefore, by applying the evolutionary interpretation, they support the argument for the non-refoulement principle to serve as a protection mechanism also against refoulement to environments with catastrophic humanitarian conditions. (Kolmannskog & Myrstad, 2009).

The literature review also focuses on the examination of Steffens, especially in the context of the distinction between voluntary and forced migration in relation to climate change, reflecting that such differentiation should not be understood as a strict dichotomy. (Steffens, 2019).

3. Methodology

This study uses qualitative doctrinal legal methodology. Through normative analysis, the study examines primary legal sources which serve as legal bases of the non-refoulement principle, operating cumulatively and to some extent, complementarily. Furthermore, the key aspects of the non-refoulement principle as defined in the Refugee Convention 1951 are examined. This study also uses normative analysis of the soft-law instruments, such as United Nations High Commissioner for Refugees (hereinafter UNHCR) Guidelines on international protection No. 4: "Internal flight or relocation alternative" (2003) (hereinafter UNHCR Guidelines 2003); and the Protection Agenda developed by the Nansen Initiative, aimed at building synergies and developing a protection agenda for individuals displaced across international borders, due to natural disasters and climate change (2015) (hereinafter Nansen Initiative). In addition, normative analysis is used for the purpose of treaty analysis of the Falepili Union Treaty and of its overall impact on the ways some states are responding to the emerging climate change challenges.

The study undertakes an analysis of case law to examine the following: jurisprudence of the ICJ, ITLOS, ECtHR, Human Rights Committee (hereinafter HRC), and national courts cases; as well as their impact on the non-refoulement principle and on its evolutionary potential. Findings from those cases are further used as a stepping stone for progressive interpretation of the non-refoulement principle.

The study further employs critical review of legal scholarship, assessing interpretations of the non-refoulement principle and its key features, and identifying trends with regards to its application to displacements of individuals facing climate risks.

Comparative analysis is being used in the context of the scope of the non-refoulement principle, demonstrating its narrower scope within the refugee regime compared to the wider international human rights protection regime.

4. Results and Findings

4.1 Emerging Climate Change Risks and Key Challenges

The identification of key risks related to climate change is not new. The first scientific warnings were already flagged a long time ago. Numerous scientists voiced their concerns about climate change risks. E.g. Gilbert Plass, whose work in the mid-1950s helped establish connection between CO₂ emissions and global warming; Roger Revelle and Hans Suess helped raise awareness through

their studies (also in mid-1950s) about how CO₂ from fossil fuels accumulates in the atmosphere; Bert Bolin, Swedish meteorologist, performed studies on the global carbon cycle in 1960 (he was also the first Chairperson of IPCC); Stephen Schneider, also known as the “*father of modern climate science*”, contributed to the understanding of climate change risks during the 1980s. (Hart & Victor, 1993). However, it is important to note that the connection between CO₂ emissions and global warming was recognized already at the beginning of the 19th century by French scientist Joseph Fourier, who discovered the greenhouse effect, which he elaborated in his research “*Mémoire sur les Températures du Globe Terrestre et des Espaces Planétaires*”. The essay first appeared in *Mémoires de l'Académie Royale des Sciences de l'Institut de France*, Vol. VII, pp. 570-604 (1827). (Fourier, 2004/1827).

However, despite early alerts, responses in international law to combat and adapt to such risks have been far too slow, thus reinforcing the urgency to accelerate the development of suitable legal solutions in order to protect vulnerable populations.

UNHCR explains:

“Growing numbers of people fleeing persecution, violence and human rights violations occurring in relation to the adverse effects of climate change and disasters will need international protection... In 2020, only one per cent of refugees were able to return home – a challenge which is only likely to grow, as the impact of climate change further deteriorates basic living conditions and opportunities for development in countries of origin.” (UNHCR, 2024).

Regardless of the fact that climate risks often act in combination with other factors of displacement, their severity continues to intensify so “we cannot underestimate climate change as an objective and autonomous factor in the decision to relocate.” (Caskey, 2020).

The paradox and sad reality are that the biggest contributors to pollution and to severe environmental degradation are industrialized countries, which are often less vulnerable to climate change impacts. On the other hand, developing countries that contribute the least to such emissions are exposed to the highest risks of climate change. We can therefore say that developed countries are the main responsible for climate change. According to the European Commission, Joint Research Centre findings in its *Emissions Database for Global Atmospheric Research 2023 Report* (hereinafter EDGAR 2023 Report), the six largest emitters in 2022 were China, the United States, India, the European Union (EU27), Russia and Brazil, collectively accounting for 50.1% of the global population and 61.2% of global gross domestic product. The EDGAR 2023 Report furthermore shows that some major economies, such as EU27, continue with improvements and reductions of the emissions, whilst on the other hand, global emissions continue to increase. In terms of the vulnerability, Allafta and Opp demonstrated the unequal responsibility for climate change, indicating that 10% of the global population (approximately 757 million people), residing primarily in high-income countries, contributes to 46.8% of cumulative emissions, whereas 50% of the global population (approximately 3.75 billion people) contributes to 8.9% of cumulative emissions. The authors also analysed the climate-induced consequences and concluded a significant negative correlation between emissions and the projected impacts of climate change. (Allafta & Opp, 2024).

This contrast between climate change “originators”, and those impacted by it creates a moral imperative for a global society to accelerate the evolution of the international legal framework in order to forcefully and systematically address the challenges created by such trends. We will analyse some of the levers of this acceleration.

1) First lever - Climate cases against states.

For example, in the *Urgenda Foundation v. State of the Netherlands* (2019) case, the Dutch Supreme Court upheld the Court of Appeal's decision and reasoning that the State of the Netherlands was obliged to achieve a minimum of 25% emission reduction by 2020. Another important case in that context is the *Association Oxfam France et al. v. État français* (2021) case or the so-called “*L’Affaire du Siècle*” (eng. “*The Case of the Century*”). Several environmental organizations in France (Oxfam France, Notre Affaire à tous, Fondation pour la Nature et l'Homme, and Greenpeace France) filed appeals before the Paris Administrative Court in December 2018, seeking the following: recognition of the failure of the French state to act on climate change, putting an end to such failure, and providing compensation for moral and ecological harm. The Paris Administrative Court ruled its decision in 2021, condemning France for lack of climate action.

2) Second lever - Advisory Opinions of international judicial bodies.

In its ICJ Advisory Opinion 2025, the ICJ concluded that, according to climate change treaties, states are obliged to protect the climate system and the environment from greenhouse gas emissions, prevent significant environmental harm, and ensure that the activities performed within their jurisdiction do not damage the climate system. In addition, it was declared that the breach of such obligations represents a wrongful act that implies a state's responsibility. Furthermore, the ITLOS Advisory Opinion 2024 affirmed the states' obligations to take all the necessary measures to prevent, reduce, and control marine pollution, which also includes adopting the necessary laws and regulations, as well as monitoring activities.

3) Third lever – Private sector liability and implementation of the Environmental, Social, Governance (hereinafter ESG) framework.

Although not a formal concept of international law, ESG in its broader sense supports the objectives of international law, especially in the context of climate. The ESG mechanism has an important role in driving sustainable investing and is gradually evolving from an ethical investment concept into a real and structured strategy for modern financial institutions and markets, which is driven by increased regulation, shifts in investors' preferences and a better understanding of risks related to climate change. (Uzsoki, 2020).

