Risk and the UN International Covenant on Civil and Political Rights

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DECLARATION

This thesis is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the preface and specified in the text. It is not substantially the same as any work that has already been submitted, or is being concurrently submitted, for any degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the preface and specified in the text. It does not exceed the prescribed word limit for the relevant Degree Committee.

ABSTRACT

This dissertation addresses obligations of States parties under the International Covenant on Civil and Political Rights (ICCPR) to refrain from exposing individuals to risk through their own conduct and to prevent or mitigate such risk exposure caused by the conduct of third parties. In this dissertation, such obligations are described broadly as 'risk-based obligations'. Drawing primarily on the jurisprudence of the Human Rights Committee on articles 6 and 7 of the ICCPR, this dissertation first uncovers the role of risk as a phenomenon giving rise to human rights obligations in varied situations, and then addresses certain theoretical and doctrinal issues associated with conditioning obligations upon risk. It is argued that the concept of risk is relevant to the general undertaking in article 2(1) 'to respect and to ensure' Covenant rights, as well as to more specific obligations entailed in substantive rights, particularly the right to life in article 6 and the prohibition on torture and cruel, inhuman or degrading treatment or punishment in article 7. Yet, despite the important function of risk as a condition or criterion giving rise to specific duties, the concept of risk is underexamined in the Committee's jurisprudence. In the absence of detailed consideration, various theoretical and doctrinal issues have emerged. This dissertation identifies and addresses four such issues: first, the challenge of articulating the meaning and nature of 'risk' for this context; second, the challenge of circumscribing risk-based obligations in a way that is sufficiently clear and principled; third, the challenge of defining an appropriate standard of review in the Committee's consideration of States parties' findings regarding risk; and fourth, the challenge of clarifying the distinction between risk and causation and specifying what it means to 'cause' risk-exposure for the purposes of the ICCPR. This dissertation uncovers these issues in the Committee's jurisprudence and proposes approaches to: (1) clarifying the nature of risk findings, and relatedly, the applicable standard of review; (2) clarifying the distinction between risk and causation, and (3) selecting a theoretical account of causation to explain when a State party should be regarded as having caused risk-exposure, particularly for cases concerning causally complex human rights risks, such as the risks of anthropogenic climate change.

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LIST OF ABBREVIATIONS

CAT	Committee Against Torture
CIDTP	Cruel, inhuman or degrading treatment or punishment
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GHG	Greenhouse gas
ICCPR	International Covenant on Civil and Political Rights
NESS	Necessary Element of a Sufficient Set
TSRA	Torres Strait Regional Authority
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations Human Rights Committee

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1 INTRODUCTION

1.1. Why examine 'risk-based' obligations in the ICCPR?

In a landmark decision in 2022, the Human Rights Committee (Committee) adopted findings (Views) on a communication submitted to it by residents of the Torres Strait region of Queensland, Australia, who alleged that Australia had violated their rights under the International Covenant on Civil and Political Rights (ICCPR) by failing to take adequate measures to mitigate and adapt to climate change.[1] The decision is well-known as the first finding of a UN treaty body in which a State party was held responsible in human rights law for the impacts of climate change, the Committee having found the State party to have violated articles 17 (the right to privacy, family and home) and 27 (the rights of ethnic, religious or linguistic minorities to their own culture).[2] The decision is also significant for another, less discussed reason: the Committee's Views highlighted the pivotal role that an appreciation of *risk* can play in determining whether or not a State party has violated its human rights obligations.

The 'risk' facing the authors was material to the Committee's reasoning in several respects. First, it was material to the finding that the authors were 'victims' within the meaning of that term in the First Optional Protocol to the ICCPR, which establishes a process for the Committee to receive and consider 'communications from individuals

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[1] UNHRC, *Daniel Billy et al. v Australia* (22 September 2022) Communication No. 3624/2019, UN Doc CCPR/C/135/D/3624/2019; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[2] The authors alleged violations of the rights recognised in article 6 (the right to life), article 17 (the right to privacy, family and home), article 24 (the rights of children to measures of protection required by their status as minors), and article 27 (the rights of ethnic, religious or linguistic minorities to culture), each read alone and in conjunction with the general undertaking in article 2 of the ICCPR to 'respect and ensure' the rights recognised therein; see: Joanne Etherton *et al.*, 'Communication under the Optional Protocol to the International Covenant on Civil and Political Rights' (13 May 2019), submitted on behalf of Yessie Mosby, Nazareth Warria, Nazareth Fauid, Stanley Marama, Keith Pabai, Ted Billy, Daniel Billy and Kabay Tamu, available at https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2019/20190513_CCPRC135D36242019_complaint.pdf (accessed 15 January 2025). For analyses of the Committee's findings, see, e.g., Connor Wright, 'The Liability of States for Inadequate Climate Action under International Human Rights Law - Billy v Australia (UN Human Rights Committee)' (2022) 29 Australian International Law Journal 223; Laura Schuijers, 'Australia's Inaction on Climate Change is a Violation of Torres Strait Islands' Human Rights: *Billy v Australia*' (2023) 24 Melbourne Journal of International Law 1.

claiming to be victims of violations of any of the rights set forth in the Covenant'.[3] When considering the authors' status as 'victims' for the purposes of the First Optional Protocol, the Committee remarked that the authors were 'highly exposed to adverse climate change impacts' and that 'the *risk* of impairment of [the authors'] rights, owing to alleged serious adverse impacts that have already occurred and are ongoing, [was] more than a theoretical possibility'.[4] Second, the 'risk' facing the authors was material to the Committee's assessment of the merits of the authors' claims, including in respect of their right to life. In this regard, the majority of Committee Members found the authors had not indicated that they faced '*a real and reasonably foreseeable risk* of being exposed to a situation of physical endangerment or extreme precarity that could threaten their right to life, including their right to a life with dignity', and this finding was material to the majority's conclusion that the information before it did not disclose a violation of the right to life.[5] Thus, the concept of 'risk' was material both to the admissibility and to the merits of the claim in *Billy et. al. v Australia*, though the 'risk' of climate change facing the authors was characterised differently for each purpose.[6]

Although the word 'risk' does not appear in the express terms of Covenant or the optional protocols to the Covenant, it often appears in the Views, General Comments and other remarks of the Committee, as do related terms and concepts such as 'threat', 'danger', and 'reasonably foreseeable' harms or human rights impacts. That is partly a result of the recognition of obligations of *non-refoulement* as implied within the ICCPR and the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty (Second Optional Protocol).[7] For decades, the concept of risk has been central to the application of these implied obligations, which arise for a State party 'where there are substantial grounds for believing that there is a *real risk* of

[3] Optional Protocol to the International Covenant on Civil and Political Rights (adopted 17 December 1966, entered into force 23 March 1976) 999 UNTS 171 (First Optional Protocol) art. 1 (emphasis added).
[4] Billy *et al.* v Australia [7.10].
[5] Ibid [8.6].
[6] The matter is discussed further in parts 2.9, 4.2, 4.3.3 and 5.8.2 below.
[7] Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (adopted 15 December 1989, entered into force 11 July 1991) 1642 UNTS 414 (Second Optional Protocol).

irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant'.[8] In recent years, however, the concept of risk has also featured prominently in the Committee's remarks on various other obligations, highlighting the broader importance of taking measures to predict and prevent future possible harm in order to give effect to ICCPR rights in the present.

The Committee's remarks on the right to life exemplify this future-oriented aspect of States parties' duties under the Covenant. In 'General Comment No. 36 – Article 6: the right to life' (2018), the Committee makes numerous references to 'risk,'[9] 'serious risk',[10] 'serious and constant risk',[11] and 'real risk,'[12] as well as to 'foreseeable', 'reasonably foreseeable'[13] and 'expected' harms or threats to life.[14] In some of the Committee's remarks, the future-oriented dimension of an obligation is very clear; for example, the Committee observes that the obligation to respect and ensure the right to life 'extends *to reasonably foreseeable threats and life-threatening situations* that can result in loss of life', and that States parties may violate the right 'even if such threats and situations do not result in loss of life'.[15] Other statements convey a similar idea in more subtle ways, such as through reference to what 'may be expected' to occur. For example, the Committee has interpreted the right to life as concerning 'the entitlement of individuals to be free from acts and omissions that are intended or *may be expected* to cause their unnatural or premature death'.[16] Expressly or implicitly, the possibility of future harm is invoked frequently in the description of what a State party must do, or refrain from doing, in order to give effect to human rights in varied situations.

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[8] UNHRC, 'General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 [12] (emphasis added). *Non-refoulement* obligations exist in a range of treaties in international law and specific obligations differ in their form, content, and scope of application, as discussed in part 2.4.1 below.

[9] UNHRC, 'General Comment No. 36 – Article 6: right to life' (3 September 2019) UN Doc CCPR/C/GC/36 [8], [13], [23], [54], [64], [69].

[10] Ibid [27].

[11] Ibid [58].

[12] Ibid [30], [31], [42], [55].

[13] Ibid [18], [21], [22].

[14] Ibid [3].

[15] Ibid [7] (citation omitted, emphasis added).

[16] Ibid [3] (emphasis added).

The Committee's emphasis on risk is unsurprising, considering the prominence of risk as a conceptual tool for prediction and decision-making in contemporary society. The idea of risk is central to decision-making across numerous industries and professions, and risk analysis, risk assessment, risk communication and risk management have each emerged as specialised fields of study and practice in themselves.[17] The concept of risk is now central to the activities of governments and intergovernmental organisations across a broad range of areas. Risk has been described as 'central concern of advanced regulatory states,'[18] and scholars of regulatory law have documented an increasing focus on risk regulation in recent decades, both on the domestic and international planes, coinciding with proliferation of the terminology of risk in legal and policy materials.[19] Risk is also relevant to various bodies private law, in which the 'role of risk-taking in *generating* liability' is linked to the role of 'liability in *regulating* risk'.[20] Reference to risk in international human rights law can be situated within a broader social, political and legal context, in which risk not only preoccupies the modern regulatory State, but is viewed as a 'quintessential characteristic of the modern world' itself.[21]

[17] Lupton writes: 'An apparatus of expert research, knowledge and advice has developed around the concept of risk: risk analysis, risk assessment, risk communication and risk management are all major fields of research and practice, used to measure and control risk in areas as far-ranging as medicine and public health, finance, the law, and business and industry': Deborah Lupton, *Risk* (3rd edn, Routledge 2023) 9.

[18] Jacqueline Peel, *Science and Risk Regulation in International Law* (CUP 2010) 34.

[19] See, e.g., Elizabeth Fisher, 'The rise of the risk commonwealth and the challenge for administrative law' (2003) Public Law 455 (focusing on the United Kingdom); Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism* (Bloomsbury 2007); Peel, *Science and Risk Regulation in International Law* 12–57.

[20] Matthew Dyson, 'Chapter 1 – Introduction' in Matthew Dyson (ed), *Regulating Risk through Private Law* (Intersetia 2018) 1.

[21] E.g. Jaeger et. al. describe risk as 'the quintessential characteristic of the modern world, socially, ecologically, and institutionally': Carlo C Jaeger and others, *Risk, Uncertainty, and Rational Action* (Earthscan 2001) 7. See also Peter L. Bernstein, *Against the Gods: The Remarkable Story of Risk* (John Wiley & Sons 1998) 10 (characterising the 'mastery of risk' as a 'revolutionary idea that defines the boundary between modern times and that past') and Lupton, *Risk* (3rd edn) 9, 17 ('Changes in the meanings and use of risk are associated with the emergence of modernity, beginning in the seventeenth century, and gathering force in the eighteenth century…. The modernist concept of risk represented a new way of viewing the world and its chaotic manifestations, its contingencies and uncertainties... the contemporary obsession with the concept of risk has its roots in the changes inherent in the transformation of societies from pre modern to modern and then to late modern').

Despite risk's obvious importance, there is little scholarship on the underlying meaning or nature of risk for the purposes of the ICCPR, nor on the implications of defining ICCPR obligations as contingent upon risk. Risk is of course addressed in literature on complementary protection obligations, the applicability of which depends upon there being 'substantial grounds for believing that there is a *real risk* of irreparable harm' to a person, either in the country of return or in any country to which they may subsequently be removed.[22] Commentaries address this criterion of risk among other principles governing the scope of *non-refoulement* under the ICCPR.[23] Scholars have analysed the potential for different forms of risk to enliven implied *non-refoulement* obligations, such as risks of harm associated with the socio-economic conditions in the country of return,[24] or harms associated with the impacts of climate change.[25] While such works highlight the evolving scope of complementary protection obligations, they generally do not delve into the epistemology of claims or findings regarding risk and the implications of this for legal doctrine, nor analyse *non-refoulement* in connection with other risk-based obligations under the ICCPR.

As this dissertation will show, the relevance of risk extends well beyond the context of *non-refoulement.* The Committee's jurisprudence can be assembled into a bigger picture, in which *non-refoulment* is one of many obligations owed by States parties which involve predicting possible future harm and taking action to prevent or mitigate risk-exposure. Viewing risk from this wider angle reveals insights about the utility and challenges associated with defining duties as contingent upon risk. While a

[22] See, e.g., UNHRC, 'General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13. Implied obligations of *non-refoulement* are addressed in part 2.4.

[23] E.g., William A. Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (3rd revised edn, N.P. Engel 2019) 47–50, 131, 132, 202–207; Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edn, OUP 2013) 196–206, 262–275.

[24] E.g., Michelle Foster, 'Non-refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law' (2009) New Zealand Law Review 257

[25] E.g., Jane McAdam, 'Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-refoulement' (2020) 114 American Journal of International Law 708. This issue is also discussed in the literature on regional human rights law systems. See, e.g., Matthew Scott, 'Natural Disasters, Climate Change and *Non-refoulement*: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights?' (2014) 26 International Journal of Refugee Law 404.

growing body of scholarship on 'positive' obligations in the European Convention on Human Rights engages with some of these issues to an extent, the ICCPR jurisprudence remains less explored.[26]

This dissertation is the first detailed study of what may be loosely described as 'risk-based obligations' under the ICCPR. Though not a term of art in international human rights law, 'risk-based obligations' provides a convenient shorthand description of a category of duties owed by States parties, which are entailed in a range of different human rights recognised in the Covenant, and which share a characteristic: they are duties or obligations upon States to refrain from exposing an individual to risk or otherwise to take action to prevent or mitigate their exposure to risk. Such obligations are 'risk-based' in the sense that are enlivened (or in other words, they are rendered applicable in the circumstances) by risk of some kind.

As the first in-depth study of risk-based obligations entailed in the Covenant, this dissertation highlights the breadth of situations in which risk-based obligations arise, and addresses three analytical questions: first, what is 'risk' for the purposes of these obligations, or to what extent is its meaning defined or explained the jurisprudence? Second, what theoretical or doctrinal issues arise from the incorporation of this concept of risk into legal principle? And third, how does risk relate, conceptually, to

[26] Important contributions on positive obligations in European human rights law include: Alastair Mowbray, *Human Rights Law in Perspective: The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004); Jean-François Akandji-Kombe, *Positive obligations under the European Convention on Human Rights* (Council of Europe 2007); Mónika Ambrus, 'The European Court of Human Rights as Governor of Risk' in Mónika Ambrus, Rosemary Rayfuse and Wouter Werner (eds), *Risk and the Regulation of Uncertainty in International Law* (OUP 2017); Vladislava Stoyanova, 'The Disjunctive Structure of Positive Rights under the European Convention on Human Rights' (2018) 87 Nordic Journal of International Law 344; Vladislava Stoyanova, 'Common law tort of negligence as a tool for deconstructing positive obligations under the European convention on human rights' (2020) 24 The International Journal of Human Rights 632; Vladislava Stoyanova, 'Fault, knowledge and risk within the framework of positive obligations under the European Convention on Human Rights' (2020) 33 Leiden Journal of International Law 601; Maria Monnheimer, *Due Diligence Obligations in International Human Rights Law* (CUP 2021); Vladislava Stoyanova, 'Framing Positive Obligations under the European Convention on Human Rights Law: Mediating between the abstract and the Concrete' (2023) 23 Human Rights Law Review 1; Vladislava Stoyanova, *Positive Obligations under the European Convention on Human Rights* (OUP 2023).

the concept of causation in the context of risk-based obligations under the ICCPR? This dissertation constitutes the first attempt to address these issues in depth.

1.2. Methodology

To identify and analyse risk-based obligations in the ICCPR, this dissertation looks primarily at the jurisprudence of the Human Rights Committee, especially that contained in the Committee's Views on communications submitted in accordance with the procedure set forth in the First Optional Protocol, as well as its General Comments issued in accordance with article 40(4). Although not legally binding upon States parties, General Comments and Views constitute leading and authoritative guidance on the interpretation of the Covenant, issued by a body that is 'for all practical purposes the principal "quasi-judicial" human rights body within the UN human rights system'.[27] General Comments have been characterised as 'distinct juridical instrument[s]' in which the Committee 'announce[s] its interpretations of different provisions of the Covenant in a form that bears some resemblance to the advisory opinion practice of international tribunals.'[28] As such, General Comments constitute 'important instruments in the lawmaking process of the Committee' and provide an important reference point for evaluating States parties' implementation of the Covenant.[29] The Committee's Views on individual communications are also an important source of jurisprudence, as 'an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument'.[30]

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[27] Thomas Buergenthal, 'The U.N. Human Rights Committee' (2001) 5 Max Planck Yearbook of United Nations Law 341, 390.

[28] Ibid 387; Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Clarendon 1994) 386.

[29] Buergenthal, 'The U.N. Human Rights Committee' 387; McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* 491.

[30] UNHRC, 'General Comment No. 33 – The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights' (5 November 2008) UN Doc CCPR/C/GC/33, [13]. In Nowak's Commentary (as updated by Schabas) it is observed that 'Academic writers have debated the legal authority of the Committee's views, often contending that they are "not binding under international law"…It is a sterile and rather unhelpful debate. The views of the Committee represent an authoritative pronouncement by a distinguished expert body': Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (3rd revised edn) 1058 (citations omitted).

It should be noted that the Committee's concluding observations on individual States' periodic reports also constitute a significant source of legal commentary, however the present study focuses on Views and General Comments rather than concluding observations for several reasons. One reason is that the concepts and issues the subject of the present study tend to surface more clearly through the adversarial processes of the individual communication procedure, in which the Committee interprets and applies ICCPR rights and obligations to the circumstances of a specific individual (often leading to the development of legal principles which are subsequently captured in General Comments). Another reason for the focus on the Committee's Views is the ability to search the JURIS database (a central repository of the jurisprudence of the United Nations Treaty Bodies) for specific issues and text appearing in Views, which allows for the efficient identification of remarks on risk and related terms and concepts.[31]

For examples of risk-based obligations, this dissertation draws primarily on the Committee's jurisprudence on the rights recognised in articles 6 and 7. These are not the only rights entailing risk-based obligations. As explained in chapter 2, the concept of risk can be seen as broadly relevant to any or all the rights recognised in articles 6–27. That is because the overarching obligation in article 2(1) 'to respect and to ensure' Covenant rights is interpreted as entailing protective duties, including duties to prevent violations of individuals' human rights by third parties. It is argued in chapter 2 that this aspect of States parties' obligation to 'respect and ensure' ICCPR rights necessarily involves some effort to predict future harm, and for this reason, risk-based approaches may be generally relevant to ensuring the enjoyment of any or all of these Covenant rights.[32] However, to examine the jurisprudence addressing all Covenant rights would be beyond the practical scope of the present project.[33] Rather than attempting a comprehensive survey, this dissertation takes the approach of analysing key examples of risk-based obligations in depth. This allows the identification of

[31] The JURIS database is accessible at https://juris.ohchr.org/.
[32] See part 2.2 in particular.
[33] There is now a vast body of jurisprudence in the Committee Views on individual communications under the First Optional Protocol; a search of the Jurisprudence Database of the UN Office of the High Commissioner for Human Rights on 12 January 2025 returns 2,594 results.

subtle, yet important issues associated with risk, including instances of conceptual ambiguity, doctrinal inconsistency, and logical tensions within legal reasoning.

There are three main reasons for selecting articles 6 and 7 as the focus of the study. First, the rights recognised in these articles—the right to life and the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (CIDTP)—have given rise to a significant body of Committee jurisprudence engaging with the concept of risk, reflecting the particular importance of prevention of the harms described in those articles (which are serious and irreparable). Much of this jurisprudence has developed through the Committee's recognition of implied obligations of *non-refoulement* in articles 6 and 7, which are triggered by a 'real risk' of serious and irreparable harm, and hence require some reasoning about risk.[34] Second, in communications under the First Optional Protocol, individuals often claim violations of both articles 6 and 7 on the basis of risk exposure, particularly in *non-refoulement* claims, which means that some legal principles that have emerged from those cases pertain to both articles 6 and 7. A third reason for focusing on articles 6 and 7 is that risk is a pre-condition not only to the obligation of *non-refoulement,* but also a range of other specific obligations entailed in these rights. Focusing on these rights therefore allows a comparative analysis of how the concept of risk features in the application of a single right across varied situations, which uncovers the different ways in which the concept of risk can be interpreted and applied.

This study analyses the law in the light of theory on risk and causation drawn from a range of fields outside of international human rights law. Chapter 3, which addresses the meaning and nature of risk, draws upon scholarship on risk from a range of perspectives, including philosophy, anthropology, cultural studies, legal theory, and economics. Some key concepts in philosophy of probability are also briefly discussed to highlight the complex and challenging nature of findings about future possibilities. Chapter 4, which addresses certain theoretical challenges associated with reliance on an open-textured concept of risk, draws upon scholarship on risk in international refugee law to highlight the connection between how risk is conceptualised and how

[34] See further at part 2.4.

the law allocates authority for reaching findings on risk. Chapter 5, which addresses the concept of causation and the ways in which that concept interacts with the concept of risk in the Committee's jurisprudence, draws upon legal and philosophical theories of causation. Causation in the law has been the subject of detailed scholarly analysis and debate for centuries, and that discourse has to some extent aided the clarification of key concepts in various bodies of law, such as the law of tort in the common law tradition.[35] However, those insights have not necessarily permeated scholarship and practice within the comparatively young (though rapidly evolving) field of international human rights law, where causation remains underexamined.[36] By drawing on the wider legal-philosophical literature on causation, this dissertation highlights choices to be made in human rights law with respect to the meaning ascribed to 'cause', as well as the potential for confused and muddied doctrine to emerge if such issues are left unexamined.

A methodological limitation of this dissertation should be noted. Beyond the Committee's jurisprudence, there is a wider body of material of potential relevance to the study of risk-based obligations under the ICCPR, which includes jurisprudence of domestic legal systems and other forms of State practice in the implementation of the ICCPR. To consider that wider body of material would go far beyond what is feasible within the practical constraints of the present project. Therefore, a limitation of the present study is that it cannot capture in great depth or breadth the positions of States parties on the issues in question (though selective reference is made throughout to States' views on certain issues). While there may be value in a larger survey of domestic jurisprudence and other State practice in the implementation of the Covenant, the absence of that survey does not diminish the value of analysing the Committee's jurisprudence on risk, which is in any event a crucial piece of the larger puzzle.

[35] This is addressed in parts 5.6–5.7.

[36] Some inroads have been made into this topic in recent years, especially in the context of European human rights law. See, e.g., Vladislava Stoyanova, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights' (2018) 18 Human Rights Law Review 309; Laurens Lavrysen, 'Causation and Positive Obligations under the European Convention on Human Rights: A Reply to Vladislava Stoyanova' (2018) 18 Human Rights Law Review 705; Stoyanova, *Positive Obligations under the European Convention on Human Rights* , Chapter 3.

1.3. Overview of chapters and key findings

This dissertation proceeds as follows. Chapter 2 provides a general overview of how risk-based obligations feature in the jurisprudence on the ICCPR, providing context for the analysis in chapters 3–5. In chapter 2 it will be explained that risk underpins ICCPR obligations on two levels. At a general level, risk-based obligations are entailed in the overarching obligation in article 2(1) ‘to respect and to ensure’ Covenant rights. It is argued that the concept of risk is relevant generally to the overarching obligation ‘to respect and to ensure’ Covenant rights, principally because that general undertaking is interpreted as requiring States parties not only to refrain from certain acts, but to take ‘positive’ steps to *protect* and *fulfil* Covenant rights. This, in turn, entails acting to *prevent* future violations, including violations that may occur in situations removed to varying degrees from the organs or agents of the State party. It will be argued that obligations of prevention are, in essence, risk-based obligations, since they require the State party to anticipate future harms that may be perpetrated more directly by third parties. This situation, in which the State party must anticipate and act under conditions of uncertainty, lends itself to the recognition of risk-based obligations. It will be argued that because risk is relevant in this general way to the undertaking ‘to respect and to ensure’ Covenant rights, risk-based obligations may arise for any or all the rights in articles 6–27, irrespective of whether the word ‘risk’ has so far been used expressly in the articulation of duties.

Chapter 2 will then address some more specific ways in which ‘risk’ and related terms and concepts underpin ICCPR obligations, focusing on the Committee’s jurisprudence on articles 6 and 7. Examples will be discussed from a range of factual contexts, namely: the removal of persons to foreign territories, law enforcement, the protection of vulnerable persons in the context of broader patterns of violence, enforced disappearances, war and nuclear weapons, degradation of the natural environment, the provision of healthcare, and measures taken in the context of public health emergencies. Through a discussion of the jurisprudence on these issues, it will be shown that articles 6 and 7 entail a broad range of obligations that may be described as risk based. It will be argued that in a wide range of situations, risk gives rise to a specific duty upon the State party, and therefore the question of whether or not a State party has acted consistently with human rights obligations can turn on a judgment about the existence or non-existence of risk. Furthermore, in chapter 2 it will be shown that the emphasis on risk in the articulation of duties under articles 6 and 7 seems to be increasing over time. Overall, chapter 2 will demonstrate that the concept of risk is expressed or implied as a necessary element in various obligations and will draw out its role through a discussion of examples in the jurisprudence.

The substantive theoretical and doctrinal analysis of this dissertation proceeds in chapters 3–5. Chapter 3 will address a question that appears straightforward on the surface, but is revealed to be complex and puzzling upon closer scrutiny: what *is* 'risk' in the context of the ICCPR? As an entry-point for exploring this deceptively tricky question, chapter 3 begins by exploring how the word 'risk' is ordinarily understood and used in day-to-day (non-specialised) communication. This discussion will explore dictionary definitions and observations in the multidisciplinary literature on risk. It will be argued that, although the word 'risk' can be used in several senses, its meaning often includes two basic elements. One basic element of the concept of risk is some negative outcome, and another is the possibility/chance/probability/likelihood of its occurrence. Furthermore, it will be argued in chapter 3 that 'risk' often implies the ability to *measure* some aspect of the possible future negative outcome—generally either the likelihood of its occurrence, the degree or magnitude of the harm, or some calculus or combination of both magnitude and likelihood. It will be argued that this idea of risk as something that is amenable to measurement goes to the heart of common conceptions of risk and is often implied in ordinary usage of the word.

Chapter 3 will then explore at greater depth the philosophical basis of the idea that we can measure future possibilities. It will be explained that an inquiry into the likelihood of future events is premised on the concept of probability, and in this way, risk is fundamentally grounded in some form of probabilistic reasoning. Through a brief discussion of some key issues in theory of probability, it will be explained that probability is itself a complex concept, and one that is generally understood to entail both 'objective' and 'subjective' facets. To assess the probability of real-world events generally involves something more than just establishing facts about past or continuing events; it also involves the application of judgment as to precisely how to draw upon the past to measure future likelihoods. In this sense, a probabilistic inquiry cannot be regarded as a purely objective, factual inquiry for most practical settings. On this basis, it will be argued that findings with respect to risk, which entail probabilistic thinking, differ fundamentally from purely factual findings about past or continuing events. It will be argued that, as probability has both objective and subjective aspects, any concept of risk that draws upon probabilistic thinking (overtly or implicitly) also entails a mix of objective and subjective inputs. In this way, risk findings are of a fundamentally different nature to purely factual findings.

Chapter 3 will then return to the overarching question, what is 'risk' in the context of the ICCPR? In order to probe the meaning ascribed to risk in the context of the ICCPR, chapter 3 will revisit some of the cases outlined in chapter 2 and analyse the Committee's jurisprudence against the backdrop of the broader literature on risk and probability. The analysis of the case law is divided into two parts. First, cases concerning *non-refoulement* will be examined. It will be shown that in the context of cases concerning *non-refoulement,* the apparent meaning of 'risk' has evolved over time. It will be argued that in early cases, risk appeared to be synonymous with the idea of 'necessary and foreseeable consequence' (implying a very high degree of certainty with respect to the anticipated future harm), but over time the meaning of risk has become more open-textured. While the Committee has sought to define the scope of protection obligations through the application of qualifying terms, such as 'real', 'reasonably foreseeable', 'personal', and more controversially, 'imminent', there has been little explanation of the meaning of risk itself or the nature of an inquiry into risk. Drawing on the theory set out at the beginning of the chapter, it will be argued that the rigour and transparency of the reasoning would be enhanced by explicitly acknowledging the special nature of risk findings—in particular, the way in which they incorporate both facts and non-factual considerations such as value/policy judgments or legal principle.

After discussing *non-refoulement* cases (in which risk is usually determined *ex ante*), chapter 3 will then address a different category of cases, in which risk is considered *post hoc,* that is, after it has materialised in physical harm. It will be observed that the concept of risk serves a different purpose in this context. When risk is considered *post hoc*, the prior existence of the phenomenon of risk is uncontentious; what is in issue is whether the State party acted appropriately in response to it. It will be argued that in this context, the concept of 'reasonably foreseeable risk' is clearly a legal/normative construct (rather than a factual matter) which serves as a filter on State responsibility. It will be argued that to invoke the concept of 'reasonable foreseeability' in this context makes more sense than it does in the very different context of *non-refoulement,* where risk is judged *ex ante* and the idea of 'foreseeability' collapses into the concept of risk. However, the question of what 'reasonably foreseeable risk' means in this context, or how the Committee understands that concept, remains largely open. The overarching conclusion drawn in chapter 3 is that, in the Committee's jurisprudence on risk-based obligations under articles 6 and 7 of the Covenant, risk remains largely an open-textured concept.

Chapter 4 of this dissertation addresses certain issues that arise when a State party's obligations are triggered by risk and the meaning of risk itself is left largely unspecified in the jurisprudence. Two issues will be explored in chapter 4. The first issue is the challenge of clarifying the scope of risk-based obligations, or in other words, developing a clear and principled approach to determining when the obligations apply. The second issue is the challenge for the Committee in defining an appropriate standard of review when it considers States parties' findings on risk as part of determining whether they have fulfilled their obligations under the ICCPR.

To address the first issue, in chapter 4 this dissertation will revisit the qualifying terms 'real', 'reasonably foreseeable', 'personal' and 'imminent'. It will be shown that such terms have developed primarily in the jurisprudence on *non-refoulement* cases but have been transplanted to some extent into the reasoning in some other cases concerning risk. It will be argued that, in addition to offering little clarity on the concept of risk itself (as argued in chapter 3), questions also arise about the meaning of each of these terms and how they fit conceptually with risk. It will be argued that the terms 'real', 'reasonably foreseeable' and 'personal' are ambiguous in the context of an *ex ante* assessment of risk. Furthermore, it will be argued that the requirement that risk be 'imminent' is itself imprecise and liable to confuse. Drawing on examples of reasoning in the case law, it will be suggested that the real purpose of the criterion of imminence is not to limit protection obligations based on the anticipated *timing* of future harm, but rather to limit obligations based upon the degree of certainty in the hypothesis about the future circumstances that may befall the individual in question. On this basis, it will be argued that using the term ‘confidence’ in this context instead of ‘imminence’ would enhance the transparency of the reasoning, by better reflecting the rationale of the requirement and highlighting the unavoidably subjective dimension of risk.

Chapter 4 will then address a second issue that is linked to the use of an open-textured concept of risk in the jurisprudence, namely, the question of the appropriate standard of review of (or degree of deference towards) States parties’ risk findings. First, to highlight the way in which this question is tied to the question of how one conceptualises risk, chapter 4 will delve into literature on risk-based obligations in the context of international refugee law. Through a discussion of the literature touching on the nature of risk in this context, it will be shown that there are a range of different characterisations of the risk assessment involved in refugee status determination, with some scholars emphasising the importance of objective evidence in this process, and others acknowledging the subjective dimension of risk and linking this to arguments about the appropriate *procedures* for determining risk. This discussion will highlight that how one characterises or conceptualises risk can support a particular position about *who* is best placed to determine risk, and *how* they ought to do so.

Chapter 4 then revisits the Committee’s jurisprudence on articles 6 and 7 to explore the issue of the standard of review in the context of risk-based obligations under the ICCPR. Drawing on examples of cases introduced in chapters 2 and 3, as well as some additional cases, it will be argued that the Committee’s approach to reviewing findings of risk varies from case to case, reflecting a lack of clarity on the fundamental nature of these findings. Having regard to *non-refoulement* cases, it will be shown that the Committee’s approach has been inconsistent and sometimes divided. In statements of broad principle, the Committee appears to characterise risk findings as essentially factual (and therefore requiring a large degree of deference to the findings of organs of States parties). However, some cases reflect variance in the willingness of Members to delve into the substantive question of risk and reach their own findings on that matter. Chapter 4 will then examine cases other than those concerning *non-refoulement,* with a focus on cases concerning environmental risk. It will be argued that the Committee has sometimes demonstrated a reluctance to disagree with a State party's risk findings in this context, especially in cases involving technical or scientific evidence about long-term risk. However, recent jurisprudence on the application of article 6 to climate change-related risk reflects some division within the Committee in its approach to reviewing risk findings.

Chapter 4 will then propose an approach to reviewing States parties' findings with respect to risk, drawing upon insights from the literature on international refugee law, and particularly the work of Hilary Evans Cameron. It will be argued that greater clarity and predictability could be achieved by distinguishing between findings of fact regarding past or continuing events (which may support risk findings), and risk findings themselves. It will be argued that breaking down the analysis into these steps would enable a more fine-grained approach to the standard of review and enhance the transparency of the Committee's reasoning, particularly in cases in which the Committee disagrees with a State party's finding regarding risk.

Chapter 5 of this dissertation addresses the concept of causation and its application in the context of risk-based obligations. Although causation is a foundational topic, and one that could be understood as logically prior to questions about the meaning of risk and the applicable standard of review for risk findings, for present purposes it is simpler to address the issue of causation last. Chapters 2–4 provide helpful context to the discussion of causation in chapter 5, by explaining the concept of risk, identifying risk-based obligations as a distinct type of duty under the ICCPR, and showing that for these obligations, risk-exposure *per se* is now conceptualised as a form of harm amounting to a human rights violation. These points are foundational to arguments developed in chapter 5 about the distinction between the concepts of risk and causation and the proper focus of causal inquiry in the context of risk-based obligations.

The topic of causation is challenging enough without the overlay of risk-based obligations; as acknowledged above, causation has been the subject of detailed scholarly analysis and debate for centuries, though it is relatively underexamined in international human rights law. Even less examined is the issue of how to think about causation in the context of risk-based obligations. What makes the question of causation especially complicated in the context of risk-based obligations, is that both 'risk' and 'causation' are largely undefined, and both concepts seem to intersect in various ways in the analysis of certain human rights obligations. Chapter 5 of this dissertation forges a path into this difficult topic and aims to do three things: first, to analyse how the concepts of risk and causation are analytically connected in the Committee's jurisprudence; second, to provide an overview of various influential theories of causation developed outside of human rights law, and drawing on those theories, propose a way of interpreting the concept of causation for the purpose of human rights law; and third, to argue that risk and causation should be clearly distinguished as distinct matters in the analysis of a State party's legal responsibility, in order to enhance clarity and transparency of the Committee's reasoning.

To understand these issues requires some background on the concept of causation in the law. Accordingly, before addressing the intersection of causation and risk, chapter 5 first explains how judgments about causation are inherent to defining States parties' obligations and determining instances of breach in international human rights law, as in international law more broadly. It will also be explained that the nature of an inquiry into causation is shaped by the context of the law and the practical purposes the law serves. For the purposes of human rights law, although there may be numerous acts or omissions that could be said to 'cause' a human rights violation in any given case, the focus of the causal inquiry is ultimately on whether the conduct of the State party should be regarded as causal.

After introducing the role causal inquiry in law generally, and its role in human rights law in particular, chapter 5 will address the interplay between risk and causation in the Committee's reasoning. Drawing again on some of the cases introduced earlier in the dissertation, three roles for risk will be explained. First, it will be argued that in certain cases, the conduct of a State party in exposing a person to 'risk' appears to be materially equated with *causing* future harm to that person. In this context, the concept of risk acts as a kind of substitute for the element of causation, particularly in cases where the feared harm has not yet occurred. Second, in some cases, a finding of risk can support an inference that some physical harm *in fact* occurred in the past, where direct evidence of its having occurred may be lacking or hidden. Third, in cases where physical harm clearly occurred in the past, but the causal link between the State party's conduct and the occurrence of the harm is empirically difficult to show, risk exposure may overcome the need to establish a causal relation, since the violation can be framed in terms of the State party's role in causing the imposition of risk (which may be less controversial). This section of chapter 5 will conclude by arguing for the concepts of causation and risk to be clearly distinguished in the analysis, as distinct considerations in determining the State party's responsibility for a human rights violation.

Chapter 5 will then address the more difficult question of how to interpret or define the 'cause' of a human rights violation in difficult cases, including where the human rights violation is framed in terms of an individual's exposure to risk. It will be explained that, even if risk and causation are understood as distinct elements in the analysis of a State party's human rights obligations, there remains scope for uncertainty and confusion as to what 'causation' means. This confusion can arise not only in the context of applying risk-based obligations, but in applying human rights obligations more generally; however, the recognition of risk-based obligations arguably adds an additional layer of complexity to causal inquiry.

Drawing on the broader literature on causation in the law, it will be argued that two steps should be taken in order to clarify causation in the context of risk-based obligations. The first step is to recognise the distinction between the factual (physical) question of causation from other questions that are sometimes conflated with factual causation, but which are essentially questions about the application of legal norms. The second step, insofar as a factual inquiry into causation is concerned, is to specify precisely what we mean by 'cause' in this context and thereby clarify the focus of that factual inquiry. To highlight the choice involved in this step, well-known interpretations of so-called 'factual' causation will be explained, namely, the '*sine* *qua non*' or 'but for' test of causation, the test of 'substantial factor' or 'material contribution', the 'weak necessity/strong sufficiency' approach, and finally, probabilistic theories of causation. Through a discussion of these various approaches to defining causation, it will be shown that even an inquiry into the 'fact' of causation itself requires something more than purely factual observation; the multiple possible interpretations of the word 'cause' mean that a choice is to be made about what facts that question pertains to. It will be argued that, for situations of so-called 'causally overdetermined harm', such as when pollution from multiple sources combines to produce the harm, the weak necessity/strong sufficiency approach to causation provides a compelling test, which seems to align with common-sense or popular intuitions about the cause of that harm.

Chapter 5 then demonstrates the utility of these ideas by applying them to risk-based obligations in two complicated scenarios. The first is the situation of removal of an individual to a foreign territory where the risk facing the individual relates in part to their deteriorating health and an anticipated lack of access to appropriate healthcare in the State of return. The second scenario considered is where individuals face risks relating to environmental degradation through climate change. Chapter 5 will discuss recent jurisprudence, in which the Committee has engaged with these two forms of risk. It will be argued that the approach to causation could be clarified by acknowledging that causation is relevant to the responsibility of the State party, while reducing the causal inquiry to the question of whether the State party's conduct was/would be involved in the imposition of risk, drawing on the weak necessity/strong sufficiency theory of causation. It will be argued that this approach would not only enhance the transparency of the reasoning by clearly separating factual from legal-normative considerations but would also produce findings that align with common sense or popular intuition, avoiding the perverse finding that no one State can be regarded as having caused complex risks, such as climate change-related risks.

Chapter 6 concludes.

The overarching picture that emerges from the present study is that risk-based obligations are useful and, in some ways, a logically necessary aspect of the general undertaking to respect and ensure the rights recognised in the ICCPR; however, these obligations also raise issues that should be addressed if international human rights law is to develop in a coherent and transparent manner. The utility of framing a human rights violation in terms of risk imposition is that it provides a principled basis for extending the State party's responsibility to conduct or events that are removed to some extent from that of its own organs or agents. In the context of *non-refoulement,* the imposition of risk explains a State's responsibility for removing an individual to a foreign territory (regardless of whether the risk manifests in physical harm), and by a similar logic, the imposition of risk can explain the human rights responsibility of States parties that fail to address greenhouse gas pollution. The challenge associated with such obligations, however, is in the inherent ambiguity of risk itself, and the way that this can generate uncertainty or disagreement as to whether obligations are triggered in specific circumstances. If the concept of risk is unexamined, this may lead to a deadlock of conflicting assertions about risk in difficult cases, with no clear way to determine whose assessment of risk is correct, or why. This dissertation proposes steps that may help to avoid such a situation, namely: clarifying the nature of risk findings, and relatedly, the standard of review, clarifying the distinction between risk and causation, and making clear what we mean by 'cause' in this context.

2.1. Introduction

Before exploring certain theoretical and doctrinal issues arising in the jurisprudence, it is helpful to have a general picture of how risk-based obligations are defined or specified, and the broad range of factual situations in which they are enlivened. As explained in the introduction, in this dissertation the term 'risk-based obligations' refers to a category of duties or obligations upon States parties to refrain from exposing individuals to risk or otherwise to take action to prevent or mitigate their exposure to risk. The present chapter provides a fuller picture of what these obligations are. The purpose of the present chapter is not to delve into the meaning of 'risk' *per se* (which is addressed in chapter 3) nor explore associated analytical issues (addressed in chapters 4 and 5), but to introduce examples of various kinds of risks that give rise to specific obligations under the ICCPR, and to explore how 'risk' and related terms or ideas feature in the Committee's articulation of those obligations.

This explanation is needed because many of the specific obligations owed by States parties to the ICCPR are not expressed in the text of the treaty itself. The 'dual nature' of human rights law is such that it is 'not sufficient simply to proclaim rights; it is also necessary to identify duty-holders and their obligations', which 'means specifying the obligations of the [S]tates parties'.[37] For the ICCPR, the specification of obligations corresponding to civil and political rights has taken place largely (though not exclusively) through the Committee's General Comments and its Views on individual communications.[38] Drawing mainly on Views and General Comments, the present chapter discusses examples of obligations entailed in Covenant rights which, in one way or another, are activated by the existence of risk and/or require the State party to respond somehow to risk. This chapter is not intended to catalogue exhaustively all human rights duties that relate to risk in one way or another, but rather to demonstrate

[37] Dinah Shelton and Ariel Gould, 'Positive and Negative Obligations' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 562.

[38] Katharine G Young, 'Rights and Obligations' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (4th edn, OUP 2022) 133.

the importance of risk as a concept underlying various obligations through a discussion of examples.

This chapter first addresses the relevance of risk to the general undertaking in article 2(1) ‘to respect and to ensure’ Covenant rights. It is argued that because that general undertaking is interpreted as entailing preventative duties, including duties to protect individuals from violations of their human rights by third parties (i.e. actors other than the State party), risk-based obligations are potentially relevant to ensuring the enjoyment of all of the rights in articles 6–27. The chapter then turns to consider two rights for which the concept of risk is particularly important: the right to life recognised in article 6, and the prohibition on torture and CIDTP recognised in article 7. This section of the chapter begins with a discussion of references to risk in General Comments on articles 6 and 7, before addressing in more detail the Committee’s application of articles 6 and 7 to certain situations or activities, namely: the removal of persons to foreign territories (*refoulement*); law enforcement activities; the protection of vulnerable persons; enforced disappearances; war and nuclear weapons; environmental degradation; and healthcare and public health emergencies (including in the context of detention). Through discussion of case law addressing these situations or activities, it will be shown that in a wide range of situations, findings regarding the State party’s adherence to articles 6 or 7 depend in one way or another upon judgments about the existence or non-existence of a risk. This highlights the theoretical and practical importance of how risk is conceptualised, providing context to the analytical discussion in chapters 3–5.

2.2. Risk and the general undertaking ‘to respect and to ensure’ ICCPR rights

Article 2 of the Covenant sets out obligations that apply generally, if not to all of the rights in the ICCPR, at least to those recognised in articles 6–27.[39] Paragraph 1 of article 2 records a State party’s undertaking to ‘respect and to ensure to all individuals

[39] It is widely accepted that the obligations in article 2 apply in respect of the rights recognised in articles 6–27, however their application to the right to self-determination in article 1 has been questioned: Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak’s CCPR Commentary* (3rd revised edn) 38.

within its territory and subject to its jurisdiction' the rights recognised in the Covenant, without discrimination on the basis of any of the protected attributes (namely, race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or 'other status'), which is interpreted applying human rights obligations to all individuals within the State's territory *or* subject to its jurisdiction.[40] In paragraph 2 of article 2, States parties undertake 'to take the necessary steps' to 'adopt such laws or other measures as may be necessary to give effect to' Covenant rights, where not already provided for by existing legislative or other measures. In paragraph 3, States parties undertake to: (a) ensure that effective remedies are available to those whose rights or freedoms have been violated; (b) ensure that claims in respect of violations shall be determined by 'competent judicial, administrative or legislative authorities' or 'any other competent authority provided by the legal system of the State', and to 'develop the possibilities of judicial remedy'; and (c) 'ensure that the competent authorities shall enforce such remedies when granted'. These overarching obligations are 'accessory' to the substantive rights recognised in the Covenant.[41] As the Committee has repeatedly confirmed, article 2 is to be read in conjunction with the substantive rights recognised in the Covenant and cannot on its own form the basis of claim under the First Optional Protocol.[42]

The undertaking in article 2(1) 'to respect and to ensure' ICCPR rights is often characterised as 'both negative and positive in nature'.[43] While the precise meaning of 'negative' and 'positive' in this context is debated (as discussed further below), in

[40] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [109]. This view was, in effect, unanimously held by the International Court of Justice. Six Judges (Judges Koroma, Kooijmans, Higgins, Al-Khasawneh, Owada and Elaraby) delivered a separate opinion, and Judge Buergenthal delivered a separate declaration. The six Judges agreed with most of the judgment, although disagreed (or alternatively chose to further elucidate) upon certain points. However, none of these Judges disagreed with the view that Israel's obligations under the ICCPR extended to the Occupied Palestinian Territories. Judge Buergenthal dissented on the basis that the Court should have declined to hear the case altogether. However, in his separate declaration, he stated that he agreed with much of the opinion, including that 'international human rights law [is] applicable to the Occupied Palestinian Territory' (at [2]).

[41] Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (3rd revised edn) 38–40.

[42] E.g., Billy *et al.* v Australia, [7.4]; UNHRC, *DM Nepal v Nepal* (22 November 2021) Communication No. 2615/2015, UN Doc CCPR/C/132/DR/2615/2015 [6.6].

[43] E.g., UNHRC, 'General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 [6].

broad terms, a 'negative' obligation is generally understood as one requiring restraint, whereas a 'positive' obligation is understood as requiring action.[44] In article 2(1), the word 'respect' is commonly understood to express the 'negative' dimension of the general undertaking, requiring the State party to refrain from conduct that would violate rights or restrict the exercise of rights in manner not permitted by the terms of the ICCPR itself.[45] In contrast, the word 'ensure' is often characterised as expressing the positive aspect of the undertaking, requiring the State party to take action (rather than refrain from doing something) to give effect to ICCPR rights.[46]

Beyond this binary categorisation, the obligation to 'ensure' ICCPR rights is often described as entailing two, more specific obligations—the obligation to *protect* and the obligation to *fulfil* Covenant rights. In this regard, Schabas observes:

> The obligation to ensure consists of the obligation to *protect* individuals against interference by third parties (horizontal effect) and the obligation to *fulfil*, which in turn incorporates an obligation to facilitate the enjoyment of human rights and an obligation to provide services.[47]

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[44] Young, 'Rights and Obligations' 134.

[45] Thomas Buergenthal, 'To Respect and To Ensure: State Obligations and Permissible Derogations' in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press 1981) 77; Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (3rd revised edn), 42. See also UNHRC, 'General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13, [6].

[46] A distinction between positive and negative obligations is also generally recognised in regional human rights systems. For example, The ECHR requires States parties to 'secure' to everyone the rights and freedoms defined in the Convention, which is understood to encompass both positive and negative obligations. Similarly, the American Convention on Human Rights contains an undertaking to 'respect' and 'ensure' the 'free and full exercise' of the rights and freedoms recognised therein. The African Commission on Human and Peoples' Rights has similarly adopted the concept of positive and negative obligations in interpreting the African Charter on Human and Peoples' Rights, having regard to other regional and universal human rights jurisprudence, and has conceptualised four categories of obligations: to 'promote', 'protect', 'respect' and 'fulfil'; see Shelton and Gould, 'Positive and Negative Obligations' 569-577; Frans Viljoen, *International Human Rights Law in Africa* (OUP 2012) 214–218. Some disagree with the approach of positive duties to acts and negative duties to omissions – see, e.g., Johan Vorland Wibye, 'Beyond Acts and Omissions — Distinguishing Positive and Negative Duties at the European Court of Human Rights' (2022) 23 Human Rights Review 479.

[47] Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (3rd revised edn) 42 (emphasis added).

These obligations to 'protect' and 'fulfil' Covenant rights are read not only in the word 'ensure' in article 2(1), but also in the obligation in article 2(2) to 'adopt such laws or other measures as may be necessary to give effect to' ICCPR rights, and in the undertaking in article 2(3) to ensure the right to an effective remedy.[48] While the so-called 'triad of State obligations'[49] to 'respect', 'protect' and 'fulfil' human rights can be traced to work undertaken in the 1980s by the Committee on Economic, Social, and Cultural rights in relation to the right to food, these terms are now used to categorise obligations in UN human rights law more widely, including those in the ICCPR.[50]

Human rights law scholars offer varying analyses of so-called 'positive' and 'negative' obligations, the nature of the undertakings 'to respect and to ensure' and to 'respect, protect, and fulfil' Covenant rights, and the relationship between these various categories. Scholars differ on how 'positive' or 'negative' duties should be defined or identified,[51] and on whether or how the positive/negative dichotomy maps

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[48] See, e.g., Shelton and Gould, 'Positive and Negative Obligations'; Olivier de Schutter, *International human rights law: cases, materials, commentary* (3rd edn, CUP 2019); Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (3rd revised edn) 42–44; Young, 'Rights and Obligations' 136–138.

[49] Shelton and Gould, 'Positive and Negative Obligations' 567, referring to Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd revised edn, N.P. Engel 2005) xxi.

[50] See, e.g., Schutter, *International human rights law: cases, materials, commentary* (3rd edn), chs 3–5; Young, 'Rights and Obligations' 135; David Jason Karp, 'What is the responsibility to respect human rights? Reconsidering the 'respect, protect, and fulfill' framework' (2020) 12 International Theory 83. According to Karp (at 84), 'There was a perceived need at the time to move beyond a false Cold War binary dichotomy between civil-political and socio-economic rights. Respect, protect, and fulfil were introduced as a spectrum…of responsibility that exists for *all* human rights. The framework grounds 'respect' in a 'do no harm' principle….[which] helped to convince Western liberals in a late Cold War context that socio-economic rights are just as important to pursue as civil-political rights, because obligations of the former could also be met—in some circumstances—simply by getting out of peoples' way'.

[51] For example, some disagree with the approach of identifying/classifying 'positive' duties on the basis that they require State action and 'negative' duties on the basis that they require a State to refrain from acting, pointing to various practical and conceptual problems with the distinction. For a discussion of the literature, see e.g., Wibye, 'Beyond Acts and Omissions — Distinguishing Positive and Negative Duties at the European Court of Human Rights'. After discussing the literature on the ECtHR jurisprudence, Wibye observes (at 488) a recurring theme in the case law in which acts that appear outwardly to be 'positive' (in the sense that the State is taking action) are undertaken by the State to remedy a prior violation of a 'negative' obligation, and considers that counting these as examples of 'positive' obligations has resulted in 'a potentially inflated count of positive rights cases'. See also Stoyanova, 'Framing Positive Obligations under the European Convention on Human Rights Law: Mediating between the abstract and the Concrete' at 9, noting that 'besides the difference between actions and omissions that can serve as a relevant (although…

onto the obligations to 'respect and to ensure' or to 'respect, protect, and fulfil' Covenant rights.[52] There are also differing views on the interaction of obligations to 'respect' and 'ensure'. For example, Schabas addresses these as distinct and separate obligations, whereas Buergenthal characterised the obligation 'to ensure' as 'substantially broader' than the duty 'to respect' ICCPR rights, with the former encompassing the latter.[53] Notwithstanding the differing categorisations in the literature, it is at least generally accepted that the undertaking to respect and ensure civil and political rights includes an obligation to *protect* individuals from violations that would occur through the conduct of third parties (that is, actors other than the State party itself).

For its part, the Committee has generally linked this duty to protect persons against violations by third parties with the word 'ensure' in article 2(1). Whereas the Committee has mainly examined the activities of the State party's organs or agents in connection with the duty to 'respect' Covenant rights, when considering the duty to 'ensure' those rights (encompassing the duty to 'protect' against rights violations), the Committee has looked to a wider sphere of conduct, including that of private actors. In this regard, the Committee has remarked:

> the positive obligations on States Parties *to ensure* Covenant rights will only be fully discharged if individuals are *protected* by the State, not just against violations of Covenant rights by its agents, but also against *acts committed by private persons or*

problematic and thus not all the time sufficient) reference, another related basis for understanding the distinction [between positive and negative obligations] is that the means (i.e. the concrete measures) for complying with a positive obligation are multiple'.

[52] For example, Karp describes the 'respect, protect, and fulfil framework' as 'attempt to reject and to move beyond a false binary divide between so-called 'negative' and 'positive' rights', and instead associate all human rights (whether civil and political or socio-economic) 'with a full spectrum of duties'. However, other authors appear to retain the distinction between 'negative' and 'positive' obligations, with 'respect' described as a negative obligation and 'protect' and 'ensure' both characterised as positive obligations; see, e.g., Shelton and Gould, 'Positive and Negative Obligations' and Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (3rd revised edn) 42–44.

[53] The author posited that the duty to 'ensure' encompasses the duty to respect, but also implies an affirmative obligation 'to take whatever measures are necessary to enable individuals to enjoy or exercise the rights guaranteed in the Covenant, including the removal of governmental and possibly also some private obstacles to the enjoyment of these rights': Buergenthal, 'To Respect and To Ensure: State Obligations and Permissible Derogations' 77.

> *entities* that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.[54]

This statement reflects the so-called ‘horizontal’ effect of human rights law. As Schabas observes, the obligation to ‘ensure’ human rights is ‘understood in the broad sense of effects that human rights produce on the horizontal level between private parties, i.e., not on the vertical level between the individual and the State’.[55] Thus, Covenant rights are understood to ‘produce effects’ in the relations between private actors, and it is often the conduct of private actors that directly undermines the enjoyment of human rights (notwithstanding that those private actors are not themselves bound by obligations at international law).[56]

In this context of the horizontal effect of human rights, the State party’s obligation is often framed in terms of what it must do to control or influence private relations or interactions, including through preventative action. For example, the Committee has remarked that a State party may violate its obligation ‘by permitting or failing to take appropriate measures or to exercise due diligence *to prevent*, punish, investigate or redress the harm caused by such acts by private persons or entities’.[57] Here, the Committee lists four distinct ways through which a State ‘ensures’ human rights—prevention, investigation, punishment and redress—though note that the latter three could also be understood as part of prevention insofar as they support deterrence of future violations.

The horizontal effect of human rights law, and in particular, the State party’s obligation to *prevent* human rights violations that would be perpetrated more directly by a third party, is linked with the role of the concept of risk in human rights law. Implicitly, the concept of risk is key to the rationale for extending and limiting the

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[54] UNHRC, 'General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 [8] (emphasis added).

[55] Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak’s CCPR Commentary* (3rd revised edn) 43.

[56] As the Committee observes in General Comment 31, ‘The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law’: UNHRC, 'General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 [8].

[57] Ibid. [8] (emphasis added).

scope of preventative obligations. For a State party to prevent a third party from interfering with the human rights of an individual within that State's jurisdiction or control, the State must be able to anticipate the interference and act pre-emptively to control or influence the situation. At the same time, the law clearly cannot require the State to anticipate and fully control every possible future harm that may be perpetrated by a third party (which would render duties unworkably broad); the law must somehow limit or moderate the scope of preventative duties. To frame an obligation in terms of how the State should perceive and respond to *risk* is to link the State's present-day conduct with the future (possible) harm perpetrated by a third party, while acknowledging and accounting for *degrees* of knowledge and control and allowing for moderation of the scope of obligations accordingly. In this way, risk justifies both the extension and limitation of responsibility, and provides an answer to the possible objection that a State ought not be held responsible for failing to prevent something that may be done by another entity (or multiple entities) in the future, which the State does not fully control.[58] Thus, at a basic level, the concept of risk and the idea that a State is able to judge risk *ex ante* is key to the rationale for preventative obligations as an aspect of the general undertaking to respect and ensure ICCPR rights.

Two points should be noted before turning to examine specific risk-based obligations arising under articles 6 and 7. The first is that risk-based obligations are potentially relevant to any or all of the rights recognised in articles 6–27. Since prevention is generally entailed in all of these rights (as an aspect of the general undertaking in article 2(1) 'to respect and to ensure' Covenant rights), risk-based approaches may be generally relevant to giving effect to any or all these rights, regardless of whether the word 'risk' has so far been used in the articulation of duties. The second point to note is that, while the foregoing discussion of the duty to 'protect' or 'prevent' has focused

[58] See, for example, the objection of the State party in the matter of Billy *et al.* v Australia (introduced in the introduction to this dissertation) regarding the imposition of responsibility in human rights law for the harms of climate change. In particular, the State party submitted (as summarised at [6.7] of the Committee's Views): 'The alleged threat to the authors' rights is a global phenomenon arising from myriad acts committed by innumerable private and State entities over decades which, unquestionably, are beyond the jurisdiction and control of the State party. It would be perverse if, to ensure that climate change does not impair the authors' rights, the Covenant were to impose a duty or obligation on the State party that the State party could not hope to fulfil'.

on the State party's obligations with respect to conduct in the private sphere within the State party's jurisdiction or control, in some limited circumstances an analogy can be drawn to the possible future acts of foreign States, or private actors in foreign territories. In some limited circumstances, risk-based obligations under the ICCPR extend to, and hence require consideration of, risks that may manifest abroad, such as in the case of implied obligations of *non-refoulement* (discussed further below). Accordingly, this dissertation generally uses the term 'third party' and the phrase 'actor other than the State itself' broadly to refer to private actors within the State party's jurisdiction or control as well as State and non-State actors abroad.

2.3. Risk in General Comments addressing articles 6 and 7

In addition to being generally relevant to the overarching duties to respect and to ensure Covenant rights, risk stands out as particularly important in the Committee's reasoning on the right to life recognised in article 6 and on the prohibition on torture and CIDTP recognised in article 7. These are 'fundamental rights which stem from the concepts of human dignity and the integrity of the person, both foundational principles in human rights law'.[59] The emphasis placed on risk in the interpretation and application of these rights seems to have increased over time, raising a range of challenging questions.[60]

The increasing emphasis on risk can be observed to an extent in the evolution of the Committee's General Comments on articles 6 and 7. At its 16th session in 1982, the Committee adopted General Comment 6 on article 6, in which it addressed, *inter alia*, the preventative dimension of the right to life in various contexts, including peace and security, crime and law enforcement, and public health. With respect to peace and security, the Committee remarked that States had a 'supreme duty to *prevent* wars, acts of genocide and other acts of mass violence causing arbitrary loss of life', and that every effort made by States parties 'to *avert the danger* of war, especially thermonuclear war, and to strengthen international peace and security' constituted

[59] Carla Ferstman, 'Integrity of the Person' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (4th edn, OUP 2022) 169.
[60] See chapters 3–5.

