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Communities on a Sinking Vessel

International Law Tools to Protect Individuals and Communities of Small Islands Developing States against the Threats Posed by Sea Level Rise

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Abstract

Sea level rise poses a compelling threat to the livelihood and the existence of Small Islands Developing States, which exacerbates the vulnerability of individuals and communities inhabiting these territories. Given the peculiar vulnerable situation that characterize these populations, this research investigates the tools offered by international law to protect individuals and communities of Small Islands Developing States against the threats posed by sea level rise, analysed on the basis of the legal limitations. In particular, the concept of protection will focus on both ensuring safety by eradicating the harm and coping with the harm that has already materialized. The research, concentrating on the legal regimes regulating international climate change law and international human rights law, concludes that the tools offered by international law are not well-equipped to protect individuals and communities by ensuring safety through the eradication of harm. However, more robust legal tools are available for their protection in terms of coping with harm and ensuring accountability. Particular focus will be devoted to tools of protection stemming from climate litigation and the enjoyment of the right to live and self determination.

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1 Introduction

The imminent and catastrophic consequences of sea level rise have proven to pose and will keep posing serious threats, particularly to low-lying coastal communities.[1] A key example of this crisis is evident in the peculiar situation of the State of Tuvalu,[2] a Small Island Developing State (SIDS). Given Tuvalu's average elevation of approximately two meters, it is undeniable its vulnerability to the increasing sea level. The vulnerability of Small Island Developing States is a growing concern in light of projections for sea level rise,[3] which could pose substantial threat of complete inundation and disappearance of the State.

In light of these alarming projections, it is crucial to enable the population facing the effects of extreme sea level to be awarded an adequate level of protection. While the worst-case scenario of entire SIDS being totally submerged remains a compelling threat, many other detrimental effects associated with extreme sea level rise are already jeopardizing the habitability of islands. These effects include: damages in infrastructures and crops arable potential, increased levels of soil salination, scarcity in drinkable water availability, flooding and coastal erosion; all these effects can highly impact the livelihood of these territories.[4]

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[1] Oppenheimer, M., Glavovic, B.C., et al (2019), Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities. In: Pörtner, H.O., Roberts, D.S. et al (eds.), IPCC Special Report on the Ocean and Cryosphere in a Changing Climate, Cambridge University Press, p 321–445.

[2] For a more comprehensive scientific assessment of the dangers caused by rising sea level to Small Island Developing States, see: Vousdoukas, M.I., Athanasiou, P., Giardino, A. et al (2023), *Small Island Developing States under threat by rising seas even in a 1.5 °C warming world,* Nature Sustainability,Vol.6 , p 1552–1564.

Small Island Developing States are a grouping of developing countries which share social, economic and environmental vulnerabilities. For a list of states falling within this definition, see United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, List of SIDS, Available at: https://www.un.org/ohrlls/content/list-sids (Accessed: 07 February 2024).

[3] Mulhern, O. (2020) Sea level rise projection map – Tuvalu, Earth.Org, Available at: https://earth.org/data_visualization/sea-level-rise-by-2100-tuvalu/ (Accessed: 07 February 2024).

[4] Nurse, L. A., McLean, R.F., et al (2014), Small Islands. In: Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, Barros, V.R., Field, C.B. et al (eds), Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects, Cambridge University Press, p 1619- 1636.

The risk of forced relocation and migration due to impacts of extreme sea level rise on the livelihood of these islands is a recurrent nightmare for most inhabitants of SIDS, but already a reality for some.[5] In the words of a Tuvalu citizen, "*moving away feels like betraying someone*";[6] but on the other hand, the disruptive force of sea level rise and the risk of inundation leave little room for alternative solutions beyond relocation. Therefore, in analysing and assessing the legal consequences associated with the extreme rise in sea level in SIDS, due regard needs to be given to the profound community struggle in cutting out the physical connection with their native lands and cultural heritage.

The International Law Association (ILA) and the International Law Commission (ILC), both bodies entrusted with the study and development of international law,[7] are currently actively addressing the legal implications stemming from sea level rise, and are using the law as an adaptive mechanism against the powerful and disruptive strength of the ocean.[8] In particular, both the ILC and the ILA have performed efforts in gathering States perspectives on how to reshape legal concepts in order to address the potential legal challenges associated with the implication of extreme sea level rise. One aspect they examined is the application of the current definition of baseline,[9] which is to be determined by a State's coast and has implications on the establishment of maritime zones over which States have maritime entitlements and

[5] Around 250 Tuvaluans are already relocated in Australia, and the country has additionally offered up to 280 more access for each year. See Srinivasan, P. (2023), Stay or go? offered a future away from home, Tuvalu's people face a painful choice, The Guardian, Available at: https://www.theguardian.com/world/2023/nov/19/stay-or-go-offered-a-future-away-from-home-tuvalus-people-face-a-painful-choice (Accessed: 07 February 2024).