The reality still remains that climate change-induced displacement is increasingly impacting millions of people, thereby underscoring the need for a specific and focused approach. Indeed, global society has shown its empathy and solidarity countless times throughout history in the face of climate catastrophes; however, such responses are usually short-term and fragmented, failing to address the broader needs of impacted individuals. Therefore, instead of being able to rely on the solid framework of the international protection system, these individuals (in situations where their countries are unable to address basic human needs) are left at the mercy and goodwill of other countries. Such individuals cannot be automatically considered under the Refugee Convention 1951, as the harm and persecution are caused by natural catastrophes, not by humans; and there is no adequate alternative legal framework, which would sufficiently guarantee the protection of their fundamental human rights.

The reality is that in order to reach effective long-term solutions, a more comprehensive approach through the evolution (or, given the complexity of the problem, we could even say "revolution") of international law will be required. Therefore, it is crucial to explore quick solutions by adjusting existing mechanisms to the extent possible in order to alleviate the most pressing impacts of climate change risks.

Additionally, it is important to stress that different forms of climate change-induced displacement require different modalities of protection and solutions. In a wider sense, persons who are displaced in the context of disasters and climate change can be divided into two groups: 1) those impacted by immediate, severe environmental disasters, where conditions may likely get back to normal, and 2) those facing an environmental damage of irreparable nature (e.g. citizens of the so-called "disappearing states"). With regards to the "disappearing states" term, it is important to note that given the lack of uniformed terminology, various expressions are being used interchangeably when referring to low lying island states which are at risk of losing their land territory. For example, Sharon is using the term "sinking states" (Sharon, 2021). and McAdam is referring to "disappearing states" or "sinking islands" (McAdam, 2010).

Here, we will not focus on the differences between these two groups, but rather on the normative framework of the early stage of the process to which such individuals are exposed in situations of environmental catastrophes. In addition, the focus will be on externally displaced individuals, those crossing international borders due to natural disasters, as they face far more challenging legal considerations and processes compared to internally displaced individuals, who remain within their country of origin and are therefore within a clearer and more predictable framework, especially when it comes to their legal status.

With respect to terminology, there are various terms used in the international law's doctrine to describe individuals fleeing from territories impacted by climate changes and environmental deterioration, such as "environmental migrants", "environmentally displaced persons", "climate refugees", "climate change refugees", "environmental refugees"; however, there is no universally accepted legal term. In addition, the term "refugee" indirectly implies what should be the final scope of the international law's protection framework in this case. The International Organization for Migration (hereinafter IOM) is using the term "climate migrants", defining them as follows:

"persons or groups of persons who, predominantly for reasons of sudden or progressive change in the environment that adversely affects their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad" (IOM, 2007).

For the purpose of this text, we will follow the approach of the UNHCR and use the term "environmentally displaced people" (hereinafter EDP). (UNHCR, 1997).

4.2 Current International Protection Framework for EDP

Despite the exponential growth of EDP over the past decades, the response of the international community to such emerging risks has been largely inadequate, which has resulted in a lack of concrete and precise legal framework to address this new reality. In order to define what should be the key governing principles of the protection of EDP in the future, we first need to understand the main role of international law in the context of human rights, and then specifically in the context of refugees' protection, which is the closest normative framework to address EDP's safeguard concerns.

At a conceptual level, we will agree with the statement that, “under international human rights law, states have the primary responsibility to promote and protect the human rights of all people within their territory or jurisdiction – both citizens and non-citizens.” (McAdam, 2016).

The responsibility of states for upholding fundamental human rights has been shaped through decades by various international treaties, such as: the Universal Declaration of Human Rights (1948) (hereinafter UDHR), the ICCPR, and the International Covenant on Economic, Social and Cultural Rights (1966) (hereinafter ICESCR). Given their universal nature and ethical foundation, which has been continuously confirmed through consistent state practice accompanied by *opinio juris*, fundamental human rights and the duty to protect them have become essential components of customary international law. The overall human rights’ protection framework also includes refugee law, which specifically addresses the protection needs of those fleeing because of persecution and severe human rights violations.

Although the Refugee Convention 1951 is a key pillar and backbone of international refugee law, its definition does not encompass individuals fleeing environmental catastrophes. There have been numerous initiatives and documents at both global and regional levels aimed at addressing various protection needs of individuals impacted by natural disasters and climate change risks. Reference will be made to some of those documents, such as: 1) the International Law Association (hereinafter ILA) Resolution 6/2018: Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise (2018), setting out recommendations concerning the protection of individuals due to sea level rise; 2) the Nansen Initiative; 3) the United Nations Framework Convention on Climate Change Task Force on Displacement (2015), established with the aim to develop, through international collaboration, responses to displacements related to climate change; 4) the United Nations Guiding Principles on International Displacement (1998), establishing a framework for the protection of internally displaced individuals and outlining the responsibilities of states and other authorities, including in cases of natural disasters; 5) the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (2009) (hereinafter Kampala Convention), which presents the first legally binding regional document addressing displacement caused by environmental factors. Article 5(4) of the Kampala Convention clearly states that, regarding the obligations of States Parties concerning protection and assistance, “States Parties shall take measures to protect and assist persons who have been internally displaced due to natural or human made disasters, including climate change”; 6) the Cartagena Declaration on Refugees (1984), which broadened the definition of refugees in Latin America by extending protection beyond the Refugee Convention 1951.

Although all of these instruments offer a degree of normative guidance, they are still too fragmented and not entirely adequate to provide a more comprehensive and fully established international framework, which could more efficiently address the growing concerns triggered by devastating natural catastrophes and environmental degradation.

In order to address such a normative gap, a corresponding development of international law is required with the aim to provide a stronger legal framework, especially when it comes to the first step, i.e. the stage when individuals cross international borders and are in urgent need of protection. The formalization of that first step at the point of entry is of utmost importance.

The key entry-point mechanism is the non-refoulement principle, recognized as one of the most important principles of international refugee law, but also of human rights law in general, aiming at ensuring that individuals are not returned to environments which are threatening for their lives and wellbeing.

4.3 Non-refoulement principle – current scope and definition

The non-refoulement principle prohibits the expulsion or return of individuals to “territories where they might be subjected to torture, inhumane or degrading treatment, or where their lives and freedoms might be at risk.” (Stoyanova, 2008).

The term “non-refoulement” originates from the French verb “refouler” which means “to return” or “to send back”. The first formal articulations of the non-refoulement principle can already be found in the Institut de Droit International’s “Règles internationales sur l’admission et l’expulsion des étrangers” (1892), specifically in its Article 16, which stipulates:

“The expelled person who has taken refuge in a territory to avoid criminal prosecution cannot be delivered by indirect means, to the prosecuting State, without the conditions laid down in matters of extradition having been duly observed.”

Furthermore, the Convention relating to the International Status of Refugees (1933) (hereinafter Refugee Convention 1933), also stipulates the need to not forcibly return to their home country individuals who face a threat of persecution. In particular, its Articles 3(1) and 3(2) stipulate the following:

3(1) "Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (refoulement), refugees who have been authorised to reside there regularly, unless the said measures are dictated by reasons of national security or public order."

3(2) "It undertakes in any case not to refuse entry to refugees at the frontiers of their countries of origin."

It is important to note that the scope of the non-refoulement principle in the spectrum of the human rights' law treaties is broader compared to the international refugee regime. It has become firmly embedded within the United Nations (hereinafter UN) human rights protection system, demonstrating that the principle of non-refoulement is not merely an obligation under the Refugee Convention 1951 but also one of the key human rights principles which are being actively reinforced through the UN mechanisms, such as UN Special Rapporteurs, including those in charge of the migrants' human rights. (Goodwin-Gill, McAdam & Dunlop, 2021).