'the most important condition and guarantee for the safeguarding of the right to life'.[61] With respect to law enforcement, the Committee remarked that 'States parties should take measures not only to *prevent* and punish deprivation of life by criminal acts, but also to *prevent* arbitrary killing by their own security forces.'[62] In relation to enforced disappearances, the Committee remarked 'States parties should also take specific and effective measures to *prevent* the disappearance of individuals'.[63] Having regard to public health, the Committee considered it 'desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.'[64] While the Committee emphasised the importance of prevention as an aspect of States' obligations in these remarks, it did not refer explicitly to 'risk' *per se*.

In contrast, General Comment 36 on the right to life, issued in 2018, contains multiple explicit references to 'risk,'[65] 'serious risk',[66] 'serious and constant risk',[67] and 'real risk,'[68] as well as to 'foreseeable',[69] 'reasonably foreseeable'[70] and 'expected' harms, threats or impacts on the right to life.[71] While the contrast between the two General Comments partly reflects the general increase in the length and detail of General Comments over time,[72] it also indicates a growing emphasis on the idea of risk. The

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[61] UNHRC, 'General comment No. 6: Article 6 (Right to life)' (1982) UN Doc HRI/GEN/1/Rev.1[2] (emphasis added). The Committee further addressed the right to life in the context of the threat of nuclear weapons in General Comment 14, adopted at its 23rd session in 1982, in which it remarked, 'It is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today', and called upon all States 'to take urgent steps, unilaterally and by agreement, to rid the world of this menace': UNHRC, 'General Comment No. 14: Article 6 (Right to life)' (1984) UN Doc HRI/GEN/1/Rev.1 [4], [7]. The Committee also addressed the human rights implications of the threat or use of nuclear weapons in General Comment 36 (2018), discussed further in part 2.8 below.

[62] UNHRC, 'General comment No. 6: Article 6 (Right to life)' (1982) UN Doc HRI/GEN/1/Rev.1[3] (emphasis added).

[63] Ibid [4].

[64] Ibid [5].

[65] UNHRC, 'General Comment No. 36 – Article 6: right to life' (3 September 2019) UN Doc CCPR/C/GC/36 [8], [13], [23], [54], [64], [69].

[66] Ibid [27].

[67] Ibid [58].

[68] Ibid [30], [31], [42], [55].

[69] Ibid [6], [22], [25], [26], [66].

[70] Ibid [18], [21], [22].

[71] Ibid [3].

[72] Buergenthal, 'The U.N. Human Rights Committee' 387 (noting in relation to the first few general comments: 'Controversial matters and the finer points of law were as a rule not addressed or

Committee makes clear in General Comment 36 that the right to life entails not only a freedom from certain forms of harm, but also freedom from the *risk* of such harms. For example, it is stated that the right to life 'concerns the entitlement of individuals to be *free from acts and omissions that are intended or may be expected to cause their unnatural or premature death*'.[73] Similarly, the Committee states that the obligation to respect and ensure the right to life 'extends *to reasonably foreseeable threats and life-threatening situations* that can result in loss of life', and that States parties may violate the right 'even if such threats and situations do not result in loss of life'.[74] Thus, a significant aspect of the right to life in article 6 (as the Committee currently interprets it) is the right to be protected by the State from foreseeable, life-threatening *risk*. The ECtHR has taken a similar approach in its interpretation of the right to life as recognised in Article 2 of the ECHR.[75]

The evolution of General Comments addressing article 7 also points to a growing emphasis on risk, though perhaps not so starkly as do the General Comments on article 6. In 1982, the Committee adopted General Comment 7, in which it addressed the scope of the protection under article 7 and provided examples of the 'machinery

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papered over with generalities on which consensus could be reached. Since it was often impossible during the Cold War to reach a consensus on issues touching on matters of ideological sensitivity, those parts of draft general comments that dealt with these subjects were simply omitted, which explains why the early general comments were rather bland and uninspiring'). See also Dinah Shelton, 'The Development of Human Rights Law and Challenges Faced by UN Treaty Bodies 1969–2022' (2023) 25 Max Planck Yearbook of United Nations Law 682, 694 (observing that the 'first few General Comments adopted by the Committee were terse and hesitant in their interpretation of the Covenant' but 'are now, as a rule, long and analytical, and frequently address difficult issues of interpretation and policy').

[73] UNHRC, 'General Comment No. 36 – Article 6: right to life' (3 September 2019) UN Doc CCPR/C/GC/36, para. 3 (emphasis added).

[74] Ibid para. 7 (citation omitted, emphasis added).

[75] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS No 5 (ECHR) Article 2 provides: '1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; c) in action lawfully taken for the purpose of quelling a riot or insurrection.' In relation to the duty of protection of life by law, Akandji-Kombe writes, 'This duty to protect is lies on the state in various situations: where death is caused by agents of the state, where it is the result of risks arising from the activity of public authorities, where it is caused by third parties, or again by the victim himself or herself': Akandji-Kombe, *Positive obligations under the European Convention on Human Rights* 21.

of control' required for States to ensure effective protection against torture or CIDTP.[76] The Committee pointed out that this went beyond merely criminalising such treatment; it required also providing for effective investigation of complaints by competent authorities, holding those found guilty responsible, providing effective remedies for victims, and adopting safeguards such as provisions against detention *incommunicado* and other measures for protection of detainees.[77] Though the word 'risk' does not appear those remarks, the Committee's comments could be said to relate broadly to the aim of averting human rights risk. At its 44th session (1992) the Committee adopted General Comment 20 on article 7, which echoed and built upon general comment 7.[78] Again, there was no explicit reference to risk, though the Committee affirmed the duty of the State party to afford protection against acts contrary to article 7, including by those acting in a private capacity.[79] It is also noteworthy that the Committee expressed its view that 'States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement'.[80] The obligation of *non-refoulement*, which is now widely recognised as implied in both articles 6 and 7, was later formulated with explicit reference to risk. For example, in General Comment 31 (2004) the Committee remarked:

> The article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a *real risk* of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant,

[76] UNHRC, 'General Comment No. 7: Article 7 (Prohibition of torture or cruel, inhuman or degrading treatment or punishment)' (1982) UN Doc HRI/GEN/1/Rev.1[1]. (General comment No. 7 has been replaced by General Comment No. 20).
[77] Ibid.
[78] UNHRC, 'General Comment No. 20: Article 7 (Prohibition of Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (10 March 1992) UN Doc HRI/GEN/1/Rev.1.
[79] The Committee remarked, '[i]t is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity': ibid [2].
[80] Ibid [9].

> either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.[81]

Thus, the Committee's General Comments on article 7 in 1982 and 1992 addressed the protective, preventative dimension of obligations under article 7 in varying degrees of detail, whereas in 2004 it acknowledged the relevance of risk more clearly in its formulation of the implied obligation of *non-refoulement.*

Risk now features in the Committee's analysis of article 6 and article 7 as applied to a broad range of situations—not only those involving the removal of persons to foreign territories, but also situations involving law enforcement, the protection of vulnerable persons, enforced disappearances, situations of armed conflict, the proliferation of nuclear weapons, pollution and other forms of environmental degradation, and the provision of health services and management of public health risks. In the following sections, examples of the Committee's reasoning on the application of the ICCPR in these situations are discussed. The reasoning illustrates the importance of the concept of risk in determining whether the rights in articles 6 and/or 7 are engaged and what conduct or circumstances amount to a violation of those rights. It should be noted that the Committee's jurisprudence is not the only source of authoritative guidance on the human rights obligations arising in these situations. Various of the rights and obligations discussed below are also addressed in other core UN human rights treaties and in detailed analysis and guidance issued by other UN treaty bodies.[82] To an extent, the jurisprudence of other treaty bodies both influences and is influenced by that of the Human Rights Committee, leading to a 'progressive convergence of human

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[81] UNHRC, 'General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13, [12] (emphasis added).

[82] For example, both the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (Convention Against Torture) and the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) 2375 UNTS 237 (Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment) are in large part directed at the prevention of torture and CIDTP. The treaty bodies established under those instruments—respectively, the Committee against Torture and the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture—each play a key role in monitoring States parties' prevention of torture and CIDTP, including in the contexts of removals processes and in contexts where persons are or may be deprived of their liberty.

rights norms' over time.[83] However, there remain some significant differences in the way certain obligations are interpreted across different treaties.[84] As the present study aims at an in-depth exploration of risk in the ICCPR, the following sections focus on the analysis of the Human Rights Committee as the leading and authoritative source of guidance on that treaty.

2.4. Risk and implied obligations of non-refoulement

2.4.1. Background to the recognition of non-refoulement under the ICCPR

Just as risk is central to the engagement of *non-refoulement* under the Refugee Convention,[85] it is also central to obligations of *non-refoulement* entailed in articles 6 and 7 of the ICCPR and the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty (Second Optional Protocol).[86] Though not explicit in the text of the Covenant nor the Second Optional Protocol, *non-refoulement* obligations have over time come to be widely recognised as implied by those instruments. Sometimes referred to as 'complementary protections' (on the basis that they 'complement' the protection obligations of States parties to the Refugee Convention),[87] obligations of *non-refoulement* under the ICCPR differ significantly

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[83] In this regard, Shelton observes:

> 'In general, members of treaty bodies have been willing to substantiate or give greater authority to their interpretations of the rights guaranteed by referencing not only their own prior case law but the decisions of other bodies. To the extent that this results in progressive convergence of human rights norms, it is in large part stimulated by victims and their lawyers. The result is a progressive development of human rights law.' Shelton, 'The Development of Human Rights Law and Challenges Faced by UN Treaty Bodies 1969–2022' 702.

[84] For example, the scope of *non-refoulement* obligations implied in the ICCPR differs from the *non-refoulement* obligation recognised in the Convention Against Torture, as explained at part 2.4.1 below. The Human Rights Committee has also taken a different approach to that of the Committee Against Torture in distinguishing 'torture' from 'CIDPT'. As Schabas observes, the Convention Against Torture imposes 'somewhat stricter obligations with respect to torture', thereby implying a 'hierarchy of gravity', whereas 'the Human Rights Committee has eschewed such an approach': Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (3rd revised edn) 173.

[85] See part 4.3.1 below.

[86] Second Optional Protocol.

[87] For example, the UNHCR Executive Committee has encouraged 'the use of complementary forms of protection for individuals in need of international protection who do not meet the refugee definition under the 1951 Convention or the 1967 Protocol': UNHCR Executive Committee, 'Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection – Conclusion No. 103 (LVI)' (7 October 2005) A/AC.96/1021. See also Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007) 2–3.

from the protection afforded by article 33(1) of the Refugee Convention in terms of the categories of persons and situations to which they apply. The scope of protection afforded by the obligation of *non-refoulement* under the ICCPR is articulated in legal principles largely developed by the Human Rights Committee through its progressive interpretation of the Covenant over time.

In early remarks on the right life in article 6 and the prohibition of torture and CIDTP in article 7, the Committee generally did not address the implied obligation of *non-refoulement* in its remarks. For example, in 1982, when the Committee first adopted general comments on article 6 and article 7, it made no reference to *non-refoulement* in either comment.[88] In the late 1980s and early 1990s the Committee received several personal communications under the First Optional Protocol alleging breach of *non-refoulement* in the context of deportation or extradition, however it declined to recognise such an obligation in those cases. For example, in *VMRB v Canada* (1988), the Committee declined to consider the merits of the author's claim based on 'the hypothetical case that he should be deported', in part because it '[could not] examine hypothetical violations of Covenant rights which might occur in the future', and furthermore because the State party had publicly stated that it would not extradite the author to the country in question and had provided an opportunity to select a 'safe third country'.[89] While these statements indicate that the finding of inadmissibility was at least partly due to an absence of risk of deportation to the country of origin, the Committee's categorical statement that it 'could not examine hypothetical violations' is still noteworthy, as is the lack of express acknowledgement of an implied obligation of *non-refoulement* under article 6 (the application of which would necessarily involve some examination of hypothetical future violations). In *Torres v. Finland* (1990), the author claimed that his extradition to a country where there were reasons to believe that he might be subjected to torture violated article 7, and although the Committee found this communication admissible, it found the claim was not

[88] UNHRC, 'General comment No. 6: Article 6 (Right to life)' (1982) UN Doc HRI/GEN/1/Rev.1; UNHRC, 'General Comment No. 7: Article 7 (Prohibition of torture or cruel, inhuman or degrading treatment or punishment)' (1982) UN Doc HRI/GEN/1/Rev.1.

[89] UNHRC, *VMRB v Canada* (18 July 1988) Communication No. 236/1987, UN Doc CCPR/C/33/D/236/1987 [6.3]. The Committee found furthermore that 'the Government of Canada [had] publicly stated on several occasions that it would not extradite the author to El Salvador and [had] given him the opportunity to select a safe third country': [6.3].

sufficiently substantiated, and did not address the existence of an implied obligation in detail.[90]

As noted above, the Committee acknowledged the existence of an implied obligation under article 7 more directly in General Comment No. 20 on article 7, issued in 1992 (replacing General Comment No. 7), in which it stated that 'States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement'.[91] This broadly aligned the Committee's approach to the prohibition on torture and CIDTP with the judgment of the European Court of Human Rights in *Soering v United Kingdom* in 1989.[92] It also somewhat aligned with the prohibition on torture as recognised in the 1984 Convention Against Torture (which expressly prohibits *refoulement* or extradition of a person where there are 'substantial grounds for believing that he would be in danger of being subjected to torture'),[93] although the obligation under the Covenant is broader in that it extends to persons at risk of CIDTP (whereas *non-refoulement* under the CAT applies only to persons in danger of 'torture' as defined therein).[94] Although the Committee did not use the word 'risk' in General Comment 20, its recognition of an implied obligation of *non-refoulement* was nevertheless an important entry-point for risk reasoning with respect to the Covenant, as determining danger to an individual would involve a forward-looking assessment of risk (much like *non-refoulement* under the Refugee Convention, as discussed in part 4.3.1 below).

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[90] UNHRC, *Torres v Finland* (5 April 1990) Communication No. 291/1988, UN Doc CCPR/C/38/D/291/1988 [6].

[91] UNHRC, 'General Comment No. 20: Article 7 (Prohibition of Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (10 March 1992) UN Doc HRI/GEN/1/Rev.1 [9].

[92] The European Court of Human Rights had held in in its 1989 judgment in *Soering* that an expulsion or extradition of a person to a state where he or she could be subjected to torture or to inhuman or degrading treatment or punishment may violate Article 3 of the ECHR, notwithstanding the absence of express *non-refoulement* obligations in that treaty: *Soering v United Kingdom* (1989) Series A no 161 [91].

[93] Convention Against Torture, art. 3.

[94] The scope of protection under the ICCPR is also broader than under the Refugee Convention, which is subject to several limitations. As Schabas observes, 'the obligation of *non-refoulement* is actually broader under the International Covenant on Civil and Political Rights, where it is only implicit, than in the specialized treaties, where it is codified in text': Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (3rd revised edn) 133–134.

2.4.2. Non-refoulement and the right to life

During 1993–2003 there were significant developments in the scope of the obligation of *non-refoulement* under the Covenant. These developments included the Committee's recognition of obligations of *non-refoulement* implied in article 6 for States parties that had abolished the death penalty, and in article 1 of the Second Optional Protocol (for States parties to that instrument). In *Kindler v Canada* (1993), the Committee considered whether the right to life and the prohibition on arbitrary deprivation of life in article 6 required an abolitionist State to refuse an extradition request in circumstances where the person would face the death penalty in the requesting country. By a majority, the Committee declined to find that a *non-refoulement* obligation was engaged in that case, though it suggested Canada would have violated its obligations under article 6 'if the decision to extradite without assurances would have been taken arbitrarily or summarily'.[95] A decade later, the Committee revisited its position in its views on *Judge v Canada*, noting the Covenant was a 'living instrument' that should be 'applied in context and in the light of present-day conditions'.[96] In reviewing its interpretation of article 6, the Committee found that, although article 6(1) did not prohibit the death penalty as such, for abolitionist States, there was 'an obligation *not to expose a person to the real risk* of its application', and therefore abolitionist States

> may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.[97]

The Committee found that the respondent, as a State party that had abolished the death penalty, had violated the author's right to life under article 6, paragraph 1, by deporting him to the United States where he was under sentence of death, and doing so without ensuring that the death penalty would not be carried out.[98]

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[95] UNHRC, *Kindler v Canada* (30 July 1993) Communication No. 470/1991, UN Doc CCPR/C/48/D/470/1991 [14.6].
[96] UNHRC, *Judge v Canada* (13 August 2003) Communication No. 829/1998, UN Doc CCPR/C/78/D/829/1998 [10.3].
[97] Ibid [10.4].
[98] Ibid [10.6].

While the Views in *Judge v Canada* represented a landmark in the jurisprudence, there had already been an important development of principle in the period between the decisions in *Kindler* and *Judge*; a subtle yet important shift in how the Committee described the precise risk that would give rise to *non-refoulement* in this context. Prior to the shift, the Committee articulated a test that required the removing State to assess the circumstances of application of the death penalty in the receiving State, and whether its application would be inconsistent with the obligations of the *receiving State* (which would still be subject to the requirements in article 6(2) as a State retaining the death penalty). Following the shift in principle, the question became somewhat simpler: whether there was a 'real risk' of the application of the death penalty *per se*.

The distinction between these two tests can be seen when comparing remarks of the Committee in *ARJ v Australia* (1997) and *GT v Australia* (1997). In *ARJ v Australia*, the Committee considered the case of an author who faced deportation to Iran, having been convicted and punished for drug offences in Australia and having applied unsuccessfully for refugee status. The author claimed that Australia would violate, *inter alia*, article 6, 7 and 14 of the Covenant, on the basis that he faced a real possibility of being prosecuted in Iran and of persecution in that context.[99] The Committee framed the key legal issue as 'whether by deporting Mr. J. to Iran, Australia exposes him to a real risk (that is, a necessary and foreseeable consequence) of a violation of his rights under the Covenant.'[100] Having regard to the author's rights under article 6, the Committee considered whether there was a risk of violation *of his rights under article 6(2)*, reasoning that 'If the author is exposed to a real risk of a violation of article 6, paragraph 2, in Iran, this would entail a violation by Australia of its obligations under article 6, paragraph 1.'[101] Thus, although the Committee was ultimately considering the question of whether the removing State was fulfilling its obligations under article 6(1) of the Covenant, in order to answer that question,

99 UNHRC, *ARJ v Australia* (28 July 1997) Communication No. 692/1996, UN Doc CCPR/C/60/D/692/1996 [3.1]–[3.6]. The author also claimed violations of articles 15 and 16 of the ICCPR and article 3 of the CAT.
100 Ibid [6.8].
101 Ibid [6.11].

implicitly it was considering the risk of the receiving State violating its own obligations under article 6(2).

In contrast, in the subsequent case of *GT v Australia*, which also concerned a person who had been convicted of a drug offence and faced deportation after serving a custodial sentence in Australia, the Committee considered whether there was a 'real risk' of capital punishment, in the sense of 'a foreseeable and necessary consequence of [the author's] deportation that he [would] be tried, convicted and sentenced to death'.[102] The Committee considered that such a risk was to be deduced 'from the intent of the country to which the person concerned is to be deported, as well as from the pattern of conduct shown by the country in similar cases'.[103] Thus, in *GT v Australia,* the key issue was risk of imposition of the death penalty as such, rather than whether there was a risk that it would be imposed in a manner contrary to the receiving State's obligations under article 6(2). The majority found in that case that there was no real risk of the author being tried, convicted and sentenced to death if returned, and hence no obligation of *non-refoulement* was enlivened under article 6 of the ICCPR or Article 1 of the Second Optional Protocol. Nevertheless, the shift in how the Committee described the focus of the risk inquiry was significant and established a precedent upon which *Judge v Canada* built. Also noteworthy is the way in which the Committee conceptualised 'risk' itself. In both *ARJ v Australia* and *GT v Australia* the Committee effectively defined the 'risk' of the outcome as meaning that that outcome was a 'necessary and foreseeable consequence' of removal. The implications of that conceptualisation of risk are addressed further in part 3.3.2 below.

The implied obligation of *non-refoulement* for abolitionist States in cases involving a risk of the death penalty is now well established and was reiterated recently in General Comment 36.[104] In that context, the Committee described this specific aspect of *non-refoulement* in a way that avoided the use of the terms 'real risk' or 'foreseeable consequence'. Instead, the Committee remarked more simply that

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[102] UNHRC, *GT v Australia* (4 November 1997) Communication No. 706/1996, UN Doc CCPR/C/61/D/706/1996 [8.4].

[103] Ibid [8.1]–[8.4].

[104] UNHRC, 'General Comment No. 36 – Article 6: right to life' (3 September 2019) UN Doc CCPR/C/GC/36 [34], [38].

abolitionist States parties ‘cannot deport or extradite persons to a country in which they are facing criminal charges that carry the death penalty, unless credible and effective assurances against the imposition of the death penalty have been obtained’[105] (though it retained reference to ‘real risk’ in a more general remarks concerning *non-refoulement* elsewhere in General Comment 36).[106] The Committee has also recognised an obligation of *non-refoulement* for States that *retain* the death penalty, in circumstances where a person faces a real risk of application of the death penalty in the State of return in a way that would contravene other paragraphs of article 6 and thus constitute arbitrary deprivation of life.[107]

The scope of the implied obligation of *non-refoulement* under the ICCPR has also evolved significantly in its application to situations other than those involving the death penalty. It is well established that *non-refoulement* extends also to persons at risk of other forms of treatment contrary to articles 6 or 7, but the question of precisely which risks will enliven protection obligations is debated. This issue can be distinguished from the separate question of whether *non-refoulement* is also enlivened by a risk of violation of rights *other than those in articles 6 and 7* (an idea to which some States parties have objected).[108] Even assuming *non-refoulement* under the Covenant to be limited to the right to life and the prohibition on torture and CIDTP, the range of specific risks understood to give rise to that obligation of protection has broadened over time.

[105] Ibid [38].

[106] E.g., ‘The duty to respect and ensure the right to life requires States parties to refrain from deporting, extraditing or otherwise transferring individuals to countries in which there are substantial grounds for believing that a real risk exists that their right to life under article 6 of the Covenant would be violated’; and ‘Returning individuals to countries where there are substantial grounds for believing that they face a real risk to their lives violates articles 6 and 7 of the Covenant (see also para. 31 above)’: ibid [30], [55] (citation omitted).

[107] E.g., UNHRC, *Jamshidian v Belarus* (8 November 2017) Communication No. 2471/2014, UN Doc CCPR/C/121/D/2471/2014; UNHRC, *Ostavari v Republic of Korea* (25 March 2014) Communication No. 1908/2009, UN Doc CCPR/C/110/D/1908/2009.

[108] For example, at paragraph 12 of General Comment 31 the Committee describes *non-refoulement* as an obligation arising ‘where there are substantial grounds for believing that there is a real risk of irreparable harm, *such as that* contemplated by articles 6 and 7 of the Covenant’ (the words ‘such as’ arguably suggesting the possibility of wider application). Yet, as observed in Nowak’s revised commentary, ‘States parties have challenged whether the principle against *refoulement* applies with respect to Art. 9, Art. 12, Art. 14, Art. 17, Art. 18, Art. 19, Art. 20, Art. 24, Art. 26 and Art. 27’: Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak’s CCPR Commentary* (3rd revised edn), 48 (citations omitted).

Having regard to the *non-refoulement* obligation implied in the right to life, in General Comment 36 the Committee remarked:

> The duty to respect and ensure the right to life requires States parties to refrain from deporting, extraditing or otherwise transferring individuals to countries in which there are substantial grounds for believing that a real risk exists that their right to life under article 6 of the Covenant would be violated. Such a risk must be personal in nature and cannot derive merely from the general conditions in the receiving State, except in the most extreme cases.[109]

Thus, in General Comment 36 the Committee acknowledges that the risk requirement for the purposes of *non-refoulement* may be satisfied by the 'general conditions' in the receiving State in the 'most extreme cases', citing the judgement of the European Court of Human Rights in *NA v United Kingdom* in this connection.[110] The Committee proceeds to list examples of situations in which removal of an individual would be contrary to article 6, stating:

> it would be contrary to article 6 to extradite an individual from a country that had abolished the death penalty to a country in which he or she might face the death penalty...Similarly, it would be inconsistent with article 6 to deport an individual to a country in which a fatwa had been issued against him or her by local religious authorities, without verifying that the fatwa was not likely to be followed; …or to deport an individual to an extremely violent country in which he or she had never lived, had no social or family contacts and could not speak the local language.[111]

In recent years the Committee has considered risks related to environmental degradation as potential bases for obligations of *non-refoulement*. In *Teitiota v New Zealand*, the Committee considered whether a risk of climate change-induced harm to an author if returned to the country of origin gave rise to *non-refoulement* under

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[109] UNHRC, 'General Comment No. 36 – Article 6: right to life' (3 September 2019) UN Doc CCPR/C/GC/36, [30] (citations omitted).
[110] Ibid [30], citing European Court of Human Rights, *NA v United Kingdom* (Application No. 25904/07), judgment of 17 July 2008 [115].
[111] Ibid, [30] (citations omitted).

article 6.[112] The author in that matter was a national of Kiribati who had migrated to New Zealand in 2007, and in 2012 had applied to be recognised as a refugee and/or protected person based on risks he would face if removed to Kiribati. His application for protection from removal was denied by the decision-maker in the relevant authority, and again by the Immigration and Protection Tribunal in its *de novo* review of the decision. Subsequent appeal applications to the High Court, Court of Appeal and Supreme Court were also denied, and the author was ultimately removed to Kiribati and his family left New Zealand shortly thereafter. The author submitted a communication to the Committee under the Optional Protocol in which he claimed that by removing him to Kiribati, New Zealand violated his right to life under the Covenant. The author argued that sea level rise in Kiribati had resulted in the scarcity of habitable space, which in turn caused violent land disputes endangering his life, and environmental degradation, including saltwater contamination of the freshwater supply.[113] The Committee noted that climate change-induced harm could occur through sudden-onset events such as intense storms and flooding, and slow-onset processes such as sea level rise, salinization, and land degradation, which could propel cross-border movement of individuals seeking protection.[114] Furthermore, the Committee observed that:

> without robust national and international efforts, the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the non-refoulement obligations of sending states. Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized.[115]

By a majority, the Committee declined to hold that the author's rights under article 6 had been violated through his deportation to the Republic of Kiribati in 2015.[116] The time at which the relevant harm would occur if the risk were to materialize was

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[112] UNHRC, *Teitiota v New Zealand* (7 January 2020) Communication No. 2728/2016, UN Doc CCPR/C/127/D/2728/2016.
[113] Ibid [3].
[114] Ibid.
[115] Ibid [9.11].
[116] Ibid [9.14].

significant. While the Committee accepted the author's claim that sea level rise was likely to render the Republic of Kiribati uninhabitable, it also found that

> the timeframe of 10 to 15 years, as suggested by the author, could allow for intervening acts by the Republic of Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population.[117]

The authorities of the State party had considered this issue in assessing the authors' claim and found that Republic of Kiribati was taking adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms. The majority on the Committee considered it was 'not in a position to conclude that [the assessment of the New Zealand authorities] was clearly arbitrary or erroneous in this regard, or amounted to a denial of justice'.[118]

2.4.3. Non-refoulement and the prohibition on torture and CIDTP

The Committee's approach to *non-refoulement* obligations implied in article 7 has also evolved over time. As previously noted, in General Comment 20 (1992) the Committee recognised an obligation of States parties not to 'expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement', and by the time of General Comment 31 (2004) this was articulated as an obligation on States parties 'not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant.'[119] Prior to the recognition of *non-refoulement* under article 6 in the context of death penalty cases, the Committee had found a violation of *non-refoulement* under article 7 based on the risk than an execution would be carried out by an inhumane method. In *Ng v Canada*, which concerned extradition of an individual to USA to stand trial for

[117] Ibid [9.12].
[118] Ibid [9.12].
[119] UNHRC, 'General Comment No. 20: Article 7 (Prohibition of Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (10 March 1992) UN Doc HRI/GEN/1/Rev.1[9].

criminal offences punishable by the death penalty, the Committee identified the key issue as 'whether by extraditing Mr. Ng to the United States, Canada exposed him to a real risk of a violation of his rights under the Covenant'.[120] The majority declined to find a violation of Canada's obligations under article 6,[121] but found that the *method* of the risked execution—gas asphyxiation—was 'contrary to internationally accepted standards of humane treatment' and amounted to a violation of article 7, and accordingly that

> Canada, which could reasonably foresee that Mr. Ng, if sentenced to death, would be executed in a way that amounts to a violation of article 7, failed to comply with its obligations under the Covenant, by extraditing Mr. Ng without having sought and received assurances that he would not be executed.[122]

The Committee's views on CIDTP indicate some evolution over time in the meaning of that term (which is not defined in the Covenant), which logically has implications for the scope of the risk analysis required to give effect to *non-refoulment*. One example of evolution is the Committee's approach to the so called 'death row phenomenon'. During the 1990s, the Committee was divided on whether the phenomenon experienced by prisoners during prolonged detention prior to execution amounted to a violation of article 7, however in General Comment 36 (2018) the Committee remarked:

> Extreme delays in the implementation of a death penalty sentence that exceed any reasonable period of time necessary to exhaust all legal remedies may also entail the violation of article 7 of the Covenant, especially when the long time on death row

[120] UNHRC, *Ng v Canada* (5 November 1993) Communication No. 469/1991, UN Doc CCPR/C/49/D/469/1991 [14.1].

[121] Consistent with the reasoning in *Kindler v Canada,* which it had decided at the previous session, the Committee found that 'While States must be mindful of their obligation to protect the right to life when exercising their discretion in the application of extradition treaties, the Committee does not find that the terms of article 6 of the Covenant necessarily require Canada to refuse to extradite or to seek assurances.': ibid, [15.6]; cf. Individual opinion by Mr. Fausto Pocar (partly dissenting, partly concurring and elaborating), Individual opinion by Mr. Rajsoomer Lallah (dissenting), Individual opinion by Mr. Bertil Wennergren (partly dissenting, partly concurring), Individual opinion by Mr. Francisco José Aguilar Urbina (dissenting) and Individual opinion of Ms. Christine Chanet (dissenting), each of whom would have found a violation of article 6.

[122] Ibid [16.1], [16.4].

> exposes sentenced persons to harsh or stressful conditions, including solitary confinement, and when sentenced persons are particularly vulnerable due to factors such as age, health or mental state.[123]

As Schabas has observed, the Committee cited certain of its Views issued in the 1990s in support of its recognition in General Comment 36 that the death row phenomenon could amount to a violation of article 7, though it 'avoided confronting the nuances that had divided the Committee so sharply in the 1990s.'[124] The recognition that this form of treatment could amount to torture or CIDTP impacts upon the scope of a risk assessment, in that it calls for consideration of not only the treatment of the person immediately upon return, but their treatment potentially years into the future and its psychological effect.

Some evolution in the meaning of CIDTP can arguably also be seen in the Committee's approach to *non-refoulement* cases involving a risk of harm arising from the socio-economic conditions in the receiving State (rather than a risk of intentional, persecutory acts on the part of State or non-State actors). In 1992 the Committee stated that it '[did not] consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment'.[125] The Committee had stated in early Views that 'whether treatment or punishment constitutes CIDTP will depend on the circumstances of the individual case', including 'the duration and manner of the treatment, its physical and mental effect as well as the sex, age and state of health of the victim'.[126] Yet, it is also clear from early remarks that torture and CIDTP were forms of treatment were 'inflicted' through an 'act'. For example, in General Comment 20 (1992) the Committee commented on the need for 'protection through legislative and other measures as may be necessary against *the*

[123] UNHRC, 'General Comment No. 36 – Article 6: right to life' (3 September 2019) UN Doc CCPR/C/GC/36, [40] (original citations omitted).
[124] Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (3rd revised edn) 153.
[125] UNHRC, 'General Comment No. 20: Article 7 (Prohibition of Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (10 March 1992) UN Doc HRI/GEN/1/Rev.1, [4].
[126] UNHRC, *Vuoalanne v Finland* (2 May 1989) Communication No. 265/1987, UN Doc CCPR/C/35/D/265/1987 [9.2].

acts prohibited by article 7, *whether inflicted* by people acting in their official capacity, outside their official capacity or in a private capacity'.[127] The Committee also stated in General Comment 20 that the prohibition in article 7 applied 'not only to *acts* that cause physical pain but also to *acts* that cause mental suffering to the victim'.[128] Such references to 'acts' and to CIDTP as being 'inflicted' implied that conduct had to be intentional to constitute 'treatment' in this context.[129] This interpretation reflected the drafting history of article 7. As documented in the *travaux préparatoires,* the Commission on Human Rights (which was tasked by the UN General Assembly to draft the ICCPR) reported that in its discussions concerning draft article 7:

> It was generally agreed that the word "treatment" was broader in scope than the word "punishment"; however, it was observed that the word "treatment" should not apply to degrading situations which might be due to general economic and social factors.[130]

The Human Rights Committee however takes an evolutive approach to treaty interpretation, as does the Committee Against Torture, and in recent years both have issued Views indicating that a State's omission or failure to provide some basic support to extremely vulnerable persons may amount to CIDTP.[131] Importantly, the intent of the receiving State was not pivotal to the finding of violation in those cases.[132] The case of *AHG v Canada* (2015) provides an example.[133] In that case the Committee considered the decision of the respondent State to deport a Jamaican national who suffered from schizophrenia and diabetes to Jamaica. The author had arrived in Canada at the age of 18 and lived there continuously for 31 years, until he

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[127] UNHRC, 'General Comment No. 20: Article 7 (Prohibition of Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (10 March 1992) UN Doc HRI/GEN/1/Rev.1, [2].
[128] Ibid [5].
[129] Cf. Joseph and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edn) at 234, suggesting that it may be possible negligently to inflict CIDTP.
[130] UN General Assembly, 'Draft International Covenants on Human Rights: Annotation prepared by the Secretary-General' (1 July 1955) 87; Marc J. Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Martinus Nijhoff 1987).
[131] E.g., UNHRC, *Jasin v Denmark* (25 September 2015) Communication No. 2360/2014, UN Doc CCPR/C/114/D/2360/2014; UNCAT, *AN v Switzerland* (21 September 2018) Communication No. 742/2016, UN Doc CAT/C/64/D/742/2016.
[132] E.g., Jasin v Denmark; AN v Switzerland.
[133] UNHRC, *AHG v Canada* (5 June 2015) Communication No. 2091/2011, UN Doc CCPR/C/113/D/2091/2011.

was deported to Jamaica in 2011. The author had been diagnosed with schizophrenia in 1993 and was institutionalised for a year and a half, and subsequently received mental health treatment as an outpatient, but had difficulty complying with his treatment after he became homeless in 2005 and suffered psychotic relapses. In 2006 he was reported 'inadmissible' on the grounds of serious criminality, in particular his conviction in 2005 for assault with a weapon, for which he was sentenced to one day in gaol in addition to 80 days of pre-sentence custody. The Committee, while recognising States' parties 'legitimate interest in protecting the general public', determined (by majority) that:

> the deportation to Jamaica of the author, a mentally ill person in need of special protection who has lived in Canada for most of his life, on account of criminal offences recognized to be related to his mental illness, and which has effectively resulted in the abrupt withdrawal of the medical and family support on which a person in his vulnerable position is necessarily dependent, constituted a violation by the State party of its obligations under article 7 of the Covenant.[134]

Later in the same year, the Committee adopted views in *Jasin v Denmark,* in which it held by a majority that deportation of a Somali national and her three young children from Denmark to Italy under the Dublin Regulation would violate article 7 because of a failure to take into account evidence that that author and her children would face extreme poverty in Italy.[135] However, the Committee was divided in this case. One member dissented, noting that '[t]he fact that living conditions are better in Denmark than in Italy is not sufficient ground to conclude that the author would be subjected to inhuman and degrading treatment if deported to the country of first asylum'.[136] Two other members, while concurring with the majority on the outcome, stated that the fact that the author had been recognized as being owed complementary protection (because they would be at risk if removed to Somalia) was essential to the finding that article 7 prohibited her removal from Denmark to Italy (thus limiting the entitlement

[134] Ibid [10.4].
[135] Jasin v Denmark [8.8]–[8.10]. For example, the Committed referred to the author's previous experience of 'indigence and extreme precarity' and 'hardship and destitution' in Italy.
[136] Ibid, Individual opinion of Committee member Dheerujlall Seetulsingh (dissenting) [4].

to *non-refoulement* based on socio-economic factors to persons already recognized as refugees).[137]

More recently, the Committee took a similar approach in its Views on *Rezaifar v Denmark* in 2017, this time unanimously. The matter concerned an Iranian national who was facing deportation from Denmark to Italy under the Dublin II regulation, along with her two children, one of whom suffered from a heart condition (largely analogous to the facts in *Jasin v Denmark*).[138] The author in that case claimed that deporting her and her children to Italy would expose them to a risk of irreparable harm in violation of article 7, based on the actual treatment that she had received after she was granted subsidiary protection in Italy, the particular vulnerability of her family unit, and the general conditions of reception for asylum seekers and refugees entering Italy, as evidenced in various reports. The author also claimed that the inability to exercise her basic economic and social rights may *de* facto compel her to return to the Islamic Republic of Iran (where she faced a risk of persecution). The Committee found that the State party had 'failed to take due consideration of the special vulnerability of the author and her children', who, notwithstanding her formal entitlement to subsidiary protection in Italy, had been 'severely mistreated by her spouse, faced great poverty, and was not able to provide for herself and her children, including for their medical needs, in the absence of any assistance from the Italian authorities'.[139] The Committee also considered the State party had failed to seek effective assurances from the Italian authorities that the author and her two children would be received in conditions compatible with their status as asylum seekers entitled to temporary protection and the guarantees under article 7 of the Covenant. Accordingly, the Committee determined that the removal of the author and her children to Italy 'without proper assurances' would violate her rights under article 7.[140]

[137] Ibid, Individual opinion of Committee members Yuval Shany and Konstantine Vardzelashvili (concurring).
[138] UNHRC, *Rezaifar v Denmark* (10 March 2017) Communication No. 2512/2014, UN Doc CCPR/C/119/D/2512/2014.
[139] Ibid [9.9].
[140] Ibid [10].

The Committee's Views in *AHG v Canada, Jasin v Denmark* and *Rezaifar v Denmark* seem to indicate the Committee's recognition of an obligation of *non-refoulement* arising where a person faces a risk of extreme socio-economic deprivation.[141] This broadly aligns with the approach the ECtHR has taken to *non-refoulement* in cases involving serious health risks and inadequate healthcare in the State of return.[142] However, it is questionable whether that principle finds widespread acceptance among State parties to the Covenant. The current state of UN law on this point is an issue deserves further, detailed study. If accepted, this would impact upon the scope of the risk assessment, as it would require a removing State to consider not only the future *intentional* acts of the receiving State, but also the broader socio-economic circumstances to which the person would be returned. This may include, for example, consideration of the state of the health system in the country of return, and how the availability of health services (or lack thereof) would impact upon the circumstances of the person being returned. This may in turn call for assessment of medical or other specialised evidence about the person's conditions and treatment needs, which may not typically feature in risk assessment undertaken for the purpose of *non-refoulement* obligations when those obligations are more narrowly construed.

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[141] Cf. UNHRC, *WMG v Canada* (11 March 2016) Communication no. 2060/2011, UN Doc CCPR/C/116/D/2060/2011, in which the Committee considered the author's claim that his removal from Canada to Zimbabwe would, *inter alia*, violate his rights under articles 6(1) and 7 of the Covenant by putting life and health at serious risk, since he would be unable to access certain medical treatment or afford antiretroviral medication, which he required due to his condition as HIV-positive and Mantoux-positive. The Committee declined to find a violation of articles 6(1) or 7 in that case, noting at [7.4]: 'the author has not shown that his life or physical and mental integrity are at imminent and direct risk as a result of his removal to Zimbabwe and that the State party's authorities took his health situation into consideration and made the necessary inquiries before implementing the expulsion decision.'

[142] E.g. in *D v. United Kingdom,* which concerned the decision taken by the United Kingdom authorities to expel to St Kitts an alien who was suffering from AIDS, the ECtHR held that the applicant's removal would expose him to a real risk of dying under the most distressing circumstances and would amount to inhuman treatment in violation of article 3: *D v United Kingdom* ECHR 1997-III. See also *Paposhvili v Belgium,* in which the Court clarified that the principle could also apply in situations in which a seriously ill person, though not at imminent risk of dying, would face a real risk of 'being exposed to a seriously rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy': *Paposhvili v Belgium* [GC] App No 41738/10 (ECtHR, 13 December 2016) [183].

2.5. Risk and law enforcement

Risk can be central to States parties' human rights obligations in the context of law enforcement activities, particularly as article 6(1) is interpreted as requiring States parties to ensure that law enforcement authorities provide protection to persons at risk of harm from private actors. The second sentence of Article 6(1) provides that the right to life 'shall be protected by law'. Read in conjunction with the general duty in article 2(1) to 'ensure' the rights recognised in the Covenant, this sentence imposes

> a due diligence obligation to take reasonable, positive measures that do not impose disproportionate burdens on them in response to *reasonably foreseeable threats to life* originating from private persons and entities whose conduct is not attributable to the State'.[143]

The phrase 'reasonably foreseeable threats to life' indicates a risk-based threshold for the engagement of a positive duty to protect individuals from risk. Notably, a causal element is built into the statement that specifies the relevant risk—in the words the words 'originating from'. The interaction between the concepts of risk and causation in the context of the Covenant raises some challenging issues, which are addressed in chapter 5.

There is arguably potential for ambiguity, but also a pragmatic degree of flexibility, in the expression '*reasonably foreseeable threats to life'*. In some situations, it will be obvious that the threshold is met, but in others it may be unclear. *Peiris v. Sri Lanka* provides an example of a situation in which the threshold was clearly met.[144] In its views on that communication the Committee accepted, based on the uncontested material before it (the State party having made no submission on admissibility or merits), that the author and her family had received a number of direct threats from the police, seeking unlawfully to coerce them into withdrawing complaints they had filed against police officers.[145] At one point, two individuals told the family that they

[143] UNHRC, 'General Comment No. 36 – Article 6: right to life' (3 September 2019) UN Doc CCPR/C/GC/36 [21] (original citations omitted).
[144] UNHRC, *Peiris v Sri Lanka* (26 October 2011) Communication No. 1862/2009, UN Doc CCPR/C/103/D/1862/2009.
[145] Ibid [7.2].

had been instructed by the Negombo police to kill them, and three months later masked men killed the author's husband. The Committee found that in the circumstances, considering the State party's lack of cooperation, the State party was responsible for the arbitrary deprivation of life of the author's husband, in breach of article 6 of the Covenant.[146] In this case, the past experiences of the author and her family, including their having received credible death threats, pointed to obvious threats to their lives.

However, in evaluating whether past events indicated risk, much can turn on how one characterises past events and the standpoint from which one performs that task. In some cases, courts or treaty bodies may be reluctant to find *ex post facto* that the threshold for engagement of a positive duty was met. That reluctance may be based on judgments about what law enforcement authorities subjectively knew at a past point in time, or what one could reasonably expect them to have known (constructive knowledge), as well as judgments about the appropriate response to such knowledge (actual or constructive) having regard to policy considerations.

In the 1998 judgment in *Osman v United Kingdom,* the ECtHR established an approach that involved considering actual or constructive knowledge of police officers.[147] Although the present project focuses on the Covenant, it is worth expanding on the case of *Osman* because it appears to have influenced the Committee's interpretation of Article 6 in the context of law enforcement.[148] In *Osman* the Court observed that Article 2(1) of the ECHR (recognising the right to life) 'enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction', and that Article 2 'may … imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another

[146] Ibid.
[147] *Osman v United Kingdom* ECHR 1998-/VIII 3124.
[148] For example, in General Comment 36 the Committee cites *Osman v United Kingdom* in connection with its statement that 'States parties must also ensure the right to life and exercise due diligence to protect the lives of individuals against deprivations caused by persons or entities whose conduct is not attributable to the State': UNHRC, 'General Comment No. 36 – Article 6: right to life' (3 September 2019) UN Doc CCPR/C/GC/36 [7] and fn 5.

individuals.'[149] The Court stated that where a State was alleged to have violated the right through the failure of its authorities to prevent and suppress offences against the person,

> it must be established to [the Court's] satisfaction that the authorities *knew or ought to have known* at the time of the existence of *a real and immediate risk* to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[150]

Thus, identifying a 'real and immediate risk' was central to identifying the existence of the duty upon the authorities to take preventive operational measures to protect the individual whose life was at risk. However, in that case the Court found (by a majority of 17 to 3) that the threshold was not met. The majority considered the various events that the applicants had claimed indicated the risk, before stating its finding that:

> the applicants have failed to point to any decisive stage in the sequence of the events leading up to the tragic shooting when it could be said that the police knew or ought to have known that the lives of the Osman family were at a real and immediate risk from Paget-Lewis. …[T]he police must discharge their duties in a manner which is compatible with the rights and freedoms of individuals. In the circumstances of the present case, they cannot be criticised for attaching weight to the presumption of innocence or failing to use powers of arrest, search and seizure having regard to their reasonably held view that they lacked at relevant times the required standard of suspicion to use those powers or that any action taken would in fact have produced concrete results.'[151]

Leaving aside the reference in the final sentence to the question of whether action 'would have produced concrete results' (which seems to run together two distinct

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[149] *Osman v United Kingdom* [115] (citation omitted).
[150] Ibid [116].
[151] Ibid [121]. Cf. Partly dissenting, partly concurring opinion of Judge De Meyer joined by Judges Lopes Rocha and Casadevall, and Partly dissenting, partly concurring opinion of Judge Lopes Rocha.

issues, namely existence of duty and causation of harm), it is noteworthy that the element of 'real and immediate risk' was applied in a way that took into account the subjective standpoint of the police, including the legal framework and practical realities within which they operated. In the context of the ICCPR, the Human Rights Committee similarly allows for consideration of such factors by specifying the obligation as 'to take reasonable, positive measures *that do not impose disproportionate burdens*', which limits the scope of a risk mitigation obligation by allowing a balancing exercise.

Risk is also relevant to the engagement of the right to life in another aspect of law enforcement: judgments about risk can be central to determining whether the use of force in the context of law enforcement operations violates the right to life. In this regard, the Committee states in General Comment 36 that '[t]he use of potentially lethal force for law enforcement purposes is an extreme measure that should be resorted to only when strictly necessary in order to protect life or prevent serious injury from an imminent threat', and that the 'intentional taking of life by any means is permissible only if it is strictly necessary in order to protect life from an imminent threat'.[152] The Committee remarks that 'States parties are expected to take all necessary measures to prevent arbitrary deprivation of life by their law enforcement officials, including soldiers charged with law enforcement missions'.[153] Here, risk conditions the use of force by the State party in a number of ways. First, risk is relevant to assessing whether the State party acted consistently with human rights obligations in a specific situation. For the use of lethal or potentially lethal force to be permissible, there must be a particular form of risk present (an 'imminent threat' to life or of serious injury), which necessitates the use of such force by the State party in that situation. Second, at a more general level, the State party is obligated to take steps to prevent its law enforcement officials from using force in a way that would amount to arbitrary deprivation of life, which logically requires the State party to consider and address the risk of misuse of force.

[152] UNHRC, 'General Comment No. 36 – Article 6: right to life' (3 September 2019) UN Doc CCPR/C/GC/36, [12] (citations omitted).
[153] Ibid [13].

The Committee describes examples of measures necessary to prevent arbitrary deprivation of life, including 'putting in place appropriate legislation controlling the use of lethal force by law enforcement officials, procedures designed to ensure that law enforcement actions are adequately planned in a manner consistent with the need to minimize the risk they pose to human life', as well as mandatory reporting, review and investigation of lethal incidents and other life-threatening incidents, and supplying forces responsible for crowd control with effective, less-lethal means and adequate protective equipment in order to obviate their need to resort to lethal force'.[154] The Committee also remarks upon the need for appropriate training of law enforcement officials to inculcate relevant international standards.[155] The Committee comments on the authorization of and monitoring of the use of various kinds of weapons and the authorization of private individuals to use potentially lethal force.[156] The Committee also addresses use of force by law enforcement agents against persons with disabilities, noting that

> Persons with disabilities, including psychosocial or intellectual disabilities, are also entitled to specific measures of protection so as to ensure their effective enjoyment of the right to life on an equal basis with others…[including] specific measures designed to prevent unwarranted use of force by law enforcement agents against persons with disabilities.[157]

The Committee considered the application of these principles recently in views on *Murne et. al. v. Sweden* (2023), which concerned the use of lethal force by police officers against the authors' son, who suffered from a psychosocial disability. In considering the merits of the claim that the use of force resulted in arbitrary deprivation of life in violation of article 6, the Committee reviewed the factual context surrounding the use of force, including the threat to police, and concluded 'the State party [had] failed to justify that any threat that Daniel Franklert Murne may have posed from a distance to four armed police officers was such that the use of

[154] Ibid [13].
[155] Ibid [13].
[156] Ibid [12]–[15] (citations omitted).
[157] Ibid [24] (citations omitted).

lethal force was required to prevent an imminent death or serious injury'.[158] The Committee found (by a majority) that the operation amounted to an arbitrary deprivation of life in violation of article 6(1). Material to this finding was the Committee's assessment that the use of firearms was disproportionate and unnecessary in the circumstances—an assessment that implicitly took into account an judgment about the risk posed to the police officers.[159] In contrast, in a separate, dissenting opinion of seven Members (with whom one Member concurred), no violation of article 6(1) was found, in part because the Members accepted findings of domestic judicial processes that the police officers had been under attack and acted in self-defence.[160] It appears that Committee Members' differing appreciations of risk to the officers, and relatedly, differing treatment of domestic authorities' findings on risk, were key factors in their division on whether there had been an 'arbitrary' deprivation of life.

2.6. Risk and the protection of vulnerable persons

Positive obligations of protection under articles 6 and 7 extend also to those who are at risk because of broader patterns of violence. Having regard to the application of article 6 in in this context, in General Comment 36 the Committee observes that the duty to protect the right to life 'requires States parties to take special measures of protection towards persons in vulnerable situations whose lives have been placed at particular risk because of specific threats or pre-existing patterns of violence.'[161] The Committee refers to examples of vulnerable persons, in particular: human rights defenders; officials fighting corruption and organised crime; humanitarian workers, journalists, prominent public figures, witnesses to crime; victims of domestic and gender-based violence and human trafficking; children—especially 'children in street situations', unaccompanied migrant children and children in situations of armed

[158] UNHRC, *Murne et al. v Sweden* (22 March 2023) Communication No. 2813/2016, UN Doc CCPR/C/137/D/2813/2016 [10.7].
[159] Ibid [10.10].
[160] Ibid, Annex I – Joint opinion of Committee members Farid Ahmadov, Carlos Gómez Martínez, Laurence R. Helfer, Marcia V.J. Kran, José Manuel Santos Pais, Kobauyah Tchamdja Kpatcha and Teraya Koji (dissenting); Annex II – Individual opinion of Committee member Yvonne Donders (partially dissenting).
[161] UNHRC, 'General Comment No. 36 – Article 6: right to life' (3 September 2019) UN Doc CCPR/C/GC/36 [23] (emphasis added, citation omitted).

conflict; members of ethnic and religious minorities; indigenous peoples; lesbian, gay, bisexual, transgender and intersex persons; persons with albinism; alleged witches; displaced persons; asylum seekers; refuges and stateless persons; persons with disabilities, including psychosocial or intellectual disabilities; and individuals deprived of their liberty by the State.[162]

One example of a case addressing this protective obligation is *Múnera López et. al. v. Colombia* (2020), which concerned the murder of a trade unionist and community leader and the adequacy of the protection provided by the State party to the victim leading up to his death.[163] The authors of the communication claimed the victim had received several threats in the context of a climate of violence directed against trade unions during 1996 to 2004.[164] The authors claimed that paramilitary groups were responsible for much of this anti-union violence, though also that the State party encouraged the creation of self-defence groups including by 'ma[king] it possible to arm, finance and provide military training to civilians, thereby creating a situation of risk for the general public' and failing to prevent such groups from committing serious human rights violations.[165] It was claimed that law enforcement authorities of the State party raided and searched his home and commenced an investigation into him and others suspected of rebellion and collaboration with the National Liberation Army (NLA), and although the investigation was later abandoned, this resulted in him becoming the target of threats of violence from unknown persons, from which the State party failed sufficiently to protect him.[166] The victim was killed on 31 August 2002, which the authors submitted was the 38th killing of a union leader in the city since 1999. The authors claimed the State party's conduct and omissions violated Mr Múnera López's rights under several articles, including articles 6(1),[167] 2(3), 6(1), 9(1), 17 and 22 of the Covenant and of their own rights, as his family members, under article 2(3) of the Covenant.

[162] Ibid [23]–[25].
[163] UNHRC, *Múnera López et al. v Colombia* (11 March 2020) Communication No. 3076/2017, UN Doc CCPR/C/128/D/3076/2017.
[164] Ibid [2.2].
[165] Ibid [2.2].
[166] Ibid [2.2]–[2.5], [3.2].
[167] The authors also alleged violations of Mr Múnera López's rights under articles 2(3), 9(1), 17 and 22 of the Covenant and of their own rights under article 2(3), 9(5) and 14(6) of the Covenant, as well

In considering the merits of the claim under article 6(1) in respect of the killing, the Committee recalled that 'the duty to protect the right to life includes an obligation to adopt any appropriate laws or other measures in order to protect life from all reasonably foreseeable threats, including from threats emanating from private persons and entities', and that States parties therefore have a 'due diligence obligation to take reasonable, positive measures that do not impose disproportionate burdens on them in response to reasonably foreseeable threats to life originating from private persons and entities'.[168] The Committee noted that the obligation to take special measures of protection for vulnerable persons at particular risk because of specific threats or pre-existing patterns of violence extended to human rights defenders and trade unionists.[169] In this case, however, the Committee accepted that the victim's protection was 'conditional on his refraining from going to the area where he would be at risk, a condition with which Mr. Múnera López did not comply, thus endangering his life and leading to the fatal outcome'.[170] In finding no violation of article 6(1) in respect of this aspect of the claim, the Committee appears to have placed more weight on risk factors specific to the author's case, and especially to his own action of returning to Barranquilla (which the Committee accepted contributed to his risk), than on the submissions regarding the State's party's contribution to the situation of risk facing trade union leaders more generally.

The Committee has also identified victims domestic and gender-based violence and human trafficking as a group of particularly vulnerable persons in respect of whom States parties should take special measures of protection (as noted above). The Committee has issued Views on several communications in which it addressed the risk of domestic and gender-based violence and/or human trafficking to individual authors, including in cases where the author claimed that the obligation of *non-*

as a violation of the right to free association of SINALTRAINAL as a 'collective victim' under article 22. The claims under articles 9(5), 14(6), 17, and 22 were found inadmissible: ibid [8.3], [8.4].

168 Ibid [9.2].

169 Ibid [9.2].

170 Ibid [9.3]. However, the Committee found the State party had failed adequately to investigate and identify persons who instigated the murders, and that this amounted to a violation of article 2(3) read in conjunction with article 6(1): ibid [9.5].

refoulement was enlivened by a risk of killing, torture or CIDTP through domestic or gender-based violence if returned to their country of origin. For example, in *Elezaj v. Denmark,* the Committee considered the claim of an Albanian national who had applied unsuccessfully for a residence permit on humanitarian grounds, and who claimed that the State party would violate her rights under articles 6, 7 and 14 of the ICCPR if she were deported to Albania.[171] In relation to articles 6 and 7, the author claimed she was at risk of being killed, tortured or subjected CIDTP, either by her uncle, who believed that she had dishonoured her family by escaping from her husband and had previously attacked her, or by her ex-husband or his family. The author claimed that the authorities in the receiving State would be unable adequately to protect her from these risks.[172] The author claimed to have been a victim of trafficking in the past and that she was at risk of the same treatment upon return to Albania.

The majority of Committee Members found that the author's removal to Albania would amount to a violation by the State party of her rights under articles 6 and 7 of the Covenant—a finding that largely turned on how the Committee evaluated the relative importance of various factors in the assessment of the risk of domestic violence upon return. The majority on the Committee reasoned:

> both the Danish Immigration Service and the Refugee Appeals Board accepted the facts presented by the author in support of her asylum application but disputed that she faced a real risk of persecution and that the Albanian authorities would be unable or unwilling to offer her protection…While noting the State party's arguments that reports indicate the legislative and policy steps taken by Albania to protect women victims of family violence and gender-based violence and progress in reducing corruption in law enforcement, the Committee also notes that the State party did not give adequate weight to information regarding the existing gap between law and practice. In that regard, the Committee has expressed concern about the persistence of the phenomenon of blood feud-related crimes, the inadequate implementation of the law, ineffective police investigation into such cases and a limited number of

171 UNHRC, *Elezaj v Denmark* (16 March 2023) Communication No. 2858/2016, UN Doc CCPR/C/137/D/2858/2016.
172 Ibid [3.1], [3.2], [5.3]–[5.6].

> convictions….The Committee also notes the information about the lack of a sufficient number of shelters for victims of domestic violence and trafficking in persons... On the author's allegation concerning the prevalence of corruption in the judiciary in Albania, the Committee considers that the State party did not accord enough weight to the information provided by the author in this respect and the ways in which this had affected her attempts to denounce her uncle and had relied mainly on general country information.[173]

In contrast, three Committee Members issued a joint dissenting opinion in which they concluded that there was no violation of the author's rights under articles 6 or 7.[174] The dissenting Members took a more deferential approach to the findings on risk of the authorities of the State party, which they found had 'carefully considered the facts and evidence before them and made thorough and individualized assessments of the author's case and of the human rights situation in Albania as it pertained to the facts presented by the author.'[175] These Members considered that the author had failed to demonstrate that the State party's assessment of risk was 'clearly arbitrary, manifestly erroneous or amounted to a denial of justice', and on this basis they saw no reason to find a violation of articles 6 or 7. In this case, both the majority and minority of Members on the Committee accepted that the author had previously suffered domestic violence in the country of origin; what divided them was essentially differing approaches to weighing this and other factors in assessment the risk facing the author upon return, as well as differing views on the degree of deference to be given to the State party's findings on that very question.[176]

A further subset of cases concerning risk of domestic and gender-based violence enlivening protection obligations are those concerning a risk of the practice of female genital mutilation (FGM). The Committee has recognised that the practice of FGM unquestionably amounts to treatment prohibited under article 7 of the Covenant, and therefore the obligation of *non-refoulement* implied in article 7 is enlivened in

[173] Ibid [8.5].
[174] Ibid, Joint opinion of Committee members Carlos Goméz Martínez, Laurence R Helfer and Marcia VJ Kran (dissenting).
[175] Ibid [6].
[176] The issue of deference is addressed further in part 4.3 of this dissertation.

circumstances where a person faces a 'real and personal risk' of being subjected to such treatment if returned to their country of origin.[177] However, the Committee has been divided on several occasions on the issue of whether such a risk existed for the author in question.

In *Kaba and Kaba v. Canada,* the Committee was divided in its Views on whether the evidence substantiated that the author's daughter in that case would face a risk of FGM if she were returned to Guinea.[178] The majority on the Committee observed that there was 'no question that subjecting a woman to genital mutilation amounts to treatment prohibited under article 7 of the Covenant' and 'nor [was] there any question that women in Guinea traditionally have been subjected to genital mutilation and to a certain extent are still subjected to it.'[179] At issue was whether the author's daughter ran 'a real and personal risk' of being subjected to such treatment if retuned to Guinea.[180] The State party had argued against the credibility of the author's account of her personal history, including her experience of domestic violence and her claim to have been divorced, and had also argued that the author's opposition to practice of FGM meant that her daughter would not be personally at risk of being subjected to it.[181]

However, the majority on the Committee assessed that 'the context and the particular circumstances of the case at hand demonstrate[ed] a real risk of [the author's daughter] being subjected to genital mutilation if she were returned to Guinea', and consequently, that her deportation would constitute a violation of articles 7 and 24(1), read in conjunction.[182] In reaching this finding, the majority placed particular weight on the lack of compliance with the prohibition of the practice in domestic law and the

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[177] UNHRC, *Kaba and Kaba v Canada* (25 March 2010) Communication No. 1465/2006, UN Doc CCPR/C/98/D/1465/2006 [10.1].