[6] Channel 4 News (2023) A country being lost to rising sea levels – documentary. YouTube. Available at: https://www.youtube.com/watch?v=H-ar5drhjzU (Accessed: 07 February 2024). In particular minute 4.

[7] The International Law Association (ILA) created in 2012 a Committee entrusted with the role of considering the international law issues stemming from the prospects of sea level rise. For more on the work of the ILA Committee see: ILA (2022), Report of the Committee on International Law and Sea Level Rise.

The International Law Commission (ILC) in 2018 introduced the topic: "Sea Level rise in relation to international law" in its program of work. For more see: ILC (2020), Sea-Level Ride in relation to International Law: First Issues Paper by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on Sea-Level Rise in relation to International Law, UN Doc A/CN.4/740. ILC (2022), Sea-Level Rise in relation to International Law: Second Issues Paper by Patrícia Galvão Teles and Juan José Ruda Santolaria, Co-Chairs of the Study Group on Sea-Level Rise in relation to International Law, UN Doc A/CN.4/752.

[8] Oral, N. (2019), *International Law as an Adaptive measure to Sea-Level Rise and its Impacts on Islands and Offshore Features*, The International Journal of Marine and Coastal Law ,Vol. 34, p 415-439.

[9] Art.5, 7 and 47 of the United Nations Convention on the Law of the Sea.

jurisdictional rights.[10] However, the risk of rapid submergence that SIDS and low-lying territories are facing, which would require a constant reassessment of ambulatory baselines,[11] prompted a re-examination of these legal concepts. The adoption of an ambulatory approach is not only impractical because it would require constant reassessment, but also it would introduce high levels of legal uncertainty and risks of unjust deprivation of maritime entitlements and jurisdictional rights. Therefore, State practice analysed by both the ILA and the ILC mirrors the emerging international consensus towards the presumption of freezing the current state of baselines and consequently entitlements over maritime areas, despite the rapid progression of sea level.[12]

Secondly, both bodies delved into the repercussion of territorial and population loss due to the extreme sea level on the legal notions of statehood and legal personality, which are two interrelated concepts essential for the recognition of a State as an independent sovereign entity which is given rights and obligations under international law and enable it to operate within this legal framework.[13] The existing international rules governing statehood[14] did not anticipate the possibility of a State being entirely inundated or rendered uninhabitable due to sea level rise. However, the assessment of State practice and historical precedents has led to the growing recognition of the presumption of continuity of statehood and legal personality, even in cases of total land or population loss.[15]

The views discussed above have extensive legal consequences on the inhabitants of SIDS, particularly concerning their recognition and access to resources. Firstly, ensuring the freezing

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[10] Art. 3, 55 and 56 of the United Nations Convention on the Law of the Sea.

For the regime governing Archipelagic States art. 48 and 49 United Nations Convention on the Law of the Sea.

[11] Anggadi, F. (2021), *Reconceptualising The 'Ambulatory Character' Of Baselines: The International Law Commission's Work On Sea-Level Rise And International Law*, Melbourn Journal of International Law, Vol. 22, p 1-24.

[12] ILA Report, p 19- 21.

ILC First Issues Report, p 80.

[13] Vidmar, J., Raible L. (2022), *State Creation and the Concept of Statehood in International Law*, In: Vidmar, J., McGibbon, S., et al (eds), Research Handbook on Secession, Edward Elgar Publishing, p 13-28.

[14] Art.1 of the Montevideo Convention.

[15] ILA Report, p 22-38.

ILC Second Issues Paper, p 21-55.

of maritime delimitations enables these communities to retain entitlements to marine resources and prevent unjust deprivation, such as fishing opportunities.[16] Secondly, the presumption of continuity of statehood has the potential to reduce the risk of people being rendered formally stateless. However, the practicality of conceiving a State that is lacking a territory and permanent population raises doubts concerning its feasibility. Various suggestions have been proposed, including establishing governments in exile, acquiring new territories, or constructing artificial islands.[17]

Despite the above efforts performed with the aim of interpreting international law in order to accommodate the current drastic increase in sea level caused by climate change, the question of how to effectively protect populations affected by sea level rise still remains relevant. In this regard, adopting a human-centred perspective is essential. Indeed, it is crucial to acknowledge that what is discussed in international fora and the decisions that governments take with regards to their carbon footprint, will all have an impact on the way in which Tuvalu citizens and people living in other SIDS will be able to imagine their future. It is therefore essential to step outside the traditional conception of international law as a set of rules governing the relations between States,[18] and adopt an approach which places individuals and communities at the forefront.

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[16] Reducing the Exclusive Economic Zone and the Territorial Sea area in which a State have respectively sovereign rights and sovereignty impacts the extent to which citizens can be granted access and benefit from natural resources. A clear example is the assignment of fishing entitlements in line with art. 2 and art. 56 of the United Nations Convention on the Law of the Sea.