Also, given the states' consistent practice and recognition of its normative character, the non-refoulement principle has become customary international law, which has been repeatedly confirmed through the ECtHR jurisprudence. (Hirsi Jamaa and Others v. Italy, 2012; M.S.S. v. Belgium and Greece, 2011).

One of the most important documents articulating the non-refoulement principle is the Refugee Convention 1951, namely its Article 33(1), whose key elements will be further analysed in the subsequent sections.

Art 33(1) of the Refugee Convention 1951 stipulates the following:

"No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of particular social group or political opinion."

From the above definition, it follows that the non-refoulement principle is the starting point for refugees' protection. "It unequivocally encompasses non-rejection at the frontier, since protection begins with the ability of the refugee to secure admission to territory." (Goodwin-Gill, McAdam & Dunlop, 2021).

The non-refoulement principle assumes "immediate" protection within a specific context, such as the threat to one's life, freedom, and physical integrity. To enjoy protection under the non-refoulement principle, one does not need to already have refugee status, nor is it assumed that such a status will be granted at a later stage. "Non-refoulement only entails that individuals cannot be returned in certain cases, not any obligation to grant them a particular status." (Kolmannskog & Myrstad, 2009). All subsequent elements of refugee protection, such as granted asylum and ultimately declared refugee status, are the result of the successful completion of a formal process and the determination that formally required conditions have been met. The non-refoulement principle does not require the satisfaction of formal/administrative criteria; protection under this principle is a contextual one and, as long as the context – serious threats to one's life, freedom, or wellbeing – endures, the principle shall apply.

Although the non-refoulement principle is fundamentally characterized as a negative obligation, mandating states to refrain from specific actions, such as expulsion or return of individuals to countries where their lives or freedoms will be endangered, the non-refoulement principle has progressively developed also into a wider set of positive obligations to ensure its effective application. Those positive obligations can be summarized as: 1) the obligation to admit prospective asylum-seekers into the state territory; 2) the obligation to grant access to status determination or risk assessment procedures; 3) the obligation to assess the risk upon removal; and 4) the obligation to allow protection-seekers to remain in the state's jurisdiction. (Graf & Katsoni, 2021). Some of the key aspects of such positive obligations will be further analysed in the text below.

The focus of the further analysis will be on broader elements of definition of the non-refoulement principle, which are mainly applicable in the procedural context, as they typically require the intervention of various decision-makers. Protected grounds stipulated in the Article 33(1) of the Refugee Convention 1951 (such as race, religion, nationality, membership of a particular social group, or political opinion) will not be the focus of this analysis, as they essentially present a limiting factor that restricts the application of the non-refoulement principle exclusively to the context of refugee law.

4.3.1 "Expel or return" element

The first element, "expel or return", prohibits actions which might result in sending individuals back to territories where they could face serious harm or persecution. There must be substantial grounds for believing that, if expelled or returned, the individual would be at risk of irreparable harm, such as persecution, torture, ill treatment of any other serious violation of human rights.

For states to comply with the obligation to avoid returning or expelling, it is common sense that at least temporary access needs to be allowed, as otherwise protection under the non-refoulement principle cannot be triggered. The positive non-refoulement obligation, also stressed out by Graf and Katsoni, which we can clearly identify here, relates to allowing temporary access to territory under state jurisdiction. (Graf & Katsoni, 2021). In other words, non-rejection at the frontiers actually implies at least temporary admission in order to determine the status of the individual. This process step is the only way for a state to ensure that an individual is not removed and put at risk of persecution or torture, and therefore it is an integral element of the effective implementation of the non-refoulement obligation. (Goodwin-Gill, McAdam & Dunlop, 2021).

Further positive obligations can be identified in the context of prohibition of indirect, “chain” refoulement. In a nutshell, indirect non-refoulement obliges states to refrain from sending a refugee or asylum seeker to countries from which they may be further deported to territories where they will be exposed to serious harm or persecution. Although indirect non-refoulement is not explicitly stipulated in Article 33(1) of the Refugee Convention 1951, the obligation to avoid indirect refoulement has been repeatedly confirmed through the ECtHR practice in numerous cases, such as: 1) the *T.I. v. the United Kingdom* (2000) case. In this case, the Sri Lankan asylum seeker complained that the United Kingdom’s action of ordering his transportation to Germany, from where he feared he would be consequently removed back to Sri Lanka and exposed to a risk of facing treatment, was contrary to Article 3 of the ECHR, which states that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment”. Although the ECtHR did not establish the existence of a real risk that Germany would expel the Sri Lankan applicant back to Sri Lanka, the ECtHR emphasized the responsibility of the United Kingdom to ensure that, before his removal to Germany as an intermediary state, the individual is not exposed to behaviour which is incompatible with the Article 3 of the ECHR. Furthermore, in 2) the *Hirsi Jamaa and Others v. Italy* (2012) case, the applicants (eleven Somali nationals and thirteen Eritrean nationals) left Libya in 2009 as part of a larger group, aiming to reach the Italian coast. After being intercepted by Italy on the high seas, they were returned to Libya, where they were exposed to a risk of ill-treatment and further deportation. In its ruling, the ECtHR concluded that “when the applicants were transferred to Libya, the Italian authorities had or should have known that there were insufficient guarantees protecting them from the risk of being arbitrarily returned to their respective countries of origin” and therefore Italy violated the non-refoulement principle, including indirect refoulement.

From the above cases we can clearly see that in order to comply with the prohibition of “chain” refoulement, any removing state has a duty to examine thoroughly whether there is a real risk that in the receiving third country the asylum-seeker may be denied access to an adequate asylum procedures and safeguards. Therefore, such an obligation clearly constitutes a positive obligation requiring a positive state action to assess the risk, by thoroughly examining the environment to which an individual is potentially being exposed. A state cannot just simply refer to the rules that an intermediary country is expected to respect, but it must check actual circumstances and it must ensure that the receiving country will undertake actions in such a manner to avoid exposing the individual seeking refuge to serious harm or persecution.

It is important to also note that whether a state fails to apply the non-refoulement principle due to misapplying the definition or if it demonstrates a clear understanding of the obligation but fails to properly administer the process, in either case the right to protection against refoulement is violated. (Hathaway & Foster, 2014).

4.3.2 “In any manner whatsoever” element

The second element of the definition of the non-refoulement principle, as per the Article 33(1) of the Refugee Convention 1951, is formulation “in any manner whatsoever”. Such formulation covers various means which states could potentially use to violate the non-refoulement obligation. It emphasizes the broad and comprehensive nature of the non-refoulement principle by prohibiting expulsion and return by any means and in any form. This phrase reinforces the definition itself, as it prevents any misuse of either terminology and/or of any method that could potentially circumvent this fundamental principle. It is important to note, however, that although the formulation clearly underscores the normative strength of the non-refoulement principle, there are certain safeguards stipulated by the Refugee Convention 1951 under which removal may be justified. For example, Article 1(F) stipulates that provisions of the Refugee Convention 1951, and therefore of the non-refoulement principle under refugee law protection regime will not apply with regards to an individual who: (a) has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) has been guilty of acts contrary to the purposes and principles of the UN. The rationale behind this provision is to exclude from non-refoulement protection those individuals who are responsible for serious crimes. Furthermore, Article 32(2) of the Refugee Convention 1951 establishes procedural rules safeguarding the process of expulsion of refugees. In other words, the purpose of this provision is to ensure fairness before a lawfully present refugee can be expelled. Furthermore, Article 33(2) of the Refugee Convention 1951 stipulates circumstances which prevent the individual to benefit from non-refoulement: if such an individual poses a threat to national security or is convicted for a serious crime. By contrast, under the wider international human rights regime, the prohibition of refoulement to a real risk of torture or other forms of ill-treatment is absolute, allowing no exceptions similar to the exceptions

described under the international refugee regime. Such a position with regards to the absolute nature of non-refoulement under the wider international human rights regime was confirmed by the ECtHR in the *Soering v. the United Kingdom* (1989) case, where the ECtHR emphasized the absolute nature of prohibition of torture and of inhuman or degrading treatment or punishment. The ECtHR further reaffirmed its position in 2025 in its Guide on Article 3 of the ECHR: Prohibition of torture, where the ECtHR stated that “the prohibition of torture and inhuman or degrading treatment or punishment is a value of civilisation closely bound up with respect for human dignity.” (ECtHR, 2025).