[178] The author also claimed that her own human rights would be violated if she and her daughter were returned to Guinea, however this aspect of the communication was declared in admissible.

[179] Kaba and Kaba v Canada [10.1].

[180] Ibid [10.1].

[181] The State part placed weight on a report of the United Nations Children's Fund (UNICEF) and a Demographic Health Survey which they submitted confirmed that it is women, and more particularly mothers, who decided to have girls excised, and on this basis argued that the author's daughter could not be at risk as her mother opposed the practice: ibid, [4.10].

[182] Ibid [10.2], [10.3].

fact that those who practised it did so with impunity, the fact that the practice was common and widespread in the country, particularly among women of the ethnic group to which the authors belonged, that the author appeared to be the only family member who opposed her daughter being subject to the practice, as well as the age of her daughter at the time of the Committee's decision.[183] Two Members of the Committee appended separate dissenting opinions, each finding no violation of the human rights of the author or her daughter.[184] One of the dissenting Members was of the view that the author had 'deliberately tainted' the process in relying on forged and fabricated evidence, and this finding appeared pivotal to his assessment that the author's daughter was not personally at risk.[185] The Member criticised the majority for having focused on the 'general' risk of FGM in Guinea rather than the question of risk arising in the individual complaint, the latter of which he viewed as underpinned by an assessment of the author's credibility.[186]

The Committee was again divided in its Views on a subsequent case concerning the risk of the author's daughter being subjected to FGM if returned to their country of origin, in that case Nigeria.[187] Again, in that case it was agreed by the author and the State party that FGM amounted to treatment proscribed by article 7, and that despite its prohibition in domestic law, women and children in Nigeria continued to be subjected to the practice. What was in issue was whether the author's daughter would be *personally* at risk if returned to Nigeria. The majority of Committee Members placed weight on the finding that the prevalence of the practice across the whole country was 27 per cent, which indicated that it was 'still practised to a significant degree', and that it was more prevalent in the south where the author had lived.[188] The majority ultimately concluded that the removal to Nigeria, 'if implemented in the absence of a procedure which would guarantee a proper assessment of the real and personal risk that they might face if deported' would violate article 7, read alone and

[183] Ibid [10.2].
[184] Ibid, Dissenting opinion by Mr. Abdelfattah Amor and Dissenting opinion by Mr. Krister Thelin.
[185] Ibid, Dissenting opinion by Mr. Abdelfattah Amor [11], [21].
[186] Ibid, Dissenting opinion by Mr. Abdelfattah Amor [11], [21].
[187] UNHRC, *JO Zabayo v Netherlands* (13 October 2021) Communication No. 2796/2016, UN Doc CCPR/C/133/D/2796/2016.
[188] Ibid [10].

in conjunction with article 24.[189] Three Members appended a joint dissenting opinion. Notably, they framed the key question as being 'whether the author has demonstrated that the assessment made by the State party of her situation was clearly arbitrary or amounted to a manifest error or denial of justice', and that 'the crucial element' to be taken into account in deciding that matter was 'whether the State party conducted an individualized assessment of the situation particular to the author and [her daughter], as opposed to relying on reports of the general situation in Nigeria'.[190] The dissenting Members considered the State party to have conducted such an individualised assessment and that the author had failed to demonstrate clear arbitrariness, manifest error or denial of justice in that assessment, and on that basis the Members declined to find a violation of 7 or 24.[191]

2.7. Risk and enforced disappearance

Over time, risk has come to play an important role in the Committee's reasoning on violation of Covenant rights in the context of enforced disappearances. The term 'enforced disappearance' does not appear in the express terms of the Covenant, but is described by the Committee as 'a unique and integrated series of acts that represent continuing violation of various rights recognized in that treaty'.[192] It is a phenomenon that impacts upon a range of civil and political rights, including the right to recognition everywhere as a person before the law in article 16, the right to liberty and security of person in article 9, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment in article 7, the right of all persons

[189] Ibid [10].
[190] Ibid, Joint opinion of Committee members Furuya Shuichi, Marcia V.J. Kran and Gentian Zyberi (dissenting) [2], [5].
[191] Ibid, Joint opinion of Committee members Furuya Shuichi, Marcia V.J. Kran and Gentian Zyberi (dissenting) [6]–[10].
[192] As cited in Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (3rd revised edn) 132 and fn 107. The Committee has also described enforced disappearance as 'a unique and integrated series of acts and omissions representing a grave threat to life': see, e.g. UNHRC, *Sharma et al. v Nepal* (25 May 2018) Communication No. 2364/2014, UN Doc CCPR/C/122/D/2364/2014 [9.5]; UNHRC, *Boudjema v Algeria* (1 December 2017) Communication No. No. 2283/2013, UN Doc CCPR/C/121/D/2283/2013 [8.4]; UNHRC, *El Boathi v Algeria* (16 May 2017) Communication No. 2259/2013, UN Doc CCPR/C/119/D/2259/2013, [7.4]; UNHRC, *Tharu et al. v Nepal* (21 October 2015) Communication No. 2038/2011, UN Doc CCPR/C/114/D/2038/2011 [10.4].

deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person in article 10, as well as the right to life in article 6.[193]

The Committee has described enforced disappearance in General Comment 36 and elsewhere as the 'deprivation of liberty, followed by a refusal to acknowledge that deprivation of liberty or by concealment of the fate of the disappeared person, which 'in effect removes that person from the protection of the law and places his or her life at *serious and constant risk*, for which the State is accountable'.[194] The Committee has also cited with approval the definition of enforced disappearance set out in the Rome Statute, which is 'the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.'[195] The latter definition includes a temporal element which, in Views on *Aboufaied v. Libya*, Member Sir Nigel Rodley identified as something that distinguishes 'the grotesque and unconscionable practice of enforced disappearance' from other cases of unacknowledged or secret detention (which may constitute at least arbitrary detention while not falling within the category of enforced disappearance).[196] Sir Nigel observed that the requirement of an intent to deprive the person of the protection of the law 'for a prolonged period of time' may effectively imply evidence of the placing of the person outside the protection of the law, thus justifying the characterization of enforced disappearance.[197]

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[193] E.g., UNHRC, *Aboufaied v Libya* (19 June 2012) Communication No. 1782/2008, UN Doc CCPR/C/104/D/1782/2008 [7.3] and footnote thereto.

[194] UNHRC, 'General Comment No. 36 – Article 6: right to life' (3 September 2019) UN Doc CCPR/C/GC/36 [58] and footnote thereto (emphasis added).

[195] Rome Statute of the International Criminal Court (adopted 7 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) art. 7(1)(i); UNHRC, *Saker v Algeria* (24 April 2006) Communication No. 992/2001, UN Doc CCPR/C/86/992/2001 [9.2]. Note the International Convention for the Protection for the Protection of All Persons from Enforced Disappearances defines the phenomenon as 'the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support of acquiescence of the State, followed by a refusal to acknowledge the deprivation liberty or by concealment of the fate of whereabouts of the disappeared person, which place such a person outside the protection of the law': International Convention for the Protection of All Persons from Enforced Disappearance (Adopted 20 December 2006) 2716 UNTS 3 (Convention on Enforced Disappearance) art. 2.

[196] Aboufaied v Libya, Individual Opinion of Committee member Sir Nigel Rodley (concurring).

[197] Ibid.

The phenomenon of enforced disappearance is noteworthy as another example of evolution in the Committee's reasoning to place greater emphasis on risk exposure as amounting to a rights violation it itself. It has long been recognised that enforced disappearance often conceals the torture and/or killing of the disappeared person. As Schabas has observed, as early as 1981 the ICRC affirmed that 'disappearances imply violations of fundamental rights such as the right to life'.[198] A year later, the Committee addressed enforced disappearances in its first General Comment on the right to life, in which it remarked that States parties should 'take specific and effective measures to prevent the disappearance of individuals, something which unfortunately has become all too frequent and leads too often to arbitrary deprivation of life', and furthermore that States 'should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.'[199] The Committee has observed the connection between the fact of disappearance and the logical inference that torture, CIDTP, and/or killing has taken place. For example, in Views on *Mojica v Dominican Republic* (1994) the Committee reasoned in relation to article 7:

> The circumstances surrounding Rafael Mojica's disappearance, including the threats made against him, give rise to a strong inference that he was tortured or subjected to cruel and inhuman treatment. Nothing has been submitted to the Committee by the State party to dispel or counter this inference. Aware of the nature if enforced or involuntary disappearances in many countries, the Committee feels confident to conclude that the disappearance if persons is inseparably linked to treatment that amounts to a violation of article 7.[200]

In relation to the right to life, in *Yamina Guezout et al. v. Algeria,* Member Kälin observed that 'the number of those among the victims of prolonged disappearances who die or are killed while held in secret detention is very high.'[201] In *Aboufaied v.*

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[198] Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (3rd revised edn) 133, referring to Resolution II, Forced or involuntary disappearances (1981) 195 *International Review of the Red Cross* 319.
[199] UNHRC, 'General comment No. 6: Article 6 (Right to life)' (1982) UN Doc HRI/GEN/1/Rev.1 [4].
[200] UNHRC, *Mojica v Dominican Republic* (15 July 1994) Communication no. 449/1991, UN Doc CCPR/C/51/D/449/1991 [5.7].
[201] UNHRC, *Yamina Guezout et al. v. Algeria* (20 September 2012) Communication No. 1753/2008, UN Doc CCPR/C/105/D/1753/2008, Individual (concurring) opinion of Mr. Walter Kälin.

Libya, Member Sir Nigel Rodley observed that 'most enforced disappearances are really camouflages for clandestine murder' and that '[v]ery occasionally the victims reappear'. [202]

It is worth noting, however, the language in some early jurisprudence suggests a circumspect approach to the question of whether enforced disappearance conclusively established a violation of the right to life (rather than just breaches of articles 7, 9 or 10). In some remarks the disappearance itself is distinguished from the violation of the right to life, which may occur and be concealed by the disappearance (but which presumably would not occur through the disappearance alone). In *Bleier Lewenhoff et al. v. Uruguay* (1982) the Committee concluded 'that the information before it reveals breaches of articles 7, 9 and 10 (1) of the International Covenant on Civil and Political Rights and that there are serious reasons to believe that the ultimate violation of article 6 has been perpetrated by the Uruguayan authorities.'[203] In the same year, in General Comment 6 the Committee remarked:

> States parties should also take specific and effective measures to prevent the disappearance of individuals, something which unfortunately has become all too frequent and leads too often to arbitrary deprivation of life. Furthermore, States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances *which may involve a violation of the right to life*.[204]

In more recent remarks on the right to life, enforced disappearance is itself characterised as amounting to a violation of the right to life *through risk exposure.* In General Comment 36 the Committee describes enforced disappearance as an 'extreme form of arbitrarily detention' which is itself life-threatening.[205] Furthermore, it seems clear from the following passage that exposure to that threat alone violates the right:

[202] Aboufaied v Libya, Individual Opinion of Committee member Sir Nigel Rodley (concurring).
[203] UNHRC, *Bleier Lewenhoff et al. v Uruguay* (1985) Communication No. 30/1978, UN Doc CCPR/C/OP/1 at 109 [14].
[204] UNHRC, 'General comment No. 6: Article 6 (Right to life)' (1982) UN Doc HRI/GEN/1/Rev.14.
[205] UNHRC, 'General Comment No. 36 – Article 6: right to life' (3 September 2019) UN Doc CCPR/C/GC/36 [57].

> The deprivation of liberty, followed by a refusal to acknowledge that deprivation of liberty or by concealment of the fate of the disappeared person, in effect removes that person from the protection of the law and *places his or her life at serious and constant risk*, for which the State is accountable. *It thus results in a violation of the right to life* as well as other rights recognized in the Covenant, in particular, article 7 (prohibition of torture or cruel, inhuman or degrading treatment or punishment), article 9 (liberty and security of person) and article 16 (right to recognition as a person before the law).[206]

A difference in rationale between the earlier and later approaches can be observed. On one approach, the person's disappearance may be part of a body of circumstantial evidence from which their death may be inferred, with the death implicitly necessary to finding a breach of the right to life. On the other approach, *risk* to life through enforced disappearance itself constitutes a breach. In a practical sense, the legal outcome may be the same in many cases; what differs is the analytical function that the concept of risk serves in legal reasoning regarding the breach.[207]

2.8. Risks of war and nuclear weapons

A shifting approach to risk has also characterised the Committee's evolving assessment of the human rights implications of the threat or use of nuclear weapons. The Committee considered the right to life in the context of the risks of nuclear weapons in its Views on *E.W. et al. v The Netherlands* in 1993.[208] The authors of the communication, 6,588 citizens of the Netherlands, claimed the government had violated their rights under article 6 by agreeing to the deployment of cruise missiles with nuclear warheads on the Netherlands' territory. The authors referred in their submission to General Comment 14 on article 6, adopted on 2 November 1984, in which the Committee stated that 'the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life

[206] Ibid [58] (emphasis added, original footnote omitted).
[207] The different roles for risk in legal analysis of ICCPR cases is explored further at part 5.4 below.
[208] UNHRC, *EW et al. v The Netherlands* (29 April 1993) Communication No. 429/1990, UN Doc CCPR/C/47/D/429/1990.

which confront mankind today'.[209] In finding the communication inadmissible, the Committee remarked:

> For a person to claim to be a victim of a violation of a right protected by the Covenant, he or she must show either that an act or an omission of a State party has already adversely affected his or her enjoyment of such right, or that such an effect is imminent, for example on the basis of existing law and/or judicial or administrative decision or practice.[210]

On their face, the remarks related to procedure rather than to the substance of the right in question; the Committee was addressing conditions of admissibility set out in the First Optional Protocol and articulating a requirement of 'imminence' for an individual to have standing as a 'victim' of an anticipated breach. Yet, the Committee's remarks imply something about the substantive content of article 6 as understood in 1993. The finding of inadmissibility indicates that being exposed to one of the 'greatest threats to the right to life' confronting mankind (though not an 'imminent' threat) was not itself regarded as an adverse impact on the enjoyment of the right. This suggests that article 6, as interpreted in 1993, offered no substantive protection against mere risk exposure relating to nuclear weapons.[211] The individual complaints mechanism under the First Optional Protocol offered some protection against risk, in the sense that it could be used pre-emptively to complain of an *imminent* breach of a right, however *the right itself* was not interpreted as entailing freedom from risk *per se* (at least not the sort of non-imminent risk alleged in that case). Later, an apparent requirement of 'imminent' risk would spread from the jurisprudence on procedural matters of admissibility and interim measures, into the

[209] Ibid [3.2].
[210] Ibid [6.4].
[211] Similarly, in a communication in which the authors claimed that France's resumption of nuclear underground tests on Mururoa and Fangataufa atolls between September 1995 and the beginning of 1996 violated their rights under articles 6 and 17 of the Covenant, the Committee reiterated, 'it is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today', yet it also took the view that the authors had failed to substantiate that the actual conduct of the nuclear tests (which took place before it issued Views) had made them 'victims whose right to life and to family life was then violated or was under a real threat of violation': UNHRC, *Bordes and Temeharo v France* (22 July 1996) Communication No. 645/1995, UN Doc CCPR/C/57/D/645/1995.

Committee's analysis of the merits of certain claims. This use of imminence is addressed further in parts 3.3.2 and 4.2 below.

The Committee again considered the right to life in the context of nuclear weapons in 1996 in Views on *Bordes and Temeharo v. France*.[212] Again, the complaint was found inadmissible for lack of victim status, on the basis of the authors' failure to prove an *imminent risk* to their rights. The authors of the communication were French citizens residing in Papeete, Tahiti, French Polynesia, who claimed that the decision of France in 1995 to resume underground nuclear tests on Mururoa and Fangataufa atolls in the South Pacific, and later the actual conduct of those test between 5 September 1995 and the beginning of 1996, threatened their right to life, as well as their right to freedom from arbitrary interference with their privacy and family life under article 17.

The authors submitted that numerous studies had shown that the health and life of individuals in the area were threatened directly through radiation exposure, and indirectly though contamination of the food chain, and that French authorities had not been able to show that the underground nuclear tests did not constitute a danger to the health of the inhabitants of the South Pacific and to the environment, and had failed to take sufficient measures to protect their life and security.[213] The risks in question included those expected to manifest slowly over time, as counsel for the authors submitted that it was too early to gauge the extent and effect of the contamination as cancers and 'genetical malformations' could take 10 to 30 yeas to develop or manifest.[214] The authors also complained of a lack of independent international investigation into the impacts of tests, lack of transparency and misrepresentations by the authorities of the State party.[215]

The State party challenged admissibility on several grounds, including on the basis that the authors had failed to prove they were 'victims' within the meaning of the First Optional Protocol. Referring to various scientific reports, the State party denied that

[212] Ibid.
[213] Ibid [2.2], [2.3].
[214] Ibid [4.3].
[215] Ibid [4.1].

the tests exposed the population of the islands surrounding the testing area to an increased risk of radiation, or that they ran a risk of contamination through consumption of agricultural products produced and fish caught in proximity of the testing area.[216]

The Committee found the authors failed to qualify as victims under OP1 and dismissed the claim as inadmissible.[217] The Committee's summary of the arguments concerning risk is brief. The Committee considered the key issue to be 'whether the announcement and subsequent conduct of underground nuclear tests ...resulted in a violation of their right to life and their right to their family life, specific to Ms. Bordes and Mr. Temeharo, or presented an *imminent threat* to their enjoyment of such rights'.[218] On the basis of the information before it, the Committee found the authors had failed to substantiate their claim that the nuclear testing 'place[d] them in a position in which they could justifiably claim to be victims whose right to life and to family life was then violated *or was under a real threat of violation*.[219] Risks relating to nuclear weapons were raised again in the matter of *Lindon v. Australia* (1998)*,* which concerned *inter alia* 'whether Australia's defence policy in general, and the facilities at "Pine Gap" in particular, constitute[d] an imminent, adverse effect to the author's right to life'.[220] The Committee found this aspect of the claim inadmissible, again based on the author's lack of victim status.[221]

The Committee's more recent remarks on nuclear weapons contrast with some of its earlier Views. In General Comment 36 the Committee expresses the view that '[t]he threat or use of weapons of mass destruction, in particular nuclear weapons, which are indiscriminate in effect and are of a nature to cause destruction of human life on a catastrophic scale, is incompatible with respect for the right to life and may amount to a crime under international law.'[222] Furthermore, the Committee remarked:

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[216] Ibid [3.2]–[3.24].
[217] Ibid [5.7].
[218] Ibid [5.5].
[219] Ibid.
[220] UNHRC, *Lindon v Australia* (20 October 1998) Communication No. 646/1995, UN Doc CCPR/C/64/D/646/1995 [6.8].
[221] Ibid.
[222] UNHRC, 'General Comment No. 36 – Article 6: right to life' (3 September 2019) UN Doc

> States parties must take all necessary measures to stop the proliferation of weapons of mass destruction, including measures to prevent their acquisition by non-State actors, to refrain from developing, producing, testing, acquiring, stockpiling, selling, transferring and using them, to destroy existing stockpiles, and to take adequate measures of protection against accidental use, all in accordance with their international obligations.[223]

Thus, the Committee again highlights risk mitigation and freedom from risk exposure as an aspect of States' obligations to respect and ensure the right to life, and although it continues to invoke the concept of imminence in certain contexts (discussed further at 3.3.2 below), that word does not feature in General Comment 36 in its remarks on the human rights implications of nuclear weapons.

2.9. Risk and environmental degradation

In recent views the Committee has recognised that a State may breach its obligations to respect and ensure the right to life by failing to protect people from risks related to pollution and other environmental degradation. In this regard, the Committee observed in General Comment 36 that 'Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life'.[224] The Committee adopted a broad interpretation of the right to life as implying that States parties should 'address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity', and relevantly, it identified degradation of the natural environment as one such general condition.[225]

CCPR/C/GC/36 [66].

[223] Ibid.

[224] Ibid [62], citing Declaration of the United Nations Conference on the Human Environment [1], Rio Declaration on Environment and Development, principle 1, United Nations Framework Convention on Climate Change, preamble.

[225] Ibid [2], [62].

This characterisation of article 6 as guaranteeing a right to life *with dignity and* entailing obligations to protect people from pollution and other environmental risks is a significant development, to which some States parties have objected. For example, prior to the adoption of GC36, one State party expressed concerns regarding the statement on the draft general comment that 'States parties should take appropriate measures to address the general conditions in society that may eventually give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity'.[226] The State party submitted that some of the draft text did 'not reflect the legal obligations contained in the text of Article 6 of the Covenant', did 'not reflect the current state of international law', and drew 'overly broad connections between compliance with Article 6 of the Covenant and other human rights obligations'.[227] Various other States also expressed concerns in submissions on this aspect of the draft.[228] Nevertheless, the finalised text of General Comment 36 contains the reference to the 'right to life with dignity', and the Committee has subsequently applied this interpretation of article 6, including in its views on *Portillo Cáceres and others v Paraguay* (2019) and on *Billy et. al. v. Australia* (2022).[229]

In *Portillo Cáceres and others v Paraguay* the authors were engaged in family farming in Colonia Yeruti, a settlement on State-owned and administered land which had been distributed to campesinos under an agrarian reform program. The authors' homes adjoined industrial farms, which were located inside and outside the settlement. In their communication, the authors claimed that crops in the industrial farms were fumigated with toxic pesticides in contravention of domestic environmental laws, resulting in contamination that severely impacted their living

[226] Australian Government, 'Submission of the Australian Government Draft General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights: Right to life' <https://www.ohchr.org/en/calls-for-input/general-comment-no-36-article-6-right-life> accessed 6 July 2024 [5].

[227] Ibid [6].

[228] E.g., United States, 'Observations of the United States of America On the Human Rights Committee's Draft General Comment No. 36 On Article 6 - Right to Life' accessed 6 July 2024Government of Canada, 'Human Rights Committee, Draft General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights – Right to life' accessed 6 July 2024 [20] (both available at https://www.ohchr.org/en/calls-for-input/general-comment-no-36-article-6-right-life).

[229] UNHRC, *Portillo Cáceres and others v Paraguay* (20 September 2019) Communication No. 2751/2016, UN Doc CCPR/C/126/D/2751/2016; Billy *et al.* v Australia, [8.4].

conditions, livelihoods, and health. The impacts included illness leading to the death of one relative of the authors, Mr. Portillo Cáceres, a 26-year-old campesino, and the illness and hospitalisation of the authors and of children of two of the authors. The authors claimed the State party had failed to fulfil its duty of protection under articles 6, 7 and 17 of the Covenant, read alone and in conjunction with article 2(3), by failing to exercise due diligence and by allowing extensive spraying of toxic chemicals in breach of domestic law.[230] The Committee found the State party had violated of articles 6 and 17 of the Covenant, read alone and in conjunction with article 2 (3).[231]

Although in this case the Committee accepted that the victims had actually suffered physical harm, it was still important in the Committee's reasons that the individuals in question had been exposed to risk. The State party had argued that the authors had not established on the evidence that they had in fact been poisoned by pesticides.[232] However in finding a violation of the right to life, the Committee reiterated that it was not necessary to have *actually caused* a death, and that that 'States parties may be in violation of article 6 of the Covenant even if such threats and situations do not result in loss of life.'[233] In this case, the Committee took the view that heavily spraying the area in question with toxic agrochemicals posed 'a reasonably foreseeable threat to the authors' lives given that such large-scale fumigation has contaminated the rivers in which the authors fish, the well water they drink and the fruit trees, crops and farm animals that are their source of food.'[234] While statement implies some causal findings (in that it accepts that spraying caused toxic contamination of the environment

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[230] Portillo Cáceres and others v Paraguay paras. 3.1, 3.4.

[231] In view of the finding on article 6, the Committee found it was unnecessary to consider whether the same information disclosed a violation of article 7. In relation to the violation of article 17, the Committee remarked that 'When pollution has direct repercussions on the right to one's private and family life and home, and the adverse consequences of that pollution are serious because of its intensity or duration and the physical or mental harm that it does, then the degradation of the environment may adversely affect the well-being of individuals and constitute violations of private and family life and the home' (citing jurisprudence of the ECHR): ibid, para. 7.8.

[232] The Committee summarised the argument as follows: 'The State party argues that it has not violated articles 6 or 7 of the Covenant because the authors have not established that they were poisoned by pesticides, since the blood and urine tests yielded values that are "within normal parameters and did not indicate the presence of residual toxins in their bodies". The State party goes on to say that lindane is the only active ingredient that was found in a concentration above the allowable threshold (0.03 mg/kg, rather than 0.01 mg/kg). The State party also emphasizes that the authors mentioned having fevers, but fever is actually not one of the usual symptoms of lindane poisoning.' ibid [4.4]

[233] Ibid [7.3], citing General Comment 36 [7].

[234] Ibid [7.5].

generally), by focusing on causation at this general level it avoids the need to consider causation specifically in relation to the authors' illnesses and death of their relative (the resolution of which would presumably require in-depth engagement with complex technical or scientific evidence).

Risks associated with environmental degradation were also important in the reasoning in *Daniel Billy et al. v Australia*, a communication concerning the impacts of climate change-related sea level rise upon inhabitants small, low-lying islands in the Torres Strait.[235] The communication was filed jointly by eight authors from the islands of Boigu, Masig, Warraber and Poruma, acting on their own behalf and on behalf of six children. The group submitted that they had suffered a range of harms due to the impacts of sea level rise on the islands on which they lived, and that they were at risk of further harms in the future. The past or continuing harms described in the complaint included: flooding and erosion of the islands leading to loss of shoreline and destruction of buildings and other infrastructure; increases in ocean temperatures and acidification leading to coral bleaching; reef death, the decline of seagrass and other nutritionally and culturally important marine species; salinification of soils such that land traditionally used for gardening could no longer be cultivated; impacts on land-based food production systems and marine industries; and health-related problems such as an increased incidence of disease and heat-related illness.[236] The authors also described how climate change was affecting their ability to practice and pass on their traditional culture. Degradation of land and marine environment had led to the loss of culturally important food sources, disruption of seasonal and weather patterns had undermined their ability to pass on traditional ecological knowledge, and the future prospect of displacement from the islands would mean the loss of important cultural practices, which were only meaningful if performed on that land.[237] It was submitted that the inhabitants of Boigu and Masig faced 'a real prospect of displacement and loss of culture within the next 10 years' and that inhabitants of

[235] Billy *et al.* v Australia.
[236] Ibid [2.3]–[2.6], [5.2].
[237] Ibid [2.6], [3.5]–[3.7], [5.2].

Warraber and Poruma faced that prospect ‘within their lifetimes unless urgent action is taken within 10-15 years’.[238]

The authors claimed that the State party had failed to mitigate and adapt to and climate change by, *inter alia*, upgrading seawalls on the islands and reducing greenhouse gas emissions, and that such failures violated their rights under articles 6, 17, and 27, as well as under article 2, read alone and in conjunction 6, 17, and 27. The authors also claimed that the six children named in the communication had suffered violations of their rights under article 24(1), read alone and in conjunction with articles 6, 17 and 27.

Risk was central to the way in which the authors framed various of their claims, particularly in relation to the right to life under article 6. For example, the authors pointed to the assessment of the Torres Strait Regional Authority (TSRA) that ‘the effects of climate changed threaten the islands themselves as well as marine and coastal ecosystems and resources, *and therefore the life*, livelihoods and unique culture of Torres Strait Islanders.’[239] Referring to the TSRA report, the authors predicted that climate change would severely impact traditional ways of life, as well as infrastructure, housing, land-based food production and marine industries, and lead to health problems such as increase disease and heat-related illness.[240] It was argued that the State party’s acts and omissions had already resulted in rights violations, but also that those acts and omissions would ‘continue to impair the authors’ rights in ways that [would] worsen over time, because of the latent and/or irreversible nature of climate change’.[241] Having regard to the right to life, it was argued that the State party’s failure to implement adequate mitigation and adaptation measures amounted to a failure ‘to prevent foreseeable loss of life from the impacts of climate change, and to protect the authors’ right to life with dignity’, in violation of *inter alia* article 6(1). Thus, exposure to foreseeable risks, including those expected to materialise over the long term, was key to the alleged breach of article 6.

[238] Ibid [5.3].
[239] As quoted in ibid [2.2] (emphasis added).
[240] Ibid [2.6].
[241] Ibid [5.4] (as summarised by the Committee).

The Committee was divided in its views on the claims under article 6. To a significant extent, the differing opinions reflect differing approaches to the question of risk and its implications for the State party's obligations under the Covenant. The majority reiterated that a violation of article 6 could occur through mere risk exposure (i.e. even if there was no loss of life) as the obligation of States parties to respect and ensure the right to life extended to 'reasonably foreseeable threats and life-threatening situations that can result in loss of life'.[242] Furthermore, the majority said that 'such threats may include adverse climate change impacts', and that 'environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life' (recalling its remark in General Comment 36).[243] However, in the case of the authors and their children, the majority declined to find a violation of article 6, for reasons explicitly concerned with the characterisation of risk. The majority reasoned:

> while the authors evoke feelings of insecurity engendered by a loss of predictability of seasonal weather patterns, seasonal timing, tides and availability of traditional and culturally important food sources, they have not indicated that they have faced or presently face adverse impacts to their own health *or a real and reasonably foreseeable risk of being exposed to a situation of physical endangerment or extreme precarity that could threaten their right to life*, including their right to a life with dignity.[244]

The majority on the Committee considered that the State party had demonstrated it was 'taking adaptive measures to reduce existing vulnerabilities and build resilience to climate-change harms in the islands.'[245] Relevantly, by the time the Committee rendered its Views, a seawall infrastructure plan was in place and building underway to address coastal erosion and storm surge impacts on the islands. The Committee

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[242] Ibid [8.3] (referring to UNHRC, *Toussaint v Canada* (30 August 2018) Communication No. 2348/2014, UN Doc CCPR/C/123/D/2348/2014 and *Portillo Cáceres and others v Paraguay*.
[243] Billy *et al.* v Australia [8.3].
[244] Ibid [8.6] (emphasis added).
[245] Ibid [8.7].

also considered that the timeframe in which the authors said their islands would become uninhabitable in the absence of urgent action (10-15 years) 'could allow for intervening acts by the State party to take affirmative measures to protect and, where necessary, relocate the alleged victims'.[246] Based on the information before it, the majority on the Committee considered it was 'not in a position to conclude that the adaptation measures taken by the State party would be insufficient so as to represent a direct threat to the authors' right to life with dignity'.[247] Nevertheless, the majority recalled the remarks of the Committee in *Teitiota* that 'without robust national and international efforts, the effects of climate change may expose individuals to a violation of their rights under article 6 of the Covenant'.[248]

Some individual opinions appended to the Views indicate different interpretations of the relevant test or question to be posed in relation to risk, as well as different assessments or characterisations of the evidence relating to risk in the case at hand. The joint opinion by Committee Members Arif Bulkan, Marcia V. J. Kran and Vasilka Sancin (partially dissenting), is particularly notable in this regard.[249] Those Members agreed with the majority's findings on the violations of articles 17 and 27 but would also have found a violation of the right to life under article 6. The partially dissenting Members first disagreed with the majority on the test to be applied. While they agreed that article 6 should not be interpreted restrictively, they considered 'the "real and foreseeable risk" standard employed by the majority interprets article 6 restrictively, and was borrowed from the dissimilar context of refugee cases'.[250] The Members distinguished the present case from *Teitiota,* in which the question was

[246] Ibid [8.7].
[247] Ibid.
[248] Ibid.
[249] Also annexed to the majority's Views were: Individual opinion by Committee Member Duncan Laki Muhumuza, who dissented on the finding regarding the right to life (finding that there had been a violation of article 6); Individual opinion by Committee Member Gentian Zyberi (concurring with the majority but expressing supplementary and differing reasoning in relation to adaptation and mitigation measures, the law on international responsibility in the context of climate change, and the link between mitigation measures and the violation of article 27); Opinión indivudal del miembro del Comité Carlos Gómez Martínez; and Opinión individual del miembro del Comité Hernán Quezada (parcialmente disidente).
[250] Billy *et al.* v Australia, Annex III: Joint opinion by Committee Members Arif Bulkan, Marcia VJ Kran and Vasilka Sancin (partially dissenting) [2] (referring to Teitiota v New Zealand).

whether the author was exposed to a real and foreseeable risk. Instead, they likened to the present case to *Caceres:*

> Using a more accurate standard from a factually similar case relating to environmental damage by pesticides, the question becomes whether there is "a reasonably foreseeable threat" to the authors' right to life. The authors detail flood related damage, water temperature increases, loss of food sources, and most importantly, explain that the islands they live on will become uninhabitable in a mere 10-15 years according to the [TSRA], a government body. Together, this evidence provides "a reasonably foreseeable threat" constituting a violation of article 6.[251]

Members Bulkan, Kran and Sancin then expressed their view that, in any case, the authors had demonstrated a 'real and foreseeable risk' to their lives through the flooding of the Torres Strait islands. In their view, whereas the majority opinion required a finding of 'adverse health impacts' to demonstrate a violation of article 6, in their view there existed a real and foreseeable risk to the authors' lives though 'significant loss of food sources, livelihood, and shelter'.[252] The partially dissenting opinion also differs from the majority view in the way it characterises the conduct required of the State in the face of such a risk, including in stating that 'State parties must duly consider the precautionary approach on climate change'.[253]

2.10. Risk in healthcare and public health emergencies

The ICCPR does not guarantee the 'right to health' as such (that right having been characterised as an economic, social or cultural right protected under ICESCR[254]). However, in some situations involving a risk to health that is also a risk to life, article 6 has been interpreted as entailing an obligation upon the State party to provide a certain level of healthcare. For example, in General Comment 36 the Committee remarks that, although States parties may adopt measures designed to regulate

[251] Billy *et al.* v Australia, Annex III [2] (citation omitted).
[252] Ibid [3].
[253] Ibid [5].
[254] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) article 12(1) guarantees 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.

voluntary termination of pregnancy, such measures 'must not result in violation of the right to life of a pregnant woman or girl, or her other rights under the Covenant', which means that States parties must, among other things, 'provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk'.[255] In addition, the Committee remarks that 'States parties should also effectively protect the lives of women and girls against the mental and physical health risks associated with unsafe abortions', and that States parties 'may not regulate pregnancy or abortion…in a manner that runs contrary to their duty to ensure that women and girls do not have to resort to unsafe abortions'.[256] Thus, risk is identified as relevant to the obligation upon States parties to ensure access to reproductive health services (including abortion) in several ways: where the risk to life or health of a pregnant woman or girl is associated with the pregnancy itself, as well as where the risk to mental and physical health stems from resorting to unsafe abortions due to criminal sanctions or other barriers to accessing safe and legal abortion. It should be noted that the Committee has also considered a State party's failure to provide for a right to termination of pregnancy to amount to a violation of article 7. In this context, a State party has been found to have violated article 7 in circumstances where abortion was prohibited under the constitution *unless* it was established as a matter of probability that there was a real and substantial risk to the life of the woman (as distinct from her health), which could only be avoided by a termination of the pregnancy.[257] In the case of a woman whose pregnancy was unviable, the legislative framework that required her to carry the foetus to term subjected her 'to conditions of intense physical and mental suffering' amounting to mounted to cruel, inhuman or degrading treatment in violation of article 7.[258]

In *Toussaint v Canada* (2014), the Committee reiterated its view that the obligation to 'respect and ensure' the right to life extended to 'reasonably foreseeable threats and

[255] UNHRC, 'General Comment No. 36 – Article 6: right to life' (3 September 2019) UN Doc CCPR/C/GC/36 [8].
[256] Ibid.
[257] UNHRC, *Mellet v Ireland* (31 March 2016) Communication No. 2324/2013, UN Doc CCPR/C/116/D/2324/2013.
[258] Ibid [7.4], [7.6]. The Committee also found violations of articles 17 and 26 in that case.

life-threatening situations that can result in loss of life', and that a violation of the right may occur even in the absence of loss of life, and furthermore that:

> as a minimum, States parties have the obligation to provide access to existing health-care services that are reasonably available and accessible when lack of access to the health care would expose a person to a reasonably foreseeable risk that can result in loss of life.[259]

In that case, the author of the communication had been unable to access a particular federal government healthcare program while residing in Canada as an irregular migrant. The author had entered Canada legally in 1999 as a visitor and had remained and worked from 1999 to 2008 without residency status or permission to work. The author took steps in 2005 to regularise her immigration status, and in 2008 applied for permanent residency based on humanitarian and compassionate grounds, but the application was unsuccessful. From 2006 her health began to deteriorate, and in 2009 it had deteriorated to 'life-threatening status'.[260] It was central to the author's application for judicial review under domestic law, and also to her communication under the Optional Protocol, that her life had been put at risk through being denied the relevant healthcare coverage.[261] Though her application for judicial review failed, the Federal Court accepted that the author 'was exposed to a significant risk to her life and health, a risk significant enough to trigger a violation of her rights to life and security of the person', a finding which was upheld by the Federal Court of Appeal.[262] This finding on risk was relevant to the Committee's analysis of the author's communication under the Optional Protocol, and ultimately to its finding that the facts of the case disclosed a violation of article 6 by the State party.[263]

Risk to health has found to enliven a State party's positive obligations under article 6 in various other situations, including in the context of detention in prison. For example, in Views on *Lantsova v. Russian Federation* (2002), the Committee found

[259] Toussaint v Canada [11.3].
[260] Ibid [2.3].
[261] Ibid [2.9].
[262] Ibid [2.12].
[263] Ibid, especially [11.2]–[11.5]. The Committee also found a violation of article 26.

that it was ‘up to the State party by organizing its detention facilities to know about the state of health of the detainees as far as may be reasonably expected’ and that the State party’s failure to provide timely medical care to a person in detention violated article 6(1).[264] In *Dafnis v. Greece* (2022), The Committee considered a communication from an author who was serving a sentence of life imprisonment and who claimed that the conditions of his detention violated his rights under articles 2(1), (3), 6, 9, 10, 15, 17 and 26 of the Covenant. The author suffered from suffered from several health conditions, including a condition that caused him to suffer from multiple strokes during his detention, as well as visual impairment, partial paralysis, hypertensive heart disease, liver disease, chronic dental problems, and bipolar disorder.[265] The Committee was of the view that the circumstances of the case involved a violation of articles 6(1), 7 and 10. The State party’s knowledge of and response to health risk was relevant. For example, in relation to the claim under article 6(1), the Committee observed that several medical opinions confirmed the author’s condition ‘could not be treated adequately within the facilities where he was detained, as his recurring ischaemic strokes required rapid in-hospital treatment’ and noted that doctors had ‘confirmed the deterioration of the author’s health while in detention and even the *concrete and serious risk of death* if he is not adequately treated owing to delays in hospital transfers.’[266]

The Committee has also commented on the obligation upon States parties towards persons deprived of liberty in the context of a public health emergency. In its Statement on derogations from the Covenant in connection with the COVID-19 pandemic (2020) the Committee observed that ‘States parties may not derogate from their duty to treat all persons, including persons deprived of their liberty, with humanity and respect for their human dignity, and must pay special attention to the adequacy of health conditions and health services in places of incarceration, and also to the rights of individuals in situations of confinement…’.[267] The Committee also

[264] UNHRC, *Lantsova v Russian Federation* (26 March 2002) Communication No. 763/1997, UN Doc CCPR/C/74/D/763/1997 [9.2].
[265] UNHRC, *Dafnis v Greece* (19 July 2022) Communication No. 3740/2020, UN Doc CCPR/C/135/D/3740/2020.
[266] Ibid [8.3] (emphasis added).
[267] UNHRC, 'Statement on derogations from the Covenant in connection with the COVID-19 pandemic' (30 April 2020) CCPR/C/128/2 [2(e)].

acknowledged that ‘States parties confronting the threat of widespread contagion may, on a temporary basis, resort to exceptional emergency powers and invoke their right of derogation from the Covenant under article 4 provided that it is required to protect the life of the nation’, which points to the relevance of risk-based reasoning in assessing the human rights consistency of States’ policy responses to a pandemic more generally.[268]

2.11. Conclusion

As this chapter has shown, there are a plethora of obligations under the ICCPR that can be understood as ‘risk-based’ obligations, articulated with varying degrees of specificity. As explained in part 2.2, there is a general way in which the concept of risk is relevant to obligations entailed in the rights in articles 6–27. The general undertaking ‘to respect and to ensure’ the rights recognised in the Covenant is interpreted as requiring States parties not only to refrain from certain acts, but to take steps to protect and fulfil Covenant rights. This, in turn, entails ‘positive’ acts to *prevent* future violations. These preventive obligations are, in essence, risk-based obligations, since they require the State party to anticipate future harms that may be perpetrated more directly by third parties. Because risk is in this general way relevant to the undertaking to respect and ensure Covenant rights, risk-based obligations may arise for any or all the rights in articles 6–27, irrespective of whether the word ‘risk’ is expressly used in the articulation of duties.

This chapter has also uncovered a range of specific examples of risk-based obligations addressed in the jurisprudence on articles 6 and 7. As has been shown, these obligations vary considerably, both in terms of whether they are framed as obligations to prevent risk entirely or merely to mitigate it, and in how specific or detailed the Committee has been in describing what measures the State party must take in response to risk. In some instances, the general undertaking to respect and ensure human rights translates into an obligation to prevent an individual’s exposure to risk entirely. For example, in the context of removal of persons to foreign

[268] Ibid [2].

territories*,* a real risk of serious and irreparable harm enlivens a duty not to deport, extradite or otherwise transfer the individual in question, the effect of which is to entirely prevent the person's exposure to that risk. While the Committee has indicated that in some situations the removing State may rely upon diplomatic assurances or explore options for internal relocation, such measures can only render the return permissible if they are effective in preventing a risk of serious and irreparable harm.[269] In other situations, risk triggers an obligation to respond by taking protective measures, though does not necessarily obligate the State party to prevent or remove risk exposure altogether. For example, in the context of law enforcement activities, the Committee has framed the obligation upon States parties arising from 'reasonably foreseeable threats to life originating from private persons and entities' as an obligation to respond with '*due diligence*'—that is, an obligation 'to take reasonable, positive measures that do not impose disproportionate burdens on them'.[270] Similarly, the Committee frames States parties' obligation towards vulnerable persons at risk because of broader patterns of violence in society as an obligation 'to take special measures of protection', which does not necessarily suggest a hard obligation to remove the risk facing such persons entirely.[271] Having regard to the threat or use nuclear weapons, and States parties' obligations under article 6 relating to this form of risk, the Committee has described the corresponding obligation upon States parties as an obligation to 'take all necessary measures to stop the proliferation of weapons of mass destruction', has listed a range of specific measures included in this category.[272] Thus, the precise content of risk-based obligations varies considerably.

[269] In this regard, the Committee has emphasised that diplomatic assurances must be *credible* and *effective.* For example, in General Comment 36 the Committee remarked: 'In cases involving allegations of risk to the life of the removed individual emanating from the authorities of the receiving State, the situation of the removed individual and the conditions in the receiving States need to be assessed, inter alia, based on the intent of the authorities of the receiving State, the pattern of conduct they have shown in similar cases, …and the availability of credible and effective assurances about their intentions. When the alleged risk to life emanates from non-State actors or foreign States operating in the territory of the receiving State, credible and effective assurances for protection by the authorities of the receiving State may be sought and internal flight options could be explored. When relying upon assurances from the receiving State of treatment upon removal, the removing State should put in place adequate mechanisms for ensuring compliance with the issued assurances from the moment of removal onwards': UNHRC, 'General Comment No. 36 – Article 6: right to life' (3 September 2019) UN Doc CCPR/C/GC/36, [30] (citations omitted).

[270] Ibid [21] (discussed in part 2.5).

[271] Ibid [23] (discussed in part 2.6).

[272] As noted in part 2.8 above, the Committee has stated that this includes 'measures to prevent their acquisition by non-State actors, to refrain from developing, producing, testing, acquiring,

Though the obligations vary considerably, they are each risk-based in the sense that they are enlivened for States parties based on the existence of some risk, and they may be violated purely through risk-exposure and in the absence of physical harm. These obligations arise in wide range of situations, which include (though are not necessarily limited to) those considered above—the removal of persons to foreign territories, law enforcement, protection of vulnerable persons in the context of broader patterns of violence, enforced disappearances, war and nuclear weapons, environmental degradation, and healthcare and public health emergences.

Viewed as a whole, the jurisprudence on articles 6 and 7 examined in this chapter indicates an increasing emphasis on risk in the articulation of States parties' obligations under the Covenant over time. Certain obligations in articles 6 and 7, although not originally defined with reference to risk, later came to be either expressly or implicitly framed as an obligation to avoid risk-exposure. Implied obligations of *non-refoulement* are a prominent example of this, and therefore the jurisprudence on these obligations has been addressed in particular detail. As was shown in part 2.4, through the Committee's progressive interpretation of the Covenant over time, articles 6 and 7 came to be interpreted as requiring not only that a State party refrain from arbitrary deprivation of life, torture and CIDTP, but also that it refrain from exposing a person to *the real risk* of such treatment through removing them to a foreign territory. Furthermore, with evolution in views on what may constitute arbitrary deprivation of life, torture, or CIDTP, views on the *kinds of risks* that may enliven obligations of *non-refoulement* necessarily also evolves, as can be seen in the jurisprudence on issues such as the 'death row phenomenon', removal to circumstances of socio-economic deprivation, and removal to a situation of climate change-related risk. The Committee's recent framing of the right in article 6 as a 'right to life with dignity' also has the potential to broaden the scope of a risk assessment involved in giving effect to that right.

stockpiling, selling, transferring and using them, to destroy existing stockpiles, and to take adequate measures of protection against accidental use, all in accordance with their international obligations': ibid [66].

Beyond the example of *non-refoulement*, this chapter has examined a range of other obligations entailed in articles 6 and 7 that centre on risk. In the context of law enforcement activities, States parties have an obligation under article 6 to respond to 'reasonably foreseeable threats to life originating from private persons and entities', and risk can also determine whether the use of force in law enforcement operations is consistent with the right to life (as discussed in part 2.5). As discussed in part 2.6, States parties also owe an obligation under article 6 to take special measures to protect the lives of persons 'at particular risk because of specific threats or pre-existing patterns of violence'.[273] Over time, risk exposure also became central to the legal rationale for findings of actual violations, or recognition of the potential for violations, in other contexts, such as enforced disappearances, the use or threat of nuclear weapons, and environmental degradation, and in the provision of healthcare. In each of these contexts, the Committee has articulated a clear position that risk exposure can amount to a rights violation, irrespective of whether the risk materialises. Furthermore, the kinds of risk which the Committee has identified as giving rise to protective obligations under articles 6 and 7 are varied, and include causally complex, geographically widespread, and even existential risks, such as those associated with climate change, nuclear proliferation and pandemic response.

In sum, risk, described by some as 'central concern of advanced regulatory states', and even as *the quintessential characteristic* of the modern world (as noted in chapter 1) appears also to have become a central and quintessential characteristic in defining States' obligations under the Covenant. A key development has been the proliferation of obligations upon the State party not to expose individuals to various forms of risk, which require active, pre-emptive action on behalf of the State party. Considering that such obligations may arise and be breached merely through risk exposure, it is important to understand matters such as: how risk is defined or conceptualised for the purposes if the ICCPR? What limits are placed around the scope of risk giving rise to obligations? How is a breach of such obligations to be determined? And also, when assessing States' fulfilment of risk-based obligations, how do the concepts of 'risk'

[273] Ibid [23].

and ‘causation’ relate to one another, and how should we think about the *causes* of risk-exposure? These issues are the focus of the following three chapters.

3.1. Introduction

Having set out examples of risk-based obligations entailed in the ICCPR, this dissertation now turns to examine the meaning ascribed to the word 'risk' in the jurisprudence on risk-based obligations, and how the Committee understands the nature of an inquiry into risk in this context. To inform the analysis of the Committee's jurisprudence which follows, part 3.2 examines the varied meanings that 'risk' takes on in ordinary communication, drawing on dictionary definitions and scholarly interpretations in the broader literature addressing risk. This dissertation takes the 'ordinary' meaning of risk as a starting point for exploring the meaning of risk in the context of the ICCPR, not because of the importance placed on ordinary meaning in the general rule of treaty interpretation (for the word 'risk' does not appear in the text of the ICCPR itself),[274] but because there is no obvious reason to draw on some specialised, technical definition of risk. The starting point is therefore to explore the ways in which the word is understood and used in ordinary, day-to-day communication.

It will be shown in part 3.2 that while ordinary meanings of risk are varied and informed by context, risk is a concept that is often understood to entail two core elements: one being some future negative outcome, and another being its possibility/chance/likelihood/probability of occurring in the future. Furthermore, what is often critical to meaning of risk, and what differentiates that concept from 'uncertainty', is the idea that the likelihood of the occurrence of the negative outcome can be *measured.* This idea of measuring future likelihoods is built upon philosophical and mathematical theory of probability. In this way, this common conception of risk is fundamentally probabilistic. Part 3.2 then explores some key ideas in theory of probability in order to explain how probabilistic claims of risk differ fundamentally from purely factual claims regarding past or continuing events.

[274] The Vienna Convention on the Law of Treaties provides that 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose': Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art. 31(1).

In part 3.3, this chapter returns to analysis of the Committee's jurisprudence in order to examine the possible meanings of 'risk' in that context. There are three parts to the analysis: part 3.3.1 explores the general sense in which the Committee uses the word 'risk', drawing on examples from the jurisprudence discussed in chapter 2. It will be shown that in the context of risk-based obligations under the ICCPR, the word risk generally means chance, probability, likelihood, or something very similar. The chapter will then analyse the jurisprudence in greater detail to uncover how the Committee understands the nature of an inquiry into risk, looking firstly at *non-refoulement* cases in part 3.3.2. It will be shown that in the context of *non-refoulement,* the meaning apparently ascribed to the word 'risk' has undergone subtle but significant changes over time, shifting from an early approach in which 'risk' was effectively equated with 'necessary and foreseeable consequence', towards a more open-textured concept of risk which emerged from the mid-2000s onwards. Part 3.3.3 will address cases in which risk is considered after it has materialised in physical harm, drawing a contrast between this concept of risk considered *post hoc* and the concept of risk considered *ex ante* in the jurisprudence. Part 3.4 concludes.

3.2. What does 'risk' mean, ordinarily?

3.2.1. Dictionary definitions of risk

The Oxford English Dictionary (OED) defines the noun 'risk' variously as: '(Exposure to) the possibility of loss, injury, or other adverse or unwelcome circumstance; a chance or situation involving such a possibility'; 'A person or thing regarded as likely to produce a good or bad outcome in a particular respect'; and 'A person or thing regarded as a threat or source of danger'.[275] The following more specific meaning is also given:

> (Exposure to) the possibility of harm or damage causing financial loss, against which property or an individual may be insured. Also: the possibility of financial loss or

[275] 'risk, n.', (*OED Online*, OUP June 2021) <www.oed.com/view/Entry/166306> accessed 29 June 2021

> failure as a quantifiable factor in evaluating the potential profit in a commercial enterprise or investment.[276]

The transitive verb 'to risk' is defined variously as: '[to] endanger; to expose to the possibility of injury, death, or loss; to put at risk'; '[to] act in such a way as to bring about the possibility of (an unpleasant or unwelcome event)'; and '[to] incur the possibility of unfortunate consequences by engaging in (an action); to venture upon or into (a place or situation).'[277] Such definitions indicate that the word is used in a variety of senses in ordinary communication, but there are some commonalities between some of the meanings. Two concepts seem to emerge from the OED definitions as common elements: first, some concept of possibility, chance, or likelihood, and second, some concept of loss, injury, damage, harm, detriment, or other adverse or unwanted event or outcome.

3.2.2. Scholarly perspectives on 'risk' in common parlance

Looking beyond dictionary definitions, the vast literature on the subject of risk offers further perspectives on the meanings of risk in ordinary communication.[278] For example, in an article addressing 'quantitative' risk in *Risk* Analysis—a multidisciplinary journal focused on the theory and practice of risk analysis across a wide range of disciplines—Kaplan and Garrick posited that when one asks, *what is the risk?* one is really asking three questions: 'what can go wrong, how likely is it, and what are the consequences?'[279] In Lutpon's sociological, anthropological and cultural study of risk, it is observed that in 'everyday lay people's language, risk tends

[276] Ibid. The OED also includes the following specialised definition: 'The error…of an observation or result considered without regard to sign; the probability of an error; the mean weighted loss incurred by a decision taken or estimate made in the face of uncertainty'; as well the following obsolete definition: 'A hazardous journey, undertaking, or course of action; a venture.'

[277] 'risk, v.', (*OED Online*, OUP June 2021) <www.oed.com/view/Entry/166307> accessed 29 June 2021.

[278] Risk literature spans numerous disciplines including philosophy, history, linguistics, sociology, anthropology, cultural studies, and psychology, among others. For overviews of various disciplinary perspectives on risk, see: Terje Aven, 'The risk concept - historical and recent development trends' (2012) 99 Reliability Engineering and System Safety 33, especially part 2; Catherine E. Althaus, 'A Disciplinary Perspective on the Epistemological Status of Risk' (2005) 25 Risk Analysis 567, especially part 3.1; Lupton, *Risk* (3rd edn) 3, 25–48.

[279] Stanley Kaplan and B John Garrick, 'On the Quantitative Definition of Risk' (1981) 1 Risk Analysis 11.

to be used to refer almost exclusively to a threat, hazard, danger or harm', such as in 'we 'risk our life savings' by investing on the stock exchange, or 'put our marriage at risk' by having an affair'; however, risk is 'also used more weakly to refer to a somewhat negative rather than disastrous outcome', as in 'If you go outside in this rain, you'll risk catching a cold.'[280] In the Stanford Encyclopaedia of Philosophy entry on 'risk', Hansson observes that '[i]n non-technical contexts, the word "risk" refers, often rather vaguely, to situations in which it is possible but not certain that some undesirable event will occur.'[281]

Writing from a legal perspective, Baldwin observes that risk generally 'may be used to imply a measurement of the chance of an outcome, the size of that outcome, or the product of both of these factors', before settling on a working definition of risk as 'the probability that a particular adverse event will occur during a stated period of time, or result from a particular challenge'.[282] Perry, a legal philosopher, has suggested that '[i]n ordinary language conduct is typically said to be risky when it gives rise to a chance of a bad outcome of some kind', and the concept 'thus involves two main elements: first, a notion of chance or probability, and second, a notion of harm'.[283] In the introduction to *Risks and Legal Theory,* Steele and Gardner write that 'a "shared" meaning of risk can only be stated in the blandest possible terms…we are faced with a situation of 'risk' when circumstances may (or importantly, may not) turn out in a way that we do not wish for'.[284] In their chapter on risk in English Tort Law, Dyson

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[280] Lupton, *Risk* (3rd edn) 8, 9.

[281] Sven Ove Hansson, 'Risk', *Stanford Encyclopedia of Philosophy* (Fall edn, 2018) <https://plato-stanford-edu.ezp.lib.cam.ac.uk/archives/fall2018/entries/risk/> accessed 22 June 2021. Hansson also distinguishes between risk as 'an *unwanted event* which may or may not occur', risk as 'the *cause* of an unwanted event which may or may not occur', risk as 'the *probability* of an unwanted event which may or may not occur', risk as 'the statistical *expectation value* of an unwanted event which may or may not occur', and risk as 'the fact that a decision is made under conditions of *known probabilities* ("decision under risk" as opposed to "decision under uncertainty")'. Although Hansson presents these as examples of *specialised* meanings and usages of risk, arguably they also reflect relatively common usages of the word.

[282] Robert Baldwin, 'Introduction - Risk: The Legal Contribution' in Robert Baldwin with the assistance of Peter Cane (ed), *Law and Uncertainty: Risks and Legal Processes* (Kluwer Law International 1997) 1–2.

[283] Stephen Perry, 'Risk, Harm, and Responsibility' in David G Owen (ed), *Philosophical Foundations of Tort Law* (OUP 1995), 322. Perry has also defined risk as 'a chance or probability of a bad outcome': Stephen Perry, 'Risk, Harm, Interests and Rights' in T Lewens (ed), *Risk: Philosophical Perspectives* (Routledge 2007) 190.

[284] Jenny Steele and John E Gardner, 'Introduction' in Jenny Steele and John E Gardner (eds), *Risks and Legal Theory* (Hart 2004) 6.

and Steel note that the word ‘risk’ can be used in more than one sense, but for their purposes they use ‘risk’ to refer to refer to ‘the probability of a negative outcome occurring in the future’.[285]

In a recent chapter on risk in the context of European human rights law, Ambrus suggests that term ‘risk’ may generally be defined as ‘the possibility of something bad happening’ and that ‘in addition to a negative event, it also incorporates a probability element’.[286] Ambrus posits that ‘while risk is often allied with uncertainty, conceptually risk, *stricto sensu*, means that there is knowledge about the probability of the occurrence of the harm as well as about the outcome’.[287] Ambrus posits that risk, so defined, sits on a ‘scale of knowledge as to probability and outcome’, alongside ‘certainty’, meaning ‘the outcome is known and it is certain that the event will take place’, ‘uncertainty’, meaning ‘there is knowledge about the outcome, but the probability of the occurrence of harm is not known’, and ‘ignorance’, which Ambrus suggests is ‘used to describe a phenomenon in relation to which there is knowledge neither about the outcome nor about the probability’.[288] Ambrus also observes that there is a broad meaning of risk, in which that term is ‘often understood as involving not only risk *stricto sensu*, but also uncertainty and ignorance’.[289]

It is worth also briefly noting a well-known thesis in economic theory in which risk was defined based on its amenability to quantification, which has undoubtedly influenced wider understandings of risk to some extent. The economist Frank Knight famously distinguished between the concepts of ‘risk’ and ‘uncertainty’ based on amenability to measurement in his 1921 work *Risk, Uncertainty and Profit.*[290] Knight

[285] Matthew Dyson and Sandy Steel, 'Chapter 2 – Risk and English Tort Law' in Matthew Dyson (ed), *Regulating Risk through Private Law* (Intersentia 2018) 24, 25. The authors also observe that the word is sometimes used to refer ‘merely to the occurrence of a negative outcome, where there was some probability *ex ante* of its occurrence’: 24.

[286] Ambrus, 'The European Court of Human Rights as Governor of Risk', 99.

[287] Ibid 102.

[288] Ibid.

[289] Ibid. Similarly, Lupton observes: ‘Risk is… a very loose term in everyday parlance. Issues of calculable probability are not necessarily important to the colloquial use of risk. Risk and uncertainty tend to be treated as conceptually the same thing: for example, the term ‘risk’ is often used to denote a phenomenon that has the potential to deliver substantial harm, whether or not the probability of this harm eventuating is estimable’: Lupton, *Risk* (3rd edn) 9.

[290] Frank H Knight, *Risk, Uncertainty and Profit* (Houghton Mifflin Company 1957 reprint). According to Reddy, although the distinction between risk and uncertainty is usually attributed to Knight, it

observed that, in everyday speech and in economic discussion, the term ‘risk’ was used loosely to cover two different phenomena. He wrote: ‘“risk” means in some cases a quantity susceptible of measurement, while at other times it is something distinctly not of this character’.[291] Knight argued, however, that ‘a measurable uncertainty, or “risk” proper, …is so far different from an unmeasurable one that it is not in effect an uncertainty at all’, and in this respect, risk and uncertainty are ‘radically distinct’.[292] In Knight’s theory, risk was regarded as something measurable or calculable, whereas uncertainty was indeterministic and unmeasurable.