4.3.3 “To the frontiers” element

“To the frontiers” stipulates that the non-refoulement principle is applicable not only within a country’s territory but also at the point of entry. In other words, access to a state territory cannot be denied to a person presenting himself at a border checkpoint who alleges that there is a risk of ill-treatment if he or she remains on the territory of the neighbouring state, unless measures to eliminate such a risk are already in place. The ECtHR confirmed this position in cases such as: 1) *Ilias and Ahmed v. Hungary* (2019); and 2) *M.K. and Others v. Poland* (2020). Hence, if a country at its border refuses entrance to an individual seeking refuge without a thorough examination of the relevant circumstances, that country violates the non-refoulement principle.

4.3.4 “Life or freedom would be threatened” element

The first component – life or freedom – refers to the most important human rights risks, i.e. the risk of death, torture, or of any other form of inhumane, humiliating treatment, or exposure to life-threatening conditions. There is a widespread support to the customary status of the non-refoulement principle and the obligation not to return refugees, asylum-seekers or any person to a frontier or territory if that would mean exposing them to the mentioned risks. (Supaat, 2013).

The second component – threat – implies a need for an assessment of the likelihood that an individual will face the above-described risks if returned. The decision-maker performing such an assessment has to take into consideration general circumstances, as well as the individual’s demonstration of the well-founded fear that the above risks could materialize if they are returned. It is important to note that the assessment must be contextualized and based on sufficient common sense and a connection to actual facts and risks. One of the potential shortcomings in this particular context is often the overreliance on the imminence and urgency of threatening events, rather than on long-term, irreparable threats to fundamental human rights, which could lead to the underestimation of the well-founded fear, and consequently result in a violation of the non-refoulement principle. There are cases such as those relating to the future impacts of climate change where the feared harm is not felt now but will clearly have devastating consequences in the future. (Anderson, Foster, Lambert & McAdam, 2020).

It is therefore important to apply a more flexible approach to the non-refoulement principle. New situations require a broadening of horizons, and in cases such as climate change-induced threats, it is important to ensure that the proximity between the plea for protection and potential (or already actual) harm is not the main deciding factor on whether there is a potential to apply the non-refoulement principle. In the following text, we will see how critical it is to apply such a flexible mindset when it comes to assessment tests for the application of the non-refoulement principle in the context of EDP.

4.4 The broader landscape of the non-refoulement principle and its evolutionary potential for the protection of EDP

As demonstrated above, one of the key challenges today for EDP is the lack of institutionalized protection and a clear legal framework under current international law.

EDP do not fit the traditional definition of refugees, as they do not flee persecution based on race, religion, nationality, membership in a particular social group, or political opinion. Also, environmental factors are often combined with various political circumstances, poverty, and, in general, socio-economic reasons. However, this should not distract us from the fact that the number of people who are left without a choice and forced to leave their homes due to unbearable living conditions is rapidly increasing. And although economic reasons may involve an element of individual choice, the decision to leave a territory due to the territory becoming uninhabitable is ultimately not a voluntary decision. (Baeza, 2023).

Therefore, although there is no explicit legal provision addressing EDP and the fact that they clearly fall outside the international refugee regime, the legal basis for their protection should be sought in general norms of international human rights law, such as UDHR, ECHR, ICCPR, or ICESCR.

The reality is that there are no adequate responses within the existing framework of international law, and unfortunately, the increase in risks caused by climate change has been outpacing the evolution of international law to address those challenges. Long-term resolutions, which should address the problems of EDP, from determining their formal status and scope of their rights to (in extreme cases) dealing with problems of statelessness, are not yet in sight or certain, despite various options which are being explored as possible solutions. (Roy, 2019; Kraler, Noack & Cernei, 2012). Therefore, it is important to turn to existing mechanisms and to expand them in order to overcome those normative gaps in the short term, and provide an immediate protection in a formalized and structured way.

In this context, we will reflect on one some of the key judicial and institutional developments. Although the *Teitiota v. New Zealand* (2019) case most closely addresses the application of the non-refoulement principle in the context of climate change and it predates the *Daniel Billy and Others v. Australia* (2022) case as well as the conclusion of the Falepili Union Treaty (signed in 2023), we will examine first the latter two initiatives as they illustrate the broader recognition of climate change as a direct threat to human rights. They also demonstrate the growing tendency that states assume a more active role either by implementing measures within their jurisdictions to address the impacts of climate change or by strengthening support for other states through engaging in formal (i.e. bilateral cooperation).

The *Daniel Billy and Others v. Australia* (2022) case is the most important climate-related human rights case, in which the HRC found that Australia had violated the claimants' rights under the ICCPR by failing to adequately protect them from the adverse effects of climate change. The significance of this case is primarily in the link that was made between climate change and its impact on human rights. The case was initiated by indigenous inhabitants of the Torres Strait Islands (eight islanders and their six children), located between Australia and Papua New Guinea, who argued that the Australian state failed to take the necessary measures against climate change impacts. In particular, it was concluded that Australia failed to provide the necessary protection and those failures ultimately resulted in the violation of the claimants' rights under ICCPR, precisely of their: 1) right to enjoy their culture; and 2) right to be free from arbitrary interference with their private life, family, and home. The HRC also stated that, despite numerous requests for action, including for financial support, Australia failed to implement an adequate adaptation programme in order to ensure the long-term habitability of the islands. Furthermore, it failed to implement the adequate mitigation measures against climate change impact. Those points were reemphasized in the argumentation showing the 30.7% increase in emissions between 1990 and 2016, resulting in Australia becoming the country with the second highest per capita greenhouse gas emissions in the world in 2017. (Daniel Billy et al. v. Australia, 2022; Kahl, 2022). Another significance of the HRC's reasoning is in its progressive approach of accepting climate-related activities to fall under a developed country's jurisdiction, despite being a global phenomenon, emphasizing the vulnerability of claimants as well as the weight that climate change poses to their lives. However, although this case clearly lays the foundation for developed countries to be held responsible for implementing adequate preventive and mitigating adaptation measures against climate change-related impacts, the HRC remained cautious with regards to future climate change-related harm. Therefore, the HRC's reasoning remained within the framework of human rights law, designed to address existing, ongoing harm but not future violations. (Kahl, 2022).