While the importance of measurement or quantification is particularly obvious in technical and scientific conceptions of risk,[293] the influence of this idea on ordinary or lay usage of the word ‘risk’ is also apparent. We can identify the idea of risk as a calculable phenomenon in some of the OED definitions given above—particularly in risk as ‘the possibility of harm or damage causing financial loss, against which property or an individual may be insured’ and risk as a ‘possibility of financial loss or failure as a quantifiable factor in evaluating the potential profit in a commercial enterprise or investment’. In contrast, ‘uncertainty’ is defined in the OED as something that ‘*cannot be measured* and whose outcome *cannot be predicted or insured against*’.[294] The Knightian concept of risk as a measurable phenomenon also echoes in some of the scholarship on risk in legal contexts; for example, Perry observes that ‘a natural move is to stipulate that a risk is the mathematical expectation of harm, i.e., the product of the probability of occurrence of the harm and the magnitude of the harm were it to occur’.[295] The same basic idea is also suggested by

appears to have been first formulated in economic theory by the mid nineteenth-century economist J. H. von Thunen: Sanjay G. Reddy, 'Claims to expert knowledge and the subversion of democracy: the triumph of risk over uncertainty' (1996) 25 Economy and Society 222, 226–7.

[291] Knight, *Risk, Uncertainty and Profit* 79.

[292] Knight, *Risk, Uncertainty and Profit* 78, 79.

[293] E.g., Adams writes that ‘Risk, according to the definition most commonly found in the safety literature, is the probability of an adverse future event multiplied by its magnitude.’: John Adams, *Risk: The Policy Implications of Risk Compensation and Plural Rationalities* (Taylor & Francis Group 1995) 69.

[294] ‘uncertainty, n.’, (*OED Online*, OUP June 2021) <https://www-oed-com.ezp.lib.cam.ac.uk/view/Entry/210212> accessed 29 June 2021.

[295] Perry, 'Risk, Harm, and Responsibility' 322 (emphasis added). See also Perry, 'Risk, Harm, Interests and Rights'. In Hansson’s categorisation, this is risk as ‘statistical *expectation value* of an unwanted event which may or may not occur’, with expectation value of a possible negative event being ‘the product of its probability and some measure of its severity’: Hansson, ‘Risk’, *Stanford*

Ambrus' understanding of risk *stricto sensu* as meaning 'that there is knowledge about the probability of the occurrence of the harm as well as about the outcome' (probability broadly indicating the ability to measure likelihood, as discussed in part 3.2.3 below below).

Although far from exhaustive, this sample of definitions drawn from the risk literature indicates at least two things that are common to many ordinary (non-technical) understandings of risk. Firstly, risk is often understood to entail at least two basic elements: (1) some kind of harmful, undesirable, adverse, hazardous, or otherwise negative outcome that may occur in the future (in short, a 'negative outcome'[296]), and (2) some concept of possibility, chance, probability, or likelihood. These two basic ingredients of risk broadly align with the two elements distilled above from OED definitions (though with the notable addition of reference to 'probability' in the scholarly descriptions of risk). Secondly, in many contexts, the word risk implies a capacity to *measure* the likelihood and/or gravity of a future negative outcome, with risk often representing the magnitude of likelihood, the magnitude of harm, or the mathematical combination of both.

It must also be acknowledged that the word 'risk' is used flexibly in ordinary communication; its precise meaning is inevitably context dependent.[297] The context in which the word is used can inform the conceptual relationship between risk and the other two elements. For example, we may intelligibly ask, 'what is the risk of contracting the Sars-Cov-2 virus during a long-haul flight?', in which context

Encyclopedia of Philosophy (Fall edn, 2018) <https://plato-stanford-edu.ezp.lib.cam.ac.uk/archives/fall2018/entries/risk/> accessed 22 June 2021.

[296] Another approach would be to summarise this aspect of risk more simply as 'harm', however as Dyson and Steel have pointed out (in the context of a chapter on risk in English tort law), this does not align with ordinary usage, as 'The risk of rain (when rain is undesirable) is not a risk of harm': Dyson and Steel, 'Chapter 2 – Risk and English Tort Law' fn 2.

[297] Adams observes that 'in common, non-technical, usage', the 'distinction between risk and uncertainty is frequently blurred and the words are used interchangeably': Adams, *Risk: The Policy Implications of Risk Compensation and Plural Rationalities* , 25. Similarly, Lupton describes risk as 'a very loose term in everyday parlance', noting '[i]ssues of calculable probability are not necessarily important to the colloquial use of risk' and '[r]isk and uncertainty tend to be treated as conceptually the same thing': Deborah Lupton, *Risk* (2nd edn, Taylor & Francis Group 2013) 10. For an example of a linguistics-based critique of claims made in sociological literature about ordinary usage of the word risk, see Craig Hamilton, Svenja Adolphs and Brigitte Nerlich, 'The meanings of 'risk': a view from corpus linguistics' (2007) 18 Discourse & Society 163.

‘contracting the virus’ is the negative outcome, and ‘the risk’ is a reference to the *likelihood* of its occurrence. In other contexts, to refer to ‘the risk’ is to refer to *the negative outcome itself,* as in, ‘what are the risks associated with contracting the Sars-Cov-2 virus?’ In a third sense of the word, ‘the risk’ refers to the *cause* or *source* of the negative outcome. Some of the OED definitions given above serve as examples of this usage of risk—in particular, risk as a ‘[a] *person or thing* regarded as likely *to produce* a good or bad outcome in a particular respect’ and risk as ‘[a] *person or thing* regarded as a threat *or source* of danger’. In a fourth sense of the word, ‘risk’ is understood to encompass, incorporate or combine *both* the element of possibility/chance/probability/likelihood *and* the element of a negative outcome. For example, in the sixth assessment report of the Intergovernmental Panel on Climate Change, it is stated that ‘Key risks are identified based on the magnitude of adverse consequences …likelihood of adverse consequences; temporal characteristics of the risk; and ability to respond to the risk, e.g., by adaptation’.[298] In this example, the term ‘key risks’ seems to encompass or incorporate both the degree of harm (‘magnitude of adverse consequences’) as well as the likelihood of their occurrence (among other factors).

Notwithstanding the flexible way in which the word risk is sometimes used day-to-day, as a broad observation, many of the dictionary definitions and scholarly interpretations cited above reflect the first sense of the word ‘risk’: risk as the *likelihood* of the occurrence of some negative outcome.

3.2.3. The relevance of probability to the measurable concept of risk

Given that risk is generally understood as a measurable phenomenon (distinguished from unmeasurable ‘uncertainty’), understanding risk requires some understanding of *probability*, for it is primarily through probabilistic reasoning that we may attempt to measure future possibilities.[299] Various historians of risk have traced the intellectual

[298] Intergovernmental Panel on Climate Change, *Synthesis Report of the IPCC Sixth Assessment Report (AR6): Longer Report*, (2023) 42.

[299] See, e.g., Kaplan and Garrick, 'On the Quantitative Definition of Risk' 11 (‘the notion of “probability” is fundamentally intertwined with the definition of risk’). See also Bernstein, *Against the Gods: The Remarkable Story of Risk* , tracing the emergence of the modern conception of risk to

origins of risk analysis to the emergence of philosophical and mathematical theory of probability during the Enlightenment.[300] For example, according to Bernstein, before any theory of probability existed, people in ancient and medieval European societies lacked intellectual tools to understand and measure risk.[301] In Hacking's historical account, the word 'probability' existed in medieval Europe but carried different connotations to the word as used today: it 'chiefly meant the approvability of an opinion', and in this 'old probability… Opinions are probable when they are approved by authority, when they are testified to, supported by ancient books'.[302] In Europe, this had begun to change by the Renaissance, with the emergence of the mathematical study of probability based on observations of games of chance.[303] Developments in mathematical and philosophical theory of probability that followed would eventually revolutionise risk analysis and decision-making under conditions of uncertainty, hence probabilistic thinking laid the foundations of modern conceptions of risk.

But what is probability? The OED defines that word as 'the extent to which something is likely to happen or be the case; the appearance of truth, or likelihood of being realized, which a statement or event bears in the light of present evidence.'[304] The adjective ,'probable', is similarly defined as 'having an appearance of truth; that may in view of present evidence be reasonably expected to happen or be the case; likely.' Such definitions may seem straightforward on their face, but closer scrutiny reveals complexity and ambiguity. To say that something is likely to happen or may

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the emergence of theory of probability.

300 Although note that various authors mention forms of probabilistic thinking that emerged earlier and outside of Europe: e.g. Terence Anderson, David Schum and William Twining, *Analysis of Evidence* (CUP 2005) 247.

301 Bernstein, *Against the Gods: The Remarkable Story of Risk* 10. It should be noted that this historical account focuses on developments in Europe and does not address possible precursors to modern theory of probability which may have emerged in other historical, geographical or cultural or contexts.

302 Ian Hacking, *The Emergence of Probability: A Philosophical Study of Early Ideas about Probability, Induction and Statistical Inference* (2nd edn, Cambridge University Press 2006) 23, 30.

303 The correspondence between Fermat and Pascal in 1654 about calculations relating to games of chance is generally regarded as seminal to the development of the mathematical study of probability. For historical accounts, see, e.g.: Bernstein, *Against the Gods: The Remarkable Story of Risk* ; Hacking, *The Emergence of Probability: A Philosophical Study of Early Ideas about Probability, Induction and Statistical Inference* (2nd edn).

304 'probability, n.', (*OED Online*, OUP June 2021) <https://www.oed.com/view/Entry/151690?redirectedFrom=probability#eid> accessed 29 June 2021

reasonably be expected to happen in the light of present evidence does not explain precisely *why* the evidence supports that assessment. More fundamentally, it does not explain the underlying logical or physical relationship between past occurrences and future possibilities, nor the epistemological character of a judgment about the likelihood of future events. As far as future events are concerned, is likelihood/probability a subjective judgment, or a matter of objective fact to be ascertained empirically?[305] Or, does it involve both objective and subjective elements? Questions such as these point to the complex philosophical dimensions of the study of probability, which philosophers have debated for centuries.[306] Though it is beyond the scope of the present project to address those debates in depth, there is value in outlining some important philosophical perspectives on the concept of probability. Explaining these perspectives—even in a relatively brief and introductory way—conveys a sense of the complexity and diversity of concepts that may underpin probabilistic conceptions of risk.

Ian Hacking describes probability as ‘a concept with two faces’, with one face ‘directed at facts, at the relative frequency with which different types of event occur’ and the other ‘directed at the degree to which you are confident of something you are not sure about.’[307] These two faces of probability reflect two broad groups of philosophical theories into which many important interpretations of probability may be sorted: ‘physical’ theories on one side (also known as ‘empirical’ or ‘frequency’ theories), and ‘epistemic’ or ‘epistemological’ theories on the other.[308] In physical

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305 In relation to the distinction between ‘subjective’ and ‘objective’ matters, Fischhoff, Hope and Watson explain, ‘Within the philosophy of science, “objective” typically means something akin to “independent of observer.” That is, any individual following the same procedure should reach the same conclusion’: Baruch Fischhoff, Chris Hope and Stephen R. Watson, 'Defining Risk' in Theodore S. Glickman and Michael Gough (eds), *Readings in Risk* (Resources for the Future 1990) 31.

306 Hacking, *The Emergence of Probability: A Philosophical Study of Early Ideas about Probability, Induction and Statistical Inference* (2nd edn).

307 Ibid xiv.

308 This is binary categorisation greatly oversimplifies the variety of philosophical accounts and approaches to grouping or classifying them, but it is nevertheless a pragmatic and helpful distinction for present purposes, and one that is often employed in scholarly introductions to theory of probability. See, e.g., Donald Gillies, *Philosophical theories of probability* (Routledge 2000) 2, 18–22; Perry, 'Risk, Harm, and Responsibility' 322–329; and Colin Howson, 'Theories of Probability' (1995) 46 British Journal for the Philosophy of Science 1, 1; Ian Hacking, *An Introduction to Probability and Inductive Logic* (CUP 2001) 128–139 (note Hacking adopts the terms ‘frequency-type probability’ and ‘belief-type probability’ for the two categories, to avoid

theories, probability is understood as having an objective existence, independent of any person's knowledge of it—it is regarded as a particular kind of *empirical fact* about the material world.[309] In frequency theories, the probability of an 'event' or 'attribute' may be observed empirically, by looking at the frequency with which it occurs in a set of repeated trials conducted under similar conditions.[310] In contrast, epistemic theories of probability are concerned with the *state of knowledge* or *beliefs* held by human beings. Generally, in such theories, probability is understood to measure 'degree of knowledge, degree of rational belief, degree of belief, or something of this sort'.[311] When probability is understood as a measure of *belief*, the belief in question may in some instances be formed on the basis of objective data about physical frequency. However, this does not render the probability itself 'objective'. As Hacking explains, *this* kind of probability statement is not a claim about 'how the world is', but rather a statement 'express[ing] a person's confidence in a belief, or stat[ing] the credibility of a conjecture or proposition in the light of the evidence'.[312] It follows that claims of probability in the subjective sense (or in Hacking's terminology, 'belief-type probability') are of a fundamentally different nature to purely factual claims about the frequency of some event in the physical world.

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confusion that can arise from the terms 'objective' and 'subjective'). In contrast, Hakej delineates *three* main concepts of probability: (1) 'An epistemological concept, which is meant to measure objective evidential support relations', (2) 'The concept of an agent's degree of confidence, a graded belief' and (3) 'A physical concept that applies to various systems in the world, independently of what anyone thinks': Alan Hájek, 'Interpretations of Probability', *Stanford Encyclopedia of Philosophy* (Fall edn, 2019) <https://plato.stanford.edu/entries/probability-interpret/> accessed 28 May 2022. For another categorisation, see Carnap's argument that there are three conceptions of probability—classical, logical and relative frequency—and that none are truly 'subjective': Rudolf Carnap, 'The Two Concepts of Probability' (1945) 5 Philosophy and Phenomenological Research 513. For another perspective, see Mellor's categorisation of three applications of numerical probability—physical probabilities/chances, degrees of belief or credences, and epistemic probabilities: DH Mellor, *Probability: A Philosophical Introduction* (Routledge 2005).

[309] For an introduction to empirical interpretations of probability, see: Henry E Kyburg Jr, *Probability and Inductive Logic* (The Macmillan Company 1970) 40–53.

[310] Gillies, *Philosophical theories of probability* 88–112; Hájek, 'Interpretations of Probability', *Stanford Encyclopedia of Philosophy* (Fall edn, 2019) <https://plato.stanford.edu/entries/probability-interpret/> accessed 28 May 2022, part 3.4.

[311] Gillies, *Philosophical theories of probability* 2.

[312] Hacking, *An Introduction to Probability and Inductive Logic* , 135.

The idea of probability as a purely objective measure of frequency is subject to some well-known philosophical problems or limitations. One problem is commonly known as the 'reference class problem'.[313] As previously noted, in frequency theories, probability is understood to be an objective measure of the frequency of an event/attribute in a set of repeated trials. The set of trials is known as the 'reference class' or 'reference set'. In games of chance involving dice or similar equipment, it is easy enough to repeat trials under similar conditions and to define a reference class by those conditions (so it makes sense that the mathematical study of probability developed through the observation of such games). However, in many real-life contexts in which we seek to measure probability, the 'event' in question could fall into any number of different reference classes, with the probability of the event or attribute differing depending on which reference class we select. There is a judgment to be made in constructing a reference set, which is not in itself an empirical exercise.

A question that can be asked to demonstrate this problem is, *what is the risk of a specific person who smokes developing a smoking-related illness?* This question could be answered by measuring, for example, the frequency of all such illnesses in a population of smokers, the frequency in a population of smokers each of the same age and gender as the individual in question, or the frequency in a population of smokers of the same age and gender, who have smoked the same number of cigarettes per day, for the same number of years as that individual, and who share other lifestyle factors with the relevant individual, and so on.[314] The probability (defined as the frequency with which smoking-related illness occurs in a population) will change depending on the way the reference class (in this example, the population of smokers) is defined. Therefore, the probability of the event in question is contingent upon how the reference class is defined, and that step of defining the reference class involves an exercise of subjective judgment that interferes with the notion of the probability

[313] Gillies, *Philosophical theories of probability* 119.

[314] This question is a variation on a hypothetical question commonly posed in the literature to explain the reference set problem. See, e.g., ibid 119; Richard von Mises, *Probability, Statistics and Truth* (2nd reprint, translated by J Neyman, D Sholl and E Rabinowitsch, William Hodge and Company 1939) 15; Hájek, 'Interpretations of Probability', *Stanford Encyclopedia of Philosophy* (Fall edn, 2019) <https://plato.stanford.edu/entries/probability-interpret/> accessed 28 May 2022.

calculus as a purely physical, objectively measurable phenomenon.[315] Gillies explains the implications of this in the following way:

> We can certainly introduce objective probabilities for events A which are the outcomes of some sets of repeatable conditions S. When, however, we want to introduce probabilities for single events, these probabilities, though sometimes objectively based, will nearly always fail to be fully objective because there will in most cases be a doubt about the way we should classify the event, and this will introduce a subjective element into the singular probability.[316]

Furthermore, as we include ever-greater detail in defining a reference class, the class shrinks until eventually it is reduced to a single case, being the individual in question (since no two cases will ever be perfectly alike in all relevant respects). In the example of the smoker, the probability of developing a smoking-related illness represents the frequency with which illnesses occurred in the past for a class defined in a specific way, rather than a definitive, physical measure of the chance of *that individual* developing a smoking-related illness in the future, taking into account all of their attributes combined. The example demonstrates the problem with evaluating the 'objective' (frequency-based) probability of a singular event. In frequency theories of probability, a singular event falls into a reference class of one, and the event either has the attribute in question or it doesn't (in which case probability calculus is inapposite). One of the most significant proponents of the frequency theory of probability, Richard von Mises, made this point in the following way:

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[315] Hájek explains the problem as follows: 'A well-known objection to any version of frequentism is that relative frequencies must be *relativised* to a reference class. Consider a probability concerning myself that I care about — say, my probability of living to age 80. I belong to the class of males, the class of non-smokers, the class of philosophy professors who have two vowels in their surname, … Presumably the relative frequency of those who live to age 80 varies across (most of) these reference classes. What, then, is my probability of living to age 80? It seems that there is no single frequentist answer. Instead, there is my probability-qua-male, my probability-qua-nonsmoker, my probability-qua-male-non-smoker, and so on. This is an example of the so-called *reference class problem* for frequentism…': Hájek, 'Interpretations of Probability', *Stanford Encyclopedia of Philosophy* (Fall edn, 2019) <https://plato.stanford.edu/entries/probability-interpret/> accessed 28 May 2022.

[316] Gillies, *Philosophical theories of probability* 120.

> When we speak of 'the probability of death'… We must not only think of an individual, but of a certain class as a whole, e.g. 'all insured men forty-one years old living in a given country and not engaged in certain dangerous occupations.' We have nothing to say about the chances of life and death of an individual even if we know his conditions of life and health in detail. *The phrase 'probability of death,' when it refers to a single person, has no meaning at all for us.* This is one of the most important consequences of our definition of probability…The principle which underlies the whole of our treatment of the probability problem is that a collective must exist before we begin to speak of probability.[317]

This highlights the limitations of the idea of probability as an objectively ascertainable phenomenon based on observations of repeated events. Few (if any) real-world scenarios involve the repetition of events under precisely the same conditions, and many events to which we may wish to apply probabilistic reasoning may be unique or unprecedented.[318] The point is not that probabilistic reasoning is invalid or inapplicable to such problems, but that the limits of frequentist theoretical accounts must affect how we interpret the concept of probability, and relatedly, how we characterise claims about the likelihood of future events. In most situations, assessing probability involves both 'objective' and 'subjective' elements. Although determining what happened in the past may be an objective, factual enquiry, there are often subjective judgments involved in deciding how to draw upon past events to measure the likelihood of future possibilities.

The duel subjective-objective character of probability is recognised and incorporated into so-called epistemic or epistemological theories of probability. Gillies describes

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317 Von Mises, *Probability, Statistics and Truth* 15, 16. Von Mises was expounding a particular 'rational' concept of probability, which he understood as applicable 'to problems in which either the same event repeats itself again and again, or a great number of uniform elements are involved at the same time' (14).

318 Anderson *et al.* make the point about the limits of numerical probabilistic judgments in legal contexts in the following way: 'In some contexts it is supposed that probabilistic judgments will always be stated numerically either using numbers on the conventional zero–one probability scale or in terms of odds. But in other contexts, law for example, such numerical judgments are quite difficult to make and justify because the events of concern either happened or did not happen on exactly one occasion. We cannot play the world over again a thousand times to determine the frequency with which these events have happened in the past. On only rare occasions in law can probabilities be determined by counting the frequency with which some event has occurred in the past': Anderson, Schum and Twining, *Analysis of Evidence* 246.

the epistemic/epistemological approach as one in which 'probability measures degree of knowledge, degree of rational belief, degree of belief, or something of this sort.'[319] The focus of these theories is the relationship between evidentiary premises and the conclusions that we draw about the world from such evidence. Bayesian inference—a method of statistical inference applying Bayes' theorem, is a prominent example of an epistemic approach.[320] In the Bayesian approach, probability is understood to be a measure of believability or confidence that one may hold about the occurrence of a particular event (although believability or confidence are measured based on known evidence of objective, factual matters).[321] Frequentist/objective and epistemic/epistemological accounts of probability are not necessarily in conflict with one another. According to Perry, the theories are 'sometimes treated as competing and mutually incompatible, but the predominant contemporary view tends to regard probability in a pluralist light' and 'it has become commonplace to recognize that two distinct but non-conflicting conceptions of probability must both be recognized: one is concerned with probabilities that in some way have objective existence, while the other characterises probabilities in terms of the current state of our knowledge and beliefs.'[322]

So far, this chapter has traversed a wide arc in search of the meaning of risk, yet a definitive answer to the question '*what is risk?*' remains elusive. As the foregoing discussion shows, ordinary meanings of risk are varied and informed by context. In general, dictionary definitions and scholarly accounts tend to point towards possibility/chance/likelihood/probability and some negative outcome as essential elements of risk, although the precise relationship between these concepts depends upon the sense in which the word 'risk' is used. Often (though not always) risk is understood as the combination or product of the probability and magnitude of the

[319] Gillies, *Philosophical theories of probability* 2. In Gillies' description, the epistemic/epistemological approach to probability encompasses several distinct theoretical interpretations, including 'logical', 'subjective' and 'intersubjective' interpretations: see 1–3.

[320] Bayes' theorem is a mathematical formula used to update the probability for a hypothesis as more evidence or information becomes available—named after the eighteenth-century English cleric Thomas Bayes: James Joyce, 'Bayes' Theorem', *Stanford Encyclopedia of Philosophy* (Fall edn, 2021) <https://plato.stanford.edu/archives/fall2021/entries/bayes-theorem> accessed 2 February 2025.

[321] Stan Kaplan, 'The Words of Risk Analysis' (1997) 17 Risk Analysis 407, 407.

[322] Perry, 'Risk, Harm, and Responsibility' 322.

negative outcome, which implies a calculable concept of risk. This idea of calculable risk, which been influential in economic theory, and which informs some wider understandings and usage of risk, is premised on the idea that we can *measure* the chance of future possibilities—an idea built upon philosophical and mathematical theory of probability. Thus, searching for an 'ordinary' meaning of risk only takes us so far before specialised, technical concepts creep into the discussion. Many ordinary or colloquial meanings of risk appear to be rooted in ideas developed within philosophy, mathematics, economic theory, or other specialised fields of knowledge. Perhaps chief among these is the philosophical and mathematical theory of probability which provides a means of seeking intelligently to measure the likelihood of future possibilities, often based on the frequency of past occurrences.

Recognising that probability is central to risk complicates the search for the meaning of risk, for probability is itself a complex, multifaceted, and endlessly contested concept; one which 'seems to hover uncertainly between objectivity and subjectivity'.[323] From one perspective, there is a 'physical' concept of probability, in which probability is understood to explain the frequency with which an event tends to occur in a series of trials repeated under similar conditions. From another perspective, probability is understood as describing a *subjective* degree of confidence, belief, or expectation held by an individual.[324] To say that some future event is 'probable' in the latter sense is to express a qualified belief that it will occur in the future, and that belief need not be based on observation of past and recurring events. To search for the meanings of risk arguably involves grappling with these varied perspectives on probability, for as Perry observes, 'what we *mean* by risk is fundamentally determined by the understanding of probability we take the concept to presuppose'.[325]

While it is far beyond the scope the present dissertation to try to resolve philosophical debates about the underlying nature of probabilistic risk, several basic ideas can be distilled from the foregoing discussion, which provide a theoretical lens through

[323] LJ Mackie, *Truth, Probability and Paradox* (OUP 1973) 154.
[324] Which is not to say that any subjectively held belief or expectation is also a probabilistic claim; someone may, for example, believe that they are going to heaven without any recourse to probabilistic thinking.
[325] Perry, 'Risk, Harm, and Responsibility' 322.

which to examine the possible meaning of risk in the ICCPR jurisprudence. First, it must be said that 'risk', although used flexibly in day-to-day communication, generally conveys that a future possibility can be measured. Second, it is primarily through probabilistic reasoning that we may attempt to measure future possibilities. Therefore, risk, insofar is it connotes something measurable, is underpinned by the concept of probability. Third, however 'probability' is understood, to assess probability generally involves something more than just establishing the facts of past or continuing events; it involves the application of some judgment about how to draw upon the past to model future likelihood. In this way, claims about probability, and claims about risk that are fundamentally probabilistic, are of a different nature to purely factual claims.

3.3. Exploring the possible meanings of 'risk' in the ICCPR jurisprudence

3.3.1. In what general sense is the Committee using the word 'risk'?

Noting the observation made above that the word 'risk' is used flexibly in ordinary communication, and its precise meaning in informed by context, as a first step towards understanding the meaning ascribed to 'risk' in the Committee's jurisprudence, it is worth clarifying the general sense in which the word is used. As previously noted, there are at least four common senses in which the word is commonly used: risk as *likelihood,* risk as a *negative outcome*, risk as *the cause* or *source* of the negative outcome, and risk as a concept that encompasses, incorporates or combines *both* the magnitude of negativity of an outcome and the likelihood of its occurrence. This prompts the question, in which of these senses is 'risk' generally used when that word appears in legal principles applicable to the ICCPR?

As an overarching observation, the jurisprudence discussed in chapter 2 broadly indicates that in the context of risk-based obligations under the ICCPR, the word risk generally means chance, probability, likelihood, or something very similar. Though the Committee generally does not state this, it is generally clear from context that 'risk' is not being used in any of the other three senses of the word outlined above. When the Committee writes of a risk of a negative outcome, the negative outcome is generally specified, which makes clear that 'the risk' is not itself a descriptor of that negative outcome. For example, when the Committee refers to the 'real risk *that the author would be subjected to treatment prohibited by Articles 6 and 7*',[326] the 'real risk *of irreparable harm*'[327], the 'real risk *that the death penalty will be imposed*'[328], the 'real risk *of the killing or torture of the authors*',[329] 'a real risk *of torture in the receiving State*',[330] 'a real risk of a threat to [one's] *right to life*',[331] and so on, the negative outcome of concern is identified separately. The Committee takes varying approaches to framing the risked outcome: either as a *legal* outcome (as in, 'treatment prohibited by Articles 6 and 7'), a *physical* outcome (as in, 'the death penalty will be imposed'), or an outcome that encompasses both a physical state of affairs and its legal implications (as in references to 'risk of torture' and 'risk of arbitrary deprivation of life', noting that both 'torture' and 'arbitrary deprivation of life' are defined by legal principle). In some cases, the Committee seems to refer to multiple layers of risk (as in, 'a *real risk* of a *threat* to [one's] right to life'), however the ultimate physical/legal outcome is still identified as something distinct from risk itself (in that case, violation of the right to life).

Generally, it is usually clear in the reasoning that 'risk' is not a synonym of 'cause'. While the conceptual relationship between risk and causation is complex and sometimes confused in legal reasoning (as explored in chapter 5), as a general observation, the Committee often specifies or implies a separate concept of cause in relation to risk. Consider, for example, the Committee's remark in General Comment 36 that '[t]he duty to investigate also arises in circumstances in which a serious risk of

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[326] E.g., UNHRC, *Khan v Canada* (25 July 2006) Communication No. 1302/2004, UN Doc CCPR/C/87/D/1302/2004 [5.4].
[327] UNHRC, 'General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13, [12].
[328] E.g.: 'The Committee reiterates that it is not necessary to prove, as suggested by the State party, that the author "will" be sentenced to death… but that there is a "real risk" that the death penalty will be imposed on her': UNHRC, *Kwok v Australia* (23 October 2009) Communication No. 1442/2005, UN Doc CCPR/C/97/D/1442/2005 [9.6].
[329] UNHRC, *Pillai v Canada* (25 March 2011) Communication No. 1763/2008, UN Doc CCPR/C/101/D/1763/2008, Individual opinion by Committee members Ms. Helen Keller, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty and Sir Nigel Rodley (concurring).
[330] Ibid.
[331] Teitiota v New Zealand, [9.6]. See part 2.4.2 above.

deprivation of life was *caused by* the use of potentially lethal force'.[332] In statements such as this, it is clear from the context in which 'risk' is used that a *risk* of something is distinct from a *cause* of that thing. What emerges from the jurisprudence discussed in chapter 2 is that, in general, the word 'risk' denotes the possibility/chance/probability/likelihood of some outcome—whether the outcome is framed in terms of a physical state of affairs, the legal implications of a physical state of affairs, or both.

From this point, the typical meaning of risk in the jurisprudence can be narrowed further, as the Committee makes clear that a mere 'possibility' of something happening in the future is too open-ended to enliven obligations in human rights law. The Committee has made this point in the context of its reasoning on admissibility, where it applies the principle that 'risk' requires 'more than mere theoretical possibility'.[333] Thus, risk denotes more than what is merely *possible*. The upshot is that in the Committee's use of the term, as in many of the examples of ordinary use set out in part 3.2, 'risk' refers to the probability/chance/likelihood of a future negative outcome, implicitly conveying the idea of measurement or appraisal of a future possibility.

Noting that it is primarily through probabilistic reasoning that we may attempt to measure future possibilities (as previously discussed),[334] it follows that 'risk' in the context of the ICCPR jurisprudence is broadly probabilistic. And yet, as explained in part 3.2 above, probability is itself a multifaceted concept, incorporating both objective and subjective matters. To describe risk as probabilistic does not take us very far in understanding what the Committee means by the word, or how it understands the nature of an inquiry into risk in the context of determining the applicability of an obligation. To repeat Perry's pithy observation, 'what we mean by

[332] UNHRC, 'General Comment No. 36 – Article 6: right to life' (3 September 2019) UN Doc CCPR/C/GC/36 [27] (emphasis added).

[333] In considering the risk requirement in establishing victim status for the purposes of admissibility under OP1, the Committee has remarked that if the law or practice the subject of the complaint 'has not already been concretely applied to the detriment of such an individual, it must in any event be applicable in such a way as to indicate that the individual's risk of being affected is more than a theoretical possibility'. See, E.g., Billy *et al.* v Australia [7.9].

[334] See part 3.2.3

risk is fundamentally determined by the understanding of probability we take the concept to presuppose'.[335] Does the Committee understand an inquiry into risk, for the purpose of risk-based obligations under the Covenant, to be fundamentally subjective, objective, or falling somewhere in the middle?

This is a significant question worthy of examination, particularly since so many of the specific obligations that flow from the general undertaking to respect and ensure Covenant rights are in one way or another contingent upon an assessment of risk (as shown in chapter 2). In pursuit of clarity, the following sections examine more closely the use of risk and related terminology in the jurisprudence, looking firstly at *non-refoulement* cases, and then to other cases which revolved around risk. The focus is largely on *non-refoulement* cases, as these are typically considered by the Committee prior to the removal of the individual concerned, and as such, they are cases concerned with mere risk exposure (i.e. determination of risk before the risked harm has materialised). In these cases, the question of how the Committee understands 'risk' is front and centre, because at this point in time the existence of the protection obligation and its potential breach turns purely on the question of risk. Therefore, these are among the cases most liable to surface competing views on the nature and meaning of risk. For comparison, the analysis then shifts to cases in which the question of 'foreseeable' risk is considered *ex post facto,* where references to risk arguably perform a different analytical function in the analysis of the human rights consistency of the State party's conduct.

3.3.2. The Committee's characterisation of risk in non-refoulement cases: subtle but significant shifts in the concept over time

In *non-refoulement* cases, the precise meaning ascribed to the word 'risk' appears to have changed over time. While in broad terms, risk in this context denotes some measure of probability/chance/likelihood of a future occurrence (as suggested above), the Committee's reasoning in *non-refoulement* cases indicates a shifting attitude with respect to the requisite degree of likelihood. This can be seen by comparing examples

[335] Perry, 'Risk, Harm, and Responsibility' 322.

of early Views with those issued more recently, i.e. from the mid-2000s up to the present.

In the reasoning in early *non-refoulement* cases, the idea of 'real risk' came to be equated with 'necessary and foreseeable consequence'. In *Kindler v. Canada,* in the 1992 decision on admissibility, the concept of 'necessary and foreseeable consequence appeared in the reasons for expanding the scope of persons who could be a 'victim' for the purpose of the First Optional Protocol. The Committee reasoned that, while a State party's obligations under article 2 did not extend to persons beyond its jurisdiction, if the State party took a decision relating to a person within its jurisdiction, the 'necessary and foreseeable consequence' of which was the violation of the persons rights in another jurisdiction, then 'State party itself *may* be in violation of the Covenant', such that the person could fulfil the victim requirement for standing under the First Optional Protocol.[336] The Committee's use of the term 'necessary and foreseeable consequence' suggested that a very high degree of confidence in the predicted outcome was required to find a violation based on future anticipated conduct in a foreign jurisdiction. This appeared to be central to the legal rationale for broadening the scope of the removing State's responsibility, for the Committee remarked that the removing State's possible violation

> follows from the fact that that a State party's duty under article 2 of the Covenant would be negated by the handing over of a person to another State (whether a State party to the Covenant or not) where treatment contrary to the Covenant *is certain or is the very purpose of the handing over*'.[337]

In the decision on the merits of *Kindler v. Canada* (1993), the Committee introduced the term 'real risk' to its analysis, reasoning that:

> If a State party extradites a person within its jurisdiction in circumstances such that as a result there a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.'[338]

[336] Kindler v Canada [6.2] (emphasis added).
[337] Ibid [6.2] (emphasis added).
[338] Ibid [13.2].

The Committee then proceeded to reason in a way that equated the two concepts of 'real risk' and 'necessary and foreseeable consequence', posing the following question:

> Did the requirement under article 6, paragraph 1, to protect the right to life prohibit Canada from exposing a person within its jurisdiction to the real risk (than is to say, a necessary and foreseeable consequence) of losing his life in in circumstances incompatible with article 6 of the Covenant as a consequence of extradition to the United States?[339]

In subsequent *non-refoulement* cases throughout the 1990s and up to the mid-2000s, the Committee continued to apply 'necessary and foreseeable consequence' ostensibly as a litmus test or a criterion of 'real risk'.[340] Yet, Members applying the same test sometimes reached quite different conclusions, highlighting the subjectivity of characterising future events as 'necessary' and/or 'foreseeable'. In several extradition cases, for example, the Committee was divided on whether the application of the death penalty could be considered the necessary and foreseeable consequence of the removal if the person the subject of the extradition request had not yet been tried, convicted or sentenced.[341] In *Ng v. Canada* (1993) the majority found that the removal of an individual charged with offences punishable by the death penalty amounted to a violation of article 7 due to the use of gas asphyxiation as a method of execution in the jurisdiction to which he was removed. Several Members dissented for varying reasons, one of them on the basis that treatment in question could not be considered the 'necessary and foreseeable consequence' of extradition, noting that the individual had not been tried, convicted or sentenced at the time of removal.[342] In a separate,

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[339] Ibid [14.1(a)].
[340] E.g., Ng v Canada; UNHRC, *Cox v Canada* (31 October 1994) Communication No. 539/1993, UN Doc CCPR/C/52/D/539/1993; GT v Australia; ARJ v Australia; UNHRC, *Bakhtiyari v Australia* (29 October 2003) Communication No. 1069/2002, UN Doc CCPR/C/79/D/1069/2002; UNHRC, *Singh v Canada* (30 March 2006) Communication No. 1315/2004, UN Doc CCPR/C/86/D/1315/2004 [6.3].
[341] E.g. Ng v Canada, cf. Individual opinion by Mr. Kurt Herndl (dissenting); see also Cox v Canada.
[342] Ng v Canada, Individual opinion by Mr. Kurt Herndl (dissenting). The point was subsequently proven at least partly correct in this case, as although the author was eventually deported to United States where he was tried and convicted of multiple murders, and sentenced to death, he reportedly remained on death row as at 2024—Legal Defense Fund, *Death Row U.S.A. Fall 2024* (Death Row

partially dissenting view, another Member (who found the State party to have violated the Covenant, but for different reasons to those of the majority) delved into the question of what it meant for something to be 'foreseeable', remarking:

> Although it is impossible to predict a future event, it must be understood that whether or not a person is a victim depends on whether that event is foreseeable - or, in other words, on whether, according to common sense, it may happen, in the absence of exceptional events that prevent it from occurring - or necessary - in other words, it will inevitably occur, unless exceptional events prevent it from happening.[343]

That level of explanation was somewhat atypical at the time. The Committee generally did not engage in detailed discussion of what it meant for something to be a 'necessary and foreseeable consequence' nor elaborate further on the meaning of 'real risk'.

The Committee's reasoning with respect to risk later changed materially, with a shift in how it applied the test of 'necessary and foreseeable consequence' to removal cases. As previously noted, in *Judge v. Canada* (2003) the Committee stated that for countries that had abolished the death penalty, there was 'an *obligation not to expose a person to the real risk* of its application'.[344] In *Khan v. Canada* (2006) the Committee explicitly considered whether an individual's *exposure to the risk of treatment* contrary to articles 6 or 7 was a 'necessary and foreseeable consequence' of removal (as distinct from whether *the treatment itself* was a necessary and foreseeable consequence). The Committee articulated the test as 'whether there are substantial grounds for believing that*, as a necessary and foreseeable consequence of his removal to Pakistan, there is a real risk* that the author would be subjected to treatment prohibited by Articles 6 and 7'.[345] In this formulation, the practical function of the words 'necessary and foreseeable' is far from clear. If it is concluded on the evidence that there is a 'real risk' to the person in a particular country, then it would

USA: A quarterly report by The Legal Defense Fund, (2024) 45.

343 Ng v Canada, Individual opinion by Mr. Francisco José Aguilar Urbina (dissenting).

344 Judge v Canada [10.4].

345 Khan v Canada [5.4].

seem obvious that removal to that country would have the necessary consequence of exposing the person to that risk. Furthermore, the combination of 'foreseeable' and 'risk' in this context is tautological, for if someone judges there to be a risk, logically they have also judged it to be foreseeable. Apart from rendering the words 'necessary and foreseeable consequence' redundant, the effect of the Committee's revised formulation was to effectively elevate the risk requirement: by separating 'real risk' from the concept of 'necessary and foreseeable consequence' the Committee made clear that mere risk exposure could result in a violation. At the same time, it left the meaning of risk itself largely open-textured.

In subsequent cases, the Committee sometimes reverted to the old test,[346] but predominantly applied the formulation in *Khan,*[347] or omitted reference to 'necessary and foreseeable consequence' and simply reiterated that States parties are obligated not to expose individuals to a 'real risk' of being killed or subjected to torture or CIDTP.[348]

The Committee subsequently clarified the test several times. In General Comment 31 (2004) the Committee omitted reference to 'necessary and foreseeable' and reiterated the obligation 'not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant'.[349] In *Kwok v. Australia* (2009), the Committee observed that 'it is not necessary to prove, as suggested by the State party, that the author "will" be sentenced to death… but that there is a "real risk" that the death penalty will be imposed on her'.[350] In *Pillai v.*

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[346] E.g.: UNHRC, *Esposito v Spain* (20 March 2007) Communication No. 1359/2005, UN Doc CCPR/C/89/D/1359/2005 [7.5].

[347] E.g., UNHRC, *Yakupova v Uzbekistan* (3 April 2008) Communication No. 1205/2003, UN Doc CCPR/C/92/D/1205/2003 [6.3]; UNHRC, *Nakrash and Qifen v Sweden* (30 October 2008) Communication No. 1540/2007, UN Doc CCPR/C/94/D/1540/2007 [7.3]; UNHRC, *Munaf v Romania* (13 July 2009) Communication No. 1539/2006, UN Doc CCPR/C/96/DR/1539/2006 [14.2]; UNHRC, *Hamida v Canada* (18 March 2010) Communication No. 1544/2007, UN Doc CCPR/C/98/D/1544/2007 [8.7]; Kaba and Kaba v Canada [6.4].

[348] E.g.: UNHRC, *PK v Canada* (20 March 2007) Communication No. 1234/2003, UN Doc CCPR/C/89/D/1234/2003 [7.2]; UNHRC, *A, B, C, D, and E v Australia* (1 April 2008) Communication No. 1429/2005, UN Doc CCPR/C/92/D/1429/2005 [6.3].

[349] UNHRC, 'General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 [12].

[350] E.g.: 'The Committee reiterates that it is not necessary to prove, as suggested by the State party, that

Canada (2011)*,* five Members addressed the distinction in their separate, concurring opinion.[351] The communication concerned a Sri Lankan family who had applied unsuccessfully for Canadian protection visas. They alleged that Canada had violated articles 6(1), 7, 9(1), 23(1) and 24(1) of the Covenant by refusing to issue protection visas, and through related domestic administrative and legal processes. The State party's submissions included an argument that the authors had failed to show that the necessary and foreseeable consequence of the authors' deportation to Sri Lanka would be that they would be killed, or that the receiving State could not protect them. In concise reasons, the majority on the Committee referred to the test in General Comment 31 in finding that the removal order, if enforced, would constitute a violation of article 7, and did not otherwise address the argument regarding necessity and foreseeability.[352] However, five members appended a joint concurring opinion in which they addressed the issue head-on. The members rejected the approach that had been taken in earlier cases on the basis that:

> The degree of certainty suggested by these early Views contrasts with the standard set forth in Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which prohibits sending a person to "another State where there are substantial grounds for believing that he would be *in danger of* being subjected to torture" (emphasis added). The focus on danger, or risk, has characterized the approach of both the Committee against Torture and the European Court of Human Rights to the question of return to torture.[353]

Thus, for these Members, 'risk' was to be equated with 'danger' to better align the obligation of *non-refoulement* implied in the ICCPR with that expressed in the Convention Against Torture and that implied in the ECHR. In their joint concurring opinion the Members clarified that the relevant question was 'whether the necessary and foreseeable consequence of the deportation would be a real risk of the killing or

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the author "will" be sentenced to death… but that there is a "real risk" that the death penalty will be imposed on her': Kwok v Australia [9.6].

351 Pillai v Canada.

352 Ibid [11.4].

353 Ibid, separate concurring opinion by Committee members Ms Helen Keller, Ms Iulia Antoanella Motoc, Mr Gerald L Neuman, Mr Michael O'Flaherty and Sir Nigel Rodley.

torture of the authors.'[354] Although subsequent to *Pillai,* some States parties have, on occasion, persisted with submissions based on the earlier test (which obviously set a more onerous a standard for authors seeking to establish the applicability of *non-refoulement*),[355] the revised standard is now applied fairly consistently and without protest, which supports the view that the law has evolved.[356] Thus, in removal cases, there has been a clear lowering of the bar with respect to the degree of certainty or confidence in a hypothesis about future events required for there to be a 'real risk'.

Yet, there remains a significant lacuna in the jurisprudence with respect to the meaning and nature of risk in the context of implied *non-refoulement* under the Covenant. It is safe to conclude that risk *does not* mean 'necessary and foreseeable consequence' for purposes of *non-refoulement*, but what does it mean? How does the Committee understand the nature or basis of a finding of risk? The Committee generally has made little attempt to define risk or explain the nature of the concept, generally applying the risk criterion in concise reasoning and without detailed explanation of the meaning or nature of the concept. The case law includes occasional paraphrasing which hint at the meaning; for example, as noted in chapter 2, the Committee remarked in *Judge v. Canada* that the obligation upon abolitionist States parties not to expose a person to the 'real risk' of its application meant that they may not remove individuals from their jurisdiction 'if it may be *reasonably anticipated* that they will be sentenced to death', thus suggesting a standard of reasonableness underpinning the assessment of risk.[357]

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[354] The Members stated: 'This Committee has also concluded that Article 7 requires attention to the real risks that the situation presents, and not only attention to what is certain to happen or what will most probably happen. General Comment No. 31, quoted above, demonstrates this focus. So do the Committee's Views and Decisions of the past decade. The phrasings have varied, and the Committee continues to refer on occasion to a "necessary and foreseeable consequence" of deportation. But when it inquires into such consequences, the Committee now asks whether a necessary and foreseeable consequence of the deportation would be a real risk of torture in the receiving State, not whether a necessary and foreseeable consequence would be the actual occurrence of torture": ibid (citations omitted).

[355] See, e.g., UNHRC, *NPSS and MK v Canada* (29 March 2019) Communication No. 2238/2013, UN Doc CCPR/C/125/D/2238/2013 [6.2]; UNHRC, *Z v Australia* (18 July 2014) Communication No. 2049/2011, UN Doc CCPR/C/111/D/2049/2011 [4.5].

[356] Recent examples include UNHRC, *O, P, Q, R and S v Sweden* (15 March 2022) Communication No. 2632/2015, UN Doc CCPR/C/134/D/2632/2015 [6.1], [9.7].

[357] Judge v Canada [10.4]. See further at part 2.4.2 above.

More typically, rather than attempting to define risk, the Committee has instead developed principles that ostensibly qualify or condition the relevant risk, providing a means of moderating the scope of circumstances giving rise to *non-refoulement*. These principles, which are addressed further in chapter 4, include the requirement that the risk be 'real', the requirement that it be 'personal' to the individual in question,[358] and the principle that 'there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists'.[359] The Committee has also apparently applied some form of *temporal* requirement to risk to further qualify the scope of States parties' *non-refoulement* obligations. Timing of anticipated harm has long been recognised as relevant to the admissibility of a communication under the First Optional Protocol, and more specifically, the requirement under article 1 that for the Committee to receive and consider a communication, the author be a person claiming to be a victim of a violation by the State party.[360] The imminence of anticipated effect on the author's enjoyment of a human right has long been recognised as necessary to fulfil the 'victim' requirement for the purpose establishing admissibility under the First Optional Protocol.[361] However, more recently (and more controversially) the Committee arguably has applied a temporal requirement in its consideration of risk when assessing the *merits* of a *non-refoulement* claim. In *Teitiota* the Committee distinguished these two applications of imminence, noting:

> in the context of attaining victim status in cases of deportation or extradition, the requirement of imminence primarily attaches to the decision to remove the individual,

[358] E.g., ARJ v Australia, [6.6]; UNHRC, *X v Denmark* (12 May 2014) Communication No. 2007/2010, UN Doc CCPR/C/110/D/2007/2010 [9.2]; UNHRC, *K v Denmark* (11 September 2015) Communication No. 2393/2014, UN Doc CCPR/C/114/D/2393/2014 [7.3]; UNHRC, *PT v Denmark* (5 June 2015) Communication No. 2272/2013, UN Doc CCPR/C/113/D/2272/2013 [7.2].

[359] E.g., X v Denmark, [9.2]; UNHRC, *KH v Denmark* (7 September 2018) Communication No. 2423/2014, UN Doc CCPR/C/123/D/2423/2014 [8.3]; UNHRC, *X v Sweden* (17 January 2012) Communication No. 1833/2008, UN Doc CCPR/C/103/D/1833/2008 [5.18]; Elezaj v Denmark, [8.3].

[360] Article 1 of the First Optional Protocol provides (in relevant part): 'A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant' (emphasis added).

[361] See, e.g., EW *et al.* v The Netherlands, and Bordes and Temeharo v France, discussed at 2.8 above. See also discussion at part. 4.2 below on timing of risk.

> whereas the imminence of any anticipated harm in the receiving State influences the assessment of the real risk faced by the individual.[362]

As noted in chapter 2, in *Teitiota* the author claimed that by removing him to Kiribati the State party subjected him to a risk to his life in violation of article 6 of the Covenant, and that the State party's authorities did not properly assess the risk inherent in his removal.[363] The Committee considered that the anticipated timeframe suggested by the author of 10 to 15 years before sea level rise was likely to render Kiribati uninhabitable 'could allow for intervening acts by Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population'.[364] As noted in chapter 2, the Committee went on to find that it was *not* in a position to conclude that the domestic authorities' assessment of the protection claim had been 'clearly arbitrary or erroneous' or 'amounted to a denial of justice' and ultimately, that it was 'not in a position to hold that the author's rights under article 6 of the Covenant were violated upon his deportation to Kiribati in 2015.'[365] In reaction to that case, human rights scholars have expressed differing views as to whether the Committee effectively established condition that risk be 'imminent' in order for it to enliven *non-refoulement* (as a factor going to the merits of a protection claim rather than the admissibility of a communication under the First Optional Protocol). That issue is addressed further at part 4.2 of this dissertation. For present purposes, it suffices to note that at the very least, the Committee's consideration of the timeframe in which the harm was anticipated to occur (10–15 years) clearly points to *timing* as a relevant consideration. However, something the Committee *did not* attempt to do in that case was clarify what 'risk' means. While requirements that risk be 'personal' and expected to materialised in a particular timeframe appear to qualify the scope of risks giving rise to protection obligations (as to which, see further at chapter 4 below), much is left unsaid about the meaning or nature of *risk itself.* Qualifying terms say little, if

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[362] Teitiota v New Zealand [8.5], discussed at part 2.4.2 above and 4.2 below.

[363] The facts are discussed at 2.4.2 above.

[364] Teitiota v New Zealand [9.12]. For a critique of this use of the concept of imminence in the Committee's reasoning, see Adrienne Anderson and others, 'Imminence in Refugee and Human Rights Law: A Misplaced Notion for International Protection' (2019) 68 International and Comparative Law Quarterly 111, discussed in part 4.2 below.

[365] E.g., Teitiota v New Zealand [9.12]–[9.14].

anything, about the underlying question of what risk *is,* and how the Committee understands the nature of the inquiry.

Arguably, there is some hint of the Committee's understanding of the concept of risk in its use of the qualifying term 'real', and the use of phrases such as 'establish the existence' in connection with risk. Such terms perhaps vaguely suggest that risk is understood as an objectively ascertainable phenomenon, and that it may be treated in the analysis as a matter of fact, much like facts about past or continuing events. This idea is also arguably suggested in the Committee's characterisation of its standard of review in *non-refoulement* cases, in particular its routine statement of principle that it is 'generally for the organs of States parties to examine the facts and evidence of the case in order to determine whether such a risk exists, unless it can be established that the assessment was clearly arbitrary or amounted to a manifest error or a denial of justice.'[366] By seemingly lumping together factual findings about past or continuing events (things that exist in the material world and can be observed) with the ultimate finding about risk, the Committee seems to treat the latter as epistemologically similar to the former.

Teitota provides an example of this way of thinking in practice. In assessing the merits of the claim, the majority on the Committee focused on 'whether there was clear arbitrariness, error or injustice in the evaluation by the State party's authorities of the author's claim that when he was removed to Kiribati he faced a real risk of a threat to his right to life'.[367] Ultimately, the majority on the Committee concluded that:

> while the author disagrees with the *factual conclusions* of the State party, the information made available to it does not demonstrate that the conduct of the judicial proceedings in the author's case was clearly arbitrary or amounted to a manifest error or denial of justice, or that the courts otherwise violated their obligation of independence and impartiality.[368]

[366] E.g., ibid [9.3], K v Denmark [7.4]; PT v Denmark [7.3].
[367] Teitiota v New Zealand, [9.6]. See part 2.4.2 above.
[368] Ibid, [9.13] (emphasis added).

Here, the State party's finding on lack of risk is implicitly characterised as a factual finding, in a broad-brush approach to monitoring the State party's decision-making. This characterisation is significant, particularly because it may bear upon the principles governing the Committee's standard of review (noting the Committee is often largely deferential to States parties on findings of 'fact').[369] The issue of the appropriate standard of review is addressed further in chapter 4 below. For now, suffice it to note that the Committee's approach to reviewing these decisions vaguely suggests a notion of risk as a purely factual finding, much like findings about past or continuing events. When considered in the light of the theoretical framework set out at part 3.2 above, the Committee's approach seems logically dubious and liable to generate confusion and inconsistency because, for the reasons previously explained in part 3.2, claims about probability (and by extension, probabilistic risk) differ fundamentally from purely factual claims.

A more intellectually rigorous and transparent approach to characterising the question of risk would be to treat the risk finding as a distinct analytical step which follows the factual inquiry, and which entails the application of both factual findings and non-factual considerations such as value judgments or legal principle. This approach is supported by the framework advanced in part 3.2, where it was shown that although determining what happened in the past may be an objective, factual enquiry, there are subjective judgments involved in deciding how to draw upon past events to measure the likelihood of future possibilities.

3.3.3. *Cases in which risk is considered* ex post facto

While the focus of the present analysis has been on *non-refoulement* cases, in which the rights violation may be established purely through the State party's exposure of an individual to risk, it is worth also briefly noting the different approach taken to risk in cases in which the rights violation concerns a failure to protect an individual from a

[369] For example, in relation to *non-refoulement* under article 7, Schabas observes that the 'Committee has often shown great deference to the national mechanisms for asylum determination': Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (3rd revised edn), 203 and fn 243. See further discussion at part 4.3 below.

risk which subsequently materialised in physical harm. Having regard to examples of such cases outlined in chapter 2, the Committee's reasoning appears to reflect a different concept of risk to that suggested in the reasoning in *non-refoulement* cases.

Consider, for example, the cases concerning article 6 in the context of law enforcement, in which States parties owe a 'a due diligence obligation to take reasonable, positive measures that do not impose disproportionate burdens on them in response to *reasonably foreseeable threats to life* originating from private persons and entities whose conduct is not attributable to the State'.[370] In this context, the language of 'reasonably foreseeable threats' seems to focus the enquiry on what the State knew or ought to have known, which is clearly different to considering the existence of risk as a factual phenomenon. That makes sense, because in circumstances where the risked harm has already materialised, and the Committee is considering the human rights consistency of the State party's conduct after the fact, the prior existence of the risk logically cannot be in issue (it is self-evident from the harm having occurred). What is in issue is whether the State fulfilled the obligation that was enlivened by the risk—in other words, what was the scope or content of the positive duty of protection triggered by the risk, and did the State fulfil that obligation? In this context, the concept of 'reasonable foreseeability' serves to limit State responsibility by reference to some standard of constructive *knowledge* about the risk (a matter of legal principle, rather than a factual inquiry into the existence of risk). The use of the idea of 'reasonable foreseeability' to limit the scope a State party's positive duties makes more sense in this context than it does in the context of assessing the existence of a *non-refoulement* obligation *ex ante* (where foreseeability and risk logically collapse into one finding, as previously explained).

[370] UNHRC, 'General Comment No. 36 – Article 6: right to life' (3 September 2019) UN Doc CCPR/C/GC/36 para. 21 (original citations omitted). The ECtHR has taken a similar approach to articulating positive duties in the context of law enforcement. As previously noted, in *Osman* (which apparently has influenced reasoning on the ICCPR), the ECtHR applied the element of 'real and immediate risk' in a way that considered the subjective standpoint of the police. As far as appreciation of risk was concerned, a key question was whether the authorities '*knew or ought to have known at the time* of the existence of a real and immediate risk' to life: *Osman v United Kingdom* [116] (emphasis added).

The Committee has also considered the State party's subjective knowledge of risk *ex post facto* in other types of cases in which the risked harm had materialised. For example, recall *Portillo Cáceres and others v Paraguay,* the case concerning the human rights implications of the spraying of toxic agrochemicals. As previously noted, the Committee took the view that heavily spraying the area in question with toxic agrochemicals posed 'a reasonably foreseeable threat to the authors' lives.[371] While factual evidence relating to risk was important, the Committee's reasoning also highlights the State party's *awareness* of the risk at the time as a relevant factor:

> The Committee also observes that, for at least the five years preceding the events in this case, a number of government authorities had been alerted to the fumigations and to their impact on the inhabitants of Colonia Yerutí … Despite these reports and complaints, the State party took no action. In addition, by imposing administrative sanctions on two of the producers… the State party acknowledged that these activities posed a danger…[372]

This indicates that in some cases when risk is considered *ex post facto*, the State's own appreciation of risk was relevant to a finding on whether a positive obligation was engaged at a past point in time. Having regard to the question of how the Committee interprets or understands 'risk', one possible interpretation of cases such as this is that the Committee's focus on the State's own appreciation of risk accommodates an interpretation of risk as something subjectively appreciable by the State. However, the better explanation is that the State's actual subjective knowledge or constructive knowledge of risk constitutes a consideration in the Committee's analysis of whether it fulfilled its positive duty of protection. In other words, the State's knowledge of the risk at a past point in time is relevant to the Committee's analysis of whether the State party acted appropriately in response to the risk, more so than its analysis of whether there existed a risk which triggered protective duties at that time (which, as previously noted, is self-evident from the risk having materialised in harm).

[371] Portillo Cáceres and others v Paraguay para. 7.5. See part 2.9 above.
[372] Ibid para. 7.5.

3.4. Conclusion

This chapter has grappled with the deceptively complex question of what risk is, and how it is understood in the Committee's analysis of risk-based obligations entailed in the ICCPR. This chapter began by exploring the various meanings ascribed to the word risk in ordinary communication, drawing on dictionary definitions and scholarly accounts in the broader risk literature. It was shown that while the word is used flexibly in day-to-day contexts, certain core elements of meaning can be distilled: one is some form of negative outcome, and another is some concept of possibility, chance, probability or likelihood. Furthermore, in many contexts, the word 'risk' implies the capacity to measure the possibility of a future negative outcome. Often (though not always) risk represents a measure of the degree of likelihood, the magnitude of the harm, or of both of these combined. It was observed that the understanding of risk as something amenable to measurement, while important in technical contexts, also influences or underpins lay usage of the word to a large extent.

This chapter then delved deeper into the concept of probability, which provides the theoretical foundation for attempting to measure future possibilities, and hence the basis for modern conceptions of risk. Through a brief discussion of some well-known philosophical problems, it was explained that probability is itself a complex, multifaceted concept, and though it is philosophically contested, it is broadly understood has having both objective and subjective facets. From this discussion, three basic ideas were set forth as a theoretical framework for the analysis of the meaning of risk in the context of ICCPR jurisprudence: first, 'risk', though used in varied and flexible ways, generally conveys the idea that a future possibility can be measured; second, it is primarily though probabilistic thinking that we attempt to measure future possibilities, and henceforth any concept of measurable risk is underpinned by the concept of probability; and third, probabilistic thinking generally involves something more than just establishing facts about past or continuing events—it involves also the application of some subjective judgment about precisely how to draw upon the past to ascertain and measure future possibilities, which is not in itself a 'factual' matter—and accordingly, claims about probabilistic risk cannot logically be characterised as purely factual claims.

With these three ideas in mind, this chapter then turned to examine the possible meanings ascribed to 'risk' in the context of ICCPR jurisprudence, and more specifically, jurisprudence concerning obligations that are contingent upon findings of risk. From a broad standpoint, it was observed that the jurisprudence discussed in chapter 2 indicates that the word 'risk' generally means chance, probability, likelihood (or something similar) in this context, and implicitly, some *measure* of future events. Accordingly, risk in the context of the ICCPR is broadly probabilistic.

The Chapter then analysed case law in greater detail in order to illuminate how the Committee understands the nature of an inquiry into risk, looking firstly at non-refoulement cases, where the question of breach can turn on mere risk exposure, and then comparing these to cases in which risk is considered *ex post facto* as part of the analysis of a State's protective obligations. It was shown that in *non-refoulement* cases, the precise meaning ascribed to the word 'risk' appears to have changed over time. Whereas in early cases the Committee's reasoning equated 'risk' with 'necessary and foreseeable consequence', from the mid-2000s onwards the Committee applied a revised formulation, the effect of which was to separate 'real risk' from the concept of 'necessary and foreseeable consequence' and clarify that mere risk exposure could result in a violation, while leaving the meaning of risk itself largely open-textured.