The Falepili Union Treaty is the first bilateral climate mobility agreement between Australia and Tuvalu. Under Falepili Union Treaty, which is limited to climate change, mobility and security matters, Australia has: 1) recognized for the first time in a legally binding treaty, Tuvalu's continuing statehood and sovereignty, notwithstanding the impact of climate-change related sea-level rise; 2) committed to assist Tuvalu in response to a major natural disaster, health pandemic or military aggression; and 3) created a special visa pathway to support mobility with dignity, which will enable citizens of Tuvalu to come to Australia to live, work and study. (Falepili Union Treaty, 2023; Green & Guilfoyle, 2024). Subsequently, on 8 May 2024, a document called "Explanatory memorandum – Falepili Union between Tuvalu and Australia" was signed in order to clarify the operation and intended implementation of the Falepili Union Treaty.

In the context of the non-refoulement principle and in a wider context of human rights, one of the key contributions of the Falepili Union Treaty is that it provides practical solutions and creates a concrete pathway for managing relocation with dignity. The mobility aspect was formalized in the Article 3 of the Falepili Union Treaty, which stipulates the following:

"Australia shall arrange for a special human mobility pathway for citizens of Tuvalu to access Australia which shall enable citizens of Tuvalu to: a) live, study and work in Australia; b) access Australian education, health, and key income and family support on arrival."

Through comparison of the described mobility mechanism from the Falepili Union Treaty and findings in the *Teitiota v. New Zealand* (2019) case (which we will further examine in the below text), we can identify that the Falepili Union Treaty offers a possible means for addressing gaps in the existing non-refoulement protection when it comes to climate-induced displacements. However, it is important to note that the nature of the Falepili Union Treaty is a bilateral one, and although it should be viewed as an

important step in the normative evolution, it applies only to Tuvalu-Australia relationship and therefore cannot be construed as establishing a rule of broader application within international law.

Furthermore, it is important to note that there are significant controversies surrounding the Falepili Union Treaty. Key concerns relate specifically to the clauses, such as: 1) Article 3(2), which requires that Tuvalu ensures compatibility of its immigration, passport, citizenship and border control systems with Australia's systems; and 2) Article 4(3), which requires for Tuvalu to grant territorial access, presence and overflight rights to Australia if necessary. The central controversy, however, arises from Article 4(4) which stipulates the following:

"Tuvalu shall mutually agree with Australia any partnership, arrangement or engagement with any other state or entity on security and defence-related matters. Such matters include, but are not limited to, defence, policing, border protection, cyber security and critical infrastructure, including ports, telecommunications and energy infrastructure."

Such conceptualization grants Australia significant influence over key considerations, such as security and defence, implying even Australia's veto power over Tuvalu's key national security interests, and notably without reciprocity. (Soderstrom, 2024).

It is therefore clear that the legal architecture around the obligations stipulated in the Falepili Union Treaty will still require further operationalization and continued analysis. Nonetheless, its main contribution alongside the contribution of the *Daniel Billy and Others v. Australia* (2022) case is in its progressiveness and in its gradual anticipatory nature when it comes to addressing climate-induced displacement, and ultimately in strengthening the underlying protective reasoning of the non-refoulement principle.

The reality is that the non-refoulement principle is still mainly linked to the context of refugee law. On the contrary, as previously mentioned, its scope within the human rights regime is wider and, therefore, such broader perspective should be a starting point for its application also in the context of climate-induced displacements. As Anderson, Foster, Lambert and McAdam explain:

"In relation to climate-related displacement, it is important to acknowledge that refugee law will not be a good fit in most cases. The impacts of climate change and/or disasters will generally not satisfy the meaning of "persecution" because of the need for human agency, and even if such harm could be characterised as persecution, a further challenge would be linking the persecution to one of the five Refugee Convention grounds. However, human rights-based protection from refoulement may apply, which prevents states from sending people to places where they face a real risk of being arbitrarily deprived of life, or subjected to cruel, inhuman, or degrading treatment." (Anderson, Foster, Lambert & McAdam, 2020).

Within this setting, it is critical and methodologically necessary to analyse the previously mentioned *Teitiota v. New Zealand* (2019) case, as it serves as a baseline for the increasing willingness to recognize climate change as a trigger for non-refoulement protection.

4.4.1 Teitiota v. New Zealand (2019) case legacy

Ioane Teitiota, Kiribati citizen, sought asylum in New Zealand in 2013, claiming that rising sea levels and environmental degradation in Kiribati constitute a threat to his and his family's life and health. New Zealand's courts, including the Supreme Court, rejected his claim, stating that "persecution" criteria as stipulated under Refugee Convention 1951 were not met. The case was further brought to the HCR who did not find that New Zealand's authorities violated Teitiota's rights by deporting him to Kiribati. The rationale for the decision was a lack of the link between environmental conditions in Kiribati and the direct threat to Teitiota's life and life of this family members.

However, despite the final outcome of the *Teitiota v. New Zealand* (2019) case, which demonstrated rather stringent requirements when it comes to criteria applied to immediate threat to one's life and well-being, a fertile ground was created for an expanded interpretation of the principle of non-refoulement as the HRC did recognize that climate change could pose a threat to the right to life. In particular, the HRC acknowledged that climate change impacted Kiribati and that the sea-level rising could pose a reason for its citizens to seek protection outside of the borders of their home country as a response to climate-change induced harm. (Bergova, 2021). In other words, the HRC recognized that climate change could be a real reason to seek asylum and therefore trigger the application of the non-refoulement principle.

After all, it is difficult to ignore that climate change and environmental threats do pose a strong need for protection as the circumstances of those impacted by climate change do not necessarily differentiate in their essence from the circumstances of those who flee due to war circumstances. As Baeza notes:

“Disruption of their habitat is caused, directly or indirectly, by the phenomenon of climate change. That is the main reason for leaving the territory. That is, there is a link between being forced to leave one’s habitat and the phenomenon of climate change.” (Baeza, 2023).

Hence, as noted above, the *Teitiota v. New Zealand* (2019) case clearly presents a fruitful starting point by stressing the importance of non-refoulement in the context of climate change and climate change-induced harm; also, by demonstrating the full evolutionary potential of the non-refoulement principle. If viewed in conjunction with subsequent developments just a few years later with the *Daniel Billy and Others v. Australia* (2022) case and with the Falepili Union Treaty, it is noticeable that, when it comes to protection against climate change, the normative framework is gradually evolving towards a stronger foundation for a more coherent legal framework with regards to climate change displacements.

In order to further conceptualize this view, we will analyse broader dimension of the non-refoulement principle, outlining its flexibility potential and thus providing ground for the creation of an enhanced normative protection framework in the context of EDP. In such broader dimension we can identify three doctrinal characteristics of the non-refoulement principle: 1) its human rights prospect; 2) its autonomous nature; and 3) its foundation for future protection.

4.4.2 Human rights prospect of the non-refoulement principle

Apart from the Refugee Convention 1951, it has already been demonstrated that the non-refoulement principle is embedded in various other documents and treaties within the wider international human rights protection regime. The non-refoulement principle is primarily designed to protect fundamental human rights, in particular: life, freedom, and human treatment. Such a broader normative scope enables the non-refoulement principle to be applied to new, emerging threats and harms, such as those resulting from climate change and environmental degradation.

4.4.3 The autonomous nature of the non-refoulement principle

The non-refoulement principle is focused on contextual protection, through preventing the return of individuals to dangerous environments. This means that the non-refoulement principle should not be interpreted as an implied recognition of the future legal status of the individual for whom the principle applies. Therefore, also in relation to EDP, the key focus must be on the context and on the recognition of additional circumstances (e.g. climate change) as a potential cause of danger to human rights. The future legal status of the individual is part of the next step in the protection mechanism (e.g., the asylum process and recognition of long-term legal status) which is conceptually outside the scope of the non-refoulement principle.