It was argued that, rather than addressing head-on the nature or meaning of risk, the Committee has added qualifying terms to risk, such as 'real', 'personal' and 'imminent', which may be understood as an effort to place some limits around the scope of obligations enlivened by a vague, unexamined concept of risk. It was argued that terms such as 'personal' and 'imminent' do little to clarify the meaning of the risk itself, although arguably there is some hint of the Committee's understanding of the concept of risk in its use of the qualifying term 'real', and the use of phrases such as 'establish the existence' in connection with risk. Such terms perhaps vaguely suggest that risk is understood as an objectively ascertainable phenomenon, and that it may be treated in the analysis as a matter of fact, much like facts about past or continuing events. It was submitted that this approach to risk, when considered in the light of the theoretical framework set out at part 3.2, seems logically dubious and liable to generate confusion and inconsistency, because it fails appreciate the ways in which claims about probability (and by extension, probabilistic risk) differ fundamentally from purely factual claims. It was suggested that a more intellectually rigorous and transparent approach to characterising the question of risk would be to treat the risk finding as a distinct analytical step which follows the factual inquiry, and which entails the application of both factual findings and non-factual considerations such as value judgments or legal principle.

Finally, this chapter considered the different approach taken to risk in cases in which the rights violation was framed as a failure to protect an individual from a risk that subsequently materialised in physical harm. Having regard to examples of cases of this kind outlined in chapter 2, it was argued that the Committee's reasoning discloses quite a different conception of risk to that which is apparent in *non-refoulement* cases. It was observed that in such cases, consideration of the 'reasonable foreseeability' of risk makes more sense as a consideration in whether the State party acted appropriately in response to risk, as it is clear in this context that this criterion is not a factual inquiry, but a legal construct applied as one consideration in the Committee's analysis of whether the State party fulfilled its positive duty of protection. However, these cases offer little, if any, insight on the question that is the focus of the present dissertation, namely: what is 'risk' in the context of the ICCPR? As far as the jurisprudence is concerned, the answer to that fundamental question remains open. This open-textured concept of risk has given rise to challenges in defining the limits of obligations of protection and identifying precisely when they have been breached—issues to which this dissertation now turns.

4 Difficulties associated with an Open-Textured Concept of Risk: Defining the Limits of Risk-Based Obligations and Reviewing States parties' Implementation

4.1. Introduction

This chapter discusses two issues that stem partly from basing obligations upon an open-textured concept of risk. The first is the challenge of defining the limits of risk-based obligations. As observed in chapter 3, one approach the Committee has taken in an effort presumably to limit the scope obligations, is to apply descriptive terms such as 'real', 'reasonably foreseeable', 'personal' and 'imminent' to qualify the nature of the relevant risk. In part 4.2 below, this approach is analysed and evaluated, drawing on examples from the jurisprudence discussed in chapters 2 and 3. It will be argued that this approach, developed principally in the context of *non-refoulement* cases, but also extended to other kinds of cases on occasion, adds little clarity to the scope of obligations. It will be argued that the terms 'real', 'reasonably foreseeable' and 'personal' are themselves ambiguous in this context. As for the application of a requirement that risk be 'imminent' (the validity of which is debated in the literature), it will be argued that this can be understood as an attempt to limit risk-based protection obligations based on degree of certainty in the hypothesis about the future circumstances that will befall the individual, and that transparency could be enhanced by using the term 'confidence' rather than imminence.

Part 4.3 addresses a second issue that arises in part from rendering obligations contingent upon an open-textured concept of risk, namely, the challenge of defining the appropriate standard of review of a State party's finding regarding risk, or in other words, deciding on the degree to which the Committee should defer to a State party's risk findings in the context of considering communications under the First Optional Protocol. It will be argued that this question of deference is intimately connected with how one conceptualises risk, and more specifically, whether risk is characterised essentially as an objective, factual matter (much like facts about past or continuing events) or as a qualitatively different kind of finding—one that combines factual findings with other considerations such as value judgments, policy judgments or legal principles. Part 4.3.1 will highlight this relationship between how risk is conceptualized and who is seen as authoritative on findings of risk through a brief detour into the scholarship on risk in refugee law, where this issue has been examined in more detail. This chapter will then return to analysing the Committee's jurisprudence, focusing firstly on *non-refoulement* in part 4.3.2 and then other cases concerning risk in part 4.3.3. Finally, in part 4.3.4 it will be argued that for the Committee to acknowledge the distinction between factual and risk findings reached through domestic processes would enable a more fine-grained approach to the standard of review taken by the Committee, and facilitate clearer explanation of reasons in cases in which the Committee disagrees with the State party's risk findings. Part 4.4 concludes.

4.2. *Attempts to circumscribe risk-based protection obligations through the addition of qualifying terms: 'real', 'reasonably foreseeable', 'personal' and 'imminent' risk*

A result of the absence of detailed explanation of the concept of risk, and how it is to be determined, is that a range of specific obligations to prevent exposure of individuals to risk are premised on a somewhat vague or ambiguous concept. When obligations are based on risk, and particularly when 'risk' is ill-defined, there is scope for potentially very expansive interpretations of States parties' obligations. States parties may be expected to protest what may be seen as intolerably broad or indeterminate protection obligations. That is not to suggest that risk-based obligations will always create controversy; in many instances their application may be straightforward. However, there have been, and will likely continue to be, cases at the margins, in which the existence of risk is disputed, and the question of risk goes to the heart of whether a State party's protection obligation is enlivened. When there is disagreement about the existence of risk, and little clarity on what risk is or how it is to be determined, obligations can appear unacceptably vague. Perhaps in response to this problem, the Committee has developed qualifying terms which on their face seem to be an attempt to limit the scope of risk that triggers protection obligations (as noted in chapter 3).

The jurisprudence discussed in chapters 2 and 3 provides examples of this approach of applying terms to qualify the nature of the relevant risk. This is particularly clear in the jurisprudence on implied obligations of *non-refoulement.* In this context, the Committee has added to the word 'risk' the descriptors 'real', 'reasonably foreseeable', and occasionally also the word 'imminent',[373] and has also stated that the risk must be 'personal' to the individual in question for it to enliven *non-refoulement*.[374] There is some indication that this approach is being carried across to the analysis of protective obligations other than *non-refoulement,* such as obligations arising under article 6 in relation to climate-change related risks and harms to persons within the State party's territory. For example, as noted in chapter 2, the majority on the Committee in *Billy v. Australia* applied terms ordinarily applied to qualify the scope of the risk in *non-refoulement cases* to the different situation of climate change-related risks facing a population within the territory of the State party. In that case, a group of Australian nationals who resided in the Torres Strait region claimed that the State party's failure adequately to mitigate and adapt to climate change-related risks, particularly that of sea level rise, violated their rights under article 2 of the ICCPR read in conjunction with articles 6, 17, 24 and 27. In finding no violation of the right to life in article 6, the majority on the Committee expressed the view that the authors had 'not indicated that they [had] faced or currently face adverse impacts on their own health *or a real and reasonably foreseeable* risk of being exposed to a situation of physical endangerment or extreme precarity that could threaten their right to life, including their right to a life with dignity'.[375] By combining the expressions 'real and reasonably foreseeable risk', 'physical endangerment or extreme precarity', and 'could threaten their right to life', this phrasing semes to stack layers of risk on top of one another, drawing 'real and reasonably foreseeable' from *non-refoulement* cases, and adding endangerment, precarity and threat (each of which suggest a future possibility rather than physical manifestation of harm). The layering of these terms seems aimed at clarifying or circumscribing responsibility that is based on a nebulous concept of risk.

[373] Khan v Canada, [5.4]; UNHRC, *Singh (Daljit) v Canada* (30 March 2006) Communication No. 1315/2004, UN Doc UN Doc CCPR/C/86/D/1315/2004 [6.3].
[374] E.g., ARJ v Australia, [6.6]; X v Denmark, [9.2]; K v Denmark, [7.3]; PT v Denmark, [7.2].
[375] Billy *et al.* v Australia [8.6] (emphasis added).

It is questionable whether the addition of terms such as 'real' and 'reasonably foreseeable' achieves this, particularly in the absence of further explanation of the concept of risk itself and the way in which these terms relate to the concept of risk. This dissertation has already pointed out the logical redundancy of the expression 'reasonably foreseeable' in contexts where risk is assessed *ex ante* (where the 'foreseeability' of the risk is self-evident from it having been identified as a risk; the very concept of risk itself being an attempt to foresee).[376] This dissertation has also questioned the use of the adjective 'real', which seems vaguely to imply the characterisation of risk as a phenomenon that exists physically in the material world, independently of the person perceiving it, and which can be ascertained through factual enquiry (which seems dubious considering the nature of risk findings and how they differ from purely factual findings, as explained in parts 3.2.3 and 3.3.2).

The requirement that risk be 'personal' also seems to raise questions about how the Committee understands risk, and arguably does little to clarify the limits of the obligation. It could be argued that risk, if measured based on objective indicators such as past frequencies or pattens of harm, is never entirely 'personal'. As discussed in part 3.2.3 above, generally when a probabilistic claim is made about an objective frequency of some event, the claim is about a class or category, not a single case; to describe a single case is to reduce the class to one (since no two cases in the real world are exactly alike), in which case probabilistic thinking is inapposite (hence von Mises' famous remark, 'the phrase "probability of death," when it refers to a single person, has no meaning at all for us').[377]

In what way does the Committee understand risk to be 'personal' in the context of claims for complementary protection (*non-refoulement*)? Does being 'personally' at risk have to do with whether the person can be assimilated to an at-risk category, or does it require that they stand out as someone especially at risk? The jurisprudence

[376] See part 3.3.2.
[377] See part 3.3.2. It should be noted, however that when probability represents a subjective belief about a single case, observation of past frequencies may of course form part of the reason for that subjectively held belief. In this regard see, e.g., Hacking, *An Introduction to Probability and Inductive Logic* 128–139.

arguably contains mixed messages on this issue. Clearly, past frequencies of human rights violations towards a group or category of persons can be probative as to risk, and therefore to the existence of protective obligations. For example, it is common for national authorities assessing protection claims (and the Committee in considering those assessments) to consider country information reports, including information about the common experience of categories of persons to which the individual in question may belong. Furthermore, as a general statement of principle, the Committee often reiterates that in determining whether a 'real risk' exists, 'all relevant facts and circumstances must be considered, including *the general human rights situation* in the author's country of origin'.[378] This points to the need to consider broad patterns of conduct or experience in society, as well as patterns of past experience of individuals similarly situated to the person in question, when in assessing risk to that person.[379]

Yet, in some cases, the Committee's reasoning seems to indicate that simply falling within a generally at-risk category is insufficient to enliven a protection obligation. For example, in Views on *A and B v. Denmark* (2016), in which the Committee considered the State party's removal of the authors to Pakistan and the risk of (among other things) persecution, torture or death due to their faith as Ahmadi or Ahmadiyya Muslims. The Committee ultimately found it '[could not] conclude that the information before it show[ed] that the authors would face a personal and real risk of treatment contrary to articles 6 (1) or 7 of the Covenant if they were removed to Pakistan'.[380] In connection with this finding the Committee took note of the finding of the Refugee Appeals Board of the State party, noting in particular:

> the Refugee Appeals Board accepted the authors' allegations that they had received threatening letters, beginning in June 2012, and that unknown individuals had painted a cross on the wall of their house around the same time. The Board found that the situation that the authors risk facing was not so severe as to indicate a well-founded fear of persecution by authorities or private individuals as a result of their religious beliefs. It observed that there were between 2 and 4 million Ahmadis in Pakistan, and

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[378] E.g., KH v Denmark [8.3]; X v Denmark [9.2]; X v Sweden [5.18] (emphasis added).
[379] For an example of this reasoning, see ARJ v Australia [6.14].
[380] UNHRC, *A and B v Denmark* (13 July 2016) Communication no. 2291/2013, UN Doc CCPR/C/117/D/2291/2013 [8.6].

> that Pakistani legislation had significantly restricted their ability to practise their faith. As a result, Ahmadis were often threatened and harassed by unspecified other groups. However, the Board found that the authors had not substantiated their claim that they would face *a specific and individualized risk* of persecution or abuse in Pakistan. The persecution endured by the authors had been of "limited severity", as they had only been subjected to threats for a short period of time before their departure. Moreover, these anonymous threats were of a nature *similar to the nature of anonymous threats to which many Ahmadis had been subjected*.[381]

What seems to emerge from this passage, and particularly the emphasised phrases, is that for someone to be 'personally' at risk, what matters is not whether the individual has personal characteristics that place them within a generally at-risk category, but rather, whether they *stand out* as having some 'specific' and 'individualised' risk. Yet, it could be argued that there is a sense in which risk, when assessed *ex ante,* is never entirely personal and individualised, for to reason in terms of future risk is to consider broader patterns of past experience, hence the requirement to consider 'the general human rights situation in the author's country of origin'. Perhaps what is really underlying the Committee's decision is an assessment that the past patterns of treatment of Ahmadi Muslims does not amount to arbitrary deprivation of life, torture or CIDTP for the purposes of articles 6 or 7, however it is difficult to tell from the reasoning. It remains unclear what the word 'personal' adds in this context (in terms of clarifying when the State party will or won't owe protection obligations), or how this criterion fits conceptually with the concept of risk itself.

The same issue can also be identified in the minority dissenting Views on the *non-refoulement* cases concerning alleged risks of FGM, discussed in part 2.6 above. Recall, for example, the case of *Kaba and Kaba v. Canada,* in which the Committee considered whether the author's daughter ran 'a real and personal risk' of being subjected to FGM if retuned to Guinea.[382] In the reasoning of the majority of Committee Members (who found *non-refoulement* to apply in that case) the assessment of risk was clearly informed by the broader social context of Guinea as a

[381] Ibid [8.4] (emphasis added).
[382] Kaba and Kaba v Canada [10.1].

strictly patriarchal society, and the pattern of experience of women and girls as a broad group within that context. Weight was placed on, among other factors, documentary evidence revealing a high incidence of FGM in Guinea. The author had cited evidence that the proportion of women who had been subjected to FGM was 96% in 2005, 97% among the Malinke ethnic group (to which the authors belonged), and as high as 99% according to a 2001 report of the United States Department of State.[383] This was significant for the majority, who noted that 'documentation presented by the author, which has not been disputed by the State party, reveals a high incidence of female genital mutilation in Guinea'.[384] In contrast, the reasoning in one of the two dissenting opinions emphasised the need to focus on 'personal' risk rather than the general prevalence of the practice. The dissenting Member remarked:

> In this case, one has the impression that everything was handled as if the issue under consideration were the process of female genital mutilation in general rather than an individual complaint… It is to the Committee's credit that it is vigilant regarding female genital mutilation in general, and it is able to question States about the issue during the consideration of their reports.
>
> It is, however, still important for the Committee to limit itself to the case at hand, using the context to clarify the situation rather than as a general justification. The essential question is whether, taking into consideration all the information provided, the particular circumstances of the case could constitute a real and personal risk for the author's daughter, who is 15 years old and whose mother is not excised, thanks to her own mother who opposed excision, recalling once again that a mother's opposition to excision is a determining factor in most cases.[385]

The Member considered that 'while there may be a risk, it is unsafe to define that risk as real or personal.'[386] On its face, this approach seems to be aimed at placing the author within a narrower group for the purpose of assessing prevalence—namely, the subset of women opposed to FGM, who objected to their daughter being subject to the

383 Ibid [5.3].
384 Ibid [10.2].
385 Ibid, Dissenting opinion by Mr. Abdelfattah Amor [18], [19].
386 Ibid [21].

practice. On this basis, the dissenting Member characterises the evidence of an extremely high rate of FGM as less probative (or perhaps irrelevant) to the authors' *personal* risk. However, by narrowing of the relevant category of persons to whom prevalence (and hence risk) is referable (in probabilistic terms, the 'reference set'), the dissenting Member appears to treat the *absence* of a specific data set as evidence of the absence of risk. The State party had relied on the fact that 'no cases of excision carried out against the mother's wishes have been reported', and from this the dissenting Member appears to conclude that 'a mother's opposition to excision is a determining factor in most cases'.[387] While it is difficult to assess the rigour of this conclusion without viewing the underlying evidence, it seems to indicate something about the logic of the requirement that risk be 'personal'. By distinguishing the authors from the broader category of vulnerable persons, in respect of whom data exists, it is possible to formulate a negative argument about the absence of data on 'personal' or 'individualised' risk, and from this absence of data, infer the absence of risk. This approach appears logically dubious when one recognises that risk, insofar as it is underpinned by probabilistic reasoning (including measuring future likelihood based on past frequencies), can never be entirely 'personal' (for the reasons explained in part 3.2.3 above).

There are also questions surrounding the apparent requirement that risk be 'imminent', particularly when applied to the assessment of the *merits* of a protection claim. As previously noted, this has been the subject of recent scholarship, with some scholars expressing disagreement with the application of a criterion of imminence to narrow the scope of risk giving rise to *non-refoulement* obligations.[388] As already noted, scholars have expressed differing views as to whether such a criterion is to be found within the Committee's reasoning, properly construed—especially its reasoning in *Teitiota v. New Zealand*.[389] Foster and McAdam conclude from their survey of reactions to that case that 'commentators either tacitly assume, or expressly believe, that imminence is now part of the test for a substantive violation'.[390] The authors

[387] Ibid [19].
[388] Noted at part 3.3.2 above.
[389] The facts are discussed at parts 2.4.2 and 3.3.2 above.
[390] Michelle Foster and Jane McAdam, 'Analysis of 'Imminence' in International Protection Claims: *Teitiota v New Zealand* and Beyond' (2022) 71 International and Comparative Law Quarterly 975,

consider this position to be confused, however. In their view, 'a very careful reading of *Teitiota*' reflects a nuance in the Committee's jurisprudence: that imminence is 'only relevant when it comes to establishing admissibility requirements as a 'victim' of a violation under the First Optional Protocol to the ICCPR'.[391]

In separate, more detailed analysis, Anderson, Foster, Lambert and McAdam have examined instances in which UN treaty monitoring bodies, the European Court of Human Rights, and the European Court of Justice have referred to the imminence of a risk in the context of a *non-refoulement* claim.[392] The authors contend that 'a protection-limiting criterion should not infiltrate decision-making without an explicit consideration of its legal validity and purpose'.[393] Furthermore, they argue that 'there is no conceptual reason why imminence—in the sense of timing—should be used to limit a State's protection obligations' under the Refugee Convention or in international human rights law.[394] Overall, the authors argue that the notion of imminence should not, in any way, be used to limit international protection, and they express concern that imminence may 'creep erroneously' into substantive assessments of risk in *non-refoulement*, and may be invoked as a basis for denying protection to persons who face a risk of harm over the long term, for example as a result of deteriorating health, or deteriorating conditions due to climate change.[395] And yet, the notion of imminence clearly does appear in the Committee's consideration of the merits of protection claims. As Foster and McAdam acknowledge, in *Teitiota v. New Zealand* the Committee does address a requirement of imminence in the context of its discussion of the merits (though the authors consider this to be an erroneous conflation).[396] Furthermore, in remarks in several other cases concerning *non-*

977 (citations omitted).

[391] Ibid 976, 977 (citations omitted). The authors take this position notwithstanding that the Committee referred to the New Zealand tribunal's reference to imminence (which had been in relation to admissibility) in the course of setting out its findings on the merits, which the authors acknowledge 'naturally creates the impression that imminence forms a relevant element of the substantive claim': 980.

[392] Anderson and others, 'Imminence in Refugee and Human Rights Law: A Misplaced Notion for International Protection'.

[393] Ibid 140.

[394] Ibid 122.

[395] Ibid 140.

[396] Foster and McAdam, 'Analysis of 'Imminence' in International Protection Claims: *Teitiota v New Zealand* and Beyond' 980.

refoulement the Committee appears to have applied a criterion of imminence in considering whether the author would be 'exposed to a real and imminent risk of violations of articles 6 and 7 of the Covenant'[397] or whether the author had 'shown that his life or physical and mental integrity [were] at imminent and direct risk' as a result of removal.[398]

To offer an alternative perspective, the imminence requirement may be seen as an attempt to limit risk-based protection obligations based on degree of certainty in the hypothesis about the future circumstances that will befall the individual. The underlying rationale for the use of the imminence in this way is that it serves as a tool for limiting States' preventative obligations to situations or categories of risk that States parties can reasonably be expected to anticipate and pre-emptively influence. This is arguably reasonable and necessary because of the inherent elasticity of positive, risk-based obligations. As noted in part 2.2 above, the general undertaking to 'respect and to ensure' human rights entails positive, preventative obligations which take effect not just 'vertically' in the relations between a State and an individual subject to its jurisdiction or control, but also 'horizontally' in the relations between private individuals (notwithstanding that the obligations in article 2(1) bind States parties and 'do not, as such, have direct horizontal effect as a matter of international law').[399] In this way, human rights law can, in theory, reach into virtually every area of human activity and any interaction between persons. Furthermore, human rights law extends also to the potential interactions of a person with the authorities in territory to which they may be removed, as well as with non-State actors in that territory. The organs or agents of the State party may be removed from these interactions to varying degrees, and in a practical sense, the degree of removal could bear upon the ability of the State to anticipate future harm and intervene to prevent or otherwise mitigate the harm. In some instances, framing or specifying the State's duty as one of diligence allows the imposition of responsibility while accounting for the

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397 Khan v Canada [5.4]; Singh (Daljit) v Canada [6.3], discussed in Foster and McAdam, 'Analysis of 'Imminence' in International Protection Claims: *Teitiota v New Zealand* and Beyond' at 980 and ibid at 127.

398 WMG v Canada [7.4].

399 UNHRC, 'General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 [8]. See part 2.2 above.

practical limits of the State's control. However, as explained in chapter 2, not all risk-based obligations are framed as obligations of diligence; in many cases (including *non-refoulement*) risk triggers a strict obligation to prevent risk-exposure. At the same time, the vagueness and elasticity of the concept of risk itself may allow for very wide-ranging applications of States' positive obligations. In a context where strict duties are enlivened by a vague and malleable concept of risk, the application of an additional criterion of 'imminence' may be understood as an attempt to limit the scope of protective obligations based on the degree of certainty in the hypothesis about the anticipated future harm.

If that is its real purpose, the choice of the word 'imminence' is imprecise, because timing does not necessarily determine the degree of certainty with respect to a future event; we may be quite confident about some events that we expect to occur well into the future, or which we expect to develop gradually over time. An example of this is the so-called 'death row phenomenon', the risk of which is now recognised as enlivening protection obligations under article 7 (notwithstanding that it is a harm that manifests over time).[400] However, in many cases, when harm is expected to occur a long way into the future, there may be a greater chance for unanticipated intervening acts and therefore less certainty about whether the risked harm will materialise. This arguably explains, and to some extent justifies, the use of the imminence requirement in assessing the merits of *non-refoulement* claims, although the word is imprecise. What may *actually* divide Members in their analysis of *non-refoulement* cases like *Teitiota* is their differing degrees of *confidence* in the hypothesis about the future circumstances in the receiving State. Using the word 'confidence' instead of 'imminence' would highlight the essential subjectivity of risk and probabilistic thinking in this context. To acknowledge this subjectivity may, perhaps somewhat counterintuitively, enhance the transparency and intellectual rigour of the Committee's reasoning in such cases.

[400] See part 2.4.3 above.

4.3. *The standard of review for findings on risk*

A further challenge that arises from grounding ICCPR obligations in an open-textured concept of risk is that it can lead to uncertainty and disagreement as to who is ultimately authoritative on the question of the existence of a relevant form of risk. In the context of the Committee's jurisprudence on protection obligations entailed in articles 6 and 7, this uncertainty sometimes finds expression in disagreement as to whether or how the Committee should review a State party's findings with respect to risk. The question of the appropriate standard of review is intimately connected with the matter of how risk is conceptualised, in that different assumptions about the fundamental nature of risk findings can support different conclusions regarding who the appropriate arbiter of risk is. If risk is understood essentially as an objective, factual matter, much like facts about past or continuing events, this may support greater deference to States parties' findings, whereas if risk is understood as a finding that inevitably combines both factual and non-factual matters, such as legal principles, value judgments, or other subjective considerations, this may support a more nuanced approach. This link between assumptions about the nature of risk and the approach to reviewing risk findings is identifiable in some of the Committee's jurisprudence, as will be shown below.

Before analysing that jurisprudence, it helps to examine how this issue features in the literature in risk-based obligations in international refugee law. Refugee law provides a useful reference point because, much like in international human rights law, risk and related concepts play a central role in key principles, obligations and procedures. Two leading examples of principles and process in refugee law which entail risk assessment are the principle of *non-refoulement*, often described as a 'cornerstone' or 'cardinal principle' in international refugee law,[401] and the principles and processes for

[401] See e.g., Walter Kälin, Martina Caroni and Lukas Heim, 'Part Six - Administrative Measures, Article 33, para. 1' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 1326, 1335; Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (4th edn, OUP 2021) 250, 263, and 241–306 generally; Vincent Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (OUP 2013) 19, 29; McAdam, *Complementary Protection in International Refugee Law* 8. See also Gregor Noll, 'Evidentiary Assessment under the Refugee Convention: Risk, Pain and the Intersubjectivity of Fear' in Gregor Noll (ed), *Proof, Evidentiary Assessment and*

determining who meets the definition of 'refugee' (refugee status determination).[402] Furthermore, the scholarship addressing these obligations highlights not only the potential for diverging views on the nature of an inquiry into risk in this context, but also the connection between how risk is conceptualised and views about who is capable of determining risk. Accordingly, in the following section, this dissertation takes a detour into scholarship on risk-based obligations in international refugee law, before returning to examine like issues that have arisen in the context of the ICCPR.

4.3.1. International refugee law as a point of comparison

In the context of the 1951 Convention relating to the Status of Refugees (1951 Convention) and the 1967 Protocol Relating to the Status of Refugees, the obligation of *non-refoulement* provides that

> 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 a particular social group or political opinion.[403]

For the obligation to apply to an individual, there must be a threat to his or her life or freedom based on his or her race, religion, nationality, membership of a particular social group or political opinion. Determining whether this threat exists requires a forward-looking assessment of risk: there must be a present and/or future risk of

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Credibility in Asylum Procedures (Brill 2005) at 142 (the 'bottom-line obligation in international refugee law').

[402] Risk is also relevant to various other aspects of refugee law, such as in determining whether certain exclusions under the Convention apply. For example, article 32(1) of the 1951 Convention, which prohibits expulsion of a refugee lawfully within the State party's territory, 'save on grounds of national security or public order', may require assessment of national security risk. There is also an exception to the principle of *non-refoulement* under article 33(1) in respect of 'a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.' For discussion, see e.g., Goodwin-Gill and McAdam, *The Refugee in International Law* (4th edn) 268; Sir Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003) [100]–[102].

[403] Goodwin-Gill and McAdam, *The Refugee in International Law* (4th edn) 571.

persecution, and there must also be a 'causal nexus' between that risk and a relevant attribute of the person (race, religion, nationality, membership of a particular social group or political opinion).[404] Kälin et. al. comment:

> The relevant facts to assess a risk of persecution in case of *refoulement* relate to both relevant personal and general information and circumstances. Most of the time, competent authorities have to rely heavily on the refugee claimant's statements, to the extent they are deemed credible, and on information concerning the country in relation to which the risk of *refoulement* is to be assessed (country of origin or a third country). Past persecution will often be indicative of a present and future persecutory risk but is not necessary in order to establish the existence of an actual threat.[405]

Risk is also central to determining whether someone is a 'refugee' as defined in the 1951 Convention, which is relevant to the application of the *non-refoulement* in article 33(1) (which is expressed as applying to 'a refugee'). The term 'refugee' is defined in Article 1. Under Article 1, paragraph A(2), read together with the 1967 Protocol, a refugee includes any person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.[406]

The question of the 'well-foundedness' of fear in refugee law entails a decision on continuing present and future risk. This involves, as Goodwin-Gill and McAdam put

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[404] Michelle Foster, 'Causation in Context: Interpreting the Nexus Clause in the Refugee Convention' (2002) 23 Michigan Journal of International Law 265.

[405] Kälin, Caroni and Heim, 'Part Six - Administrative Measures, Article 33, para. 1' 1389–1390 (original citations omitted).

[406] The 1951 Convention limited the definition of 'refugee' to a critical date (those resulting from 'events occurring before 1 January 1951'). States Parties to the 1967 Protocol agree to apply articles 2 to 34 of the Convention to refugees as defined in article 1 thereof, as if references to that critical date were omitted. The 1951 Convention also allowed, under Article 1B(a), the option of further restricting States' obligations to refugees resulting from events occurring *in Europe* before the critical date. Though there remains the option of geographical limitation, only a few States utilise it: see Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (1967 Protocol) art. 1; Goodwin-Gill and McAdam, *The Refugee in International Law* (4th edn) 572.

it, 'essentially an essay in hypothesis, an attempt to prophesy what might happen to the applicant in the future, if returned to his or her country of origin.'[407] Most scholars understand the question of whether a person has a 'well-founded fear' to be bound up with the question of whether their 'life or freedom would be threatened' in the sense of article 33(1).[408] On this view, the test in article 33(1) is understood to be no more restrictive than that in Article 1A(2), and therefore if a person meets the definition of 'refugee' in Article 1A(2) then they will necessarily also be entitled to *non-refoulement* under article 33(1) (unless an exception applies).[409] Risk thus assumes an immediate and central place in analysing a State's obligations with respect to a specific individual, whether in refugee status determination or in determining entitlement to *non-refoulement*. Both assessments turn on whether there exists a present and/or future risk. As with the implied obligation of *non-refoulment* under the ICCPR, risk exposure is itself 'actionable', meaning that a breach of a protection obligation occurs upon the removal of an individual to a situation of risk (regardless of whether the risked harm later materialises).[410]

Relevantly for present purposes, the conceptual ambiguity of risk seems to hang in the background of scholarly debates about the meaning of 'well-founded fear' in the context of the Refugee Convention. Commentators offer varying analyses of the meaning of that phrase and the nature of the inquiry it entails, including whether it involves an assessment of 'subjective' or 'objective' matters, or some combination of

[407] Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 54. See also Goodwin-Gill and McAdam, *The Refugee in International Law* (4th edn) 614: 'a system of protection founded, as international law would seem to require, upon essays in prediction'.

[408] However, scholars are not unanimous on this point. For a discussion of various views, see Kälin, Caroni and Heim, 'Part Six - Administrative Measures, Article 33, para. 1' at 1387–1389.

[409] Ibid 1342; Goodwin-Gill and McAdam, *The Refugee in International Law* (3rd edn) 233; Goodwin-Gill and McAdam, *The Refugee in International Law* (4th edn) 267; James C Hathaway and William S Hicks, 'Is there a subjective element in the Refugee Convention's requirement of "well-founded fear"?' (2005) 26 Michigan Journal of International Law 505, 542; Paul Weis, *The Refugees Convention, 1951: the travaux préparatoires analysed, with a commentary by Dr Paul Weis* (CUP 1995) 341. Article 33(2) provides an exception in the following terms: 'The benefit of [Article 33(1)] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he [or she] is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.'

[410] Goodwin-Gill and McAdam observe: 'The 1951 Convention does not require a refugee to have fled by reason of persecution, or that persecution should actually have occurred': Goodwin-Gill and McAdam, *The Refugee in International Law* (4th edn) 614.

both, highlighting the potential for disagreement about the nature of findings with respect to future events. The UNHCR understands 'well-founded fear' to contain both 'subjective' and 'objective' elements. For example, the UNHCR guidance includes the following statement:

> Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgement on the situation prevailing in his country of origin.
>
> To the element of fear – a state of mind and a subjective condition – is added the qualification "well-founded". This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term "well-founded fear" therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration.[411]

Some leading scholars broadly agree that the refugee definition involves examination of subjective and objective elements, while emphasising the factual basis of refugee status determination. For example, Kälin *et. al.* comment:

> As the wording, 'would be threatened', implies more clearly than the terms 'a well-founded fear', there must be an objective basis for establishing the risk of persecution. Reference to the subjective fear (*i.e.* the person's emotional state) would lead to inequality in refugee protection, giving less protection to a fearless person than to a fearful one.[412]

[411] UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status on International Protection' (reissued February 2019) UN Doc HCR/1P/4/ENG/REV. 4 [37] and [38].

[412] Kälin, Caroni and Heim, 'Part Six - Administrative Measures, Article 33, para. 1' 1390 (original citations omitted).

Similarly, Goodwin-Gill and McAdam observe the refugee definition 'supposes a dispassionate case-by-case examination of subjective and objective elements',[413] however the authors also remark:

> Although subjective fear or at least apprehension may be relevant, the key issues are nevertheless factual, and the key question is whether there are sufficient facts to permit the finding that, if returned to his or her country of origin, the claimant may face a serious risk of harm.[414]

Elsewhere in the same book, Goodwin-Gill and McAdam refer to 'serious risk' as a *standard of proof* that suffices for both refugee status under Article 1 and non-refoulement under article 33, noting that '[i]n practice, the same standard is accepted at both national and international levels, reflecting the sufficiency of serious risk, rather than any more onerous *standard of proof*, such as the clear probability of persecution'.[415]

Wouters emphasises the objectivity of 'well-founded fear', which he argues 'implies that there needs to be a present or prospective risk of persecution which can objectively be established'.[416] According to Wouters, although fear is a subjective emotion, 'for purposes of refugee status determination it must be well-founded; that is, it must have an objective basis'.[417] Den Heijer likewise emphasises objective evidence as the primary basis of a 'well-founded fear' under the Refugee Convention. Den Heijer observes that, although that standard 'has been interpreted as referring to both subjective and objective factors, it is widely agreed that the criterion's application should rest primarily—rather than on the frame of mind of the person

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[413] E.g. Goodwin-Gill and McAdam observe the refugee definition 'supposes a dispassionate case-by-case examination of subjective and objective elements': Goodwin-Gill and McAdam, *The Refugee in International Law* (4th edn) 602.
[414] Ibid 614.
[415] Ibid 266 (emphasis added).
[416] CW Wouters, *International legal standards for the protection from refoulement: A legal analysis of the prohibitions on refoulement contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture* (Intersentia 2009) 83.
[417] Ibid.

concerned—on objective evidence.[418] Having regard to the various standards applicable in *non-refoulement* obligations more generally, the author observes, '[t]he element of uncertainty is under all treaty provisions… most commonly translated into a forward-looking expectation of risk, to be measured in accordance with objective criteria.'[419]

Interestingly, Den Heijer characterises the risk question as a probabilistic inquiry, though not one that is amenable to calculation. The author describes the terms 'well-founded fear' and 'threat' in articles 1A(2) and 33(1) as a 'probability standard used for activating the duty of non-expulsion', noting however that most States do not interpret this as requiring the risk to the individual to meet some numerical percentage, instead applying a test of 'real risk' or 'reasonable degree', consistent with UNHCR guidelines as well as the approach taken in *non-refoulement* under certain human rights treaties.[420] Furthermore, Den Heijer observes:

> It will normally be simply impossible to couch the risk criterion into a strict probability calculus. The assessment is always case-specific, and… depends on the individual's story, facts, and circumstances prevailing in the country of return, as well as the application of specific doctrines in refugee law, such as the relevance of past experience of ill-treatment, the availability of an internal protection alternative, the existence of diplomatic assurances, etc.[421]

Other authors have also pointed out that risk in the context of refugee law is not amenable to calculation. For example, Wouters writes:

> It is impossible to couch the risk criterion in objective and measurable terms, for example, in the form of a probability calculus or in clear tests of probabilities or chances. What matters more is the credibility of a claim and the required evidentiary standards.[422]

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[418] Maarten den Heijer, 'Refoulement' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (CUP 2017) 499 (original footnotes omitted).
[419] Ibid 499.
[420] Ibid 499, referring in particular to the ECtHR, the CAT and the HRC.
[421] Ibid 500.
[422] Wouters, *International legal standards for the protection from refoulement: A legal analysis of the prohibitions on refoulement contained in the Refugee Convention, the European Convention on*

Thus, while some scholars emphasise the objectivity of the risk requirement in the term 'well-founded fear', they also acknowledge the difficulty or impossibility of quantifying risk numerically in this context, sometimes citing reasons that call to mind the 'single case' problem well known to philosophers of probability (discussed in part 3.2.3 above). Considering that the problem of the single case is commonly invoked to demonstrate the deficiency or limits of an objective (frequency-based) concept of probability, one might wonder whether it is logically possible to maintain that well-founded fear is both probabilistic *and* grounded in objectivity. Perhaps the objectivity of the factual landscape is to be distinguished from the risk judgment which it informs. Neither Den Heijer nor Wouters address that issue directly.

Hathaway and Hicks have argued that there is *no* subjective element within the requirement of well-founded fear. In their view, '[r]ather than predicating access to protection on the existence of "fear" in the sense of trepidation,' the reference to fear in the 1951 Convention 'was intended simply to mandate an individuated, forward-looking appraisal of actual risk, "not to require an examination of the emotional reaction of the claimant."'[423] The authors justify this reading of fear on the basis that it accords with one of the meanings of 'fear' ordinarily used in English, is consistent with the objects and purposes of the Convention and its structure, and because it is consistent with the verb *craindre* in the (equally authoritative) French language version of the Convention and States parties' practice in the application of that version.[424] Conversely, the authors argue that the prevailing approach of interpreting well-founded fear as entailing *both* subjective and objective elements is unjustified in principle and impossible to implement fairly and consistently in practice, leading to outcomes that are at odds with the object and purposes of the treaty.[425] Based on their

Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture 85.

[423] Hathaway and Hicks, 'Is there a subjective element in the Refugee Convention's requirement of "well-founded fear"?' 507, citing James C Hathaway, *The Law of Refugee Status* (CUP 1991) 67

[424] Hathaway and Hicks, 'Is there a subjective element in the Refugee Convention's requirement of "well-founded fear"?' 508–509, 535–542.

[425] In particular, Hathaway and Hicks contend that there is 'simply no principled way for decisionmakers to evaluate an applicant's state of mind for evidence of trepidation', and consequently, decision makers rely on 'largely artificial surrogate indicators of trepidation', resulting in 'the denial of refugee status to person who face the risk of being persecuted in their

reading of ‘fear’ as the forward-looking expectation of risk, the authors contend that to determine whether fear is well-founded requires the State party ‘to determine whether there is a significant risk that the applicant may be persecuted’, and furthermore:

> While the mere chance or remote possibility of being persecuted is insufficient to establish a well-founded fear, the applicant need not show that there is a clear probability that he or she will be persecuted. Only a “real chance” or “reasonable possibility” of being persecuted needs to be demonstrated.[426]

In arguing against the duel subjective-objective interpretation of ‘well-founded fear’ and calling instead for a purely objective assessment of risk, the authors seem to accept the premise of risk itself as an objectively observable phenomenon. For Hathaway and Hicks, the focus of the well-founded fear requirement is on ‘*actual risk’* (an expression employed throughout the article), which seems to imply an understanding of risk as something existing objectively (vaguely reminiscent of the Committee’s ‘real risk’).[427] Interestingly, the authors acknowledge that the terms ‘objective’ and ‘subjective’ are loaded. Noting the OED defines ‘objective’ as ‘external to the mind; real’ and ‘subjective’ as ‘existing in the mind only… illusory, fanciful’, the authors suggest that ‘If there is truly a meaningful distinction between evidence labelled as “objective” and evidence labelled as “subjective,” it must be because the former is, by nature, more rational, more reliable, and more probative than the latter.’[428] Thus, the authors acknowledge the possible connotations of characterising something as ‘objective’, but apparently do not question the notion of risk as something objectively ascertainable in the sense of being ‘external to the mind’ or ‘real’.

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country of origin, some of whom may, in fact, be fearful’: ibid 509. Hathaway and Hicks also argue against the approach of using evidence of subjective fear (trepidation) ‘as a means of “topping up” a claim that is insufficiently established on objective grounds’, whereby ‘persons whose fear is readily recognized as such by decisionmakers, as well as those who are simply more demonstrative, will be advantaged in securing refugee status for reasons that have nothing to do with the actual risk faced’: ibid 509, see also 510–535.

[426] Ibid 508 (original citations omitted).

[427] The authors refer throughout to ‘actual risk’: ibid 509, 510, 516, 518, 524, 531, 534, 535, 536, 538, 539, 540, 541, 542, 543, 546, 549, 561, 562.

[428] Ibid 549 (original citations omitted).

Noll, somewhat like Hathaway and Hicks, has argued against the delineation of distinct objective and subjective elements within the well-founded fear standard, though for different reasons. In contrast to Hathaway and Hicks, Noll seems to challenge the notion of objectivity in future predictions. He observes that 'an "objective element" suggests that there are "facts or conditions as perceived without distortion by personal feelings, prejudices, or interpretations"'.[429] The author posits that 'it should be common grounds that an assessment of the well-foundedness of fear is based on predictions' which are, according to Noll, 'necessarily personal interpretations of reality'.[430] Furthermore, Noll argues that the delineation of objective and subjective elements is at odds with the Convention: 'a move from "fear" to "subjectivity" and from "well-foundedness" to "objectivity" invariably adds things to the Convention definition that are simply not there.'[431]

Noll also argues that the way in which the phrase 'well-founded' fear is interpreted can have implications for refugee status determination *procedures*, including the way in which evidence is assessed through those procedures.[432] In Noll's argument, the appearance of the word 'fear' three times in article 1A(2), and the linkage of fear to the applicant's unwillingness to return, suggests the importance of the applicant's own assessment for the purposes of article 1A(2) (in contrast to the term 'threat' employed in article 33(1)). This language, Noll argues, 'accords the refugee a greater role in contributing to the assessment of a *general* risk of persecution by stating her fear, while any consecutive assessment of *specific* threats to her "life or freedom" under Article 33(1) [of the Refugee Convention] is put into the hands of the determining State'.[433] Noll argues that this emphasis in art. 1A(2) on the applicant's

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[429] Noll, 'Evidentiary Assessment under the Refugee Convention: Risk, Pain and the Intersubjectivity of Fear' 144-5.

[430] Ibid 145 (original citation omitted). Noll refers to country of origin data for example, which are themselves upon personal judgements and are '*a priori* no less subjective than, say, an account by the protection seeker.' Furthermore, Noll contends that talk of a subjective element in the singular fails to capture 'a plurality of subjective elements present in any asylum case'—the protection seeker, the decision-taker, the legal representative and the interviewing officers 'could each provide their version of a subjective element': ibid 145.

[431] Ibid 144.

[432] Ibid 141.

[433] Ibid 143–144.

own assessment of the situation in the territory of return implies an obligation upon States parties relating to the design of refugee status determination procedures:

> Were it not for the mentioning of "fear", emphasising the importance of the refugee's own assessment, determination procedures could cast claimants as mere objects to be dissected by an impersonal machinery of assessment… the element of "fear contains a procedural obligation…to design procedures in such a manner that the applicant is given the possibility to communicate "fear" as a personal risk assessment.[434]

In a somewhat similar vein, Hilary Evans Cameron has advanced an argument that the Refugee Convention implicitly governs States' approach to the process of risk assessment, and in particular, the conceptual devices by which decision-makers should resolve the inherent uncertainty of risk assessment. In *Refugee Law's Fact-Finding Crisis* (2018), Evans Cameron focuses on how the law 'decides which mistake is worse, and how this judgment informs the legal structures that resolve uncertainty: burdens of proof, standards of proof, and presumptions'.[435] Evans Cameron argues that such legal structures allow the decision-maker to move from a position of uncertainty to a decision by 'turn[ing] their doubt into findings of fact, either at the expense or to the benefit of the moving party', and that the way in which the 'error burden' is allocated in this process '[reflects] an underlying judgment about which kind of mistake is worse.'[436]

Having regard to international refugee law, Evans Cameron argues that it is logically implied in the Refugee Convention that the 'the wrong mistake' is the denial of a genuine refugee claim (rather than the recognition of a baseless claim), and by extension, that the Convention obligates States to implement decision-making processes that resolve doubt in the claimant's favour by erring on the side of granting protection.[437] Towards this end, Evans Cameron proposes a model of refugee status determination that eschews the goal of pursuing 'truth' through inductive or deductive

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[434] Ibid 144.
[435] Hilary Evans Cameron, *Refugee Law's Fact-Finding Crisis: Truth, Risk, and the Wrong Mistake* (CUP 2018) 2.
[436] Ibid 9.
[437] Evans Cameron contends that this is logically entailed in the substance of Convention obligations, especially the declaratory nature of refugee status determination and the nature of the principle of *non-refoulement*. See ibid at 28 and 175–184.

inference, and instead involves decision-makers undertaking a risk assessment using abductive reasoning. According to Evans Cameron, in abductive reasoning one draws a conclusion 'not because it must follow, as in deduction; nor because it probably follows, as in inductions; but because it is plausible enough, and it is the best answer that we can come up with under the circumstances'.[438]

Importantly, Evans Cameron argues that '[r]isk assessment is not a fact-finding process', and that refugee law 'is in crisis not only because of *how* decision-makers are making findings of fact, but *because* they are making them'.[439] Evans-Cameron distinguishes risk assessment from the fact-finding processes typical of other legal procedures, noting:

> Final judgments are reached by drawing inferences from the established facts as though these factual determinations reflect "objective reality"'. There is no room, in this final analysis, for recognizing any possibility of error in the fact-finding process: "To think of truth as a matter of degree, as though facts could be partly true and partly false, is alien to this perspective". This is precisely the perspective of risk assessment, however, which carries any fact-finding uncertainty forward into the final analysis.[440]

Evans Cameron is not alone in distinguishing between findings of risk and the findings of fact on which they are based; other scholars of refugee law have also observed this distinction. For example, Goodwin-Gill and McAdam implicitly acknowledge a distinction in the following passage, which is worth quoting at length:

> Although an applicant must generally prove the *facts* on which he or she relies on a balance of probabilities, the legal test for the *risk* of persecution is not set so high. The history of the 1951 Convention shows that refugee status was intended for a person who has been persecuted or who has "good reason" to fear persecution. The fear here is essentially an "appreciation", based on an objective situation, of what might plausibly and reasonably follow. The meaning of terms can only be pursued so

438 Ibid 193.
439 Ibid 210.
440 Ibid 140–1 (original citations omitted).

> far in the abstract, for decision-making requires looking at a series of variables, each of which may be characterised by uncertainty. In some respects, the process is ultimately "predictive", and will try to focus on what *might* happen, some time in the future, in a variety of necessarily unknown circumstances. Only in very rare cases, if ever, will the persecutor have provided clear evidence that this particular asylum seeker is indeed at risk. The word "predict" is potentially misleading, however, so far as it may suggest a high degree of confidence in a particular outcome; whether international protection is called for involves a decision of a somewhat different order. The bottom line is *risk*, but reaching a conclusion of risk requires that the preliminary steps be taken efficiently and effectively.[441]

Here, while circling around the meaning of risk itself, Goodwin-Gill and McAdam seem to acknowledge the essential subjectivity of risk by pointing out that risk of persecution is something to be 'appreciated' through the application of reason to an 'objective situation'. Furthermore, Goodwin-Gill and McAdam highlight the importance of the *process* refugee status determination to the appreciation of risk, as well as the need to anchor such processes in international standards. In this regard, they write:

> Words such as "serious" or "reasonable" risk, when removed from any set of individual circumstances, cannot capture precisely what is needed, but an appreciation of risk will commonly emerge within the interstices of the process of understanding the individual in context; here, a well-constructed process properly anchored in the applicable international standards can help to reach the right conclusions.[442]

Thus, Goodwin-Gill and McAdam's perspective on risk in refugee status determination has some similarities to Evans Cameron's more recent argument. However, Evans Cameron offers a particularly detailed analysis of how findings of risk differ from findings of fact, and how the nature of risk findings should factor in the analytical structure of risk reasoning. Furthermore, Evans Cameron's argument goes further in actually specifying presumptions that a decision-maker should apply in

[441] Goodwin-Gill and McAdam, *The Refugee in International Law* (4th edn) 615.
[442] Ibid 615.

order to resolve doubt and reach a finding, which she argues are legally prescribed as an implied feature of the Refugee Convention itself, having regard to its object and purpose.

It is presently unnecessary to take a view on any of the foregoing analyses of the Refugee Convention. The relevant insights for present purposes can be summarised as follows. In analysing refugee status determination and *non-refoulement* under the Refugee Convention, scholars commonly explain standards such as 'threat' and 'well-founded fear' with reference to risk, though they diverge significantly in their characterisation of risk assessment in this context, and in the extent to which they address the conceptual nature of risk at all. Some scholars have emphasised the importance of objective evidence in refugee status determination, largely avoiding consideration of the subjective dimension of probabilistic risk, while others address the inescapable subjectivity head-on and link it to arguments about the appropriate procedures or analytical structures for deciding on risk. In the latter approach, debates about risk find a pragmatic detour around the inherent vagueness of risk and its underlying concept of probability. The detour is to focus on *process* rather than *substance*. Rather than attempting to define what risk *is*, the debate centres on what risk and related words or expressions imply about appropriate *decision-making processes*—including *who* decides on the existence of risk, and *how*.

4.3.2. The standard of review in non-refoulement cases under the ICCPR

In applying the obligation of *non-refoulement* under the ICCPR, the Committee has frequently reiterated the general principle that 'there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists',[443] or 'substantial grounds for believing' in the existence of a real risk,[444] and that 'all relevant facts and circumstances must be considered, including the general human rights situation in the author's country of origin'.[445] However, the Committee has also

[443] E.g., X v Denmark, [9.2]; KH v Denmark, [8.3]; X v Sweden, [5.18]; Elezaj v Denmark, [8.3].
[444] UNHRC, 'General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 [12].
[445] E.g., KH v Denmark, [8.3]; X v Denmark [9.2]; X v Sweden [5.18].

frequently stated that 'it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice'.[446] Specifically in relation to findings of risk in *non-refoulement* cases, the Committee has also frequently stated the principle that

> considerable weight should be given to the assessment conducted by the State party, and that it is generally for the organs of the States parties to the Covenant to review and evaluate facts and evidence in order to determine whether such risk exists, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice.[447]

In line with this principle, the Committee has often deferred to the organs of the State party on whether an individual faced a real risk.[448] However, in a significant number of cases it has found a violation of *non-refoulement* obligations despite national courts or tribunals finding that the obligation was not enlivened. The Committee's rationale in such cases discloses varying approaches to reviewing the findings of the organs of States parties.

In some cases, the Committee has found a violation based on the national authorities' failure to consider relevant risks (ostensibly a procedural flaw), while also stating own finding on the substantive issue of risk. For example, in *Khakdar v Russian Federation* the Committee considered the author's claims that, as a former combatant of the pro-Soviet regime who fought against the mujahideen, he would have been at serious risk of a vigilante attack by the Taliban fighters if returned to Afghanistan,

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[446] PK v Canada [7.3]. See also substantively similar formulations of this principle in, e.g., UNHRC, *IMY v Denmark* (14 July 2016) Communication No. 2559/2015, UN Doc CCPR/C/117/D/2559/2015 [7.6].

[447] Rezaifar v Denmark, [9.3]. See also substantively similar formulations of this principle in, e.g., K v Denmark, [7.4]; Z v Australia, [9.3]; UNHRC, *Lin v Australia* (21 March 2013) Communication No. 1957/2010, UN Doc CCPR/C/107/D/1957/2010 [9.3]; Pillai v Canada [11.2]; Jamshidian v Belarus, [9.2]; Ostavari v Republic of Korea, [11.3]; X v Denmark, [9.3].

[448] Schabas observes that 'The Committee has often shown great deference to the national mechanisms for asylum determination': Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (3rd revised edn), 203 and fn 243. See also Yuval Shany, 'All Roads Lead to Strasbourg?: Application of the Margin of Appreciation Doctrine by the European Court of Human Rights and the UN Human Rights Committee' (2018) 9 Journal of International Dispute Settlement 180, 190–191 (discussed further at 4.3.4 below).

and that the risk to his life was increased by the fact that he had spent more than 20 years in the Russian Federation.[449] In relation to risk, the Committee observed that 'the author's allegations suggest that he is at real and personal risk of being subjected to treatment contrary to article 7 of the Covenant'.[450] In relation to the State party's domestic processes, the Committee observed:

> when the author's claims were considered by the State party's authorities, much weight was given to the fact that the domestic legislation regulating refugee status did not apply to him and that it appears that in the proceedings related to his application for temporary asylum inadequate consideration was given to the specific rights of the author under the Covenant. The Committee observes that the State party in its submissions merely states that he had left his home country for economic reasons and does not assess the current risk of torture for the author should he be returned to Afghanistan.[451]

While the Committee made findings about the defective process for assessing risk, it appears also to have reached its own finding that there was a real and personal risk to the author based on its assessment of the evidence. The Committee concluded that:

> In the absence of a submission from the State party demonstrating that a thorough assessment would be conducted of his claims that he might be subjected to torture if forcibly returned to Afghanistan, the Committee considers that a deportation order issued and enforced against the author would constitute a violation of article 7 of the Covenant.[452]

A similar approach is evident in the majority's views on *Choudhary v Canada*.[453] In that case the majority on the Committee found that 'because of his apparent failure to establish his identity at the initial stage of the procedure, the author was not given any

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[449] UNHRC, *Khakdar v Russian Federation* (17 October 2014) Communication No. 2126/2011, UN Doc CCPR/C/112/D/2126/2011 [11.4].
[450] Ibid [11.4].
[451] Ibid [11.4].
[452] Ibid [11.4]. Cf. Individual opinion of Committee member Yuji Iwasawa (dissenting) who found the communication inadmissible because no deportation order had been issued.
[453] UNHRC, *Choudhary v Canada* (28 October 2013) Communication No. 1898/2009, UN Doc CCPR/C/109/D/1898/2009 [9.6]–[9.8].

further opportunity, in the framework of the Immigration and Refugee Board, to have his refugee claim assessed, even though his identity was later confirmed', and that while his claims were assessed in a separate 'pre-removal risk assessment' process, 'such limited assessment cannot replace the thorough assessment which should have been performed by the Immigration and Refugee Board.' The Committee also considered various factual allegations indicating risk in finding that the expulsion of the author and his family would violate articles 6(1), and 7, read in conjunction with article 2(3).[454] In contrast, the minority on the Committee declined to find a violation, stating as follows:

> According to the Committee's established jurisprudence, it should accord deference to fact-based assessments by national immigration authorities as to whether removed individuals would face a real risk of a serious human rights violation upon removal, since "it is generally for the instances of the States parties to the Covenant to evaluate facts in such cases". Such an approach is based on acceptance by the Committee of the comparative advantage that domestic authorities have in making factual findings due to their direct access to oral testimonies and other materials presented in legal proceedings at the national level. It is also based on the view that the Committee should not re-evaluate de novo facts and evidence already reviewed by domestic legal institutions.[455]

In some cases the Committee has considered new evidence that was not available to the national authorities and has reached a finding that the author was at risk, which indicates that the Committee is ultimately concerned with whether the individual is at risk and is prepared to reach its own findings on that substantive issue (and not just focused on whether the finding under domestic processes was clearly arbitrary or amounted to a denial of justice).[456] This approach has sometimes been accompanied

[454] 'The Committee has taken note of the allegations that a fatwa had been issued against the author and a First Information Report had been filed against him under the blasphemy law, and that blasphemy charges incur the death penalty under the criminal law of Pakistan. While death sentences have reportedly not been carried out, several instances of extrajudicial assassination, by private actors, of members of religious minorities accused under the blasphemy law have been reported, without the Pakistani authorities being willing, or able, to protect them': ibid [9.8].

[455] Ibid, Individual opinion of Committee members Mr. Yuval Shany, Ms. Anja Seibert-Fohr, Mr. Konstantine Vardzelashvili, Mr. Cornelis Flinterman, Mr. Gerald L. Neuman and Mr. Walter Kälin (dissenting) [2].

[456] See, e.g.,UNHRC, *HEAK v Denmark* (23 July 2015) Communication No. 2343/2014, UN Doc

by strong separate dissenting opinions. For example, in in *Rasappu v Denmark*, three Committee members stated in their joint dissenting opinion:

> In past cases in which the decision of State organs to deport an individual was found by the Committee to run contrary to the Covenant, the Committee attempted to base its position on inadequacies in the domestic decision-making process of the domestic organs of the State party that had led to the decision to deport; or indications that the final decision was manifestly unreasonable or arbitrary in nature because available evidence was not properly taken into account or inadequate consideration was given in domestic proceedings to the specific rights of the author under the Covenant… Procedural inadequacies consisted, at times, of serious procedural flaws in the conduct of the domestic review proceeding… or of the inability of the State party to provide a reasonable justification for its decision...[457]

The dissenting Members went on to express the view that the new materials in the public domain which had influenced the majority (published after the conclusion of asylum proceedings under the domestic laws of the State party) '[did] not suggest a worsening of the human rights situation in Sri Lanka, nor… establish a new personal risk to the authors which was not included in the information that was before the State party's authorities', and furthermore that had there been new relevant information, 'the proper course of action for the Committee would have been to suspend its proceedings and request the parties' comments on the said reports before drawing any factual conclusions therefrom.'[458]

In some cases, the Committee has found the author to be owed protection based on a different analysis or different evaluation of evidence that had been considered by the State party. For example, in *X. v. Denmark* the Committee considered that:

CCPR/C/114/D/2343/2014; UNHRC, *Rasappu v Denmark* (4 November 2015) Communication No. 2258/2013, UN Doc CCPR/C/115/D/2258/2013 [7.7], cf. Joint opinion of Committee members Yuval Shany, Anja Seibert-Fohr and Konstantine Vardzelashvili (dissenting); Ostavari v Republic of Korea [11.5].

457 Rasappu v Denmark, Joint opinion of Committee members Yuval Shany, Anja Seibert-Fohr and Konstantine Vardzelashvili (dissenting) (citations omitted).

458 Ibid.

> the State party did not adequately address the concern that the author's personal circumstances, including his inability to prove that he left Eritrea legally, might lead to him being designated as a failed asylum seeker and as an individual who has not completed the compulsory military service requirement in Eritrea or as a conscientious objector.[459]

On this basis the Committee found that the author's deportation to Eritrea would violate article 7. In another case also identified as *X. v. Denmark*, decided the following year, the majority considered that

> the author's membership if the Kurdistan Freedom Party, together with his previous participation in activities of the Democratic Party of Iranian Kurdistan and Komala, do indeed present a risk that he will be considered or suspected by the Iranian authorities of being a member or supporter of Kurdish political groups and that, as such, he would be at risk of treatment contrary to article 7 of the Covenant if returned to the Islamic Republic of Iran.[460]

Significantly, in reaching its finding, the Committee considered that the personal risk faced by the author should be assessed 'in the light of a combination of his political profile and other personal circumstances, such as his birth in the Al-Tash refugee camp, his later residence in the Barika refugee Camp and the fact that he has no identity documents and does not speak Farsi'.[461] The Committee expressed the view that none of these factors would be independently sufficient to substantiate a risk of torture or ill-treatment, but that 'the State party should have considered them in their combination, together with the documented prevalence of torture in the Islamic Republic of Iran'.[462] Thus, the Committee's different finding on risk appears to have turned on its different analytical approach to the evidence of risk, rather than on a finding of clear arbitrariness or denial of justice in domestic processes. A similar approach can be found in several other cases in which the author was found to be at

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[459] X v Denmark [9.3].
[460] UNHRC, *X v Denmark* (22 July 2015) Communication No. 2389/2014, UN Doc CCPR/C/114/D/2389/2014 [7.6].
[461] Ibid [7.7].
[462] Ibid [7.7]. Cf. Individual opinion of Committee members Yuval Shany, Yuji Iwasawa and Konstantine Vardzelashvili (dissenting).

risk (often by a majority of Committee Members, with several Members dissenting), including the cases discussed in part 2.6 above concerning *non-refoulement* in the context of risks of domestic and gender-based violence.[463] This sampling of cases shows that the Committee (or at least a majority on the Committee) are on occasion prepared to engage in a fine-grained review of States parties' findings on risk, including by reviewing the way in which the State party assessed particular evidence and factual claims, and how it weighed the relative value of different facts in the overall judgment of risk.

4.3.3. Other cases concerning future risks

Turning to cases concerning risk in contexts other than *non-refoulement*, we can identify a variety of approaches to reviewing the question of risk. Overall, the Committee has demonstrated some reluctance to disagree with States' parties' risk assessments, particularly in notable cases involving technical evidence and claims of long-term risk.

An early example of this reluctance can be seen in the Committee's jurisprudence on the admissibility of communications concerning the deployment and testing of nuclear weapons during the 1990s. Recall, for example, the case of *Bordes and Temeharo v France*, in which the authors claimed the decision of the State party to conduct a series of underground nuclear tests on the atolls of Mururoa and Fangataufa in the South Pacific, and later the actual conduct of those tests, constituted a threat to their right to life and their right not to be subjected to arbitrary interference with their privacy and their family life.[464] As noted in part 2.8 above, the Committee's summary of the author's and the State party's factual and legal claims was brief. It did not engage in an in-depth analysis of the scientific evidence to reach its own finding on

[463] See part 2.6 for discussion of *non-refoulement* in the context of risks of domestic and gender-based violence and human trafficking. For further examples of *non-refoulement* cases more generally, see, e.g.: UNHRC, *RM and FM v Denmark* (24 July 2019) Communication No. 2685/2015, UN Doc CCPR/C/126/D/2685/2015 [9.7]–[9.8], cf. Individual opinion of Shuichi Furuya (dissenting) and Joint opinion of Photini Pazartzis, Yuval Shany and Andreas Zimmermann (dissenting); UNHRC, *EUR v Denmark* (1 July 2016) Communication no. 2469/2014, UN Doc CCPR/C/117/D/2469/2014 [9.8]–[9.12], cf. Joint opinion of Committee members Yuval Shany, Yuji Iwasawa, Sir Nigel Rodley and Konstantin Vardzelashvili (dissenting); UNHRC, *MKH v Denmark* (12 July 2016) Communication No. 2462/2014, UN Doc CCPR/C/117/D/2462/2014 [8.8].

[464] Bordes and Temeharo v France [2.2], [2.3] (as summarised in the Committee's views).

risk. Read in the present day, in the light of subsequent reporting on the impacts of nuclear testing in the Pacific, the Committee's approach seems strikingly deferential.[465] The increase in emphasis on risk exposure as a violation *per se* and the Committee's more recent remarks on the threat or use of nuclear weapons (discussed at part 2.8) suggest the Committee may approach the issue differently today.

The Committee also considered long-term risks associated with environmental degradation in the more recent case of *Billy et. al. v Australia* (2022). As discussed in part 2.9 above, risk was central to the way in which the authors framed certain claims in that case (particularly in relation to the right to life under article 6), and the division between Committee Members with respect those claims can be explained in part by their differing approaches to the issue of risk. In considering the merits of the claim under article 6, the Committee reiterated that 'environmental degradation can compromise effective enjoyment of the right to life and that severe environmental degradation can adversely affect an individual's well-being and lead to a violation of the right to life'.[466] The Committee also recalled that 'in certain places, the lack of alternatives to subsistence livelihoods may place individuals at a heightened risk of vulnerability to the adverse effects of climate change'.[467] The Committee however considered that 'while the authors attest to feelings of insecurity' they had 'not indicated that they have faced or currently face adverse impacts on their own health or a real and reasonably foreseeable risk of being exposed to a situation of physical endangerment or extreme precarity that could threaten their right to life, including their right to a life with dignity.'[468] Having regard to the authors' claim that their islands would become uninhabitable in 10-15 years in the absence of urgent action, the Committee took into account the State party's submissions regarding infrastructure works for sea level rise adaptation that were either underway or planned. The Committee considered that 'the time frame of 10 to 15 years, as

[465] See, e.g., BBC, 'French nuclear tests contaminated 110,000 in Pacific, says study' (*BBC.com,* 10 March 2021) <https://www.bbc.com/news/world-europe-56340159> accessed 5 June 2024; Jon Henley, 'France has underestimated impact of nuclear tests in French Polynesia, research finds: Groundbreaking new analysis could allow more than 100,000 people to claim compensation' (*TheGuardian.com,* 9 March 2021) <https://www.theguardian.com/world/2021/mar/09/france-has-underestimated-impact-of-nuclear-tests-in-french-polynesia-research-finds> accessed 5 June 2024.
[466] Billy *et al.* v Australia [8.5].
[467] Ibid [8.6].
[468] Ibid.

suggested by the authors, could allow for intervening acts by the State party involving taking affirmative measures to protect and, where necessary, relocate the alleged victims.'[469] As previously noted, the majority on the Committee considered that it was 'not in a position to conclude that the adaptation measures taken by the State party would be insufficient so as to represent a direct threat to the authors' right to life with dignity'.[470]

Looking closely at the majority's reasoning on article 6 in Billy, one can arguably discern a deferential posture toward the State party on its assessment of risk. This is in part a product of the allocation of the burden to the author to substantiate their claims, which in the case of *Billy* involved substantiating that the authors faced the risk of relevant forms of harm. We can see this burden allocation reflected in the negative framing of the Committee's ultimate finding (by majority) that it was 'not in a position to conclude' that the adaptation measures 'would be insufficient'. This suggests the Committee started with a presumption that adaptation measures would be sufficient, and then considered whether the authors had displaced that presumption by proving the insufficiency of existing or planned adaptation measures to prove that they faced a relevant risk. On one view, this is consistent with established practice and uncontroversial. Compare, for example, the Committee's analysis of admissibility in *Bordes and Temeharo v France* in 1996. In that case, the authors complained that the State party had failed to show that underground nuclear testing would not endanger their health and the environment, whereas the Committee's finding effectively rejected this attempt to shift the burden; the communication was found inadmissible because (among other reasons) the authors had failed to show a 'real threat of violation'.[471] Both *Bordes and Temeharo* and *Billy* affirm that the evidentiary burden rests with the author. And yet, from another perspective there is something interesting about the reasoning in Billy which perhaps differentiates it from the 1990s jurisprudence on nuclear weapons. By the time of the adoption of Views in Billy (2022), it was well known and well supported by an abundance of scientific evidence that the current trajectory of climate change, absent a major and rapid correction,

[469] Ibid [8.7].
[470] Ibid (emphasis added).
[471] Bordes and Temeharo v France [5.4], [5.5].

poses catastrophic and even existential risks. Indeed, the risk is acknowledged in the Committee's remarks in General Comment 36 and in its finding on admissibility in *Billy*, in which it acknowledges not only the general risks of climate change but also specific and heightened risks to the authors, whom the Committee describes as 'highly exposed to adverse climate change impacts' as 'members of peoples who are the long-standing inhabitants of traditional lands consisting of small, low-lying islands which presumably offer scant opportunities for safe internal relocation'.[472] Thus, at least at the admissibility stage, there is a finding of risk. The analytical move of the majority from this presumption of risk towards a finding of the absence of risk relies in part on the assumptions it makes regarding future adaptation and mitigation.

In this respect, the reasoning of the majority in *Billy* echoes that of the majority in *Teitiota* (2020). Although *Teitiota* was a *non-refoulement* case, it was factually similar to *Billy* insofar as the alleged risks to the author upon return stemmed from climate change and sea level rise.[473] As noted in part 2.4.2 above, in *Teitiota* the majority on the Committee accepted the author's claim that sea level rise was likely to render the Republic of Kiribati uninhabitable, but also found that

> the timeframe of 10 to 15 years, as suggested by the author, could allow for intervening acts by the Republic of Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population.[474]

Similarly, in *Billy* the majority found that

> the time frame of 10 to 15 years, as suggested by the authors, could allow for intervening acts by the State party involving taking affirmative measures to protect and, where necessary, relocate the alleged victims.[475]

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[472] Billy *et al.* v Australia [7.10].
[473] The facts are described in part 2.4.2 above.
[474] Teitiota v New Zealand [9.12].
[475] Billy *et al.* v Australia [8.7].

These statements seem to imply that, based on the current climate trajectory and current state of adaptation measures, the authors would face serious harm in the future if nothing changed. However, in both cases the Committee was prepared to factor in an assumption that some further intervention within the next 10-15 years would prevent the worst outcome. In essence, the Committee bridged the gap in knowledge about the future by applying particular hypotheses, and these hypotheses gave the benefit of the doubt to the respondent State (in the case of *Billy*)[476] or to the receiving State and the international community as a whole (in the case of *Teitiota*). It is not necessarily suggested that this approach was unreasonable in either case. The point is merely to highlight that these were hypotheses or assumptions, rather than factual findings, and ones that arguably reflected a deferential posture towards States parties on the question of risk. Once again, this points to the inescapable subjective element in risk findings.

In contrast, the reasoning in some of the dissenting opinions in *Billy* does not employ the same assumptions or hypotheses. For example, one of the dissenting Members noted the State party's various adaptation measures, describing them as 'commendable and appreciated', but nevertheless considered that the State party had 'failed to prevent a foreseeable loss of life from the impact of climate change… and to protect the authors' right to life with dignity'.[477] In this connection, the Member expressed the view that the State party had 'not taken any measures to reduce greenhouse gas emissions and cease the promotion of fossil fuel extraction and use, which continue to affect the authors and other islanders and endanger their livelihood, resulting in the violation of their rights under article 6 of the Covenant'.[478] As previously noted, in another joint separate opinion three Members disagreed with the majority's application of the 'real and foreseeable risk' standard, which they said 'borrowed from the dissimilar context of refugee cases'.[479] The Members expressed the view that '[u]sing a more accurate standard, from a factually similar case relating

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476 As noted in the Committee's Views, the State party had argued that there was 'still the opportunity for mitigating factors at the national and global levels to intervene in order to allay the threat posed by its future impacts' (as summarised by the Committee): ibid [6.7].

477 Ibid, Individual opinion of Committee member Duncan Laki Muhumuza (dissenting) [5], [6].

478 Ibid [7].

479 Ibid, Joint opinion of Committee m embers Arif Bulkan, Marcia V.J. Kran and Vasilka Sancin (partially dissenting) [2] (discussed also in part 2.9 above).

to environmental damage by pesticides, the question becomes whether there is 'a reasonably foreseeable threat' to the authors' right to life'.[480] In applying that standard, the Members appear to have focused more on past and continuing events (which they considered disclosed an existing violation of article 6) and less on future adaptation, noting 'promises of future projects are insufficient remedies, as they have not yet occurred, whereas damage to the foundation of the authors' homes has already occurred'.[481]

4.3.4. How should the Committee approach its review of findings about risk?

The forgoing discussion demonstrates that there is some uncertainty as to the analytical approach the Committee takes in reviewing States parties' findings regarding future risk, or whether it ought to do so at all. The issue is somewhat controversial in the context of *non-refoulement* cases but is also relevant to the reasoning in other cases, including those concerning climate change-related risks. It is submitted that the problem has to do with a mistaken characterisation of risk as purely factual, and broad-brush reasoning that does not acknowledge the distinction between (a) factual findings concerning past and/or continuing events that support risk findings, and (b) the risk findings themselves. As argued elsewhere in this dissertation, risk findings are probabilistic, and probabilistic thinking is not a purely objective exercise (though it may take into objectively ascertained findings of fact). It includes subjective or normative considerations.

The conflation of risk and the facts that underpin it is sometimes apparent in scholarship addressing the issue of deference in the Committee's analysis. For example, in commentary on *non-refoulement* under article 7, Schabas has observed there is 'a fine line between deference to the national decision and imposing a "fourth instance" review on questions of fact' (implicitly characterising the 'real risk' inquiry as a factual one).[482] Professor Yuval Shany (writing in an academic capacity) makes a

[480] Ibid.
[481] Ibid [6].
[482] Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (3rd revised edn) 204.

similar point in a 2018 article exploring the possibility that the HRC may be applying something similar to the European Court of Human Rights' 'margin of appreciation' approach to the standard of review.[483] Professor Shany observes in relation to the 'application of law to facts' that:

> it appears as if the default position of the HRC, when assessing whether a given set of facts or domestic laws meets a legal standard found in the Covenant… is deferential to the domestic decision-makers who have previously reviewed such facts or domestic laws.[484]

Professor Shany then refers to extradition or deportation cases as an example, noting the legal standard employed by the Committee to evaluate the lawfulness of the removal 'involves appreciation of the applied factual risk assessment—whether or not "there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant …'.[485] Professor Shany assesses that although the Committee has not always been consistent, there is still 'considerable support for the proposition that the HRC normally applies a deferential approach towards national authorities, when the latter engage in application of legal standards found in the Covenant to the facts before them (or to domestic laws)'.[486] Professor Shany suggests that there may be similar underlying rationales for deference to State decision-making in the application of the ICCPR as for the 'margin of appreciation' doctrine applied by the European Court of Human Rights. He mentions two rationales in this regard: first, that the competent national authorities would generally be better positioned to make findings of fact than the Committee, which lacks an independent fact-finding capacity;[487] and second, that the

[483] Shany, 'All Roads Lead to Strasbourg?: Application of the Margin of Appreciation Doctrine by the European Court of Human Rights and the UN Human Rights Committee'.
[484] Ibid 190.
[485] Ibid 191.
[486] Ibid 192.
[487] Although, note that in January 2019 (subsequent to the publication of the article under consideration) the Committee distributed new rules of procedure, which may signal an increasing willingness and capacity to engage in substantive review of States parties' findings of fact. Of particular relevance is that the rules now provide for oral hearings for individual communications in 'exceptional cases'. This is a significant change to previous procedures, which only provided for written submissions in individual communications. The impact of this development remains to be seen. See UNHRC, 'Rules of Procedure of the Human Rights Committee' (9 January 2019) UN Doc

Committee should not operate as a court of 'fourth-instance' to review issues already decided by competent decision makers at the domestic level.[488]

While the 'better position' rationale and the 'not a court of fourth instance' are generally compelling as reasons for showing deference to States parties on findings of fact, these rationales do not necessarily account for the different nature of probabilistic risk assessments. As previously argued, risk findings may be underpinned by factual findings about past or continuing events (which national authorities may generally be better placed to assess) but also entail other considerations. It is respectfully submitted that to acknowledge the distinction between factual and risk findings reached through domestic processes would enable a more fine-grained approach to the standard of review taken by the Committee and facilitate clearer explanation of reasons in cases in which the Committee disagrees with the State party's risk findings.

For example, instead of applying the broad principle that 'there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists,'[489] the Committee could distinguish between different aspects of the reasoning on risk, such as: (a) evaluating the evidence which substantiates relevant factual claims, such as an author's past experience of persecution; (b) evaluating evidence concerning the ongoing situation in the country of return; and (c) evaluating the rigour or coherence of the reasoning and conclusions with respect to risk, taking into account (a), (b), and other relevant matters. Having regard to the 'better position' rationale and the 'not a court of fourth instance' rationale, the Committee may consider it appropriate to exercise a significant degree of deference to the State party's findings on (a), and perhaps also on (b), while taking a less deferential approach to (c).

Furthermore, and perhaps most importantly, in considering the rigour or coherence of the State party's reasoning and conclusions with respect to risk, the Committee could

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CCPR/C/3/Rev.11, r 101, cf. 'Rules of procedure of the Human Rights Committee' (11 January 2012) UN Doc CCPR/C/3/Rev.10.

488 Shany, 'All Roads Lead to Strasbourg?: Application of the Margin of Appreciation Doctrine by the European Court of Human Rights and the UN Human Rights Committee'.

489 See part 2.4.3.

acknowledge instances in which the differences between the State party's view and its own view on risk are based on differences in how each deals with *the gaps* in relevant evidence. Drawing on the insights from scholarship on international refugee law, and especially the work of Evans Cameron (addressed in 4.3.1 above), it may be that different conclusions about risk result not so much from different evaluations of evidence, but rather, from differential approaches to bridging the *gaps in evidence*, in other words differences in the assumptions employed to move past uncertainty and reach a decision on whether risk is substantiated. Acknowledging this would highlight the potential role for legal principles or other normative considerations in shaping risk findings.

A subsequent step would be to investigate whether some legal norms are emerging or have already emerged which govern the assumptions that should be applied to overcome or resolve uncertainty, ultimately shaping the outcomes of risk assessment (a matter which lies beyond the scope of the present project). At the very least, an initial step towards clarifying the Committee's reasoning on risk would be to make clear the distinction between purely factual findings concerning past or continuing events, and findings concerning future risk. While this may not resolve all controversies, it would support a more fine-grained approach to reviewing States parties' findings on risk. This would go some way towards resolving concerns about the appropriate standard of review and enhancing the transparency and consistency of the Committee's reasoning on risk-based obligations.

4.4. Conclusion

This chapter has explored two broad issues arising from the Committee's jurisprudence on articles 6 and 7, which can be understood as stemming partly from the lack of detailed explanation of what 'risk' is, and how it is to be determined for the purpose of establishing the existence of a risk-based obligation. The first issue considered was the challenge of limiting the scope of risk-based obligations in way that is clear and principled. It was argued that the approach of applying qualifying terms such as 'real', 'reasonably foreseeable', and 'personal' does little to clarify the scope of obligations in difficult cases (where risk is contested). Furthermore, it was argued that the Committee's application of a requirement of 'imminence' can be understood as an attempt to limit risk-based protection obligations based on degree of certainty in the hypothesis about the future circumstances that will befall the individual. It was argued that transparency could be enhanced by using the term 'confidence' rather than imminence, which would better reflect the underlying rationale for the requirement and also acknowledge the subjective dimension of risk findings.

The second issue considered was the challenge of defining the standard of review which the Committee should apply when monitoring implementation of the ICCPR, such as when considering a communication under the First optional Protocol in which it is claimed that a State party exposed a person to risk (or failed to take steps to address the risk). It was shown that this issue of the appropriate degree of deference to State parties' findings is bound up with how one understands the concept of risk. It was explained that assumptions about the fundamental nature of risk findings can shape conclusions about who is best placed to determine risk, and the amenability of their findings to review. This relationship between the conceptualisation of risk and the appropriate standard of review was first explained through an analysis of literature in international refugee law touching on this issue. It was shown that scholars in that field diverge significantly in their characterisation of risk assessment, with some emphasising the importance of objective evidence in refugee status determination (largely avoiding consideration of the subjective dimension of probabilistic risk), and others addressing the subjective nature of risk and linking that to arguments about the appropriate procedures for determining risk. This provided a backdrop to analysis of the Committee's approach to reviewing findings on risk, looking first at cases concerning *non-refoulement*, and then other cases concerning future risk.

It was shown that in *non-refoulement* cases, the Committee has taken varying approaches to reviewing the risk findings of States parties, and on occasion has been internally divided on the proper approach. In other kinds of cases, the Committee has demonstrated some reluctance to disagree with States' parties' risk assessments, particularly in notable cases involving technical evidence and claims of long-term risk, although again the Committee is sometimes divided. Through a close analysis of the Committee’s reasoning in *Billy v Australia*, it was argued that what really divided Committee Members on the merits of the claims under article 6 was what hypotheses they were prepared to accept in order to resolve gaps in evidence with respect to future events.

This chapter then addressed the question of how the Committee should approach its review of States parties’ findings with respect to risk. It was observed that there is some uncertainty as to the analytical approach the Committee takes in reviewing States partes’ findings regarding future risk, or whether it ought to do so at all, and that this uncertainty is rooted in the mistaken characterisation of risk as purely factual matter, and in broad-brush reasoning that fails to acknowledge the distinction between (a) factual findings concerning past and/or continuing events that support risk findings, and (b) the risk findings themselves. Drawing on the scholarship in international refugee law—particularly the work of Evans Cameron on the distinction between risk findings and purely factual findings—it was argued that to acknowledge explicitly the distinction between factual and risk findings would enable a more fine-grained approach to the standard of review and would facilitate clearer explanation of reasons in cases in which the Committee disagrees with the State party’s risk findings. In some cases, this may turn not so much on a disagreement as to fact, as on a difference in the significance placed on gaps in knowledge, or different approaches to resolving doubt to reach a finding with respect to risk.

5 CAUSATION AND RISK-BASED OBLIGATIONS UNDER THE COVENANT

5.1. Introduction

This chapter addresses the concept of causation and the ways in which it interacts with the concept of risk in the Committee's jurisprudence concerning certain risk-based obligations under the ICCPR. Part 5.2 introduces the broader topic by explaining the general relevance of causal inquiry in law, before the relevance of causation in human rights law is discussed in part 5.3. The chapter then turns to consider the relevance of causation in reasoning on risk-based human rights obligations. Part 5.4 examines various ways in which risk and causation relate to one another in the reasoning towards finding a State party responsible for a human rights violation in certain circumstances. This includes the use of risk findings to support inferences that some physical harm in fact occurred (even though it cannot be directly observed), as well as the use of risk as a substitute for proving the *cause* of harm that clearly occurred.

Part 5.5 introduces some difficult problems which arise in analysing causation of harm in cases where the 'harm' in question is *risk exposure* per se. The issue of how the law should define 'cause' in situations of causal overdetermination is introduced. As will be explained, the problem of causal overdetermination is by no means confined to the context of risk-based obligations, but the nature of those obligations can add an extra layer of complexity to an already theoretically challenging topic.

Parts 5.6, 5.7 and 5.8 propose a particular theoretical approach to defining and applying causal concepts in human rights law. Drawing on causal theory from the wider legal literature, in part 5.6 it is argued that the first step to clarifying causation is to separate causation as a question of fact from legal/normative concepts such as proximity and remoteness. In part 5.7 it is argued that the second step is to select an interpretation of causation to specify precisely what facts the causal inquiry is concerned with. In Part 5.8, these ideas are applied to two difficult scenarios which have been the subject of communications under the First Optional Protocol, and which raised difficult questions concerning the complex 'causes' of *risk exposure*:

first, *non-refoulement* cases involving risks linked to a person's deteriorating health, and second, cases concerning the human rights risks of climate change. It will be argued that to avoid the pitfalls of an ill-defined concept of causation, we should acknowledge that causation is relevant in such cases, but reduce the causal inquiry to the minimal question of whether the State's conduct is *involved* in the individual's exposure to risk, to be determined by applying a weak necessity/strong sufficiency test of causation. It will be argued that applying this minimalistic approach to causation helps to highlight the legal-normative quality of the key issues in the dispute (such as scope and content of duties) and avoids conflating them with a factual question of causation. Part 5.9 concludes.

5.2. The role of causal inquiry in law generally

Descriptors such as 'cause' and 'consequence' may seem uncomplicated at first glance. We use these terms in everyday language to describe the relations between physical phenomena, which we often judge intuitively. Yet, scrutiny of these terms reveals ambiguity. That ambiguity exists partly because the same terms are used variously in different contexts to convey different information about the world.[490] A scientist's inquiry into the cause of some phenomenon in an experiment may differ markedly from a lawyer's inquiry into the cause of a plaintiff's injury.

In law, at a very general level, the function of causation is 'to attribute responsibility for bad outcomes in order to justify the imposition of sanctions'.[491] Causation is not always necessary for the imposition of legal responsibility, nor is sufficient on its own to establish legal responsibility in those cases in which it is required.[492] Nevertheless, the legal approach to causation is based on the 'most fundamental assumption … that responsibility to repair bad outcomes should depend on causation.'[493] To that end, legal rules and principles of causation are essentially concerned with two issues: 'as a

[490] Jane Stapleton, 'Causation in the Law' in Helen Beebee, Christopher Hitchcock and Peter Menzies (eds), *The Oxford Handbook of Causation* (OUP 2009); Jane Stapleton, 'Choosing What We Mean by Causation in the Law' (2008) 73 Missouri Law Review 433, 439.
[491] Peter Cane, *Responsibility in Law and Morality* (Hart Publishing 2002) 119, 137.
[492] Antony Honoré, 'Causation in the Law', *Stanford Encyclopedia of Philosophy* (Winter edn, 2010) <https://plato.stanford.edu/archives/win2010/entries/causation-law/> accessed 29 July 2020.
[493] Cane, *Responsibility in Law and Morality* 137.

matter of fact did the agent's conduct play a part in bringing about the outcome in question? … and if so, ought the agent … be held liable for that outcome?'[494]

Theorists have recognised other functions of causal inquiry. Honoré describes the notion of cause as a 'multi-purpose tool' that functions differently depending on the context of its application.[495] One function is forward-looking and predictive: 'that of specifying what will happen and by what stages if certain conditions are present together'.[496] Another function is 'backward-looking and explanatory: that of showing which conditions best account for some later event or state of affairs'.[497] In the latter context, the focus is on 'selecting from the whole complex the particular condition or conditions that best explain a given outcome'.[498] Honoré observed a third, 'attributive' function: 'that of fixing the extent of responsibility of agents for the outcomes that follow on their agency or intervention in the world'.[499]

Courts of national legal systems have applied various tests to determine the 'cause' of harm in order to establish legal responsibility. The variation in tests applied by different courts is partly a reflection of differing values and policy objectives underpinning different areas of law. As Cane has observed, '[i]nterpretation is a purposive activity, and causal interpretations of events are informed by the purposes for which the interpretation is being made.'[500] Thus, in law, causation serves a practical purpose, and the practical objectives of the law shape the approaches that lawyers take to determining causation.

5.3. Causation in human rights law

Although not always explicitly acknowledged in legal reasoning, causal judgments are inherent to determining the existence or breach of States' obligations under

[494] Ibid 113.
[495] Honoré, 'Causation in the Law', *Stanford Encyclopedia of Philosophy* (Winter edn, 2010) <https://plato.stanford.edu/archives/win2010/entries/causation-law/> accessed 29 July 2020.
[496] Ibid.
[497] Ibid.
[498] Ibid.
[499] Ibid.
[500] Cane, *Responsibility in Law and Morality* 119.

international law, including obligations in international human rights law. Plakokefalis describes three ways in which the idea of causation is relevant to the responsibility of States in international law: first, causation may appear in the primary rules, such as when a treaty provides that a State party bears responsibility for damage caused by its conduct;[501] second, causation appears as a requirement in certain secondary rules of State responsibility, such as in the references to causation in ARSIWA articles 31, 34 and 36(1);[502] and third, causation is 'an inherent feature of the judicial decision-making process when the case before a court or a tribunal concerns a harmful outcome allegedly caused by a single or multiple actors'.[503] In relation to the latter role, Plakokefalis contends that the 'fact that causation is an intrinsic feature of judicial reasoning explains why causation need not be treated as a general principle of law under Article 38(1)(c) of the International Court of Justice (ICJ) Statute'.[504]

Just as causation is inherent or intrinsic to 'judicial' reasoning, it also inherent or intrinsic to the Committee's reasoning when it considers and issues Views on communications submitted to it under the First Optional Protocol. Though the Committee is not a court or tribunal, it is a body which 'includes *elements of judicial, quasi-judicial*, administrative, investigative, inquisitorial, supervisory, and conciliatory functions', as McGoldrick has observed.[505] When exercising certain of its

[501] The author points for example to article 139 of the United Nations Convention on the Law of the Sea which provides that '[d]amage caused by the failure of a State Party or an international organization to carry out its responsibilities under this part shall entail liability', cited in Ilias Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' (2015) 26 European Journal of International Law 471, 474.

[502] As the author observes, article 31 concerns the obligation to make reparation for the injury '*caused* by the internationally wrongful act' of a State; article 34 provides that 'Full reparation for the injury *caused* by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter', and article 36(1) provides that 'The State responsible for an internationally wrongful act is under an obligation to compensate for the damage *caused* thereby, insofar as such damage is not made good by restitution': Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries (adopted by General Assembly resolution 56/83 of 12 December 2001) UN GAOR, 56th Sess, Supp 10, Ch 4, UN Doc A/56/10 (2001) (ARSIWA) discussed in Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity', 474.

[503] Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity', 474.

[504] Ibid.

[505] McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* , 55 (emphasis added).

functions, the Committee clearly performs a role of a judicial nature.[506] That seems particularly so when the Committee exercises its function under the First Optional Protocol to 'consider' communications submitted by individuals who claim to be victims of violations of Covenant rights by a State Party, and to 'forward its views to the State Party concerned and to the individual',[507] notwithstanding that such Views do not in themselves constitute an independent source of binding legal obligation. The observation that causation is intrinsic to judicial reasoning therefore extends by analogy to the reasoning of the Human Rights Committee, particularly in its consideration of communications under the First Optional Protocol.

As far as causation is concerned, ultimately, it is the *State party's role* in causing a human rights violation that is in issue. This is the case notwithstanding that the positive obligation to 'ensure' Covenant rights takes effect both 'vertically' in the relations between the State and the individuals subject to its jurisdiction or control and 'horizontally' in the relations between private persons (as explained in part 2.2). As previously noted, the general obligation under article 2 to 'ensure' human rights entails an obligation to protect individuals from 'acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities'.[508] That human rights law is understood as taking effect in the relations between private actors means there may be an additional layer of causal reasoning involved when considering an alleged human rights violation—in addition to the causal role of the State party, at another level there is a causal contribution of individuals to the harm in question. However, the Committee's focus is ultimately on the State party's role in causing the violation, whether through an act or omission. This is reflected in General Comment No. 31 on the Nature of the General Legal Obligation on States Parties to the Covenant, and in particular the Committee's remark that:

[506] Several Committee Members have pointed to the judicial or quasi-judicial function of the Committee, although note that Members have sometimes differed in their characterisations: see ibid, 53–55.
[507] First Optional Protocol, art. 5.
[508] UNHRC, 'General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 [8]. See further at part 2.2 above.

> There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, *as a result of* States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm *caused by* such acts by private persons or entities.[509]

In the above statement, although the word 'caused' is used more directly in reference to acts by private persons or entities, the words 'as a result of' indicate that the focus ultimately falls on the State party's conduct in causing (whether by an act or omission) the situation which gave rise to a violation of a Covenant right. This focus on the State party's causal role follows logically from two points previously acknowledged: firstly, that the general function of causation in law is to *attribute responsibility* for bad outcomes, and secondly, that under the Covenant it is States parties, and not individuals, who bear international legal responsibility for giving effect to the rights recognised therein. Thus, the causal inquiry is shaped by the content of the law and by the practical purpose which causation serves in the context of the law. This is a point to which this dissertation will return.

In many cases, the causal connection between a State party's conduct and some harm to a person is obvious and does not require detailed or explicit causal analysis. An example of this is when a State carries out the death penalty. In other cases, causation may be less obvious and may therefore require some explanation in the reasoning. For example, in the decision on admissibility in *Kindler v. Canada* the State party had argued that the author of the communication could not be considered a 'victim' for the purposes of the First Optional Protocol since his allegations were 'derived from assumptions about possible future events, which may not materialize and which are dependent on the law and actions of the authorities of the United States' (as summarised by the Committee).[510] The majority on the Committee rejected this argument, finding that the author qualified as a victim *vis-à-vis* the State party. That was because, although a State party would not generally be responsible under the Covenant for human rights violations that 'may later occur in the other jurisdiction', a

[509] Ibid [8] (emphasis added).
[510] Kindler v Canada, [4.2]. See 2.4.2 and 3.3.2 above.

State party may violate the Covenant if it takes a decision of which the '*necessary and foreseeable consequence*' would be the violation of that person's rights in another jurisdiction.[511] In this reasoning, the words 'necessary' and 'consequence' indicate the potential for the removing State to contribute to causing an anticipated human rights abuse through the removal.[512] This causal reasoning, in which the removing State was attributed responsibility for causing a (hypothetical) future harm that would manifest in the State of return, overcame an objection based on the limited geographical reach of a State party's obligations under the Covenant (notwithstanding that the receiving State's conduct could presumably *also* be identified as an anticipated cause of future harm).

For reasons explained in part 5.4.2 below, the Committee's analytical approach to *non-refoulement* has shifted since that decision on admissibility in *Kindler v. Canada,* such that that the rationale for the removing State's responsibility no longer rests on its causal contribution to the anticipated future harm.[513] Nevertheless, causation remains an essential ingredient in responsibility. As a more recent example of the appearance of the concept, in General Comment 36 the Committee characterises the right to life as one that 'concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to *cause* their unnatural or premature death'.[514] As that statement indicates, at a very basic level the concept of causation is involved in defining the acts or omissions from which a person is entitled to be free. Arguably, risk-based reasoning is also indicated in the statement (in the words '*may be expected*'), however this does not replace the element of causation. Logically, there is causal reasoning involved in identifying things that cause 'unnatural or premature death', whether judged *ex ante* as part of a risk analysis or judged *ex post facto* (after physical harm has materialised).

[511] Ibid [6.2] (emphasis added).
[512] As will be explained below, the idea of 'necessity' is central to concepts of causation.
[513] As explained in 5.4.2 below, the Committee's focus subsequently shifted towards conceptualising *risk imposition* as the basis of a distinct rights violation, instead of reasoning in terms of the removing State's causal contribution to a violation in a foreign territory.
[514] UNHRC, 'General Comment No. 36 – Article 6: right to life' (3 September 2019) UN Doc CCPR/C/GC/36 [2].

5.4. The relevance of causation in reasoning with respect to risk-based human rights obligations

Having addressed in chapters 2–4 the relevance of risk in defining various obligations under the ICCPR, and having introduced the concept of causation in part 5.2 and its general relevance to human rights law in part 5.3 above, this dissertation now turns to examine how these two concepts—risk and causation—interact in the jurisprudence. Before doing so, it is worth briefly noting that the interplay between the concepts of risk and causation has been the subject of scholarship in other systems and bodies of law, and this scholarship can provide a helpful frame of reference for identifying and analysing similar ideas and issues arising in the jurisprudence on the ICCPR. Scholarship on tort law provides a helpful reference point, as it has uncovered how the concept of risk can feed into different elements within the analysis of legal responsibility in tort. Some useful ideas gleaned from the scholarship in the field of tort law are set out briefly in part 5.4.1 below, before the remainder of this chapter addresses the interaction of risk and causation in the jurisprudence on the ICCPR.

5.4.1. Interplays between risk and causation in the rationale for legal responsibility

Scholars of tort law have observed a variety of ways in which risk may be relevant to the legal responsibility of a defendant for a plaintiff's injury. More specifically, the concept of risk can be relevant to multiple elements in the analytical structure of a claim. In this regard, Dyson and Steel observe that risk-reasoning has long been relevant to the analysis of whether a defendant was *at fault* in English tort law, however over time, risk-reasoning has also become relevant to other elements of a claim: 'in the last half-century risk-reasoning has, to varying degrees, also permeated the analysis of other elements of liability, such as causation and damage.'[515]

Two points made by Dyson and Steel are particularly relevant for present purposes. The first is that 'propositions about risk bear upon conclusions of fact, particularly in

[515] Dyson and Steel, 'Chapter 2 – Risk and English Tort Law' 23.

relation to causation: risk thus plays an epistemic role'.[516] This is because, if the plaintiff can show that the defendant's wrongful conduct increased the risk of the plaintiff's injury, this may support an inference 'on the balance of probabilities' (the civil standard of proof, which is applicable in tort claims) that the conduct was a cause of the injury.[517] In this context, risk 'acts merely epistemically as evidence in favour of some factual proposition.'[518] In other words, claims about the prior existence of a risk can be relevant to establishing the cause of subsequent harm as part of a body of evidence from which to draw conclusions about what actually happened.

The second relevant insight is the observation of Dyson and Steel that 'the creation of a risk sometimes serves as a second-best, exceptional substitute for a true causal connection between wrongful conduct and injury, where a causal attribution is impossible'.[519] In this regard, the authors observe that English law generally requires satisfaction of the 'but-for' test for something to be regarded as a cause: 'but for c, would e have occurred? If not, then this requirement of causation is satisfied.'[520] Furthermore, the authors observe that risk and causation are conceptually distinct, for

> the mere fact that c increased the risk of e is not identical to c's being connected, in a but-for sense, to e. In other words, c can increase the risk of e and yet not be a but-for cause of e.[521]

Dyson and Steel observe that despite the conceptual distinction, in some exceptional circumstances, English law 'equates materially increasing the risk of an outcome with causing it.'[522] The authors refer to the 'Fairchild rule' as an example of this. Under this rule, where there are multiple defendants who each, in breach of duty, expose the claimant 'to an agent which materially increases the risk of C suffering personal

[516] Ibid 53.
[517] Ibid 43, 44.
[518] Ibid 24.
[519] Ibid 53.
[520] Ibid 42, referring to *Barnett v Chelsea & Kensington Hospital* [1969] 1 QB 428.
[521] Ibid 43.
[522] Ibid.

injury and the state of scientific knowledge does not allow us to say which [defendant's] agent caused the harm, then C can recover against both defendants.'[523]

It is worth noting that the rule in *Fairchild* has been the subject of scholarly debate, and there are various perspectives on the characterisation of this area of tort law. Wright has argued that the outcome in such cases could be understood as turning on the finding that exposure to risk of personal injury constituted an actionable form of damage in and of itself (i.e. a harm separate to the materialization of the risk) and thus did not necessarily depend upon the rejection of a factual, deterministic concept of causation in favour of a probabilistic notion.[524] On the other hand, Lord Hoffman has observed that the notion that the House of Lords created in *Fairchild* an exceptional cause of action for increasing the risk of mesothelioma was inconsistent with the fact that in the relevant category of cases, the law allows the plaintiff to sue for the whole injury caused by contracting the disease (rather than the loss attributable to the increase in *risk* of contracting the disease).[525] Consistent with the latter view, Dyson and Steel describe *Fairchild* as an example of an exceptional type of case in which English law 'equates materially increasing the risk of an outcome with causing it' (as previously noted).[526] In this way, risk, though conceptually distinct from causation, effectively stands in place of proof of causation. These two entry-points for risk—risk as epistemically relevant to proof of causation, and risk as a substitute for proof of causation—can be distinguished from the treating risk as an actionable form of harm in and of itself.[527]

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[523] Ibid 46. Examples include cases relating to asbestos exposure, as well as cigarette smoking cases, where the risk to the plaintiff was potentially created through the accumulation of exposure to harmful substances, and possibly that exposure in synergy with other factors.

[524] E.g., David A Fischer, 'Insufficient Causes' (2005) 94 Kentucky Law Journal 277; Richard W Wright, 'Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts' (1988) 73 Iowa Law Review 1001, 1073.

[525] Lord Hoffman observes that there were two possible characterisations of the change to the law of negligence created by the ruling in *Fairchild* – either the causal requirements in an action for damages for mesothelioma had been altered such that one need only prove that the risk was increased and the specific exposure may have provided the actual agent, or that the House of Lords had exceptional created a new cause of action in which a plaintiff could recover for increased risk of mesothelioma rather than for the disease itself. Parliament has clarified the law by statute giving effect to the first interpretation: Lord Hoffman, 'Causation' in Richard Goldberg (ed), *Perspectives on Causation* (Hart 2011) 8.

[526] Dyson and Steel, 'Chapter 2 – Risk and English Tort Law' 43. See part 3.3 above.

[527] As to whether the imposition of risk can constitute an actionable form of harm in tort, see, e.g., Perry, 'Risk, Harm, Interests and Rights'; Matthew D. Adler, 'Risk, Death and Harm: The

Returning to consider the role of risk in jurisprudence on the ICCPR, when we look closely at the reasoning in selected cases, we can see that somewhat like in tort law, the concept of risk can permeate the reasoning at different points in the analysis of a claim that a State party has violated a human right. Up until this point, much of this dissertation has focused on cases in which risk is conceptualised as a *form of harm,* exposure to which may constitute a human rights violation in and of itself. However, in some cases, risk seems to play a different role in the analysis of the State party's responsibility for a human rights violation. At least three categories can be observed: first, the use of risk as a substitute for causation in early *non-refoulement* cases; second, the 'epistemic function' of risk (to borrow Dyson and Steel's term) in supporting inferences about the occurrence of harm that may already have occurred but for which direct evidence is lacking;[528] and third, the use of risk as a substitute for finding 'factual' causation of harm that is known to have occurred, but the cause of which is empirically difficult to prove. In the following sections, examples of the jurisprudence discussed in chapters 2–4 are revisited in order to illuminate these different interplays between risk and causation in the Committee's analysis of the ICCPR.

5.4.2. Risk and causation in the legal rationale for implied non-refoulement

As explained in part 4.2.1, the meaning ascribed to the word 'risk' appears to have changed over time in the Committee's reasoning with respect to *non-refoulement.* In some early *non-refoulement* cases, the Committee seemed to equate 'risk' with 'necessary and foreseeable consequence', however it later decoupled these concepts and made clear that to substantiate the risk of a particular form of harm to an author in a foreign territory, it was not necessary to prove that the occurrence of that harm would be the necessary and foreseeable consequence of removal. The focus in part 4.2.1 was on what this shift might indicate about the way in which the Committee understood the concept of *risk*. However, another point can be made about the same

Normative Foundations of Risk Regulation' (2003) 87 Minnesota Law Review 1293, especially 1436–1445; Dyson and Steel, 'Chapter 2 – Risk and English Tort Law' 26 at 28, 29.

[528] Dyson and Steel, 'Chapter 2 – Risk and English Tort Law' 54.

shift: it may be argued that the change in terminology substantively altered the legal and logical rationale for State responsibility in the context of implied obligations of *non-refoulement*. Viewed from this angle, risk can be characterised as a 'stand in' for the concept of causation in cases in which the physical harm is perpetrated by another State or non-State actors abroad.

Because *non-refoulement* obligations are implied rather than expressed in the text of the Covenant, some conceptual scaffolding was required to support the extension of States' protection obligations in that way—in other words, to justify holding a State legally responsible in relation to harm perpetrated (or expected to be perpetrated) abroad, notwithstanding the primarily territorial scope of States parties' obligations under the Covenant. In the early cases on *non-refoulement* under the ICCPR, the concept of causation appears to have provided that scaffolding. In early cases, some statements in the Committee's Views suggested that obligations of *non-refoulement* rested logically upon the sending State's *causal contribution* to anticipated harm, which would be perpetrated more directly in the receiving State (or a third State to which the person may subsequently be removed, in the case of so-called 'chain-refoulement').

This notion can be inferred from the Committee's reasoning in the case of *Kindler v Canada.*[529] To recap, Kindler was a US citizen who, at the time of his communication to the Committee, was detained in Canada pending extradition to the US to face sentencing for a prior conviction of first-degree murder and kidnapping. On the merits, the key issue was whether the right to life and prohibition on arbitrary deprivation of life in article 6 required an abolitionist State to refuse an extradition request by a non-abolitionist State, where the person would face the death penalty. By a majority the Committee declined to find that a *non-refoulement* obligation under article 6 applied in that case but suggested that Canada would have violated its obligations under article 6 'if the decision to extradite without assurances would have been taken arbitrarily or summarily.'[530]

[529] Kindler v Canada.
[530] Ibid [14.6].

In relation to admissibility, as previously noted, Canada had argued that the author could not be considered a 'victim' within the meaning of the First Optional Protocol, since his allegations were 'derived from assumptions about possible future events, which may not materialize and which are dependent on the law and actions of the authorities of the United States'.[531] The majority on the Committee rejected this argument, finding that although a State party would not generally be responsible under the Covenant for human rights violations that '*may* later occur in the other jurisdiction', a State party may violate the Covenant if it 'takes a decision relating to a person within its jurisdiction, and the *necessary and foreseeable consequence* is that that person's rights under the Covenant *will* be violated in another jurisdiction.'[532] The majority considered this to follow logically from 'the fact that a State party's duty under article 2 of the Covenant would be negated by the handing over of a person to another State (whether a State party to the Covenant or not) where treatment contrary to the Covenant *is certain or is the very purpose* of the handing over'.[533] The Committee continued:

> For example, a State party would itself be in violation of the Covenant if it handed over a person to another State in circumstances in which it was foreseeable that torture would take place. The foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later on.[534]

This suggested dual requirements of causation and knowledge as the bases of the violation. Responsibility was based on a requirement that a human rights violation was a necessary consequence of the removal (causation), coupled with a requirement that that consequence was foreseeable to the transferring State (knowledge). On this basis the Committee determined by a majority that the communication was admissible and considered the author's claim on its merits. However, when the Committee came to consider the merits of in *Kindler*, its focus appears to have shifted away from causation and knowledge, and onto the distinct concept of 'real risk', particularly in

[531] Ibid [4.2].
[532] Ibid [6.2] (emphasis added).
[533] Ibid (emphasis added).
[534] Ibid (emphasis added).

its statement that ‘if a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party may be in violation of the Covenant.[535]

This statement seems to indicate two potential violations: a violation that may occur in another jurisdiction (of which a person is at a ‘real risk’), and the separate violation of the sending State, which exposes the person to the real risk by removing them to that other jurisdiction. While the latter violation would be attributable to the removing State, responsibility for the violation that takes place in the receiving State is left unclear in the majority’s reasoning. That ambiguity is reflected in the Committee’s remark that:

> what is at issue is not whether Mr. Kindler’s rights have been or are likely to be violated by the United States, which is not a party to the Optional Protocol, but whether by extraditing Mr. Kindler to the United States, Canada exposed him to a real risk of a violation of his rights under the Covenant.[536]

This approach avoids drawing conclusions about the lawfulness of the conduct of a State that is not a respondent to the Communication, consistent with the requirement in article 1 of the Optional Protocol, which provides that ‘No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol’.

While the Committee’s views on the merits of *Kindler* represented an important shift, the outcome arguably left open the question of what role causation might play in holding one State responsible for a human rights violation directly perpetrated (or expected to be directly perpetrated) in a foreign territory. Perhaps uncertainty or ambiguity on this issue remained because of the Committee’s analytical shift went unacknowledged: it had applied both the ‘necessary and foreseeable consequence’ and ‘real risk’ tests in different phases of *Kindler*, but left the relationship between the

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[535] Ibid [13.2].
[536] Ibid [13.1].

two tests unclear. Throughout the 1990s the Committee continued to refer to necessary and foreseeable consequences and real risks in extradition and deportation cases. Rather than settling on one expression or the other, the Committee used them interchangeably, sometimes referring parenthetically to 'necessary and foreseeable consequence' as a synonym of 'real risk', reflecting entanglement or conflation of these two different concepts (as discussed in part 3.3.2 above).[537] Sometimes the Committee added the qualifier of 'reasonableness' when referring to the foreseeability of an event.'[538]

However, as previously noted, eventually the Committee's focus shifted towards conceptualising *risk imposition* as the basis of a distinct rights violation, instead of reasoning in terms of the removing State's causal contribution to a violation in a foreign territory.[539] As previously explained, in its reasoning in *Judge v. Canada* in 2003*,* the Committee identified risk as legally significant in and of itself (separate from causation of the risked physical harm). The Committee stated that for countries that had abolished the death penalty, there was 'an obligation not to expose a person *to the real risk* of its application'.[540] The Committee continued:

> Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.[541]

Two aspects of this statement are relevant to the present analysis. The first is that the risk to be assessed is that of specific conduct or treatment (in this case the application of the death penalty). This can be contrasted with the more complicated framing in *Kindler,* which involved assessment of whether the removal of a person would result in 'a real risk *that his or her rights under the Covenant will be violated* in another

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537 Ng v Canada [15.1]; ARJ v Australia [6.8]; GT v Australia [8.1].

538 For example, in *Ng v Canada* the Committee considered the author's claim that the State party's decision to extradite him violated article 7 (among other articles), and in this context the Committee observed that Canada 'could reasonably foresee that Mr Ng, if sentenced to death, would be executed in a way that amounts to a violation of article 7: Ng v Canada [16.4].

539 See part 3.3.2.

540 Judge v Canada, [10.4] (emphasis added).

541 Ibid [10.4].

jurisdiction' (which would seem to require the Committee to assess the human rights obligations of a State other than the respondent State party). The second notable point is that the Committee avoided the causal terminology of 'certain' and 'necessary and foreseeable consequence' in describing the basis of the protection obligation. In the Committee's view the threshold was met where it could be reasonably anticipated that the individual would be sentenced to death and the State party had not ensured that the death sentence would not be carried out. The phrase 'reasonably anticipated' echoed the Committee's reference in *Charles Chitat Ng v. Canada* to what was 'reasonably foreseeable'. The Committee did not use the phrase 'necessary' in this context. Its only reference to necessity was in its summary of the arguments made on behalf of Canada and the author.[542]

In the years that followed the Committee's formulation of the test for *non-refoulement* generally focused on risk (as previously noted). In those cases in which the Committee mentioned necessity, it was as part of a remodelled formula that incorporated risk and causation as separate concepts. In Views on *Khan v Canada* (2006) the Committee considered that the applicable test was 'whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of his removal to Pakistan, there is a real risk that the author would be subjected to treatment prohibited by Articles 6 and 7.'[543] In connection with this statement the Committee cited its views in *G.T. v Australia* and *A.R.J. v Australia* (both issued in 1997), however in *Khan* the Committee appears to have applied a substantively different test to the one applied in those earlier cases (which focused on whether the removal would lead to the necessary consequence of a human rights violation).[544]

Causal reasoning appeared again in the Committee's Views on *Munaf v Romania* (2009). In this case the Committee explicitly invoked the metaphor of the 'causal

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[542] Ibid [4.2], [4.15], [8.3].
[543] Khan v Canada [8.3].
[544] For example, in *GT v Australia* the Committee's finding of no violation rested on its assessment that 'it cannot be concluded that it is a foreseeable and necessary consequence of T.'s deportation that he will be tried, convicted and sentenced to death', as well as its assessment that 'information before the Committee does not indicate that any treatment in violation of article 7 of the Covenant is the foreseeable and necessary consequence of T.'s deportation from Australia': GT v Australia [8.4]–[8.6].

chain' in the context of explaining the *non-refoulement* obligation, in a way that seemed to suggest that the removing State's responsibility was based on its causal contribution to subsequent harm experienced extraterritorially. In that communication it was claimed that the State party had violated its obligation of *non-refoulement* by allowing the author to leave its embassy in Baghdad and to be transferred into the custody of US military personnel. After coming into custody of US forces, he was arrested and charged with participating in a kidnapping, detained in a military facility, and tried and sentenced to death, which the author submitted involved contraventions of his rights under articles 6, 7, 9, 10 and 14 of the Covenant. The majority on the Committee found the communication to be admissible, based on the view that 'a State 'may be responsible for extra-territorial violations of the Covenant, *if it is a link in the causal chain* that would make possible violations in another jurisdiction' (citing in this connection *ARJ v Australia, Judge v Canada* and *Alzery v Sweden*).[545]

However, in considering the merits of the Communication, the Committee found no violation by the State party on the facts of that case, noting that for responsibility to arise the risk of an extra-territorial human rights violation *'must be a necessary and foreseeable consequence* and must be *judged on the knowledge the State party had at the time*: in this case at the time of the author's departure from the Embassy'.[546] The reasoning is noteworthy because it seems to suggest that in *non-refoulement* cases, a jurisdictional link (and therefore responsibility) may be grounded in the notion of cause and effect, which is reminiscent of the rationale for implied obligations of *non-refoulement* articulated in earlier *non-refoulement* cases such as *Kindler v Canada* (at the admissibility stage).[547] The reasoning in *Munaf* was contentious at the time, with four Committee Members issuing strong dissents on the finding of admissibility, including a joint dissenting opinion by three Members who concluded that the communication had been 'artificially constructed as a complaint against Romania… in order indirectly to draw attention to alleged violations of the Covenant by Iraq and

[545] Munaf v Romania [14.2] (emphasis added).
[546] Ibid (emphasis added). Cf. Dissenting opinion of Committee members, Mr Ivan Shearer, Sir Nigel Rodley and Mr Yuji Iwasawa.
[547] Also noteworthy is the majority's use of the metaphor of the causal chain which, as previously discussed, has been criticised as an idea that can muddy the rationale for legal liability by masking the conflation of factual and normative issues. This will be addressed further below.

the United States' (as neither Iraq nor USA were parties to the Optional Protocol and therefore the Committee lacked jurisdiction to determine alleged violations by those States).[548]

Notwithstanding the division, the majority's Views in *Munaf* have been invoked subsequently, including relatively recently. For example, in 2019 a group of 16 children submitted a communication to the Committee on the Rights of the Child alleging that Argentina, Brazil, France, Germany and Turkey had each violated various of their obligations under the Convention on the Rights of the Child by causing and perpetuating the climate crisis.[549] In their submission the authors referred to *Munaf v Romania* in connection with their argument that a State party's conduct constituting a rights violation may itself be sufficient to establish the requisite 'control' for establishing a jurisdictional link between the State and the individual, such that the State's human rights obligations would apply to that individual.[550] The authors submitted that this principle for the extension of obligations extraterritorially 'would not render the jurisdictional requirement superfluous, as causation must still be established (i.e., that the state's wrongful conduct caused or contributed to the violation)', citing *Munaf v Romania* in this connection.[551] In Views on the admissibility of that communication adopted in 2021, the Committee on the Rights of the Child noted 'the relevant jurisprudence of the Human Rights Committee and the European Court of Human Rights referring to extraterritorial jurisdiction', referring in this connection to *Munaf v Romania* (among other matters), though the Committee

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[548] Munaf v Romania, Dissenting opinion of Committee members Mr Ivan Shearer, Sir Nigel Rodley and Mr Yuji Iwasawa.

[549] Sacchi et. al., *Communication to the Committee on the Rights of the Child in the case of Chiara Sacchi (Argentina); Catarina Lorenzo (Brazil); Iris Duquesne (France); Raina Ivanova (Germany); Ridhima Pandey (India); David Ackley, III, Ranton Anjain, and Litokne Kabua (Marshall Islands); Deborah Adegbile (Nigeria); Carlos Manuel (Palau); Ayakha Melithafa (South Africa); Greta Thunberg and Ellen-Anne (Sweden); Raslen Jbeili (Tunisia); & Carl Smith and Alexandria Villaseñor (USA); Petitioners, v. Argentina, Brazil, France, Germany and Turkey, Respondents* (23 September 2019) Doc available at https://childrenvsclimatecrisis.org/wp-content/uploads/2019/09/2019.09.23-CRC-communication-Sacchi-et-al-v.-Argentina-et-al-2.pdf accessed January 2021.

[550] See ibid [244] and fn 229.

[551] See ibid [244] and fn 229.

also noted the factual dissimilarity of the case to the one before it.[552] The Committee ultimately found the communication to be inadmissible for other reasons.[553]

The Human Rights Committee itself cited *Munaf v. Romania* in Views issued in 2020 regarding two cases concerning extraterritorial jurisdiction or control. In *AS, DI, OI and GD v Italy* and *AS, DI, OI and GD v Malta,* the authors, a Palestinian national and three Syrian nationals, submitted communications concerning Italy and Malta on behalf of themselves and 13 of their relatives who died in a shipwreck of a vessel in the Mediterranean Sea on 11 October 2013, in which more than 200 people were estimated to have died.[554] The shipwreck occurred at a location 113km south of the island of Lampedusa, Italy, and 218km from Malta. In each communication the authors argued that the State party had violated the right to life through failing to take appropriate measures to assist their relatives in distress at sea and failing effectively to investigate the shipwreck, and that the State party had also violated their own rights under article 7 read in conjunction with article 2(3).[555] An issue in both cases was whether the State party in question had exercised jurisdiction or 'effective control' (as understood in international law) over the victims such that its obligations under the Covenant applied in respect of them, notwithstanding that the relevant events took place outside of the territorial waters of either State and on a vessel that was not flagged to either State party.[556] In Views on the admissibility of the communication relating to Malta, while addressing the question of jurisdiction, the Committee cited *Munaf v Romania* in connection with its statement that:

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[552] UNCRC, *Sacchi et al. v Argentina* (22 September 2021) Communication No. 104/2019, UN Doc CRC/C/88/D/104/2019 [10.4] and fn. 15.

[553] The Committee found the communication to be inadmissible on the basis of the authors' failure to exhaust domestic remedies as required under article 7(e) of the Optional Protocol to the UN Convention on the Rights of the Child: ibid [10.21].

[554] UNHRC, *AS, DI, OI and GD v Italy* (4 November 2020) Communication No. 3042/2017, UN Doc CCPR/C/130/D/3042/2017 [1.1]; UNHRC, *AS, DI, OI and GD v Malta* (13 March 2020) Communication No. 3043/2017, UN Doc CCPR/C/128/D/3043/2017 [1.1].

[555] AS, DI, OI and GD v Italy [1.2]; AS, DI, OI and GD v Malta [1.2].

[556] In the Communication relating to Malta, the authors submitted that the State party exercised effective control on the basis that the shipwreck occurred within an area for which it had undertaken search and rescue obligations under relevant rules of international law of the sea. In the Communication relating to Italy, the authors submitted that the State party had exercised *de facto* control over the relevant area. It was also submitted that both States had exercised control over the persons in distress through being in continuous contact with the vessel and activating rescue procedures throughout the day. AS, DI, OI and GD v Italy [2.7]; AS, DI, OI and GD v Malta [2.7].

> a State party may be responsible for extraterritorial violations of the Covenant in cases such as those involving extradition or deportation, if it is a link in the causal chain that would make possible violations in another jurisdiction, where the risk of an extraterritorial violation is a necessary and foreseeable consequence judged on the knowledge the State party had at the time.[557]

The majority on the Committee ultimately found the communication against Malta to be inadmissible on the basis of a failure to exhaust domestic remedies.[558] Five Members appended separate opinions.[559] Notably, these included a separate opinion of one Member who considered the communication inadmissible on the basis of a failure to exhaust domestic remedies *and* the lack of a jurisdictional link, and who expressed the view that the reference to *Munaf v Romania* in the majority's reasoning was 'misleading, since in that case, the author was within the Embassy of Romania, where the State obviously had full legal jurisdiction over its diplomatic premises and the acts of all persons therein—a situation hardly comparable with the high seas'.[560] The Member also disagreed with the notion of causation-based jurisdiction, expressing the view that 'an obligation to protect human rights—eventually arising in the case at hand under the International Covenant on Civil and Political Rights—cannot be triggered by a decision not to protect them; the former is logically prior to the latter'.[561] In the communication relating to Italy, the Committee was divided on the admissibility and the merits. The majority found that communication to be admissible and ultimately found that Italy had failed fulfil its due diligence obligations under

[557] AS, DI, OI and GD v Malta [6.5] and fn 9; AS, DI, OI and GD v Italy [7.5] and fn 9.
[558] AS, DI, OI and GD v Malta [6.9].
[559] Ibid, Individual opinion of Committee member Andreas Zimmermann (dissenting), Joint opinion of Committee members Arif Bulkan, Duncan Laki Muhumuza and Gentian Zyberi (dissenting); Individual opinion of Committee member Hélène Tigroudja (dissenting).
[560] Ibid, Individual opinion of Committee member Andreas Zimmermann (dissenting) [4].
[561] Ibid, Individual opinion of Committee member Andreas Zimmermann (dissenting) [5].

article 6(1).[562] Nine Members issued separate opinions, including five who would have found the matter inadmissible (for reasons not presently relevant). [563]

Most relevant for present purposes is the point that the majority on the Committee referred to the reasoning in *Munaf v Romania* as relevant jurisprudence in in its analysis on the issue of jurisdiction. However, in doing so, the majority adjusted the principle established in *Munaf* by stating that 'a State party may be responsible for extra-territorial violations of the Covenant...if it is a link in the causal chain that would make possible violations in another jurisdiction, *where the risk of an extra-territorial violation is a necessary and foreseeable consequence judged on the knowledge the State party had at the time'*.[564] The latter part of the sentence, which is an addition to the statement of principle in *Munaf,* seems to create a standard that broadly aligns with the Committee's current approach to *non-refoulement* cases (insofar as it focuses on *risk exposure* as the relevant 'necessary and foreseeable' consequence). Yet, unlike most *non-refoulement* cases, the statement suggests a limitation on a State party's responsibility by reference to its (subjective) knowledge at a past point in time.