Therefore, the uncertainty surrounding the individual’s future legal status should not, in itself, constitute an obstacle to the application of the non-refoulement principle. Such a framework with clearly defined limits of the non-refoulement principle ensures its autonomy and expeditious safeguard as the focus must remain on protecting EDP from being returned to environments that are dangerous for their lives and their well-being due to climate change-caused factors, without necessity to respond to further complexities related to determining the future formal status of such individuals, which could ultimately hinder the prompt protection already at the initial protection step.

4.4.4 Foundation of the non-refoulement principle for future protection

As stated earlier, the non-refoulement principle does not automatically imply any formal legal status (e.g., refugee status). However, it is clearly a first step in the wider protection process of those whose lives and well-being are at serious risk. In the context of refugees, we could even conceptualize the non-refoulement principle as one of the segments in the “triangle of protection” mechanism. Three constitutive elements could be identified in such a “triangle of protection” mechanism: 1) the non-refoulement principle as the first step and as *de facto* foundation principle, creating the conditions for the other two elements; 2) the asylum approval procedure, which becomes applicable only once the non-refoulement principle has been applied. Otherwise, without the protection afforded by the non-refoulement principle it would be difficult, if not impossible, to ensure access to an asylum procedure; and consequently 3) the opportunity to obtain a final refugee status. In other words, the non-refoulement principle serves as enabler for an individual to remain within the jurisdiction of the receiving state in order to access an asylum procedure and have the refugee status claim properly examined.

Through analysing the above detailed three doctrinal characteristics of the non-refoulement principle, we have already been able to establish its evolutionary nature and its normative flexibility, which could serve as a pathway to its further evolution. Such an evolution is particularly important if we take into consideration previous case law, which has not been very fruitful when it comes to granting protection from climate change impacts. As McAdam explains:

"Courts around the world have held that the Refugee Convention does not generally protect victims of natural disasters or those in search of better living conditions... Between 2000 and 2015, there were over twenty cases in Australia and New Zealand where people from Tuvalu and Kiribati argued that they should receive refugee protection from climate change impacts, but all failed." (McAdam, 2016).

However, considering further developments with the *Daniel Billy and Others v. Australia* (2022) case, which recognizes climate change as a cause of violation of human rights, and with the Falepili Union Treaty, which shifts the approach towards climate-induced mobility with more pragmatic solutions, we can clearly conclude that, although a coherent legal framework has not yet been formed, these examples signal a growing pressure to refine and to adapt the overall protection mechanisms.

In the following text, we will further analyse some proposals as to how the non-refoulement principle can be further refined through *de lege ferenda* approach and how its flexibility can be leveraged as a protection mechanism for EDP in the short term, and conceptualized in a normative framework.

4.5 Non-refoulement "four-step test"

Despite the above-described qualities of the non-refoulement principle, including the important views stressed by the HCR in the *Teitiota v. New Zealand* (2019) case, a universal approach with regards to the criteria which should be applied when it comes to non-refoulement within the context of EDP is still lacking. Hence, a "substantial progressive development of the principle of non-refoulement under human rights law would be required before this could be considered an effective remedy." (Goodwin-Gill, McAdam & Dunlop, 2021).

Therefore, the following "four-step test" mechanism presented below may be a helpful framework, stipulating concrete guidelines for the mandatory application of the non-refoulement principle in the context of EDP. We will first focus on the content of each test, and then on their combination which would require a positive test result in order for the non-refoulement principle to be mandatorily applicable.

4.5.1 Imminent harm/threat test

The key feature of imminent harm and threat is the immediacy of events, such as earthquakes, floods, tornadoes or tsunamis. Some of those events took hundreds of thousands of peoples' lives (e.g. the Indian Ocean earthquake and tsunami in 2004 had over 200.000 casualties; the devastating earthquake in Haiti in 2010 took approximately 300.000 lives). Given the immediate nature of such events, there is usually very little time to react to or prevent their impacts.

In the imminent-harm test assessment, it would therefore be critical to establish whether returning an individual to their country of origin, which was impacted by a similar event, would expose them to imminent harm. In order to establish if the harm is imminent, we need to analyse the nature of the event and to determine if the event has the characteristics of a severe and sudden occurrence which poses a threat to people's lives and properties. Also, it needs to be established whether there is a risk of escalation into a severe natural disaster or if the living conditions are so undermined that a return is no longer possible. In this context it is important to consider the threshold stipulated in the argumentation of the HRC in the *Teitiota v. New Zealand* (2019) case. The HRC stated the following:

"The information made available to the Committee does not indicate that when the author's removal occurred, there was a real and reasonably foreseeable risk that he would be exposed to a situation of indigence, deprivation of food, and extreme precarity that could threaten his right to life, including his right to a life with dignity. The Committee therefore considers that the author has not established that the assessment of the domestic authorities was clearly arbitrary or erroneous in this regard, or amounted to a denial of justice."

Argumentum a contrario, it could be concluded that had the HRC found that the living conditions in Kiribati already were seriously life threatening and that a dignified life is not possible, the harm would have been considered as imminent and a displacement as forced. As a result, the imminent harm test would have been positive.

It is important to note that, as a methodology for determining the existence of imminent harm, the hazard-exposure-vulnerability framework methodology (which, apart from the identification of the imminent harm, also facilitates the identification of common hazard characteristics, governance challenges and opportunities for more enhanced future risk governance) could serve as a valuable mechanism. (Stauffer, Kirsch-Wood, Stevance, Mani, Sundaram, Dryhurst & Seifert, 2023).

4.5.2 Irremediable harm/threat test

Irremediable harm should be understood as harm which would irreparably damage one's basic human rights, "including the rights to life, health, housing, culture, means of subsistence, and the rights to be free from inhuman or degrading treatment." (Goodwin-Gill, McAdam & Dunlop, 2021). In the context of climate change and, more specifically, sea-level rise, it is important to note that such a phenomenon is a unique due to both its gradual and sudden effects. As Steffens explains, sea-level risk unfolds over a longer period of time but it also makes storms and coastal disasters more severe. (Steffens, 2019). Nonetheless, when it comes to the degree to which individuals affected by the sea-level rise have the ability to adapt, sea-level rise should be primarily considered as a gradual process as opposed to imminent disaster which usually necessitates immediate reaction and departure. However, the key factor which makes the sea-level rise to be determined as a cause of irremediable harm (also, as a differentiator from the imminent harm) is its progressive continuum which ultimately may eliminate any possibility for adaptation, resulting in unavoidable displacement.

Furthermore, due to its gradual nature and the fact that the sea-level rise can take years or decades, one of the key questions is – when can migration caused by climate change and environmental degradation be considered as voluntary or as forced? According to Steffens, such a distinction can be controversial as the slow pace of the environmental degradation might be perceived as voluntary only at first glance; however, the surrounding circumstances of such degradation are leaving no feasible alternative to migration; hence, in reality there remains no real choice (Steffens, 2019).

Nonetheless, the key distinction from the imminent harm still remains in the time factor as well as in the nature of the risk itself. Whilst imminent harm is very likely to materialize in the very near future, the irremediable harm is more focused on consequences. However, once the long-term impacts of climate change, in particular of sea-level rise materialize, they may very likely become permanent without possibility of being remedied. For example, since the end of 1992 until 2009, the sea level on Kiribati has risen approximately 6.14cm. (Aung, Singh & Prasad, 2009). And the phenomenon still continues, as reflected also in the HRC's decision in the *Teitiota v. New Zealand* (2019) case, in its reference to the timeframe of 10 to 15 years before Kiribati becomes uninhabitable. The HRC actually acknowledged the severeness of environmental circumstances, strongly suggesting the occurrence of irremediable future harm.