The Committee's reference to *Munaf v Romania* in recent Views, and the consideration of that case in communications submitted to other treaty monitoring bodies, each point to the possible continuing relevance of the 'causal chain' reasoning employed in that case, particularly in relation to the issue of jurisdiction. While the issue of extraterritoriality of human rights obligations is beyond the scope of the present dissertation, it is worth noting how the combination of risk-based obligations

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562 AS, DI, OI and GD v Italy [7.8], [8.5]. Having regard to the admissibility of the communication, the majority took the view that 'in the particular circumstances of the case, a special relationship of dependency had been established between the individuals on the vessel in distress and Italy', due to (in summary) facts relating to the contact between the vessel in distress and Italian authorities, proximity of an Italian-flagged vessel to the vessel in distress, Italian authorities' involvement in the rescue operation, and Italy's relevant law of the obligations: [7.8].

563 Ibid, Individual Opinion of Yuval Shany, Christof Heyns and Photini Pazartzis (dissenting); Individual Opinion of Andreas Zimmermann (dissenting), Individual Opinion of David Moore (dissenting), Individual opinion of Gentian Zyberi (concurring), Individual opinion of José Santos-Pais (concurring), Individual opinion of Vasilka Sancin (concurring), Individual Opinion of Hélène Tigroudja (concurring).

564 AS, DI, OI and GD v Malta [6.5] and fn 9; AS, DI, OI and GD v Italy [7.5] and fn 9 (emphasis added).

and causation-based jurisdiction could massively expand States parties' obligations under the Covenant (if causation-based or 'effects based' jurisdiction became widely accepted, which at present it is not). The expansion seems to follow logically from the interpretation of the right to life as entailing an entitlement to be free from *risks* to life.[565] If a State's positive obligations extend to individuals beyond its territory based on the causal contribution of that State's conduct to the *risk* to that individual, then, depending on how one interprets and assesses the phenomenon of risk, and depending also on how one interprets causal contribution (as to which, see part 5.5 onwards), then the State's obligations may be unworkably broad.

5.4.3. Risk as a basis for drawing inferences about the occurrence of harm

In another category of cases, risk seems to play a different role in the analysis of responsibility: it is understood as part of the circumstances from which the commission of human rights violations may inferred in the absence of direct evidence of past occurrence of the harm. Recall, for example, the discussion of enforced disappearance cases in part 2.7 above. As noted in that discussion, the Committee has described enforced disappearance in General Comment 36 and elsewhere as the 'deprivation of liberty, followed by a refusal to acknowledge that deprivation of liberty or by concealment of the fate of the disappeared person', which 'in effect removes that person from the protection of the law and *places his or her life at serious and constant risk*, for which the State is accountable'.[566] As previously noted, the way in which the Committee applied the concept of risk in reasoning to find a rights violation in such situations has shifted over time.[567] Remarks in some earlier Views implied that the *risk of violation* of the right to life associated with enforced disappearance was high (in the sense of the high rates of killings of persons who were victims of enforced disappearance and the common use of enforced disappearance to conceal clandestine murder).[568] In this context, implicitly, the risk of killing (in the

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565 See part 2.3 above regarding the interpretation of article 6 in General Comment 36.
566 UNHRC, 'General Comment No. 36 – Article 6: right to life' (3 September 2019) UN Doc CCPR/C/GC/36 [58] and footnote thereto (emphasis added).
567 See part 2.7.
568 See in particular, Yamina Guezout *et al.* v Algeria, Individual (concurring) opinion of Mr. Walter Kälin; Aboufaied v Libya, Individual Opinion of Committee member Sir Nigel Rodley (concurring) (discussed at part 2.7).

frequency sense) is part of the body of evidence from which it may be inferred that killing *actually occurred*. In this way, findings of risk can stand in place of proof of causation where there is a gap in evidence, such as when the State in question conceals evidence of physical harm. However, as previous observed, later Views on enforced disappearances cases seem to reflect a move towards conceptualising the imposition of risk *per se* as constituting the breach. The latter approach is conceptually different from inferring the occurrence of a separate breach from the circumstantial evidence, including evidence of risk.

5.4.4. Risk as a substitute for proving causation of harm that clearly occurred

Risk may serve a similar function in overcoming difficulties in proving causation in cases in which it is uncontentious that physical harm occurred, but whether the harm resulted from the State party's act or omission is contested, and it is empirically difficult to resolve that question. In this situation, risk-reasoning can once again allow the Committee to side-step around the thorny issue of causation. For example, recall the case of *Portillo Cáceres and others v Paraguay,* which concerned the spraying of toxic agrochemicals resulting in the illness and death of the authors and their relatives. As noted in part 2.9 above, the State party's submissions in response to the communication argued (among other points) that the authors had failed to establish on the evidence that they had in fact been poisoned by pesticides.[569] In its Views on the merits of the communication, by focusing on the broader *risk* posed by the widespread use of the toxic chemicals (which was not in doubt), the Committee seems to avoid the issue of the more specific causal connection between the environmental contamination and the health impacts suffered by the authors and their relative in particular. In this instance, risk-reasoning does not entirely remove the element of

[569] The Committee summarised the argument as follows: 'The State party argues that it has not violated articles 6 or 7 of the Covenant because the authors have not established that they were poisoned by pesticides, since the blood and urine tests yielded values that are "within normal parameters and did not indicate the presence of residual toxins in their bodies". The State party goes on to say that lindane is the only active ingredient that was found in a concentration above the allowable threshold (0.03 mg/kg, rather than 0.01 mg/kg). The State party also emphasizes that the authors mentioned having fevers, but fever is actually not one of the usual symptoms of lindane poisoning.' Portillo Cáceres and others v Paraguay, [4.4].

causation, but shifts the focus from the specific question of *did 'x' cause 'y'* to the more general question of *did 'x' cause the risk of 'y'*. Where the existence of broader risk is uncontentious, this may avoid the need to delve deeply into technical evidence that may be required to prove the cause of illness of specific individuals.

5.4.5. Preliminary conclusions on the interplay between risk and causation

The foregoing discussion has demonstrated that in reasoning regarding a State party's responsibility for human rights violations, the concept of risk can intersect with the concept of causation in various ways. In some cases, a finding of risk can support an inference that some separate physical harm *in fact* occurred, where direct evidence of its occurrence may be lacking or hidden. In other cases, a finding of risk may overcome the need to establish a causal relation between the acts or omissions of the State party and the harm suffered by the author, since the violation can be framed in terms of the State party's role in causing the imposition of risk. In *non-refoulement* cases, the precise role of risk in the legal analysis appears to have shifted over time. Whereas in some early *non-refoulement* cases, the reasoning suggested a legal duty and responsibility based on causal contribution to (physical) harm, in later cases, the removing State's responsibility came to be explained in terms of its role in imposing a risk of such harm. However, in at least one case decided after this analytical shift (*Munaf v Romania*), the majority seemed to revert to explaining the removing State's responsibility in terms of its causal contribution to subsequent harm. A majority on the Committee has since cited that case with approval, though it appears to have reframed the principle in a way that better aligns with the dominant contemporary approach to *non-refoulement.*

It is submitted that to maintain a clear distinction between causation and risk as analytically separate factors in defining the State party's responsibility for a human rights violation is preferable, as it supports transparent and consistent legal reasoning. In some cases that centre on risk-exposure, human rights lawyers face challenges which are in some ways similar to the challenges encountered by tort lawyers in the litigation of tobacco and asbestos cases—the challenge of justifying the imposition of legal liability in the absence of proof that the defendant's acts caused the physical harm to the defendant. When loosely analogous evidentiary challenges arise in human rights law, there may be a tendency to invoke the concept of risk as a kind of substitute for the element of causation. The clearer approach is to recognize a distinct legal obligation entailed in certain rights to avoid exposing an individual to risk *per se*. In this context, causation is still relevant to responsibility, but its role is analytically separate to the question of risk. Once risk imposition *per se* is recognised as a rights violation, the causal inquiry focuses on whether a State party's conduct *caused the exposure* of the individual to risk.

The effect of this move is not to dismantle the conceptual scaffolding originally constructed to rationalise implied *non-refoulement* obligations. It remains the case that the object and purpose of articles 6 and 7 would be undermined if a State could act in a way that exposes an individual to a real risk of serious and irreparable harm of a kind referred to in those articles. That is particularly so because of the serious and irreparable nature of the harms described in those articles, including arbitrary deprivation of life, torture and CIDTP. Preventative, risk-based obligations *non-refoulement* are clearly necessary to give practical effect to these rights and implying them within articles 6 and 7 is thus consistent with the general rule interpreting a treaty 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[570]

5.5. Analysing causation in the context of risk-based obligations in difficult cases: deteriorating health and climate change as case studies

Even if risk and causation are understood as distinct elements in the analysis of a State's positive human rights obligations, there remains scope for uncertainty and confusion as to what 'causation' means for the purposes of risk-based obligations (and for the purposes of human rights law more generally). Causation, like risk, is a deeply philosophically contested concept. Uncertainty and disagreement about the underlying meaning or nature of causation can pervade legal reasoning, leading to unclear or inconsistent doctrine. Reasoning about causation may be especially

[570] VCLT, art. 31(1).

challenging in situations of multiple causation, including cases of co-called causal 'overdetermination'. Overdetermination is discussed further below, but in broad terms, it is a situation involving multiple contributing causes of a harm. Some of the most serious and widespread *risks* to the enjoyment of Covenant rights are risks of what may be described as 'causally overdetermined' harm. This raises questions about States parties' responsibility in relation to individuals' exposure to such risks, and nested within that, questions about how to analyse a particular State's causal contribution to the creation or imposition of that risk.

Later in this chapter, two examples are discussed to illustrate this issue. The first example is the application of *non-refoulement* to scenarios in which the risk facing the individual relates in part to the individual's deteriorating health condition and the lack of access to appropriate care in the receiving State. In this context, the cause of the risk (and the physical harm, if it occurs) has several identifiable causal inputs. Although in some ways, it is no more complex than any *non-refoulement* case, all of which involve multiple causation (in that they involve the acts or omissions of multiple actors), for whatever reason, the cases involving this scenario have shone a light on the ways in which different approaches to analysing 'the cause' of the harm can complicate reasoning as to the scope of the removing State's obligations. In order to analyse this issue, reference is made first to the jurisprudence of the ECtHR on relevant *non-refoulement* cases under the ECHR, as the reasoning on this issue is more developed in relation to the ECHR than the ICCPR. One matter concerning the ICCPR (considered by the Committee under the First Optional Protocol) is then addressed.

The second situation discussed is that of anthropogenic climate change. As previously noted, the Committee has characterised climate change as among the 'most pressing and serious threats to the ability of present and future generations to enjoy the right to life' and has stated that the 'ability of individuals to enjoy the right to life, and in particular life with dignity, depends on measures taken by States parties to protect the environment against harm and pollution'.[571] However, when it comes to assessing

[571] UNHRC, 'General Comment No. 36 – Article 6: right to life' (3 September 2019) UN Doc CCPR/C/GC/36 [65].

whether a particular State party has acted consistently with its obligations under article 6, (which entails an 'entitlement of individuals to be free from *acts and omissions that are intended or may be expected to cause their unnatural or premature death*'),[572] difficult questions can arise regarding the State's role in 'causing' climate change-related risks to persons within the State's jurisdiction or control. Even leaving aside debates about how 'jurisdiction' or 'control' ought to be interpreted in this context, there is still much scope for confusion about which State or States should be regarded as having caused climate change and its associated risks.[573]

The following sections draw on influential theories of causation to propose two steps that should be taken in order to clarify the element of causation in human rights law. The first step is to distinguish between the physical or factual question of causation and other issues that are sometimes conflated with causation in legal reasoning, but which are better understood as separate normative considerations. The second step is to choose what we mean by causation. As will be argued, there are a range of interpretations of causation which, when applied to a single set of facts, produce different findings regarding the 'cause' of a specified harm. As some causal theorists have shown, the choice of what we mean by 'cause' is itself shaped by normative considerations. Once a definition of causation is selected, this allows a factual inquiry into whether that test is satisfied by the facts of the case. After clarifying these issues, part 5.8 of this dissertation returns to the two scenarios introduced above (*non-refoulement* in cases of deteriorating health and climate change risks) and suggests an approach to analysing causation in each context for the purposes of the Covenant.

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[572] Ibid [3].

[573] Many scholars have pointed out this issue. E.g., Plakokefalos writes, 'Climate change is an obvious example that poses significant strain on the application of causal notions in domestic legal systems, and it might well pose the same challenges in international law': Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity', 492.

5.6. *The first step towards clarifying causation in difficult cases: distinguishing between causation as a question of fact and related legal/normative concepts such as 'proximity' and 'remoteness'*

The word 'cause' has various meanings in domestic legal systems, as do related expressions such as 'proximate cause', 'remote cause' and 'causal chain'. In some instances, such terminology is used to communicate factual information about physical phenomena (i.e. observable events). For example, in the statement, 'the cause of a person's death was a heart attack', the word 'cause' is used to convey information about the physical relationship between specified phenomena: in broad terms, the person died from insufficient blood supply to the heart. Alternatively, causal terminology may be used to communicate something other than the relations between physical phenomena. Expressions such as 'proximate cause', or in the context of human rights law, 'necessary and foreseeable consequence', may describe the findings from a different kind of inquiry—one that is not purely factual, but rather shaped by the application of both factual findings and non-factual considerations, such as legal rules, policy judgments, or other norms. For example, the statement that 'the doctor's negligence caused the death' implies both factual findings as well as the application of a body of legal norms (the law of negligence).

The distinction between 'legal' and 'factual' notions of causation is explored in legal scholarship on causation across a range of municipal legal systems. Scholars have identified the normative dimensions of expressions such as 'proximate cause' and 'causal chain', and have argued for the clear identification of legal/normative considerations and their separation from the factual question of causation. An early example is the work of the nineteenth century American legal philosopher Nicolas St John Green.[574] Jerome Frank examines the analysis of causation and responsibility in Green's article 'Proximate and Remote Cause', first published in 1870.[575] In that

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[574] For discussion of the author's contribution to the philosophical tradition of pragmatism, see Phillip Wiener, *Evolution and the Founders of Pragmatism* (University of Pennsylvania Press 1972) 154; Jerome Frank, 'A Conflict with Oblivion: Some Observations on the Founders of Legal Pragmatism' (1954) 9 Rutgers Law Review 425, 426.

[575] Nicholas St. John Green, 'Proximate and Remote Cause' (1870) 4 Am L Rev 201. The article was originally printed unsigned. It is reprinted in Nicholas St. John Green, *Essays and Notes on the Law of Tort and Crime* (George Branta Publishing Company 1933) and as an appendix to Frank, 'A

article, which is appended to Frank's article of 1954, Green attributes the origins of the legal maxim *in jure non remota causa, sed proxima, spectator* (in law the proximate, and not the remote cause is to be considered) to the 'Maxims of the Law' of the 16th–17th century British legal philosopher Sir Francis Bacon.[576] Green observed that at the time of writing (1870) the maxim was being applied by courts generally in maritime insurance claims and in actions for negligence, however the meaning ascribed to the maxim by the courts in such cases departed from the original meaning intended by Sir Francis Bacon, and the whole question of causation had become confused.[577] Green saw the confusion as largely stemming from over-reliance on the expression 'chain of causation'—a phrase Green regarded as a 'dangerous metaphor' and a 'pure fabrication of the mind' to which nothing in nature corresponded.[578]

Green argued that Bacon had used the word 'cause' in the Aristotelian sense, in which it was 'nearly synonymous with the word reason' (reason in the sense of 'explanation' for some proposition), and that 'true knowledge was knowledge of the proximate cause'.[579] According to Green, Bacon had also adopted the Aristotelian distinction between 'proximate' and 'remote' causes. The distinction between a proximate and a remote cause was to be found in the idea of *necessity*: 'Those causes which are plainly and necessarily followed by the effect are proximate. Those causes between which and the effect the connection is uncertain or not necessary are remote causes'.[580] Green contended that the distinction between proximate and remote causes in the Aristotelian sense (and in Bacon's maxim as originally intended) had 'nothing to do

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Conflict with Oblivion: Some Observations on the Founders of Legal Pragmatism', 452–463. Subsequent references are to the republication in Volume 9 of the Rutgers Law Review.

[576] See Sir Francis Bacon, 'The Maxims of the Law', *The Elements of the Common Laws of England* (Assignes of I. Moore 1636). Green observed, 'whether the maxim be original with Bacon or not, it is from him that it derives its authority': Frank, 'A Conflict with Oblivion: Some Observations on the Founders of Legal Pragmatism', 453.

[577] Frank, 'A Conflict with Oblivion: Some Observations on the Founders of Legal Pragmatism' 453, 454.

[578] Green wrote: 'The phrase "chain of causation," which is a phrase in frequent use when this maxim is under discussion, embodies a dangerous metaphor. It raises in the mind an idea of one determinate cause, followed by another determinate cause, created by the first, and that followed by a third, created by the second, and so on, one succeeding another till the effect is reached. The causes are pictured as following one upon the other in time, as the links of a chain follow one upon the other in space. There is nothing in nature which corresponds to this. Such an idea is a pure fabrication of the mind.' ibid 460.

[579] Ibid 456.

[580] Ibid 456 (emphasis added).

with their relative distance from the effect either in space or time' and were not viewed 'as connected like the links of a chain.'[581]

Having articulated this distinction, Green went on to address how causation in the physical sciences differs from *legal* approaches to causal inquiry, in remarks that are helpful for present purposes. In the context of the physical sciences, Green described causal inquiry as 'a search for the conditions immediately antecedent to and concomitant with the effect' and in this context, he observed that the word 'proximate' was 'not an absolute but a relative term' which 'signifies the nearest known cause considered in relation to the effect, in contrast to some more distant cause'.[582] The author drew a contrast between this use of the idea of proximity and the purposes for which proximity is employed in legal contexts, arguing:

> In the law there is no such investigation as this. The law, in the application of this maxim [of proximate cause], is not concerned with philosophical or logical views of causation. When the maxim is applied, the whole body of facts has been ascertained by testimony. The facts are the subject of inquiry for a single purpose. That purpose is to determine the rights and liabilities of the respective parties to the proceedings. Those facts alone are viewed as causes and effects, which have a direct bearing upon those rights and liabilities.[583]

The author argued that the use of the term proximity in legal contexts was plagued by various problems, chief among them that:

> the term proximate and the term remote have no clear, distinct, and definable significations… Sometimes, causes are decided to be proximate which are remote in time; sometimes those are decided to be proximate which are remote in space. The division is neither scientific nor logical. …Above all, it is not a fixed and constant division. It varies in different classes of action. The same cause and effect which would be considered proximate in one class of actions, the attendant circumstances being unchanged, would be considered remote in others. The meaning of the terms,

[581] Ibid 456.
[582] Ibid 461.
[583] Ibid 463.

> proximate and remote, is contracted or enlarged, according to what is the subject-matter of the inquiry.
>
> The maxim, when applied in actions of contract, is essentially a rule of construction. It is the same thing to say a thing comes within a contract as it is to say the contract embraces the thing. It is the same thing to say the loss is a proximate consequence of a peril insured against, as it is to say that the parties intended that such a loss should be covered by the policy. The different forms of expression are one in meaning.[584]

This passage includes two observations that are presently helpful. The first is that investigations into cause and effect differ significantly depending on the purposes for which the investigation is conducted. In legal settings, as causal investigations are conducted for the purpose of determining rights and liabilities, the only facts viewed as potential causes and effects are those that may have some bearing upon rights and liabilities. The second key observation is that the search for a 'proximate' cause in law is essentially an exercise in interpretation of the scope of the legal obligations assumed by the parties to the dispute.

Similar ideas echo in modern and contemporary theoretical accounts of causation in the law. According to Stapleton, modern accounts of causation began with the work of American Legal Realists from the 1920s onwards.[585] As Stapleton explains, the Realists argued that many legal rules and concepts 'often obscured the true reasons for appellate judgment',[586] which 'were primarily stimulated by the facts of the case and non-legal considerations rather than by legal rules and concepts'.[587]A significant contributor to this movement was Leon Green, who argued that judges often employed causal terminology in an ambiguous an obfuscatory way.[588] According to Stapleton, Green showed that:

[584] Ibid 463.
[585] Stapleton, 'Choosing What We Mean by Causation in the Law' 456
[586] Ibid 456, referring to Brian Leiter, 'Positivism, Formalism, Realism' (1999) 99 Columbia Law Review 1138, 1147–49.
[587] Stapleton, 'Choosing What We Mean by Causation in the Law' 456.
[588] Ibid 456. Leon Green did not identify himself as a Legal Realist, however he came to prominence about the same time as other American Legal Realists and shared with them an interest in understanding judicial decision-making and, in particular, shared certain substantive views about how adjudication really works. Green therefore described as a major figure in the American Legal Realist movement: David W Robertson, 'Legal Philosophy of Leon Green' (1978) 56 Texas Law

> In cases where the defendant's wrongdoing was clearly involved in producing the plaintiff's injury, courts were rejecting plaintiffs' claims by merely asserting that the wrongdoing was not a "proximate cause" of the injury or that the "chain of causation" had been broken or that the injury was not a "natural consequence" of the wrongdoing. [589]

Furthermore, the use of causal language:

> falsely suggested some scientific rationale for these normative decisions and obscured their real basis: namely, the determination that the relevant consequence of the wrongdoing fell outside the scope of liability which was judged appropriate for the particular legal rule in the light of its purpose.[590]

Another influential causal theorist, Richard Wright, explains the Realists' core critique of judicial use of causal language as follows:

> They insisted that the only causal issue in a tort case is the simple factual issue of actual causation or causation-in-fact: whether the defendant's conduct actually contributed to the plaintiffs injury. They noted that most of the courts' allegedly causal analysis had nothing to do with the issue of causation-in-fact, but rather, under the misleading label of "proximate cause" or "legal cause," served as a smokescreen for policy judgments on whether the defendant ought to be held liable for an injury to which his conduct had clearly contributed. [591]

The basic distinction between the question of 'cause-in-fact' and normative concepts such as 'proximity' is also addressed by leading contemporary theorists of causation in the law. For example, Moore describes it as 'conventional wisdom' that the causation requirement in both tort and criminal law really consists of two very different requirements: that of 'cause in fact', and that of 'proximate' or 'legal'

Review 393, 398-401 and fn 25; Leiter, 'Positivism, Formalism, Realism' 1147.

[589] Stapleton, 'Choosing What We Mean by Causation in the Law' 456

[590] Ibid 456–7.

[591] Richard W Wright, 'Causation in Tort Law' (1985) 73 California Law Review 1735, 1737.

cause.[592] In this conventional understanding, only the former is considered to be a truly *causal* requirement, in the sense of corresponding to any scientific notion of causation.[593] Leading contemporary scholars in the field call for disambiguation of the causal terminology. For example, Richard Wright and Ingeborg Puppe have observed:

> in legal discourse, causal language is often employed to refer not only to causation in its basic sense, but also—employing phrases such as "lien de causalité," "Kausalzusammenhang," "legal cause," "proximate cause," "material contribution," "substantial factor," or merely "cause"—to the normatively based principles for limiting the defendant's legal responsibility for the consequences of his wrongful conduct.[594]

Wright and Puppe contend that '[t]he use of causal terminology to refer not only to causation in its basic sense but also to the normative issue of attributing legal responsibility has generated considerable disagreement and confusion over the nature of and differences between these two quite different issues and, as a result, frequent failures to distinguish them and to apply the proper empirical or normative analysis, respectively, to each of them.[595]

In international law the topic of causation is less examined,[596] however there is a growing body of scholarship aimed at addressing this gap and promoting clearer reasoning on causation in the settlement of international disputes.[597] For example,

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[592] Michael Moore, 'Causation in the Law', *Stanford Encyclopedia of Philosophy* (Winter edn, 2019) <https://plato.stanford.edu/entries/causation-law/> accessed 21 August 2020.
[593] Ibid.
[594] Richard W Wright and Ingeborg Puppe, 'Causation: Linguistic, Philosophical, Legal and Economic' (2016) 91 Chicago-Kent Law Review 461, 463 (citations omitted).
[595] Ibid, 464.
[596] Plakokefalos observes that despite the centrality of causation to dispute settlement, 'the treatment of causal concepts in international law is mostly rudimentary', and furthermore, 'the causal inquiry performed by international adjudicatory bodies is, usually, haphazard and unprincipled': Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' 473.
[597] E.g., Brigitte Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale* (Pedone 1973), cited in Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity'; André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 Michigan Journal of International Law 359; A Gattini, 'Breach of International Obligations' in PA Nollkaemper and I Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (CUP 2014); Catherine Gascoigne, *Causation in the Law of the World Trade*

Plakokefalos draws on theory of causation in municipal systems to propose that the causal inquiry in international cases be divided into two steps: first, an inquiry into 'cause in fact', which 'seeks to establish the causal relation between the act or the omission…of the defendant and the harmful outcome', and second, the inquiry 'often referred to as remoteness, proximity, or, more accurately, scope of responsibility', which 'seeks to determine for which consequences of the wrongful act should the defendant be responsible'.[598] Plakokefalos posits that although international law 'embodies this two-step approach', international courts and tribunals seem often to conflate the two steps.[599] Plakokefalos argues that although international courts have engaged with the issue of overdetermination in cases involving a multiplicity of causes, 'confusion reigns supreme in the vast majority of these decisions'.[600] The author identifies several reasons for this, including instances of courts incorporating factual causation standards into an inquiry into the scope of responsibility, leading to uncertainty as to the applicable standards in international law for determining causation in situations involving multiple causes.[601] Plakokefalos argues that the failure of courts clearly to identify the steps in causal reasoning within their decisions has produced a 'chaotic' jurisprudence, and calls for a closer scholarly analysis of courts and tribunals' approach to the problem of overdetermination as a step towards greater clarity.

In calling for the delineation of the two steps to the causal inquiry in international law, Plakokefalos draws upon legal theory developed in relation to domestic law—particularly in the private law of tort—which the author sees as potentially helpful in cases where international law does not provide guidance or clear answers. Plakokefalos justifies recourse to theory of tort law based on some commonalities between the law of state responsibility and the law of tort. He argues that although such parallels should be approached with 'extreme caution', in this context, the analogy between the law of State responsibility and tort law is 'rather straightforward'

Organization: An Econometric Approach (CUP 2023); Alexander Orakhelashvili, *Causation in International Law* (Elgar 2022).

598 Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' 475.

599 Ibid 475.

600 Ibid 486.

601 Ibid 486–490.

insofar as causation is involved in determining a breach and in assessing reparation for the breach in both contexts.[602] Furthermore, the author observes that international courts 'look at private law concepts of causation whenever they seek to apply a causal test' rather than devising special international law rules for dealing with causal problems, and that the same can be said for the relevant literature.[603]

If we are going to borrow philosophically based theoretical distinctions from the realm of private law, it should be noted that some have questioned the practical utility and relevance of such distinctions to courts' adjudication of tort claims. Notably, in a 2011 article addressing causation in UK tort law, Lord Hoffman dismissed the scholarly distinction between 'factual' and 'legal' causation and the academic pursuit of some 'real' meaning of 'cause in fact' as largely unnecessary or irrelevant for judges, arguing:

> On what basis are academic writers entitled to say that judges should take into account a philosophically privileged form of causation which satisfies criteria not required by the law? Of course, anyone is entitled to say that in treating X in some particular context as having caused Y, the courts are stretching the ordinary meaning of 'cause'. But this is engaging in a legitimate argument over interpretation and not introducing the concept of 'real' causation as a preliminary test which has to be satisfied before the question of interpretation arises.[604]

In essence, Lord Hoffman's contention was that the test of causation is always a matter of legal interpretation specific to the law in question, and that

> It might be easier if, instead of speaking of proof of 'causation', which makes it look as if we are dealing with one monolithic concept… we spoke of the 'causal requirements' of a legal rule. That would make it clear that causal requirements are creatures of the law and nothing more. The causal requirements of one rule may be different from those of another.[605]

[602] Ibid 475–477.
[603] Ibid 475–476.
[604] Hoffman, 'Causation' 5.
[605] Ibid 9.

Though there is something appealing about the simplicity of this position, it obviously does not assist to clarify the 'uncertain', 'confused' or 'chaotic' jurisprudence on causation in international law. In that legal system, unlike the in the UK, the meaning of causation cannot simply be straightened out through an act of a central legislature or a universally binding judgment from an overarching court of final appeal, since neither of those exist in international law. Without a clearly defined and widely accepted understanding causation in international law, disputes may end in a kind of intellectual stalemate, with one party claiming something to have been a cause, another denying that claim, and no clear or principled way of explaining which party is correct and why. Causal theory can, at the very least, help to clarify the reasoning by highlighting that a question which appears on its face to be factual may actually involve both factual and normative considerations.

5.7. The second step towards clarifying causation of causally overdetermined human rights violations: selecting an interpretation of causation

Having distinguished between an inquiry into causation as a factual matter and the separate question of the scope or content of a State's legal responsibility, this dissertation now turns to consider various influential definitions or tests of factual causation. Four approaches are addressed: first, the 'sine qua non' or 'but-for' test of causation, second, the 'substantial factor/material contribution' approach, third, the 'weak necessity/strong sufficiency' test, and finally, probabilistic conceptions of causation. Each of these theories of causation specify a particular kind of inquiry about relations in the physical world, and through specifying that inquiry, they each effectively define a particular concept of causation. While these theories each provide an approach to the 'factual' matter of causation, the variance between them highlights that the matter of causation in law is never entirely 'factual' and separate from normative considerations, for prior to undertaking any factual inquiry about 'the cause', there are non-factual considerations involved in selecting an interpretation of causation itself.

5.7.1. Counterfactual theories and the 'sine qua non' or 'but-for' test of causation

Within several domestic legal systems, a commonly-applied test of whether a particular factor was a cause-in-fact of an outcome is to consider whether that factor was a '*conditio sine qua non*' of the outcome; that is, a condition without which the outcome could not be.[606] This test is commonly referred to as the '*sine qua non*' or 'but-for' test of causation as it involves asking whether, *but for* the defendant's action, the victim or plaintiff would have been harmed as he or she was. As Moore observes, the *sine qua non* test of causation is intuitively appealing because it isolates something that seems important when explaining events and assessing responsibility for them: 'did the defendant's act *make a difference vis-à-vis* how the world would have been had she not done what she did?'[607] The *quality of necessity* is at the heart of the test, as it requires a factor to have been a *necessary* condition for the occurrence of the harm in order for that factor to be regarded as the cause of the harm. In this way the test reflects a 'deeply rooted belief that a condition cannot be a cause of some event unless it is, in some sense, necessary for the occurrence of the event'.[608]

Although the *sine qua non* test works well in many legal cases and has become a kind of 'default' test of factual causation in many contexts, it is seen as deficient in certain cases. In broad terms, it is considered to be deficient either because it is difficult to apply or because it produces findings that are counterintuitive or otherwise inappropriate. Moore has summarized four main problems arising in the application of *sine qua non* causation.[609] The first relates to the evidentiary challenge of verifying what would have transpired in the absence of the defendant's act or omission. The second problem relates to the indeterminacy in the meaning of the test, separate to any

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[606] Simon Blackburn, *The Oxford Dictionary of Philosophy* (3rd edn, 2016), entry on *conditio sine qua non*.

[607] Moore, 'Causation in the Law', *Stanford Encyclopedia of Philosophy* (Winter edn, 2019) <https://plato.stanford.edu/entries/causation-law/> accessed 21 August 2020.

[608] Wright, 'Causation in Tort Law', 1775. The but-for test is sometimes referred to as the 'necessary condition test' for this reason. See Moore, 'Causation in the Law', *Stanford Encyclopedia of Philosophy* (Winter edn, 2019) <https://plato.stanford.edu/entries/causation-law/> accessed 21 August 2020.

[609] Moore, 'Causation in the Law', *Stanford Encyclopedia of Philosophy* (Winter edn, 2019) <https://plato.stanford.edu/entries/causation-law/> accessed 21 August 2020.

evidentiary issues: 'The vagueness lies in specifying the possible world in which we are to test the counterfactual'.[610] The third problem arises when the test produces a result that seems overly inclusive in what it counts as a cause. Moore illustrates the problem with the following example:

> Oxygen in the air over England, timber in Scotland, Henry VIII's obesity, and Sir Francis Drake's perspicuity, were all probably necessary for England's defeat of the Spanish Armada; but we should be loath to say that each of these was a cause of that defeat.[611]

This remark illustrates how any number of trivial conditions may be said to be 'necessary' for the occurrence of any event, thus satisfying the *sine qua non* test of causation. This is seen as a product of the test's failure to factor in the quality of *sufficiency* in determining a cause. In focusing on the necessity of a particular factor, the test fails to consider whether that factor was sufficient (either alone or in combination with other factors) for the occurrence of the outcome. As discussed later in this chapter, in the context of legal practice this so-called problem of over-inclusiveness is sometimes addressed through the application of other (non-causal) limitations on responsibility, which narrow the focus to those factors of potential relevance to legal responsibility.[612]

The fourth problem Moore identifies, and the most significant one for present purposes, is that in certain cases the *sine qua non* test seems 'under-inclusive', or in other words, too restrictive in what it regards as a cause. This reaction arises in cases of causal over-determination in which a single observed effect has multiple distinct causes, any one of which alone would have been sufficient to 'determine' (i.e. account for) the effect. A commonly cited hypothetical scenario illustrating causal over-determination involves two hunters, 'D1' and 'D2', who both shoot a third person walking in the woods, 'V'.[613] In this hypothetical scenario each bullet would

[610] Ibid.
[611] Ibid.
[612] See part 5.7.2.
[613] See, e.g., Stapleton, 'Choosing What We Mean by Causation in the Law', 745; Honoré, 'Causation in the Law', *Stanford Encyclopedia of Philosophy* (Winter edn, 2010) <https://plato.stanford.edu/archives/win2010/entries/causation-law/> accessed 29 July 2020, 6;

have been independently sufficient to cause V's death, such that in the absence of either D1 or D2's shot, V would still have died from the other shot. Application of the *sine qua non* test of causation ('*but for D1/D2's act of firing the shot, would V have died?'*) leads to the perverse conclusion that neither D1 nor D2 could be regarded as having caused V's death, since neither bullet was *necessary* to produce V's death. Yet intuitively it seems clear that both D1 and D2 caused or contributed to causing V's death. In scenarios like this one, the outcome of the *sine qua non* test is inconsistent with popular intuitive understanding of causation and is generally regarded as unacceptable. Theorists sometimes encounter difficulty in trying to articulate exactly why the test produces 'incorrect' results in over-determined cases. It is sometimes argued that the test allows a responsible party to avoid responsibility by hiding behind the act of another person, thereby undermining fundamental aims of the law such as retributive justice (in the context of criminal law) or corrective justice (in the context of tort law).[614] This objection to *sine qua non* causation may seem logically circular, in that a causal test only fails to deliver retributive or corrective justice if you have already decided intuitively who caused the harm (which is the very issue to which causal inquiry is directed). Yet, the conclusion that *neither* D1 nor D2 caused the death of V clearly seems wrong, even if it is difficult to articulate why.

The scenario of the hunting accident is an example of a particular kind of causal over-determination, sometimes described as 'duplicative' over-determination. D1 and D2's actions are described as 'duplicate' causes of V's death because they are regarded as having occurred simultaneously.[615] Alternatively, the term 'multiple causation' is sometimes used to describe this situation. Ingeborg Puppe explains, '[m]ultiple causality exists if several factors in a causal explanation can be substituted for each other without one pre-empting the other.'[616] This can be contrasted with situations of 'pre-emptive' causal over-determination, in which one factor that is sufficient for the

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Wright, 'Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts', 1074.

[614] See, e.g., David A. Fischer, 'Causation in Fact in Omission Cases' (1992) 1992 Utah Law Review 1335, 1380; Fischer, 'Insufficient Causes', 292 and fn 67 thereto, and 301.

[615] Or as Stapleton describes, the acts of each hunter were 'involved' in the death of the walker by a 'relation of duplicative necessity': Stapleton, 'Causation in the Law' 4.

[616] Ingeborg Puppe, 'The Concept of Causation in the Law' in Benedikt Kahmen and Markus Stepanians (ed), *Critical Essays on "Causation and Responsibility"* (De Gruyter 2013) 67.

occurrence of harm pre-empts some other factor that would have been equally sufficient for the occurrence of the harm had it not been pre-empted. For example, D1 starts a fire sufficient to burn down P's house, and D2 subsequently starts a fire that is also sufficient to burn down P's house, but D1's fire burns down the house shortly before D2's fire reaches the building and so there is no house for D2's fire to burn. In this case, application of the *sine qua non* test again yields a perverse conclusion: neither D1 nor D2 caused P's loss, since P's house still would have burnt down in the absence of either one of the fires.[617] Thus, whether the case involves 'duplicate' or 'pre-emptive' causal overdetermination, the *sine qua non* approach to 'factual' causation can be strongly counterintuitive in the findings it produces.

5.7.2. The 'substantial factor' or 'material contribution' approach to causation

Courts have long recognised the limitations of *sine qua non* causation in cases of causal over-determination (or multiple causation) and have eschewed it in favour of other tests that would avoid perverse or strongly counter-intuitive findings. The alternative approaches have not always been convincing. In common law jurisdictions, courts have sometimes invoked vague terms to rationalise findings of liability for causally over-determined harm despite the absence of *sine qua non* causation, for example asking whether the conduct in question was a 'substantial factor', a 'common sense cause', or something that 'materially contributed to' the harm.[618] As Wright and Puppe have pointed out, such tests fail to resolve the causal issue; the words 'factor', contribute' and 'cause' merely restate the causal issue, while qualifiers like 'substantial', 'material' and 'common sense' further confuse things by introducing a test of significance, thereby conflating factual causation with the

[617] Again, the underlying values and aims of the law appear to be central to explaining why this result is unacceptable. In relation to the twin fires hypothetical, see, e.g., Fischer, 'Causation in Fact in Omission Cases', 1380: 'This corrective justice view of tort law is a primary basis for imposing liability in the twin-fires hypothetical, especially when both fires are of human origin. The argument is that it would be appallingly unfair to permit an innocent victim to go uncompensated simply because of the fortuity that two tortfeasors, rather than one, lit the fires that contributed to the victim's harm. Each tortfeasor should not escape liability by hiding behind the negligence of the other. Courts imposing liability in such cases may be reflecting the view that society's interest in corrective justice outweighs the social costs of shifting the loss to defendants…' (citations omitted).

[618] Wright and Puppe, 'Causation: Linguistic, Philosophical, Legal and Economic', 480–481.

normative issue of responsibility.[619] In civil law jurisdictions, Wright and Puppe observe, 'courts generally employ unexplained and unelaborated findings or presumptions of causation or, usually to the same effect, reverse the burden of proof.'[620]

5.7.3. Weak Necessity/Strong Sufficiency tests of causation

A further alternative approach to defining factual causation is known as the weak necessity/strong sufficiency theory of causation. This approach has been influential in scholarship in common law and civil law jurisdictions,[621] and may be reflected also in the reasoning in some international law cases.[622] Like the *sine qua non* test, it recognizes necessity as fundamental to causation, however it differs in its precise use of necessity. In simple terms, the theory holds that a condition is a cause of some outcome if the condition is necessary to complete a 'set' of conditions, which together are sufficient for the outcome's occurrence. That necessity requirement is considered 'weak' in comparison with the *sine qua non* test, according to which a condition is only a cause if it is 'strongly necessary' for the occurrence of the outcome (in the sense that *but for* the condition the outcome would not have occurred on that particular occasion).

In the common law tradition, a well-known version of this approach is the Necessary Element of a Sufficient Set ('NESS') account of causation, first suggested by Hart and Honoré in their seminal 1959 book *Causation in the Law*, and later developed and popularised by Wright.[623] For brevity, the following explanation focuses on Wright's account as one articulation of a weak necessity/strong sufficiency theory, however

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[619] Ibid.
[620] Ibid 481.
[621] See ibid. Though note that some have cast doubts on the relevance of the theory to the practical task of the courts; see Hoffman, 'Causation'.
[622] E.g., Plakokefalos identifies versions of the test as applied in various arbitral cases: Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity': 489-491.
[623] See, e.g., HLA Hart and T Honoré, *Causation in the Law* (OUP 1959), Wright, 'Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts', Richard W Wright, 'The NESS Account of Natural Causation: A Response to Criticisms' in Benedikt Kahmen and Markus Stepanians (ed), *Critical Essays on "Causation and Responsibility"* (De Gruyter 2013) 14, 15.

there are other examples. Notably, philosopher John Mackie coined the term 'INUS condition', standing for 'insufficient but necessary element of an unnecessary but sufficient set', which in broad terms is an alternative description of the weak necessity/strong sufficiency concept.[624] It should also be noted that the weak necessity/strong sufficiency theory is not confined to common law scholars. Puppe also developed an account of causation that is functionally very similar to Wright's, drawing upon the work of German jurist Karl Engisch and German philosophers Carl G Hempel and Paul Oppenheim.[625] Puppe and Wright both began to critique the strong necessity requirement in theories of factual causation around the same time (during the 1980s), but wrote in different languages and with different doctrinal backgrounds (the common law tradition in Wright's case, civil law in Puppe's) and only became aware of each other's work more recently.[626] That the two theorists converged on weak necessity/strong sufficiency as a preferred approach to factual causation, despite working in isolation of one another and building upon different theoretical foundations, points to the intuitive quality of weak necessity/strong sufficiency and its potential relevance across different legal systems.

In the common law context, Hart and Honoré suggested a form of the NESS account of causation in their influential book *Causation in the Law,* applying John Stuart Mill's scientific account of a causal law to develop their definition of a 'causally relevant factor'.[627] The notion of 'weak' necessity was central to that definition. Hart

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624 JL Mackie, 'Causes and Conditions' (1965) 2 American Philosophical Quarterly 245; JL Mackie, *The Cement of the Universe: A Study of Causation* (Oxford University Press 1980) 62. Mackie was writing after the publication of Honoré and Hart's work, and apparently was aware of their work although did not cite them: see Richard W Wright and Ingeborg Puppe, 'Causation: Linguistic, Philosophical, Legal and Economic' (2016) 91 Chi-Kent L Rev 461 469-470 and fn 32-35. Mackie proposed the INUS definition to describe the conditions that comprise the minimally sufficient set of abstract conditions that constitute a causal law, however he ultimately insisted upon a requirement of strong necessity in singular instances of causation. For an explanation of the distinction between 'causal laws', 'causal generalizations' and 'actual [singular] instances of causation', see Richard W Wright, 'The Efficiency Theory of Causation and Responsibility: Unscientific Formalism and False Semantics' (1987) 63 Chicago-Kent Law Review 553, 558-59.

625 Puppe was unaware of Honoré and Hart's work at the time of developing this theory. Puppe, 'The Concept of Causation in the Law' 72-73. Puppe and Wright disagree on certain aspects of the application of weak necessity/strong sufficiency in certain situations, though the differences are not presently relevant; see Wright and Puppe, 'Causation: Linguistic, Philosophical, Legal and Economic'.

626 Wright and Puppe, 'Causation: Linguistic, Philosophical, Legal and Economic'.

627 Hart and Honoré, *Causation in the Law* .

and Honoré proposed that a condition may be a 'causally relevant factor' if it is necessary 'just in the sense that it is one of a set of conditions jointly sufficient for the production of the consequence: it is necessary because it is required to complete this set'.[628] Wright built upon this concept of a causally relevant factor in his own account of causation, in which he sought to correct several perceived shortcomings of Hart and Honoré's account.[629] In Wright's NESS account, a cause is defined as a set of actual (not hypothetical) antecedent factors which, when combined, are sufficient for the occurrence of the effect. In addition, each of the factors in the set must have been necessary to the sufficiency of that set in producing the effect. More precisely, the NESS test provides that 'a particular condition was a cause of (condition contributing to) a specific consequence if and only if it was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the consequence'.[630]

The NESS account recognises that in any given scenario there may be multiple *sets* of factors, each of which would be sufficient (as a set) for the occurrence of a particular outcome. That multiplicity of 'sufficient sets' does not disqualify any one set from being regarded as a cause of the outcome. Rather, each set is regarded as a 'duplicative' cause. A set need not have been necessary to produce the effect; it need only have been *sufficient*. Necessity is still relevant, but only in determining the constitutive factors (or conditions) that comprise the *set*. In order for any one condition to be regarded as a cause of the effect (in the sense of it being a condition that contributed to that effect), it must have been *necessary* for the sufficiency of the set. Thus, the NESS test regards both qualities—necessity and sufficiency—as essential criteria in the identification of a cause, though the requirement of necessity plays a subsidiary or subordinate role to the requirement of sufficiency. In contrast, the *sine qua non* test elevates the quality of necessity as the 'the direct and exclusive criterion of causal contribution'.[631]

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[628] T Honoré HLA Hart, *Causation in the Law* (2nd edn, OUP 1985) 13–22, 112–13. See also JS Mill, *A System of Logic, Ratiocinative and Inductive: Being a Connected View of the Principles of Evidence, and the Methods of Scientific Investigation* (first published 1843, Cambridge University Press 2011) vol 1, bk 3, ch V s 3, ch VIII ss 1–4, ch X ss 1–3.
[629] Wright, 'The NESS Account of Natural Causation: A Response to Criticisms' 14–18.
[630] Wright, 'Causation in Tort Law' 1790.
[631] Ibid 1803.

In situations of causal over-determination (cases in which a single observed effect has multiple distinct causes, any one of which alone would have been sufficient to account for the effect) the NESS test and the *sine qua non* test yield different results, with the NESS test more inclusive in what it counts as a cause. This can be illustrated by reference to the hypothetical scenario of the hunting accident in the woods previously described. In that case there were two sets of antecedent actual conditions to V's death, one set involving D1's actions, and the other involving D2's actions. Each set alone would have sufficed for the occurrence of V's death, and in each set, the act of the defendant was *necessary* to render that set of conditions *sufficient* for V's death. Therefore, when applying the NESS test to that scenario each of D1 and D2 are regarded as having caused V's death—a result generally regarded as more acceptable than that of the *sine qua non* test of causation (in which neither D1 nor D2 would be held responsible).

It is worth noting how the NESS test can explain outcomes in cases concerning pollution discharged by multiple defendants, which, as previously argued, is a real and current example of multiple causation with which human rights law must grapple.[632] Wright observed a pattern in pollution cases before common law courts, in which the courts declined to apply the *sine qua non* test of causation and instead allowed plaintiffs to recover from each defendant who contributed to the injury—even if none of the defendants' individual contributions were necessary or independently sufficient for the occurrence of the injury.[633] Wright argued that such legal outcomes could be explained and justified by reference to the NESS test of causation. Under the NESS test, individual discharges of pollution may be aggregated to form a notional set, the set comprising the volume of pollution that was sufficient for the occurrence of the injury. Wright explains:

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[632] Part 5.5 above.

[633] Wright, 'Causation in Tort Law' 1792-94; Wright, 'Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts' 1035-39; Richard W Wright, 'Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility' (2001) 54 Vanderbilt Law Review 1071, 1106-07; Richard W Wright, 'The Grounds and Extent of Legal Responsibility' (2003) 1425 San Diego Law Review 1425, 1444-45.

> assume that five units of pollution were necessary and sufficient for the injury and that each of seven defendants discharged one unit of pollution. Each defendant can truthfully say that its one unit was neither necessary nor independently sufficient for the injury. But each defendant's one unit was necessary for the sufficiency of *a* set of actual antecedent conditions that included only four of the other units, and the sufficiency of this particular set of actual antecedent conditions was not affected by the existence of two additional duplicative units.[634]

Wright's hypothetical assumes that the injury in question occurs when the amount of pollution reaches the injurious threshold of five units. The additional two units are 'duplicate' causes in that they merely reinforce the occurrence of the effect, rather than add to it in any relevant way. If, however, the extra units of pollution accelerated or aggravated the injury, then their causal contribution would be even more obvious.[635] That would not constitute a situation of causal over-determination (a situation in which a single observed effect has multiple distinct causes, any one of which alone would have sufficed to account for the effect) as the 'effect' in question would be the effect of seven units of pollution, not five.

On the other hand, if five units of pollution were released earlier in time than the other two, and so produced the injury in question before the other two were able to have any impact, then under Wright's theory, the first five units were causes of injury and the other two were not.[636] Similarly, applying the NESS test to the scenario of the two fires described above yields the conclusion that only D1's fire was a cause of P's loss. In that scenario, the fire started by D2 could not form part of a set of antecedent actual conditions sufficient for P's house to burn down, since the house had already burnt down by the time D2's fire spread to the site. Note the presence of the word 'actual' in the reference to 'antecedent actual conditions'; the word 'actual' is an important qualifier in Wright's NESS formula, because it rules out *hypothetical* conditions from any potential set of causal factors. Whereas the *sine qua non* concept of causation is constructed by reference to the (hypothetical) counter-factual, Wright's NESS test

[634] Wright, 'Causation in Tort Law' 1793.
[635] Ibid fn 243.
[636] Ibid fn 243.

focuses attention on factors present in the world as it actually existed—and not on factors that might have come to pass in some hypothetical alternate reality.[637]

In developing the NESS test, Wright did not focus on the terminology deployed by the courts in their reasoning on causation. Rather, Wright sought to examine the underlying, unarticulated meaning of causation and to 'capture the concept of causation that we tacitly employ in all our (purely empirical) causal judgments'.[638] There is arguably a tension in this notion of a 'purely empirical' judgment that is also shaped by some tacitly employed *concept.* Yet, Wright apparently regarded the NESS test not merely as one available test for causation, but as *the inherent and comprehensive meaning* of causation itself.[639]

Professor Stapleton has challenged this characterisation of NESS as the single, inherent and comprehensive meaning of causation.[640] Stapleton has argued that meaning invested in the word 'causation' varies depending on context and is influenced by the underlying purpose of the inquiry, hence different information may be expressed using the same causal terminology.[641] For these reasons, Stapleton has argued that NESS cannot constitute the single, all-encompassing definition of causation, nor could any other test or formula. In Stapleton's argument, the failure to specify in clear and precise terms the nature of the interrogation which underlies the

[637] This focus on the actual world to the exclusion of hypothetical scenarios does not preclude the application of NESS to cases concerning exposure to risk of future harm, as explained in part 5.8 below.

[638] Wright, 'Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility' 1107.

[639] See Wright, 'Causation in Tort Law' 1802; Wright, 'Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts' 1018; Wright, 'The NESS Account of Natural Causation: A Response to Criticisms' 66.

[640] Stapleton, 'Choosing What We Mean by Causation in the Law' 472–474. Stapleton argues that failure to specify the precise nature of causal inquiry has generated confusion within the law: 'Unfortunately, in the past lawyers have not agreed on which interrogation underlies their use of causal terminology nor, therefore, to what information "causation" refers in the Law. For example, some have thought the appropriate interrogation was a narrow one dealing with blame so that a "cause" could only be a blameworthy factor; others argued for a limited "physics based" interrogation which excluded normative concerns; others seemed to advance the circular idea that "causation in the Law" should track the current usage of causal terms by ordinary people in which normative and non-normative information were merged; while some even resorted to the non-sequitur device of merely asserting that a factor was a cause by virtue of "intuition" or "common sense"': ibid, 440–441.

[641] See part 5.2.

use of causal terminology is a source of confusion, and to overcome this confusion there is a need to choose what we mean by 'causation' from the various possible meanings.[642] Furthermore, Stapleton argues that in in the interest of clarity we ought to choose just *one* broadly applicable meaning that can apply to any legal case. Stapleton proposes that any inquiry into 'factual' causation in the law, whatever the situation, should be understood as an inquiry into whether a specified factor was historically 'involved' in the phenomenon in question, in the sense of it being a NESS condition for the occurrence of the phenomenon.[643] In this framing, NESS is accepted as an appropriate formula for factual causation, but is characterised as a linguistic 'algorithm' through which lawyers can detect relations of involvement, rather than as *the* singular, inherent and comprehensive meaning of causation, as Wright had argued.[644]

Leaving aside the question of whether NESS defines the inherent meaning of factual causation or is merely one approach to defining 'involvement' for the practical purposes of the law, the NESS approach to factual causation is compelling as an alternative or supplement to *sine qua non* causation. For Stapleton, an advantage of the NESS approach is that it is wide enough to capture (i.e. identify as a cause) all forms of 'involvement' that may be of interest to the law. The ability to apply the NESS approach to analysing causation across a broad range of situations allows for the consistent use of causal terminology, which in turn supports clarity and transparency of legal reasoning.[645]

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[642] Stapleton, 'Choosing What We Mean by Causation in the Law' 472–474. Stapleton argues that failure to specify the precise nature of causal inquiry has generated confusion within the law: 'Unfortunately, in the past lawyers have not agreed on which interrogation underlies their use of causal terminology nor, therefore, to what information "causation" refers in the Law. For example, some have thought the appropriate interrogation was a narrow one dealing with blame so that a "cause" could only be a blameworthy factor; others argued for a limited "physics based" interrogation which excluded normative concerns; others seemed to advance the circular idea that "causation in the Law" should track the current usage of causal terms by ordinary people in which normative and non-normative information were merged; while some even resorted to the non-sequitur device of merely asserting that a factor was a cause by virtue of "intuition" or "common sense"': ibid, 440–441.

[643] Ibid fn 15.

[644] Stapleton identifies three forms of relations of involvement: 'necessity', 'duplicate necessity' and 'contribution', with contribution constituting an overarching category that subsumes the other two: ibid 436.

[645] Noting the variation in possible usages of causal language, and the need for precise and unambiguous terminology in legal practice, Stapleton argues that lawyers ought to 'choose an

In practice, the NESS test appears to have influenced approaches to causally over-determined cases to some extent in several jurisdictions. For example, US tort law now recognises that in cases where there are multiple sufficient causes, or multiple sufficient causal sets, each of which would be sufficient on its own to cause the plaintiff's harm, then it is appropriate to supplement the but-for standard (which is otherwise applicable) with the NESS standard of factual causation.[646] The stated rationale for adopting the standard includes the point that 'we recognize [multiple sufficient causes] as such in our common understanding of causation, even if the but-for standard does not'.[647] Thus, a standard of causation that recognises multiple sufficient causes 'comports with deep-seated intuitions about causation and fairness in attributing responsibility.'[648] NESS appears also to be gaining some traction in international legal scholarship. In the context of discussing possible tests of factual causation in international law, and noting that the but-for test 'fails to address any of the issues raised by overdetermination [and] may easily lead to absurd result', Plakokefalos has suggested that the 'most convincing alternative to the but-for test is the so-called necessary element of a sufficient set (NESS) test' which 'allows for a more nuanced approach than the crude yes/no option offered by the but-for test'.[649]

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interrogation to underlie causal usage in the Law'. Furthermore, Stapleton urges lawyers to choose just *one* kind of enquiry, which should be wide enough to capture (identify as causes) all forms of 'involvement' that may be of interest to the law: ibid. Cf. Hoffman, 'Causation' at 5: 'It is this concept of something having to be really a cause according to criteria lying outside the law which puzzles lawyers. On what basis are academic writers entitled to say that judges should take into account a philosophically privileged form of causation which satisfies criteria not required by the law? Of course, anyone is entitled to say that in treating X in some particular context as having caused Y, the courts are stretching the ordinary meaning of 'cause'. But this is engaging in a legitimate argument over interpretation and not introducing the concept of 'real' causation as a preliminary test which has to be satisfied before the question of interpretation arises.'

[646] American Law Institute, *Restatement of the Law, Third, Torts: Liability for Physical and Emotional Harm* (American Law Institute 2010) s. 26 comment c, s. 27 comments a, f–i and reporters' notes.

[647] Ibid, s. 27, comment c.

[648] Ibid.

[649] Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity', 477–478. For a discussion of the weak necessity/strong sufficiency test and its relevance to the law of the WTO, see Gascoigne, *Causation in the Law of the World Trade Organization: An Econometric Approach* , part 1.2.1.

5.7.4. Where risk and causation intersect: probabilistic theories of causation

Before addressing causation in over-determined cases in international human rights law, it is worth briefly mentioning probabilistic or risk-based theories of causation. In contrast to the *sine qua non* test and the weak necessity/strong sufficiency tests, which are based on the notion of cause as a factual, *deterministic* concept,[650] in probabilistic theories, a condition is regarded as having 'caused' an outcome if the condition significantly increased the objective probability (risk) of the outcome occurring.[651] One proponent of this view, Calabresi, explained the idea of 'causal linkage' as follows:

> the concept of causal linkage between acts and activities and injuries is no more than an expression of empirically based belief that the act or activity in question will, if repeated in the future, increase the likelihood that the injury under consideration will also occur.[652]

On this approach, causation may be defined in terms of *ex ante* probabilities of harm associated with some activity, rather than through an *ex post* inquiry into the actual (physical) relationship between the activity and the harm. According to Wright, this view of probability was underpinned by a particular understanding of tort law as a body of law primarily aimed at maximising social wealth or utility through the efficient distribution of legal risk (in contrast to the traditional, corrective-justice theory of tort liability).[653] In rebutting probabilistic theories of causation, Wright has argued that proof that a condition increased the risk of a result does not equate to proof that the condition actually caused the result, and consistent with this, judges in

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650 Wright argued that 'causal analysis relies solely upon—and is limited by—our empirical knowledge of the conditions that actually existed on the particular occasion and the possibly applicable causal generalizations.' In this theory, any indeterminacy surrounding a cause is merely the result of gaps in empirical knowledge: Wright, 'Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts' 1041, 1042.

651 E.g. Guido Calabresi, 'Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.' (1975) 43 University of Chicago Law Review 69, 71–74, 78, 84–85.

652 Ibid 72.

653 For a critique, see e.g. Richard W Wright, 'Actual Causation vs. Probabalistic Linkage: The Bane of Economic Analysis' (1985) 14 The Journal of Legal Studies 435; Wright, 'The Efficiency Theory of Causation and Responsibility: Unscientific Formalism and False Semantics'; Stapleton, 'Choosing What We Mean by Causation in the Law' 468–471.

tort cases have generally refused to accept naked statistics or *ex ante* causal probabilities as evidence of what actually happened on a particular occasion.[654]

Yet, as discussed in part 5.4.1 above, there are some exceptions to this, such as the case of *Fairchild v Glenhaven Funeral Services Ltd,* in which 'the creation of a risk sometimes serves as a second-best, exceptional substitute for a true causal connection between wrongful conduct and injury, where a causal attribution is impossible'.[655] Thus, it is possible for the law to incorporate a test of causation in which conduct that increases the risk of some form of harm is taken to have caused that harm. The present dissertation has already touched some examples of early *non-refoulement* cases under the Covenant which perhaps vaguely reflect or embody this idea.[656] However, as noted in that discussion, the jurisprudence in that area has evolved to recognise a duty to avoid exposing an individual to risk *per se*. Once risk imposition *per se* is recognised as a rights violation, the causal inquiry focuses on whether a State party's conduct *caused the exposure* of the individual to risk, which may be simpler in terms of the evidence required. This approach preserves the role of an inquiry into what *actually happened* (a largely factual question)[657] as a distinct filter on legal responsibility, rather than entirely collapsing the element of causation into the concept of risk.

5.7.5. Conclusions on theoretical accounts of 'factual' causation

To summarise the foregoing discussion, there are a range of theoretical accounts of the so-called 'factual' aspect of causation. Each theory specifies a particular kind of inquiry. The *sine qua non* or 'but for' test is commonly a default approach in practice in several legal systems and bodies of law, although theorists have pointed out its various perceived inadequacies, particularly in cases involving causally overdetermined harms. It was observed that courts have sometimes considered

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[654] Wright, 'Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts' 1050.
[655] Dyson and Steel, 'Chapter 2 – Risk and English Tort Law' 53. See part 5.4.1.
[656] See part 5.4.4.
[657] Here, the risk finding is characterised as 'factual' for simplicity, however it should be born in mind that an inquiry into 'risk' is itself a matter which entails a mix of both factual and legal/normative considerations, as explained in Chapters 3 and 4.

whether something was a 'substantial factor', a 'common sense cause', or something that 'materially contributed to' the harm, however such terms provide little additional clarity as to the underlying meaning of cause. Weak necessity/strong sufficiency tests to causation such as the NESS account provide a reasonably compelling alternative or supplementary test to the *sine qua non* test, particularly considering their ability to account for multiple causes of harm which are sufficient for the harm to occur (independently or as part of a set of conditions), though not 'necessary' for the harm in the strong sense. As leading causal theorists have argued, the results of the NESS approach seem to align with popular intuitions about causation in cases concerning pollution from multiple sources, and other analogous situations. Finally, it was noted that probabilistic or risk-based theories of causation have also been advanced in the legal literature on causation. Such theories seem to conflate the concepts of risk and causation, which seems disconnected with physical reality and likely to generate confusion—especially in the cases the focus of the present dissertation, in which the legal obligation is subject to a separate condition of risk. To the extent that the *sine qua non* test is perceived as inadequate, the weak necessity/strong sufficiency approach to causation stands out as the most obvious alternative or supplementary theory of causation. Finally, it must be acknowledged that the very exercise of selecting a theoretical account seems in itself to contradict the notion of a purely factual test or account of causation. In selecting an approach, we are, as Stapleton explained, choosing what we mean by causation, and that choice is itself not an exercise in factual inquiry. Thus, somewhat like the element of risk, the element of causation seems inevitably to be underpinned by legal normative considerations.

5.8. Applying causal theory to risk-based human rights obligations

As previously argued, in cases concerning the obligation upon a State to avoid exposing an individual to certain forms of risk, the relevant causal inquiry is not whether the State caused the ultimate harm, but rather whether the State caused the person's exposure to that risk of harm. But precisely what is meant by the proposition that a State caused a person to be exposed to risk, as a matter of fact? Does it mean that, *but for* the State's conduct, the person would not have been exposed to that particular risk? What is the correct approach in cases of causally over-determined risks/harms? The possible approaches to factual causation in human rights law may be as varied as they are in municipal law. The need to specify a theoretical approach to causation in human rights law arguably depends upon the extent to which existing reasoning lacks clarity or consistency.

In many of the cases centred on risk, the causal relationship between the State's conduct and the imposition of risk could satisfy any of the popular definitions or tests of 'factual' causation. The cause may be so obvious that it is unnecessary to address it explicitly in legal reasoning. For example, in many *non-refoulement* cases, the State obviously causes the person's exposure to risk through the removal process, and so this does not require separate analysis. However, as identified earlier, there are other scenarios in which the causal relationship between a State's conduct and the creation of risk (or actual occurrence) of harm may be unclear. In such cases, a claim that the State *caused* the risk may turn on the definition of causation. Consider, for example, a hypothetical claim concerning a States party's role in creating the risks associated with anthropogenic climate change: is a State to be regarded as having exposed individuals to such risks, in breach of its obligation to respect and ensure the right to life as recognized in article 6, even if the State's own conduct in relation to carbon emissions was insufficient in on its own to produce the risk? What about if the State's conduct is neither necessary nor sufficient, in the strict sense, for the creation of climate risks? These questions point to the possible utility of specifying an approach to factual causation in human rights law.

It is submitted that, in international human rights law, like in municipal legal systems, determining causation requires choosing a particular kind of interrogation to underlie the use of causal terminology. For the reasons explained below, it is argued that an inquiry into whether a State caused a particular harm can be reduced the minimalistic question of whether the State was *involved* in the occurrence of the harm, in the sense of its conduct being a NESS condition of that harm.

Although the Committee's recurring references to 'necessary consequence' in *non-refoulement* cases may vaguely suggest acceptance of the but-for standard of causation in that context, the more nuanced understanding of causation captured in the

NESS test is preferable for several reasons. Like tort law, human rights law sometimes addresses situations in which the harm to an individual occurs through a combination of multiple contributing causes. In some cases, the harm may be causally over-determined, such as where two or more States pollute at a level going above and beyond what would be sufficient to expose an individual to life-threatening risk. In these situations, a simple but-for test may produce findings at odds with our strong intuitions regarding cause and effect. The NESS test, on the other hand, allows us to analyse causally over-determined harms in a way that is logically coherent, consistent across different factual scenarios, and which is internally free of normative considerations. It provides a minimalistic concept of causation, which allows us to separate out policy-based reasons for limiting responsibility. The suitability of the NESS test is demonstrated below by reference to specific case studies in human rights law.

Before turning to case studies, it is helpful to clarify one aspect of the NESS approach as it relates to risk-based obligations. As previously explained, the NESS test involves considering *actual* antecedent conditions; it calls for consideration of factors present in the world as it actually existed, and not factors that might have existed in some hypothetical, alternate reality.[658] Yet the present dissertation focuses on obligations enlivened by *risk*. For such obligations, hypothesising about the future is ordinarily part of determining whether the obligation applies. Because of its forward-looking nature, at first glance, risk-based responsibility may seem to be at odds with the requirements of the NESS test. However, there is actually no problem with applying NESS as part of an analysis of a risk-based obligation, so long as we understand the distinct analytical functions of risk and causation in such cases and do not conflate the two.

In obligations to avoid risk-exposure, the causal question is whether the State's conduct caused exposure of the individual to risk. At the time a decision is made about the applicability of protection obligations, that conduct is generally known, and is not a mere hypothesis. That is so not only when assessing legal responsibility after

[658] See part 5.7.3.

the fact, but also when assessing it pre-emptively (such as in a pre-emptive action to halt a planned deportation or extradition). In the case of legal action commenced after the State's act (for example, after the removal of an individual from the State's territory), the causal inquiry is retrospective: did the State, through removing the individual, expose them to a relevant form of risk? But even if a communication pre-empts the State's conduct (as is often the case in UN treaty complaints mechanisms), there is generally still a high level of certainty as to the description of the anticipated conduct of the State. This means that even in pre-emptive cases, the legal implications of that conduct can be assessed in much the same way *as if* it had already happened. That does not interfere with the NESS test itself, which focuses on actual antecedent conditions. It simply means that the anticipated conduct of the State is analysed for the purpose of causal analysis as though it has happened.

An implication of this is that any legal assessment of potential future acts of a State requires a reasonably clear picture of that State is planning to do. There is nothing unusual about this. Human rights treaty bodies frequently consider communications from individuals in relation to anticipated acts of States parties, and they require for the purpose of admissibility that such complaints be substantiated with detailed factual claims and supporting evidence. In such pre-emptive cases, the ultimate legal conclusion may be phrased as a conditional (e.g., *for the respondent State to do x would amount to a breach of its human rights obligations*), but the application of the NESS test remains internally free of hypotheticals. As such, the NESS test remains intact and applicable notwithstanding the forward-looking nature of cases focused on risk.

5.8.1. Causation in removal cases involving risk of deteriorating health

The application of NESS test to removal cases is often relatively uncomplicated. Under the ICCPR the State's obligation of *non-refoulement* is an obligation not to extradite, deport, expel or otherwise remove a person from the State's territory, if there are substantial grounds for believing that there is a real risk of irreparable harm of the kind addressed in articles 6 and 7. The risk may be in the country to which removal is to be effected, or in any country to which the person may subsequently be removed.[659] As previously explained, the obligation upon the State is to refrain from an act of risk-exposure. If it is alleged that a State party has breached that obligation, then the causal element implicit in that allegation is that the State's conduct *caused* the person to be exposed to the relevant risk. Similarly, if a pre-emptive claim is made (that is, it is alleged that the State *will* breach the obligation), then the causal element of the claim is that the anticipated State conduct *will cause* exposure of the individual to the relevant risk. If 'the State caused', or 'the State will cause' is understood to mean that the State's conduct has been or will be *involved in* the risk-exposure, in the sense that it will be a NESS condition of the risk-exposure, then causation is generally obvious. That is because, in typical *non-refoulement* cases, the removing State's act of physically detaining and transporting a person to the receiving State will always be a NESS condition of that individual's exposure to risk. That follows logically from the assessment that the individual faces risk of the relevant kind in the territory to which they have been (or will be) removed.

Whereas in typical *non-refoulement* cases causation is straightforward, some atypical *non-refoulement* cases, more complicated reasoning has emerged which points to uncertainty regarding the concept of causation. This can be seen in *non-refoulement* cases in which the risk to the individual relates in part to their access to healthcare in the State of return. In the present study, only one communication under First Optional Protocol of this nature was identified. It is discussed below. Before addressing that case, cases in the ECtHR that have raised this issue are discussed. It will be argued that in such cases, causal assumptions can seem to creep into the legal analysis and can influence the assessment of protection obligations in subtle but legally significant ways. Having regard to these cases, and to the single case under the Covenant, it is suggested that the NESS account of causation may assist to clarify the causal analysis, and to delineate causation from other legal elements of the protection claim and, in this way, enhance transparency of the reasoning.

The 1997 judgment of the European Court of Human Rights in *D. v. United Kingdom* is illustrative. The case concerned the decision taken by the United Kingdom

[659] UNHRC, 'General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 [12].

authorities to deport to St Kitts an alien who was suffering from Acquired Immune Deficiency Syndrome (AIDS). The applicant claimed that his removal to St Kitts would expose him to inhuman and degrading treatment in breach of article 3 of the ECHR, which provides that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.[660] It was argued that the exposure to torture or inhuman or degrading treatment or punishment would arise from the deterioration of the applicant's health, in the particular circumstances which he faced in St Kitts: he lacked close family or friends to support him in St Kitts, he had no accommodation, financial resources or means of access to other social support. It was established that withdrawal of medical treatment would hasten his death, as similar treatment was unavailable to him in St Kitts. He faced a situation of homelessness, lack of proper diet and poor sanitation, and inevitable infection due to his weakened immune system. The applicant therefore claimed that his removal to St Kitts would not only hasten his death but also condemn him to spend his remaining days in pain and suffering, in conditions of isolation, squalor and destitution. Such conditions, it was argued, would be inhuman and degrading, contrary to the prohibition in article 3.

In response the United Kingdom argued that the applicant would not be exposed to treatment of a kind that would breach the standards in article 3, and requested the Court to find that the applicant had no valid claim under article 3. The United Kingdom argued, among other things, that the applicant's hardship and reduced life expectancy would stem from his terminal and incurable illness, coupled with the deficiencies of health and welfare services in St Kitts.[661] The concept of causation figures in this argument of the United Kingdom. By focusing on the applicant's illness and the deficiencies of health or palliative care or other support services in the receiving country, the argument seems to suggest is that *these* factors, and not the United Kingdom's act of removal, ought to be regarded as the causes of suffering. Furthermore, it suggests that because *these* causal factors would not engage the international legal responsibility of St Kitts, the feared harm could not amount to 'torture or inhuman or degrading treatment or punishment' in the article 3 sense. In

[660] ECHR art. 3.
[661] *D v United Kingdom* [42].

this way, the element of causation can loop back and feed into the question of the content of the right and the obligations it entails.

In a well-known judgment the Court rejected the United Kingdom's argument, finding that the applicant's removal to St Kitts would amount to inhuman treatment by the United Kingdom in violation of article 3, in view of his 'exceptional circumstances' and 'bearing in mind the critical stage now reached in the applicant's fatal illness'.[662] Insofar as factual causation is concerned, the following passage of the Court's decision is relevant:

> It is true that this principle has so far been applied by the Court in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanates from intentionally inflicted acts of the public authorities in the receiving country or from those of non-State bodies in that country when the authorities there are unable to afford him appropriate protection…
>
> Aside from these situations and given the fundamental importance of Article 3 (art. 3) in the Convention system, the Court must reserve to itself sufficient flexibility to address the application of that Article (art. 3) in other contexts which might arise. It is not therefore prevented from scrutinising an applicant's claim under Article 3 (art. 3) where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article (art. 3). To limit the application of Article 3 (art. 3) in this manner would be to undermine the absolute character of its protection.[663]

This passage is relevant because it can be used to illustrate the appropriateness of applying a minimalistic concept of causation when assessing the removing State's legal responsibility. Causal assumptions are embedded in the reasoning reflected in the passage, as indicated by the description of the risk as something *emanating from* certain actors, and something *sourced in* or *stemming from* various factors. Yet the judgment discloses little or no consideration of the meaning of these terms, or of the

[662] Ibid [53].
[663] Ibid [49] (citation omitted).

broader relevance of factual causation to legal responsibility under article 3. The potential problem with this reasoning is that the source (or cause) of risk could be understood as pivotal to the outcome of the case, when it arguably shouldn't be. The case is better understood as turning on the legal-normative question of the scope of the term 'treatment' in article 3. Failure to frame that legal-normative issue as central can muddy the legal reasoning.

To avoid the pitfalls of ill-defined concept of causation, one approach would be to acknowledge that causation is relevant but reduce the causal inquiry to the question of whether the State's conduct would be involved in the individual's exposure to risk (in the sense of it being a NESS condition of the exposure to risk). In *D v United Kingdom* the answer would have been *yes*, as the respondent State's act of removal would be one necessary element in the set of conditions sufficient for the exposure of the applicant to risk. Taking this minimalistic approach to causation highlights the legal-normative quality of other issues in dispute, in particular, the scope of the terms 'treatment or punishment' in article 3. Do those words include the situation of a State failing to provide palliative care? In the result of *D v United Kingdom*, the answer was yes, but only because the applicant's case involved 'very exceptional circumstances'.[664]

Those exceptional circumstances included the fact that the applicant was critically ill and close to death, that removal would have hastened the applicant's death and subjected him to 'acute mental and physical suffering', that it was not shown whether he would have received a hospital bed in St Kitts, and that there was no evidence to show that he would have received any family support.[665] The legal-normative finding is, in effect, that the various factors in combination amounted to a risk of harm so severe that to remove the individual to that situation constituted inhuman or degrading treatment. The utility of the NESS approach is that it quarantines the question of causation (that is, the causal relationship between the removing State's conduct and

[664] The Court held: 'In view of these exceptional circumstances and bearing in mind the critical stage now reached in the applicant's fatal illness, the implementation of the decision to remove him to St Kitts would amount to inhuman treatment by the respondent State in violation of Article 3': ibid [53].
[665] Ibid [52].

the exposure of the individual to risk) from more complicated normative questions about the precise nature of the harm to which the protection in article 3 applies, thereby allowing those normative questions to be addressed head-on.

The European Court of Human Rights has since developed its jurisprudence on the scope of article 3 in several cases concerning the expulsion of individuals with deteriorating health conditions. In *N v United Kingdom,* concerning the removal of a Ugandan national who was HIV-positive to her country of origin, the Court upheld the high threshold established in *D v United* Kingdom. The majority reasoned that that high threshold was correct and should be maintained

> given that in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country.[666]

The Court majority acknowledged that there might be other kinds of 'very exceptional' situations besides the one addressed in *D v United Kingdom*, in which the humanitarian considerations weighing against removal would be equally as compelling as those identified in *D v United Kingdom*.[667] However the majority held that neither removal of an individual with a serious illness to a country with inferior treatment facilities, nor the fact that the individual's life expectancy would be significantly diminished, constituted in themselves 'exceptional' circumstances sufficient to give rise to a breach of article 3.[668]

Subsequently, in *Paposhvili v Belgium* the Court clarified that the 'other very exceptional circumstances' to which the Court had previously referred included situations where a seriously ill person, though not at imminent risk of dying, 'would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid

[666] *N v United Kingdom* ECHR 2008-III 227 [43].
[667] Ibid [43].
[668] Ibid [42].

and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy.'[669]

These cases can be understood as focusing on the nature of the anticipated harm (including its severity and whether it would be intentionally inflected by the receiving State) as the decisive issue in determining whether a risk of that harm engaged the protection in article 3. That is different from a factual inquiry into causation, which must acknowledge that the act of the State to deport a person is in fact a contributing cause of that individual's exposure to risk. Owing to this focus on the nature of the anticipated harm, the potential for confusion or divergent views about the meaning of factual causation is probably minimal at this point.

As previously noted, there have been relatively few cases so far addressing the corresponding protection in article 7 of the ICCPR as it applies to individuals suffering from deteriorating health conditions. As the jurisprudence on the scope of *non-refoulement* under article 7 develops, it will serve the interest of clarity and coherence of UN human rights law if the concept of factual causation is kept separate from the legal-normative issue of the meaning of the words 'treatment or punishment' in article 7. Based on Views issued to date, it appears that there is some risk of conflation of causation and other elements of responsibility.

This conflation arguably can be seen in the Committee's views on *AHG v Canada,* which concerned the decision of the respondent State to deport the complainant to Jamaica.[670] To recap on the facts of this case (also discussed in part 2.4.3), the complainant was a Jamaican national who suffered from schizophrenia and diabetes. He had arrived in Canada at the age of 18 and lived there continuously for 31 years, until he was deported to Jamaica in 2011. He had been diagnosed with schizophrenia in 1993 and was institutionalised for a year and a half, and subsequently received mental health treatment as an outpatient, but had difficulty complying with his treatment after he became homeless in 2005 and suffered psychotic relapses. In 2006 he was reported 'inadmissible' on the grounds of serious criminality, in particular his

[669] *Paposhvili v Belgium* [183].
[670] AHG v Canada.

conviction in 2005 for assault with a weapon for which he was sentenced to one day in gaol in addition to 80 days of pre-sentence custody.

The author complained to the Committee under the First Optional Protocol in August 2011, prior to his deportation, however by the time the Committee adopted views on the admissibility and merits of the communication (25 March 2015) he had been deported to Jamaica. In his initial communication he claimed that his removal to Jamaica would breach articles 6 and 7, as he would be exposed to risks of arbitrary deprivation of life and CIDTP. The author claimed that such risks arose from deficiencies in available treatment and care for persons suffering mental illness in Jamaica, and attendant risks of homelessness and acts of violence. After his deportation, in 2013 the author submitted additional information about his actual experiences in Jamaica, which he argued involved violations of his rights under articles 7, 9(2), 9(3) and 10 of the Covenant.

In responding to the authors' claims concerning certain aspects of his treatment post-deportation, the State party invoked the concept of causation as one basis (among several) for limiting the scope of its responsibility under the Covenant. The State party's argument, as summarised by the Committee, was as follows:

> With respect to the new, post-deportation evidence provided by the author, the State party submits that the relevant time for the Committee's assessment of the case is at the time of removal. It could not be foreseen that the author would be sexually abused, that the police would not return his medication upon his release from detention or that the community group home would close. Even if all the alleged events are true, the State party cannot be considered responsible for them, as there is *no causal connection* between the removal and the subsequent events. *Even if that connection is said to exist*, which the State party denies, *it is too indirect and remote* to trigger any violation of the Covenant by Canada.[671]

This argument is noteworthy because it illustrates the potential for ambiguous references to causation within analysis on legal responsibility for risk-exposure,

[671] Ibid [6.3] (emphasis added).

particularly when risks arise from a combination of factors that includes the individual's deteriorating psychiatric condition. The State party's argument, as summarised by the Committee, seems ambiguous in two ways. First, no distinction is drawn between causation and the related (though strictly non-causal) concepts of remoteness or foreseeability. This has the potential to undermine transparency in legal reasoning, for the reasons explained in 5.6 above. Second, to the extent that factual causation (or lack thereof) is argued, there is no explanation of how causation is defined or what test is applied to detect it.

The author responded to this argument of the State party, but there is no indication that the response addressed the meaning of causation or the distinction between causes in fact and foreseeability or remoteness. The author's response seems to have focused on foreseeability of the harm as a matter of fact. In the Committee's summary, the author argued:

> While it may not have been foreseeable that the author would be raped by the exact person who assaulted him, the fact that he faced a serious risk of irreparable harm was certainly evident from the evidence available at the time of removal. It was entirely foreseeable that without adequate housing and sufficient support to manage his symptoms of schizophrenia, his mental health would deteriorate, exposing him to violence from the community and the police, as well as to cruel, inhuman or degrading treatment.[672]

Ultimately the Committee found that the deportation of the author constituted a breach of the State party's obligations under article 7, though it expressed this finding in concise views that did not address conceptual questions relating to causation.[673] It was unnecessary to address such issues, as in finding a violation of article 7 the Committee focused on the State party's decision to deport the individual, rather than

[672] Ibid [7.1].

[673] Ibid [10.4]. The Committee also found that the author's claims under articles 6, 9 and 10 inadmissible, and that his claims under articles 17 and 23(1), read alone or in conjunction with article 2(3), were admissible. Having found a violation of article 7, the majority on the Committee declined to examine the merits of the claims under 17 and 23(1). Two Members appended individual concurring opinions, and one appended an opinion partly dissenting (but concurring on the finding of violation of article 7).

subsequent events. Implicitly, the violation was in the exposure of the individual to risk, rather than any causal connection between the deportation and his actual experiences in Jamaica. While it cannot be said that the matter establishes any particular approach to causation, it illustrates the potential for confusion in cases where causal concepts are invoked to justify a limitation of State responsibility for harm occurring after removal. It is submitted that the clearer approach is to focus on the exposure of the individual to risk as the harm in question (as the Committee ultimately did). As previously discussed, in that context, the fact of causation (in the sense of the involvement of the State party in risk-exposure) is obvious. This separates causal analysis from the more complex issue to be addressed, which is the legal-normative question of the scope of the protection in article 7, including whether the 'treatment or punishment' referred to in article 7 extends to the author's particular experiences.

5.8.2. Causation in cases concerning risks of climate change

The utility of a minimalistic approach to factual causation can also be explained by reference to claims concerning the risks associated with climate change and associated impacts upon the enjoyment of human rights. To date, only a small handful of communications to UN human rights treaty monitoring bodies have raised the question of States parties' obligations in relation to climate change and their legal responsibility for past, continuing and future human rights violations of those obligations. The present dissertation has touched on three such communications in the analysis of separate legal issues: *Teitiota v. New Zealand,*[674] *Billy v Australia,*[675] and *Sacchi et al. v. Argentina.*[676] The issue identified above was not addressed substantively in Views on any of these communications. In *Teitota,* which primarily concerned whether the author would face a risk of harm if returned to the country of origin, such that *non-refoulement* under article 6 would apply, the outcome ultimately turned on the Committee's assessment of the adequacy of the State party's domestic

[674] See parts 2.4.2,3.3.2 and 4.3.3 above.
[675] See parts 2.9 and 4.3.3 above.
[676] See part 5.4.2 above.

legal processes for evaluating the *non-refoulement* claim.[677] Therefore, the question of whether the State party itself caused risk exposure by causing climate change through its GHG emissions was not in issue.

In *Sacchi et al.,* the communication raised the issue of causation squarely. The authors claimed that the respondent States had each 'knowingly caused and perpetuated the climate crisis' by failing to reduce GHG emissions 'at the highest possible ambition', and failing 'to use all available legal, diplomatic, and economic means' to achieve reductions on GHG emissions by major emitters (China, the US, the EU, and India) and other G20 members, and that by 'recklessly causing and perpetuating life-threatening climate change, the respondents have failed to take necessary preventive and precautionary measures to respect, protect, and fulfill the petitioners' rights to life (Article 6), health (Article 24), and culture (Article 30)'.[678] However, as previously noted, the Committee on the Rights of the Child declined to consider the merits of the communication on the basis of the authors' failure to exhaust avenues for remedies in domestic law.[679]

In *Billy,* the communication also raised the issue of causation of climate risk, but the Committee ultimately decided the matter in a way that avoided addressing that difficult question. The authors' submissions to the Committee included claims that the State party had violated various human rights obligations by (*inter alia*) failing adequately to *mitigate* the effects of climate change, including by failing to 'take adequate measures to reduce Australia's national greenhouse gas emissions which contribute to climate change'.[680] This aspect of the claim logically raises the issue of

[677] See parts 2.4.2 and 4.3.3.
[678] Sacchi et. al. v. Argentina, Brazil, France, Germany and Turkey, [20], [22], [24].
[679] See part 5.4.2.
[680] For example, the authors submitted that 'their State, Australia, is violating its responsibility to protect their human rights by failing to:… (2) take adequate measures to reduce Australia's national greenhouse gas emissions which contribute to climate change, including by failing to set a sufficiently ambitious national emissions reduction target under the 2015 Paris Agreement …by failing to pursue adequate domestic measures to meet that target, and by failing to cease promoting the extraction and use of fossil fuels, particularly coal for electricity generation ("mitigation")': Joanne Etherton *et al.*, 'Communication under the Optional Protocol to the International Covenant on Civil and Political Rights' (13 May 2019), submitted on behalf of Yessie Mosby, Nazareth Warria, Nazareth Fauid, Stanley Marama, Keith Pabai, Ted Billy, Daniel Billy and Kabay Tamu, available at https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2019/20190513_CCPRC135D36242019_complaint.pdf (accessed 15 January 2025).

the State party's causal contribution to climate change-related harms and/or causal contribution to the *risk* of those harms. However, in its Views on the admissibility and merits of the communication, the Committee dealt with the matter in a way that sidestepped this aspect of the claim. Although the Committee summarised the authors' claims concerning the State party's alleged failure to take adequate *mitigation* measures,[681] and the State party's response to those claims,[682] in its reasoning on the merits, the Committee focused on the State party's *adaptation* measures, such as coastal works undertaken to adapt the Torres Strait islands to sea level rise and coastal inundation. Interestingly, in assessing the *admissibility* of the communication, the Committee does address the claim of the failure to mitigate climate change by reducing GHGs, and furthermore, the Committee's *prima facie* assessment that 'the State party is and has been in recent decades among the countries in which large amounts of greenhouse gas emissions have been produced' appears to have been relevant to the Committee's finding that the communication was admissible.[683] Yet, when it came to consider the merits of the authors' claims, the issue of the State party's causal contribution to harm or risk of harm through failure to *mitigate* GHGs seems to fall away in the reasoning of the majority. Reference is made to 'coastal mitigation works', but in this context, the word 'mitigation' is used to refer to what the authors had described in their submissions as *adaptation* measures.[684] Similarly, in considering the merits of the claims under articles 17 and 27 (which the Committee found to have been violated), the Committee again focused on the inadequacy of *adaptation* measures such as seawall upgrades.[685] The effect is to sidestep the theoretically and empirically challenging question of the State party's

[7], [8] (citations omitted).

[681] Billy *et al.* v Australia [3.1], [3.4], [5.3], [5.4], [8.2], [8.3].

[682] Ibid [4.3], [4.5], [6.3], [6.12], [7.6].

[683] The Committee Stated: 'With respect to mitigation measures, although the parties differ as to the amount of greenhouse gases emitted within the State party's territory and as to whether those emissions are significantly decreasing or increasing, the information provided by both parties indicates that the State party is and has been in recent decades among the countries in which large amounts of greenhouse gas emissions have been produced. The Committee notes that the State party ranks high on world economic and human development indicators. In view of the above, the Committee considers that the alleged actions and omissions fall under the State party's jurisdiction under articles 1 or 2 of the Optional Protocol and therefore that it is not precluded from examining the present communication': ibid [7.8].

[684] Ibid [8.7].

[685] Ibid [8.12], [8.14].

potential responsibility under the Covenant for risk-imposition through regulatory or policy settings with respect to GHG emissions.

More claims that raise this issue may be expected in the future, particularly as the adverse effects of climate change become more widespread, more immediate, and more severe in their impact on individuals and communities around the world. A recent development in this regard is the resolution of the UN General Assembly on 29 March 2023 requesting the International Court of Justice to give an advisory opinion on 'the obligations of States in respect of climate change'.[686] Relevantly, in the chapeau to the operative part of the resolution, the General Assembly states the request 'Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights…' (and certain other international legal instruments and principles), thus expressly linking the request for the advisory opinion on to the ICCPR and to international human rights more broadly. The advisory opinion may provide an opportunity to clarify how causation should be understood in the context of analysing States parties' obligations under the Covenant in respect of their contribution to anthropogenic climate change; an issue so far unresolved in the jurisprudence of UN treaty bodies.

It should be noted that the question of what States parties to the Covenant are obligated to do in respect of climate change to fulfil their obligations to 'respect and to ensure to all individuals within [their] territory and subject to [their] jurisdiction the rights recognized in the...Covenant' is a broad and complicated question which entails numerous challenging sub-questions. These could include, for example: how should obligations entailed in specific rights be specified? Are they obligations to exercise due diligence or to achieve a particular result? If obligations of diligence, how is that standard of conduct understood? To what is that standard referable? How *specific* should the formulation of a State party's obligations be, and how does the degree of

[686] Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change (adopted 29 April 2023 UNGA Res 77/276) (Climate Change Advisory Opinion Request).

specificity interact with the approach to determining instances of breach?[687] Can treaty and customary rules in international environmental law provide a valid reference point for defining or specifying human rights obligations? What are the broader implications of litigating environmental claims in a legal system outside of the treaties established to address those specific issues, including for the fundamental principle of consent-based jurisdiction at international law? And so on.

While many of these issues are beyond the scope of the present project, one question concerning causation is within scope and of central relevance to the present discussion on causation in the context of risk-based obligations. The question can be stated as follows: Considering that the Committee interprets the right to life as entailing an entitlement to freedom from certain *risks* to life, and more specifically, an 'entitlement of individuals to be free from *acts and omissions that are intended or may be expected to cause their unnatural or premature death*',[688] and considering also that the Committee has characterised climate change as one of the 'most pressing and serious threats to the ability of present and future generations to enjoy the right to life', how should the Committee (or the ICJ for that matter) analyse *causation* of climate change-related harms, and/or causation *of the risk* of climate change-related harms, for the purpose of analysing the broader question of a State party's obligations under article 6 in the context of climate change?

At the heart of this question is the difficult theoretical issue of causation, which is arguably made even more complex by the recognition of *risk-based* obligations. As the present dissertation has attempted to show, to condition an obligation upon a finding of risk can be complicated enough in itself. To this, the whole issue of causation adds another layer of theoretical complexity. We are required to figure out not only what risk means and how to identify it, but also, determine which State is causing exposure of a person to risk, including in cases where risk (and ultimately physical harm) is arguably 'caused by' the acts or omissions of many States parties to

687 This issue is addressed in the context of European human rights law in Stoyanova, 'Framing Positive Obligations under the European Convention on Human Rights Law: Mediating between the abstract and the Concrete'.
688 UNHRC, 'General Comment No. 36 – Article 6: right to life' (3 September 2019) UN Doc CCPR/C/GC/36, [3].

the Covenant. The answer depends on what you mean by 'risk', and also on what you mean by 'cause'.

It is submitted that international human rights law can draw inspiration from the extensive body of scholarship on causation in the law (even if written largely having regard to municipal law) to structure the analysis of causation for the purpose of risk-based human rights obligations. Consider, for example, the issue of causation as it arose in the authors' submissions in *Billy v Australia*.[689] In alleging that a State party has violated the authors' right to life by (among other things) failing to take action to reduce greenhouse gas emissions, the claim implies a causal connection between the conduct of the State party and the predicted or actual harm suffered by the complainants. Yet, sea level rise and other impacts of global heating have obviously resulted from the combination of the past and continuing conduct of multiple States (leaving aside any questions relating to the attribution of conduct of non-State actors). Multiple States are involved, broadly speaking, in the occurrence of anthropogenic climate change. Because of this, the communication had the potential to elicit differing views on whether there is relation of cause and effect between the respondent State's conduct and the harm suffered by the authors. As previously explained, that depends on what we mean by our use of the word 'cause'.

Causation in this context would be relatively straightforward if the State had on its own emitted a volume of GHGs both necessary and independently sufficient to create the conditions for serious and irreparable harm, or risk thereof. But for many potential respondent States, hypothetically (and without commenting on any specific claim or situation), it may be that the State's emissions on their own are not *sufficient* for the occurrence of the harm (noting that the harm may be framed in terms of risk exposure and/or past or continuing physical harm). Furthermore, it may be that the State's emissions on their own are not *necessary* for the occurrence of the harm, because the emissions of one or more other States would be sufficient for the occurrence of the

[689] Joanne Etherton *et al.*, 'Communication under the Optional Protocol to the International Covenant on Civil and Political Rights' (13 May 2019), submitted on behalf of Yessie Mosby, Nazareth Warria, Nazareth Fauid, Stanley Marama, Keith Pabai, Ted Billy, Daniel Billy and Kabay Tamu, available at https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2019/20190513_CCPRC135D36242019_complaint.pdf (accessed 15 January 2025).

harm. If so, then the situation is analogous to that of the causally over-determined pollution cases discussed in part 5.7.3 above. With the NESS test, Wright was able to elucidate a rationale for finding that a defendant had caused a plaintiff's injury, despite the defendant's pollution being neither necessary nor independently sufficient for the occurrence of the injury. So too can the weak necessity/strong sufficiency account of causation explain why a relatively minor contributor to the greenhouse gas effect can still be regarded as in fact a cause of that effect. The weak necessity/strong sufficiency account of causation helps to explain our intuition that all GHG emitting States are involved in some way in the occurrence of dangerous climate change and its attendant human rights risks, even if that involvement is just one element in a very large and complex set of causal conditions.

It may be an entirely legitimate project of the law to sanction that form of involvement. Whether the law in question (in this case, an obligation in international human rights law) applies to that conduct in some way is, at its heart, a question of *legal interpretation*, rather than a factual inquiry. That is because, as acknowledged at part 5.7.5, to specify that this form of involvement equates to causation is itself a choice governed by legal norms, rather than the result of a factual inquiry. It is submitted that to argue that a State lacks responsibility because it alone didn't 'cause' the risk or the physical harm to the individual is to disguise that legal-normative inquiry as a factual one, or to sidestep it altogether.

Human rights complaints addressing the causes and impacts of climate change point to a need to define causation when analysing a State's international legal responsibility. Furthermore, such cases demonstrate the appropriateness of selecting a minimalistic concept of causation and asking simply whether the State party was involved in the occurrence of the harm to the individual complainant in the sense that the State's conduct (whether an act or omission) was a NESS condition for the occurrence of that harm. This approach has the benefit of avoiding the introduction of vague or inconsistent notions of causation into the jurisprudence on this issue, while also ensuring that legal-normative issues are addressed directly, and not hidden within an ostensibly factual inquiry.

The NESS test can be applied to the situation of the inundation of low-lying islands to explain how a single respondent State can be regarded as having 'caused' the harm of climate change through its own emissions. If a respondent State emits a volume of greenhouse gasses that combine with the emissions of a group of other States so as to create the conditions for climate change (and interconnected phenomena such as sea level rise), that State's emissions can be regarded as a necessary element in a set of actual antecedent conditions which, taken together, were sufficient for the occurrence of the harm. In this context, a 'set' could be comprised in any number of different ways, by selecting from various GHG-emitting States and tallying their respective emissions to reach a particular threshold of emissions. The threshold is the volume of emissions established (as a matter of fact) as the minimum level of emissions sufficient for the occurrence of the harm (or risk, where risk exposure constitutes an actionable harm). As previously explained, on this approach it does not matter that there could be multiple different sets of emitters that would each suffice for the occurrence of the harm.[690] What matters is that the respondent State's emissions were necessary to the sufficiency of one of those sets. If so, the NESS test holds that the State ought to be regarded as having caused the harm/risk.

To pre-empt a potential criticism of this approach, it could be argued that NESS causation in the context of GHG emissions would have the effect of casting the net too wide, in the sense that virtually any State could find itself responding to a claim that it has caused anthropogenic climate change—even if the volume of its own contribution is but a tiny fraction of that of the largest emitters. Similar criticisms have been levelled at the NESS test in the context of tort law. For example, David Fischer has noted the potential of the NESS test to produce what he considered to be bizarre or implausible findings of causation, by aggregating very minor or trivial contributions with much larger ones:

> Suppose a party adds a teaspoon of water to a tsunami causing great destruction… the NESS test concludes the party caused all the destruction in the vicinity of the

[690] See part 5.7.3.

> teaspoon of water… by aggregating the teaspoon of water, with just enough other water, to create an injury-causing set'.[691]

Wright's response to that criticism was to point out that a teaspoon of water added to a flooding river does in fact contribute to, and is part of the flood; similarly, a match added to a raging forest fire does in fact contribute to and is part of the forest fire.[692] Wright argued that such contributions should be acknowledged as causes, because:

> What if the same flood or fire were caused by a million (or many more) different people all contributing a teaspoonful of water or a single match? Denying that any of the teaspoonfuls or matches contributed to the destruction of the property that was destroyed by the flood or fire would leave its destruction as an unexplained, non-caused miracle… What is generally agreed upon is that the trivial contributor should not be held liable when her contribution was trivial in comparison to the other contributing conditions and was neither strongly necessary nor independently strongly sufficient for the injury at issue, *but this is a normative issue of attributable responsibility rather than causal contribution.*[693]

That distinction can be applied also when analysing the issue of causation in the context of human rights law and its relevance to harm caused through GHG emissions. The benefit of drawing the distinction is to ensure transparency; to rule out small contributions on the purported basis that they are not factually 'causes' can mask the normative considerations at play in the allocation of responsibility. It is also preferable simply because it captures the complex reality of causal conditions in a phenomenon like climate change. Trying to characterise any single State as *the* cause would be at odds with physical reality and could also lead to the perverse conclusion that no State bears responsibility.

To play 'devil's advocate' for a moment, it could be argued that that outcome would not be perverse but would simply be the unfortunate result of a lacuna in international law, reflecting the limits of obligations which States have thus far been willing to

[691] Fischer, 'Insufficient Causes' 290.
[692] Wright, 'The NESS Account of Natural Causation: A Response to Criticisms' 41.
[693] Ibid (emphasis added).

accept. But this ignores the point that international human rights law has already evolved to recognise the relevance of climate change-related harms to the enjoyment of various rights, including the right to life. Once it is accepted that the right to life encapsulates 'the entitlement of individuals to be *free from acts and omissions that are intended or may be expected to cause their unnatural or premature death*',[694] and that the obligation to respect and ensure the right to life 'extends *to reasonably foreseeable threats and life-threatening situations* that can result in loss of life',[695] and furthermore, that various forms of environmental degradation, including climate change, constitute 'some of the *most pressing and serious threats* to the ability of present and future generations to enjoy the right to life',[696] then the notion that no State bears any responsibility for the impacts of greenhouse gas emissions appears logically and legally unsustainable. The task then is to explain the legal rationale for States parties' responsibility, having regard to the analytical structure of a claim in human rights law. This involves, among other things, explaining which States should be regarded as having caused the harm, and why. Applying the necessity/strong sufficiency account of causation, the volume of any one State's contribution, however small it may be in comparison with that of other States, is not a sound basis for claiming that that State did not cause the harm.

Of course, like in tort law, in international human rights law causation alone would be insufficient to engage the State's legal responsibility. It is also necessary to consider the scope of the duty, or in other words, what specific conduct is required of the State party to respect and ensure human rights in the context of climate change. How to specify human rights obligations in relation to climate risk is an important issue that lies beyond the scope of the present dissertation.

[694] UNHRC, 'General Comment No. 36 – Article 6: right to life' (3 September 2019) UN Doc CCPR/C/GC/36, para. 3 (emphasis added).
[695] Ibid [7] (citation omitted, emphasis added).
[696] Ibid [62], citing Declaration of the United Nations Conference on the Human Environment [1], Rio Declaration on Environment and Development, principle 1, United Nations Framework Convention on Climate Change, preamble (emphasis added).

5.9. Conclusion

This chapter has grappled with the complex and challenging concept of causation, as it applies to risk-based obligations entailed in the ICCPR. As explained in parts 5.2 and 5.3, causation is often an essential element in legal responsibility, both in human rights law and in legal obligations more generally. It was explained that, although they are not always explicitly acknowledged in legal reasoning, causal judgments are inherent to determining the existence or breach of a State party's obligations in international human rights law.

This chapter has shown that the concept of causation figures in international law in several ways: it can appear in the primary rules, such as when a treaty provides that a State party bears responsibility for damage caused by its conduct, it appears as a requirement in certain secondary rules of state responsibility, and it is also an inherent or intrinsic feature of judicial reasoning in cases involving allegations that some actor caused a harmful outcome. By analogy, it is also inherent to the Committee's reasoning in Views on communications under the First Optional Protocol in which it is alleged that a State party violated the human rights of a person by causing harm to them. This chapter has explained that in this context, as in legal reasoning more generally, the causal inquiry is shaped by the content of the law and by the practical purpose which causation serves in that context. Accordingly, causal inquiry in international human rights law ultimately focuses on the role of the State party in causing (whether by an act or omission) the situation which gave rise to a violation of a Covenant right.

In part 5.4, various conceptual interactions of risk and causation as elements in responsibility were examined. Although much of the present dissertation has focused on the relevance of risk is as a distinct *form of harm* which States parties are obligated to prevent, in some cases, risk seems to have played a different role in the analysis of responsibility. Drawing on the jurisprudence, three roles of risk were considered: first, the use of risk as a substitute for causation in early non-refoulement cases; second, the epistemic function of risk to support the drawing of inferences about the occurrence of harm which may already have occurred, but for which direct evidence is lacking;

and third, the use of risk as a substitute for proving causation of harm that is known to have occurred, but which is difficult prove to have been caused (as a factual matter) by the State party's act or omission.

Parts 5.5–5.7 engaged with some difficult problems which arise in analysing causation of risk-exposure. It was argued that, even if risk and causation are understood as distinct elements in the analysis of obligations and breach (which they ought to be), there remains scope for uncertainty and confusion as to *what causation means.* Reasoning about causation can be especially challenging in situations of multiple causation, including cases of so-called causal overdetermination. Drawing on causal theory developed in the wider legal literature, it was argued that the first step to clarifying causation is to separate causation as a question of fact from legal/normative concepts such as proximity and remoteness. It was then argued that the second step is to select an interpretation of causation to specify precisely what facts the causal inquiry is concerned with. Several theoretical accounts of the so-called 'factual' aspect of causation were considered, each of which specifies a kind of inquiry. It was observed that in the broader literature on causation in the law, the default approach of *sine qua non* or 'but for' causation is generally regarded as inadequate for situations of causally overdetermined harm. Weak necessity/strong sufficiency approaches to causation such as the NESS account provide a reasonably compelling alternative or supplementary test to *sine qua non* causation, particularly considering their ability to account for multiple causes of harm that are sufficient for the harm to occur (independently or as part of a set of conditions), though not 'necessary' for the harm in the strong sense. As leading causal theorists have argued, the results of the weak necessity/strong sufficiency account of causation seem to align with how we intuitively think about causation in cases concerning pollution from multiple sources, and other analogous situations.

The utility of these ideas for reasoning in cases concerning the ICCPR was demonstrated through case studies of two difficult situations involving risk-based obligations under the Covenant: first, *non-refoulement* cases involving a risk of deteriorating health, and second, cases concerning the risks of climate change. It was argued that a clearer approach to these cases would involve acknowledging that causation is relevant, but reducing the causal inquiry to the question of whether the State's conduct was or would be involved in the individual's exposure to risk (in the sense of it being a NESS condition of the exposure to risk). Taking this minimalistic approach to causation highlights the legal-normative quality of other issues in dispute and ensures that legal issues (such as the scope and content of duties) are not confused with factual questions.

6 Conclusion

This dissertation has advanced the first in-depth theoretical and doctrinal analysis of what can be described as 'risk-based obligations' entailed in the ICCPR. It began by defining 'risk-based obligations' as a loose category of obligations under the Covenant which share the characteristic of being duties or obligations upon States to refrain from exposing an individual to risk or otherwise to take action to prevent or mitigate their exposure to risk. Such obligations are 'risk-based' in the sense that are enlivened (or in other words, they are rendered applicable in the circumstances) by a risk of some kind. It was argued that there is good reason for studying risk-based obligations, and the concept of risk more broadly in the context the ICCPR: in summary, risk is a concept that appears frequently in the jurisprudence and is often pivotal to the rationale for the existence and/or breach of an obligation, yet there is relatively little analysis of it in human rights scholarship.

Chapter 2 addressed how obligations under the ICCPR can be understood as 'risk-based' obligations, providing context for the analysis in chapters 3–5. It was explained that the idea of risk is implied at a very general level, as well as in more specific duties. At general level, the idea of risk is logically involved in giving effect to the overarching obligation 'to respect and to ensure' Covenant rights, principally because that general undertaking is interpreted as requiring States parties not only to refrain from certain acts (the duty to 'respect' Covenant rights), but to take steps to protect and fulfil (to 'ensure') Covenant rights. This involves positive acts to *prevent* future violations, including in situations that are some extent removed from the State party's organs/agents. It was argued that, because risk (however interpreted) is the principal intellectual tool by which we may attempt to predict negative outcomes and respond appropriately, risk-based approaches are the logical corollary of preventative obligations. For this reason, irrespective of whether the word 'risk' is used in the articulation of duties, it is generally relevant to protective or preventative obligations, and therefore to any or all of the rights in articles 6–27.

It was also shown that risk and related ideas are central to a range of specific duties entailed in articles 6 and 7. Examples of these risk-based obligations were discussed, drawing on the Committee's jurisprudence on cases concerning the removal of persons to foreign territories, law enforcement, the protection of vulnerable persons in the context of broader patters of violence, enforced disappearances, war and nuclear weapons, degradation of the natural environment, the provision of healthcare, and measures taken in the context of public health emergencies. As demonstrated in chapter 2, there are a plethora of obligations that can be described as 'risk-based' in the sense that they are obligations to avoid or prevent the exposure of individuals to various forms of risk or take action to mitigate risk. In a wide range of situations, the question of whether or not a State party has acted consistently with human rights obligations can turn on a judgment about risk. It was also shown that the emphasis on risk seems to be increasing over time in connection with 6 and 7; the word 'risk' was absent from early General Comments, whereas more recent General Comments contain numerous references to it. Overall, risk is a prevalent and influential concept in the jurisprudence.

Chapter 3 addressed a question that appears straightforward on the surface, but is revealed to be complex and puzzling upon closer scrutiny: what is 'risk' in the context of the ICCPR? As an entry-point for exploring this deceptively tricky question, chapter 3 began with a discussion of how the word 'risk' ordinarily is understood and employed in day-to-day (non-technical) communication. Drawing upon dictionary definitions and explanations in the multidisciplinary literature on risk, it was argued that while 'risk' can be used in several senses, it often conveys two core elements—one being a negative outcome, and another being the possibility/chance/probability/likelihood of its occurrence. Furthermore, 'risk' often implies that some form of measurement is possible, whether measurement of the likelihood of occurrence, measurement of magnitude of the harm, or a combination of both. It was argued that the idea of risk as amenable to measurement goes to the heart of common conceptions of risk and is often implied in ordinary use of the word. In this framing, it is risk's amenability to measurement that differentiates it from pure uncertainty with respect to future events. Furthermore, because the task of measuring future likelihoods is premised on the concept of probability, risk is fundamentally grounded in probabilistic thinking. Once this is acknowledged, it becomes clear that risk findings differ fundamentally from purely factual findings. That is because, as explained in chapter 3, to assess the probability of real-world events generally involves more than just establishing facts about past or continuing events; it also involves the application of judgment about how to draw upon the past to measure future likelihoods. As probability has both objective and subjective aspects, any concept of risk that draws upon probabilistic thinking (overtly or implicitly) also entails a mix of objective and subjective inputs. Risk in this sense differs significantly from purely factual findings.

Against this theoretical backdrop, in the remainder of chapter 3 the Committee's jurisprudence on various risk-based obligations was analysed to probe the meaning ascribed to risk in that context. Cases concerning *non-refoulement* were examined first. Drawing on examples from the cases introduced in chapter 2, it was argued that the meaning of 'risk' in *non-refoulement* under the ICCPR has evolved over time. Whereas in early cases, risk appeared to be synonymous with the idea of 'necessary and foreseeable consequence' (implying a very high degree of certainty with respect to the anticipated future harm), over time the meaning of risk in *non-refoulement* has become more open-textured. While the Committee has sought to define and limit the scope of protection obligations through the use of qualifying terms, such as 'real', 'reasonably foreseeable', 'personal', and more controversially, 'imminent', little has been said about the concept of risk itself, or the epistemological nature of *ex ante* risk findings. Drawing on the theory set out at the beginning of the chapter, it was argued that to acknowledge the special nature of risk findings—in particular the way in which they incorporate both facts and non-factual considerations such as value/policy judgments or legal principle—would enhance the intellectual rigour and transparency of the reasoning.

After discussing *non-refoulement* as a category of cases in which risk must be determined *ex ante*, chapter 3 then briefly examined the different analytical role for risk in cases in which the risk subsequently materialised in physical harm. It was shown, again though discussion of jurisprudence introduced in chapter 2, that when risk is considered *post hoc*, qualifying terms such as 'reasonably foreseeable' serve a different analytical function, and one that makes more sense in this context than in the situation of an *ex ante* risk assessment. It was shown that expressions such as 'reasonably foreseeable' can be more clearly identified as legal/normative filters on responsibility in this context. Yet, the question of what 'risk' *is*, or how the Committee understands that concept, remains largely open.

Chapter 4 addressed certain theoretical issues that arise when a State party's obligations are triggered by risk, and the meaning or nature of risk itself is left largely unspecified. Two challenges were addressed: first, the challenge of providing an acceptable degree of clarity as to the scope of risk-based obligations (in other words, a clear and principled approach to determining when the obligations apply), and second, the challenge of defining the appropriate standard of review of (or appropriate degree of deference toward) States parties' findings with respect to risk.

To explore the first issue, this dissertation revisited the use of qualifying terms such as 'real', 'reasonably foreseeable', 'personal' and 'imminent', which have been developed primarily in the jurisprudence on *non-refoulement* cases but have been transplanted to some extent into the reasoning in some other cases concerning risk. In chapter 3 it was observed that most of these terms give little indication of how 'risk' itself is understood; in chapter 4, further problems were identified, including the ambiguity of the terms themselves and how they fit conceptually with the requirement of risk itself. It was argued that that terms like 'real', 'reasonably foreseeable' and 'personal' can be ambiguous and raise further questions. Furthermore, the apparent emergence of a criterion of 'imminence' for risk to trigger protection obligations has been questioned in recent scholarship. That debate was addressed briefly in chapter 4. It was argued that, while placing some limits on the scope of risk-based obligations is reasonable and necessary, particularly in the context where risk itself is open-textured, the use of 'imminence' as a limiting criterion is imprecise and liable to confuse. It was suggested that the real purpose of that term may not be to limit protection obligations based on the anticipated timing of future harm, but rather to limit obligations based upon the degree of certainty in the hypothesis about the future circumstances that may befall the individual. It was argued that, if this is the underlying rationale for the requirement of imminence, that term is imprecise, because timing does not necessary determine the degree of certainty of the future harm. It was suggested that using the term 'confidence' in this context instead of 'imminence' would enhance the transparency of the reasoning, by highlighting the unavoidably subjective dimension of risk (and the probabilistic reasoning which underpins it).

The question of the appropriate standard of review for risk findings was then addressed. It was explained that this issue is closely linked to the issue of how risk is understood conceptually, and more specifically, whether risk is understood as a purely factual matter (much like facts about past or continuing events), or as something of a different epistemological nature, which combines factual findings with non-factual considerations, such as values, policy considerations, or the application of legal rules or principles. Before analysing this issue as it arises in the context of the ICCPR, this dissertation briefly examined how similar issues arise in the context of *non-refoulement* and refugee status determination under the Refugee Convention. Through a discussion of the literature touching on the nature of risk in this context, it was shown that there are a range of different characterisations of the nature of the risk assessment involved in applying the criterion of well-founded fear. Some scholars have emphasised the importance of objective evidence in refugee status determination, others have addressed the subjective dimension of risk and have linked that to arguments about the appropriate procedures for determining risk. As was shown in chapter 4, this debate in refugee law sheds light on an important dynamic that plays out in the application of the ICCPR also: how one characterises or conceptualises risk can support a particular position about *who* is best placed to determine risk, and *how* they ought to do so.

Returning to the Committee's jurisprudence on articles 6 and 7, it was then demonstrated that the cases reflect a varying approach to reviewing States parties' risk findings, reflecting a lack of clarity or agreement on the fundamental nature of these findings. It was argued that in *non-refoulement* cases, the Committee's approach has been inconsistent and sometimes divided. Although in statements of broad principle, risk findings are ostensibly treated as factual (thereby requiring considerable deference), in some cases in which the Committee is divided, different findings on the existence or breach of a protection obligation sometimes turn on the willingness of Members to delve into the question of risk. Cases other than *non-refoulement* cases were then considered, focusing on environmental risk. It was observed that the Committee has sometimes demonstrated a reluctance to disagree with a State party's risk findings in this context, especially in cases involving technical or scientific evidence about long-term risk. However, in the recent case of *Billy v Australia,* on which the Committee was divided, the differing conclusions of Committee Members seem to reflect differing approaches to the question of risk. It was argued that a close reading of these Views indicates that what underpinned the different findings with respect to article 6 was different approaches to reviewing findings on risk, and more specifically, different hypotheses applied (implicitly) to resolve gaps in evidence with respect to future events.

It was then argued in chapter 4 that there some uncertainty surrounding the Committee's approach to reviewing States parties' findings with respect to risk, and this uncertainty arises because of the mistaken characterisation of risk as a purely factual finding. Drawing on insights from the literature of international refugee law, in particular the work of Evans-Cameron, it was argued that greater clarity and predictability could be achieved by distinguishing between findings of fact regarding past or continuing events (which may support risk) findings, and risk findings themselves. It was argued that breaking down the analysis into these steps would enable a more fine-grained approach to the standard of review and enhance the transparency of the Committee's reasoning, particularly in cases in which the Committee disagrees with a State party's finding regarding risk.

The final substantive chapter of this dissertation addressed the challenging topic of causation and its application to risk-based obligations. In chapter 5 it was shown that judgments about causation are inherent to defining States parties' obligations and determining instances of breach in international human rights law, as in international law more broadly. It was also explained that the nature of an inquiry into causation is shaped by the context of the law and the practical purposes the law serves. It was explained that in the context of human rights law, while a human rights violation may in fact have many causal inputs, the focus of the inquiry is ultimately on whether the conduct of the State party caused a violation of a human right. However, as argued in chapter 5, the meaning of causation in this context is largely unexamined. Even less examined is the issue of how to think about causation in the context of risk-based obligations.

Chapter 5 has forged a path into this difficult landscape by analysing how the concepts of risk are analytically connected in the Committee's jurisprudence, suggesting a way of interpreting the concept of causation, and proposing that risk and causation be clearly distinguished in order to enhance clarity and transparency of the reasoning. After introducing the role causal inquiry in law generally, and in human rights law in particular, chapter 5 explained ways in which risk and causation can intersect in the Committee's reasoning. Drawing on examples of the Committee's jurisprudence on communications under the First Optional Protocol, three roles for risk were highlighted: first, exposing a person to 'risk' can sometimes be materially equated with *causing* future harm to that person, and in this way the concept of risk acts as a kind of substitute for the element of causation where the harm has not yet occurred. Second, in some cases a finding of risk can support an inference that some physical harm *in fact* occurred in the past, although direct evidence of its having occurred may be lacking or hidden. Third, in cases where physical harm clearly occurred in the past, but the causal link between the State party's conduct and the occurrence of the harm is empirically difficult to show, risk exposure may overcome the need to establish a causal relation, since the violation can be framed in terms of the State party's role in causing the imposition of risk. Through a detailed examination of selected *non-refoulement* cases, it was argued that the conceptual relationship between risk and causation appears to have shifted in the jurisprudence over time, with the responsibility of the removing State initially rationalised in terms of its causal contribution to (future) physical harm (with risk effectively being materially equated with actual causation), but later rationalised in terms of its role in exposing an individual *to risk* of physical harm. It was argued that to maintain a clear distinction between causation and risk as analytically separate factors in explaining the State party's responsibility for a human rights violation is preferable, as it supports conceptually clear and transparent legal reasoning.

Chapter 5 then turned to the more challenging question of how to interpret or define the concept of causation in difficult cases, where the rights violation is framed in terms of the State party's role in the imposition of risk on an individual. This final substantive part of the dissertation began by acknowledging that even if risk and causation are understood as distinct elements in the analysis of a State party's human rights obligations, there remains scope for uncertainty and confusion as to what 'causation' means—both for the purpose of risk-based obligations and for human rights law more generally. It was observed that causation, like risk, is a deeply philosophical contested concept, and uncertainty and disagreement about the underlying meaning or nature of causation in legal contexts can lead to unclear and inconsistent doctrine.

It was argued that two steps should be taken in order to clarify causation in the context of risk-based obligations. The first step is to recognise the distinction between the factual (physical) question of causation from other questions that are sometimes conflated with the factual question of causation but which are essentially questions about the application of legal norms. The second step, insofar as a factual inquiry into causation is concerned, is to specify precisely what we mean by cause in this context, and thereby clarify the focus of that factual inquiry. Drawing on causal theory in the wider legal literature, several theoretical accounts of so-called 'factual' causation were considered. It was observed that the default of approach of defining causation based on the *sine qua non* test ('*but for x, would y have occurred?*) is regarded as inadequate for situations of so-called causally overdetermined harm. It was argued that another popular theoretical account of causation, known as the weak necessity/strong sufficiency account, provides a compelling alternative or supplementary test, as the application of that test seems to align more with common-sense or popular intuition in cases concerning causally overdetermined harm, such as when pollution from multiple sources combines to produce the harm.

Chapter 5 then demonstrated the utility of these ideas by applying them to the obligation of *non-refoulement* in two scenarios of complex risk: first, where the risk facing the individual relates in part to their deteriorating health and an anticipated lack of access to appropriate healthcare in the State of return, and second, where the risk relates to environmental degradation from anthropogenic climate change. Through a discussion of Committee Views on notable cases considered under the First Optional

Protocol, which involved these two forms of risk, the case was made for a particular approach to causation. Specifically, it was argued that the approach to causation could be clarified by acknowledging that causation is relevant to the responsibility of the State party but focusing the causal inquiry on the question of whether the State party's conduct was/would be involved in the imposition of risk, in the sense articulated in weak necessity/strong sufficiency account of causation. It was argued that this approach enhances transparency of the reasoning by clearly separating factual from normative considerations and avoids the counter-intuitive finding that no State can be regarded as having caused the imposition of complex risks, such as climate change-related risks.

This dissertation has focused not on the *content* of specific duties enlivened by risk, but on the criterion of risk itself as a precondition to the applicability of certain duties. For some obligations that are enlivened by risk, the content of the duty is specified in the legal principle; for example, *non-refoulement* requires the State party, in the context of the ICCPR, to refrain from deporting, expelling, or otherwise removing a person from their territory. For other obligations enlivened by risk, the specification of a State party's obligations can be more complicated, and raises questions about the nature of due diligence obligations, or positive obligations more generally. While those issues are beyond the scope of the present project, this dissertation provides relevant context to further studies on those issues by scrutinising the meaning and function of the concept of risk as a precondition to those obligations.

The overarching picture that emerges from the present study is that risk-based obligations are useful and necessary to give practical effect to the rights recognised in the ICCPR, and hence they support the object and purpose of the Covenant, yet they also raise difficult conceptual questions linked to the inherent complexity of the concept of risk. Risk is a convenient concept for moderating the scope of States parties' responsibility, providing a rationale for both extending and limiting protection obligations in specific situations. Risk is an especially useful idea for extending the State party's human rights obligations into the relations between the individual and third parties, by explaining the role of the State party in terms of risk imposition. In the context of *non-refoulement,* it is the role of the removing State in imposing risk that explains its responsibility in human rights, and by a similar logic, the imposition of risk can explain the human rights responsibility of a State party that fails to address greenhouse gas pollution of private actors over which it exercises jurisdiction or control. A State party cannot passively ignore risks to life created by other actors; responsibility in international human rights law arises through risk imposition, and a State may violate human rights through a failure to respond to risk, irrespective of whether the risk materialises in physical harm. At the same time, the idea that some risk has not reached a particular degree or level is also used to explain the absence of a human rights violation.

While risk performs a useful function in explaining the extension or limitation of responsibility in human rights law in various situations, risk-based responsibility can also raise difficult theoretical questions, which are linked to the complexity and vagueness of the concept of risk and its underlying concept of probability. To ignore those issues could lead to vague and elliptical reasoning, and ultimately to an unacceptable degree of uncertainty or unpredictability as to the scope of obligations. Particularly difficult or sensitive cases could produce a stalemate of conflicting views on the presence or absence of risk, with no clear way to determine whose assessment of risk is correct, or why. The present dissertation has proposed some approaches that would assist to avoid such a situation, by clarifying the nature of risk findings and the standard of review, clarifying the distinction between risk and causation, and selecting a theoretical account of causation for this context.

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