The nature of the irremediable future harm of sea level rising is indicated also through the emerging concept of "mobility with dignity", as a potential response to climate-induced displacements. The concept was first advanced by the former president of Kiribati, Anote Tong (who was the fourth President of Kiribati between 2003 and 2016), and it was further formalized in the Falepili Union Treaty. The underlying premise of the "mobility with dignity" concept is to ensure that the migration is based on voluntary decision, as opposed to being a forced displacement, and that it is performed in a safe way, with respect for human dignity, and by allowing basic access to education, employment and healthcare. (McClain, Bruch, 2021). The development of the "mobility with dignity" concept reflects an implicit recognition that the climate change, in particular, the sea-level rising phenomenon, continues to evolve to the level of non-remediable harm.

4.5.3 Minimum living standards test

Minimum living standards are the core conditions required for a person to live a secure life with dignity.

"The right to a basic standard of living includes adequate access to food, water, housing, health care, and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other livelihood limitations beyond a person's control." (McClain, Bruch, Daly, May, Hamada, Maekawa, Shiiba, Nakayama & Tsiokanou, 2022).

In order to assess whether the living standards are at an adequate level of humanity, decision-makers should apply the "normal life" criteria. As indicated by the UNHRC:

"Conditions in the area must be such that a relatively normal life can be led in the context of the country concerned. If, for instance, an individual would be without family links and unable to benefit from an informal social safety net, relocation may not be reasonable, unless the person would otherwise be able to sustain a relatively normal life at more than just a minimum subsistence level" (UNHCR, 2003). This means that the lack of such "normal life" means that the minimum living standards are not met, hence, the minimum living standards test is positive.

It is important to note that the minimum living standards criteria may in practice overlap with the imminent harm criteria; however, they are still conceptually distinct. The imminent harm may indeed stem from the living standards falling below the minimum, "normal life" threshold and therefore making the return impossible. In that case we have two tests simultaneously positive. Nonetheless, the imminent harm might arise from different conditions, and not necessarily from the living standards falling below the "normal life" threshold. In that case, both tests need to be performed independently.

4.5.4 Possible alternatives test

The possible alternatives test involves determining whether the home state can provide the necessary protection, which includes ensuring adequate places where such individuals can be placed, either temporarily or in the long term. Possible alternatives could also entail seeking options in third countries, which is important from a burden sharing perspective as, logically, in case of environmental disasters, people will typically seek shelter in the closest safe countries. Such countries, however, need to have the possibility to consider solutions outside of their borders in order to relieve the pressure and burden from their own territories. This, in turn, will mean that those third countries will have to apply the same assessment tests to provide protection under the non-refoulement principle, which in itself highlights the importance of a uniform approach with regards to the “four-step test” mechanism in order to allow certain level of foreseeability, not only for threatened individuals, but also for the states as providers of protection.

We need to recognize, however, that the possible alternatives which imply the involvement of third countries are by default exposed to further political complexities and international collaboration considerations; therefore, for the purpose of this analysis, when referring to the possible alternatives, only the alternatives that can be provided within the territories of the country of origin are being considered under this particular test.

4.5.5 “Four-step test” mechanism *modus operandi*

Below we will analyse how the aforementioned “four-test step” mechanism could potentially work in practice.

When it comes to the harm test, it will often be the case that harm will not be imminent and irremediable at the same time. However, both unquestionably pose the same level of danger to fundamental human rights. So, we could say that, in order to invoke the mandatory application of the non-refoulement principle, it is sufficient if at least one of the harm-tests is positive. As per the other two tests, they become relevant at the second stage and are therefore of a subsequent nature. If the harm test (regardless of whether the harm is imminent or irremediable) is negative, decision-makers will not perform the assessment of the other two tests. However, if the harm test is positive, it does not yet mean that the non-refoulement principle will apply. This only means that there are grounds for further analysis as to whether its application is mandatory, and the final determination as to whether the application of the non-refoulement principle is justified and required will depend on the results of the last two tests.

If decision-makers determine that, in addition to the existence of the harm risk, refoulement would mean returning the individual (whether directly or indirectly) to a place where minimum living standards are not satisfied, and if at the same time there are no possible alternatives, the non-refoulement principle shall apply. On the contrary, if decision-makers establish that, despite the presence of the (either imminent or irremediable) harm risk, living standards are not below the required minimum, or (if they are) the state of origin manages to demonstrate that it is able to ensure minimum living standards in another location within the same state territory, the non-refoulement principle shall not mandatorily apply.

To summarize, for the non-refoulement principle to mandatorily apply, the results of the following three tests must be cumulatively positive: 1) harm (either imminent or irremediable); 2) minimum living standards; and 3) possible alternatives. More precisely, the “imminent harm” test and the “irremediable harm” test are positive if the presence of harm has been determined. The “minimum living standards” test is positive if it has been determined that the minimum living standards have not been satisfied, and the “possible alternatives” test is positive if it has been determined that there are no possible alternatives that could be leveraged.

For the non-refoulement principle to be mandatorily applicable, at least one of the two harms (imminent or irremediable) must cumulatively exist with the other two mandatory criteria. We also need to bear in mind that these criteria may overlap. We can have a situation where a decision maker, by assessing only one aspect of climate change (e.g., extreme sea level rising dynamic), may establish that the harm should be qualified as irremediable (because, for example, it is based on long-term risks, such as the disappearance of a habitable land). Furthermore, whilst performing the subsequent, minimum living conditions-test, a decision maker may also determine that living conditions are severely below minimum standards and so undermined that life (therefore also return) is not possible, which in itself can be qualified as an imminent harm and lead to a situation in which all four tests are positive.

Accordingly, the “four-step test” methodology would consist of two stages. The first stage would relate to establishment whether the harm/threat (either imminent or irremediable) exists. Only if one or the other, or both harms/threats exist (meaning, the harm test is positive) the analysis proceeds to the second stage. The second stage would relate to the assessment of the minimum living standards and of the possible alternatives, which both must result in positive tests. Consequently, a positive application of the

non-refoulement principle would be reached where the minimum living standards and the possible alternatives tests are cumulatively positive, together with at least one (or both) harms/threats tests being also positive.

It is important to note, however, that the focus here is confined to a framework that sets out the minimum requirements for a mandatory application of the non-refoulement principle; nonetheless, each country can always provide greater protection. The fact that the above-mentioned test assessments do not result in cumulative criteria which would trigger the mandatory application of the non-refoulement principle does not automatically mean that each individual case will necessarily result in the return of the individual to his/her country of origin. It cannot be argued that there is excessive or too much protection when it comes to human rights, as the international human rights regime rules should be understood as establishing a minimum standard of protection rather than the upper limit.

4.5.6 Reassessing *Teitiota v. New Zealand* (2019) case through “four-step test” mechanism

Based on the “four-step test” mechanism, it is worth evaluating whether the *Teitiota v. New Zealand* (2019) case would have had a different outcome.

With regards to the existence of harm/threat, at all court instances up to the HRC’s decision, it was found that there was no imminent threat for Teitiota and his family. However, as stated by Behrman and Kent:

“From the initial Immigration and Protection Tribunal hearing all the way up to the HRC, every court found the evidence presented to be entirely credible. Inter alia, the evidence detailed coastal erosion, increased storm surges and flooding, contamination of relatively scarce sources of potable water that in turn has caused diseases especially amongst young children, loss of land on which to live and grow food that has in turn led to violent disputes between neighbours. Specifically, it was accepted that these deteriorating conditions of life on the islands has been caused, at least partly, by the effects of climate change, both sudden and slow-onset. So clearly there was substantial evidence for a threat to life on Kiribati as a result of the effects of climate change.” (Behrman & Kent, 2020).

Furthermore, the HRC determined that the current environmental conditions in Kiribati are very severe causing them an irreparable damage and rendering them unsuitable to sustain human habitation in the near future and that, as a result, Kiribati will likely become uninhabitable in 10 to 15 years. Such a determination was implicitly an acknowledgment that the underlying irremediable harm is already materializing.

As a result of the above assessment, we could argue that the first test, the existence of harm (the irremediable one in this case), was positive.

Furthermore, as noted earlier, the determination of the existence of either imminent or irremediable harm allows us to further examine the case against other two tests, the minimum living standards tests and the possible alternatives tests. In that sense, when it comes to the minimum living standards test, we will reflect on the report of the Kiribati National Statistics Office and the United Nations Development Programme Pacific Centre from 2010 (hereinafter the Report), which indicates that the living conditions in Kiribati do not even satisfy the minimum standards. With the existing poverty, inadequate infrastructure and very limited sources to basic human needs such as fresh water and food, the climate change risks are becoming a severe risk amplifier, exponentially multiplying already existing challenges and further limiting Kiribati’s ability to respond to such challenges. The Report shows that approximately one in five households in Kiribati lives below the national basic-needs poverty line and it’s characterised by the continuous inability to meet the essential needs, forcing the households to often choose between competing basic necessities, such as food, utility costs, and education. (Kiribati National Statistics Office and the United Nations Development Programme Pacific Centre, 2010). We could therefore argue that the basic humanitarian conditions at the time of the HRC’s decision were clearly not at the adequate level and therefore not allowing the “normal life”. We believe that already such documented evidence demonstrated that the living conditions were clearly below an adequate “normal life” level; hence, we could argue that the minimum living conditions test was also positive.

In this context we will also reflect to the dissenting opinion of one of the HRC’s members in the *Teitiota v. New Zealand* (2019) case, Vasilka Sancin, who was even questioning whether New Zealand had demonstrated the access to safe drinking water for Teitiota and his family. Sancin was rejecting the assumption that the potable water should be treated as equivalent to a safe drinking water and she argued that the burden of proof that the access to safe drinking water can be guaranteed was on New Zealand and not on the claimant. Although Sancin was not making a factual statement with regards to the actual existence of the safe drinking water (as her argumentation in this context focused on the burden of proof only), the fact that this particular point was challenged indirectly suggests that the existence of the minimum living standards was in doubt.

Furthermore, the fact that New Zealand did not determine that there is an access to the safe drinking water for the claimant and his family, means also that the positive obligation arising from the non-refoulement principle was breached. As it has already been demonstrated earlier, the ECtHR's interpretation of state's procedural obligations in non-refoulement cases clearly established certain positive obligations, such as the obligation to thoroughly examine if there is an adequate protection in the place to which the claimant is being returned. In such examination, any potential degrading circumstances arising from humanitarian conditions are grounds to apply the non-refoulement principle. Such position was confirmed by the ECtHR also in the *D. v. United Kingdom* (1997) case where the ECtHR concluded that deporting an individual who is seriously ill to a country lacking a proper medical protection and proper medical facilities is a violation of the prohibition of inhuman or degrading treatment as per the Article 3 of the ECHR.

Although the ECtHR repeatedly characterised that such circumstances must be "very exceptional", requiring the high threshold for protection, this was a clear judicial endorsement that the non-refoulement principle as defined in the ECHR may apply even when inhuman or degrading treatment arises from humanitarian conditions. (Kolmannskog & Myrstad, 2009). Although the factual context differs, we believe that if the same rationale would have been applied to the *Teitiota v. New Zealand* (2019) case, the assessment and the final outcome may have been different.

Lastly, with regards to the possible alternatives test, the HRC's determination that the life expectancy of Kiribati is likely 10 to 15 years could undoubtedly be considered as an implicit recognition of inability for Kiribati to provide any adequate alternatives within the Kiribati territory. Therefore, the possible alternative test could also be considered as positive.

5. Conclusion

The large-scale wave of human displacement due to natural catastrophes and climate change is our present and our certain future. Turning a blind eye on a problem that is so big and right in front of us is a certain formula for creating a severe humanitarian crisis in the coming decades. Global society needs to effectively address the problem, especially with regards to the existing normative gaps and start building more predictable and clearer legal frameworks through a more flexible interpretation of existing mechanisms. Through these actions, we strongly believe that the fundamental human rights of EDP will be adequately protected, resulting in a more predictable and less pressing environment for the entire international community, providing greater scope for addressing this complex and far-reaching challenge.

In that sense, the non-refoulement principle is an important catalyst and a driving force for the evolution of international law, aimed at addressing the critical needs of EDP. This impetus for the evolution stems from the key characteristics of the non-refoulement principle, such as: 1) human rights as its underlying values; 2) its role as a legal safeguard, preventing forced returns of individuals to places where they could be exposed to severe risks to their lives and freedoms; and 3) its capacity for broader interpretation. However, such an evolution and *de lege ferenda* legal development of the non-refoulement principle should be guided by clearly defined criteria. One possible approach would be the development of a "four-step test" framework based on the following tests: 1) imminent harm test; 2) irremediable harm test; 3) minimum living standards test; and 4) possible alternative test. And the application of the non-refoulement principle in case of EDP would therefore be assessed against those four tests. The proposed "four-step test" methodology is only one proposal for addressing the application of the non-refoulement principle in cases of EDP. And, as we have demonstrated earlier, we believe that there is a high probability that had the *Teitiota v. New Zealand* (2019) case been analysed through the "four-step test" methodology, the outcome may have been different.

However, it is important to note that the value of the proposed framework goes beyond just ensuring that the non-refoulement principle is applied in EDP-related cases. As we already explained, if the necessary criteria under the "four-step test" are not satisfied the non-refoulement principle would not be mandatory applicable in any case. Nevertheless, even in cases where the criteria would not be satisfied, such a clear methodology would serve as an instrument which requires from decision makers to provide a more rigorous justification when refusing the non-refoulement protection. In other words, a precise and robust framework could help not only with effective determination of cases where such protection should be warranted, but also with progressive development of the overall procedural reasoning.

Building concrete mechanisms to expand the existing scope of the non-refoulement principle is only a first step; however, it should not be viewed in isolation from the wider context and realities of the "new normal" confronting states which are largely vulnerable to climate change, especially those that are facing unprecedented challenges related to losing their habitable territory. Legal responses to those challenges will need to be considered within a wider context of challenges for territorial integrity but also for the overall concept of statehood, and consequentially for the future legal status of EDP.

Although some of the above-proposed solutions may initially appear overly ambitious, it is crucial to look at the new challenges through some new, more innovative lenses, because that is the only way to ensure that international law retains its role as safeguard of fundamental human rights on a global scale.

As Anote Tong once said:

"I have often said that this is the moral challenge because it calls on answers which are unprecedented – never written and never heard of, so this calls for outside-the-box solutions." (Korauaba, 2015).

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