[17] Gerrard, M. (2023), *Statehood and Sea-Level Rise: Scenarios and Options*, Charleston Law Review, Vol.17, p 590-595.

The acquisition of new land is a component of the solution implemented by the State of Kiribati. For more see: Ellsmoor, J., Rosen, Z. (2016), Kiribati's land purchase in Fiji: does it make sense?, DevpolicyBlog, Available at: https://devpolicy.org/kitibatis-land-purchase-in-fiji-does-it-make-sense-20160111/#:~:text=Kiribati%20is%20also%20the%20only,customary%20and%20unavailable%20to%20foreigners (Accessed: 07 March 2024).

The building of artificial islands is the solution Maldives is trying to adopt. For more see: A New Artificial Island: Preparing of Rising Seas in the Maldives, Greening the Islands Foundation (2021), Available at: https://greeningtheislands.org/a-new-artificial-island-preparing-for-rising-seas-in-the-maldives/#:~:text=The%20new%20island%2C%20built%20by,islands%20due%20to%20rising%20seas (Assessed: 07 March 2024).

However, the reliance on artificial islands solution does not come without its drawback; indeed, under the Law of the Sea Convention it is specified that artificial islands does not give rise to marine entitlements, art. 60.8 of the United Nation Convention on the Law of the Sea.

[18] Schreuer, C. (1993), *The Waning of the Sovereign State: Towards a New Paradigm for International-Law?*, European Journal of International Law, Vol.4, p 447-471.

Within this research, the adoption of a human-centred perspective entails the analysis of the international legal system, which primarily addresses States rather than individuals, to understand what level of protection it entrusts to them. Taking this human-centred perspective into mind, this research will explore the potential available tools that international law offers to protect population affected by sea level rise.

1.1 Purpose and Research Question

The purpose of this research is to map and evaluate the array of potential legal tools provided by international law in order to protect populations affected by sea level rise. Specifically, the research will shed light on the limitations of these legal tools and discern the specific context in which they can be employed. As it will be better explained in the next subchapter, the focus of the research will fall on individuals and communities inhabiting Small Islands Developing States particularly affected by sea level rise.

To achieve the objective of mapping and evaluating international law tools available to protect populations affected by sea level rise, the following legal question will be posed:

- What legal tools does international law offer to protect individuals and communities of Small Islands Developing States against threats posed by sea level rise? And what limitations do they pose?

The research question will be broken down in the following sub questions:

  - What legal tools does the international climate change regime offer to protect individuals and communities of Small Islands Developing States against the threats posed by sea level rise? What legal limitations do they pose?

  - What legal tools does the international human rights regime offer to protect inhabitants of Small Islands Developing States against the threats posed by sea level rise? What are legal limitations do they pose?

The rationale behind the choice of these two specific regimes on which to focus this investigation will be further elaborated in the scoping section.

1.2 Scope

In order to establish a clear understanding of the scope and the boundaries of this research, an overview of the key concepts and elements relevant for laying the groundwork for the subsequent analysis of the topic at hand will be provided. In this light, the elements that will be analysed include: the focal point of the research, the intended meaning of legal tools that international law offers and the implications encompassed within the concept of protection.

Firstly, the focal point that this research aims to establish is the protection of those more vulnerable to the effects of extreme sea level rise. Given the absence of a universally applicable definition of vulnerability to sea level rise, this research could have taken different directions and adopted a variety of diverse focal points. One approach could have been focused on the specific groups which already have been awarded special protection status, indicating their heightened vulnerability in general, which is exacerbated by the harms caused by sea level rise. These vulnerable groups might encompass children, [19] elderly people, [20] or Indigenous communities.[21] Another approach could have adopted a broader perspective, by focusing more generally on populations inhabiting low-lying areas, encompassing both developed and developing countries. However, in adopting this approach, the primary and solely commonality among these groups would have been their geographical vulnerably to sea level rise. Therefore, the scope of the research will focus specifically on individuals and communities inhabiting SIDS, which are characterized by a collective and more broad notion of vulnerability. Indeed, the notion of vulnerability that characterize these populations extends beyond geographical susceptibility and encompasses infrastructural and economic fragility. [22] Additionally, considering a justice dimension,[23] these countries have often contributed the least to climate

[19] For more see: Currie, J., Deschenes, O. (2016), *Children and Climate Change: Introducing the Issue*, The Future of Children, Vol.26 (1), p 3-9.

[20] For more see: Filiberto, D., Wethington, E. et al (2009), *Older People and Climate Change: Vulnerability and Health Effects*, Generations, Vol.33 (4), p 19-25.

[21] For more see: Figueroa, R.M. (2011), *Indigenous Peoples and Cultural Losses*. In: Dryzek, J.S, Norgaard, R.B, et al (eds), The Oxford Handbook of Climate Change and Society, Oxford University Press, p 232-249

[22] Briguglio L. (1995), *Small Island Developing States and Their Economic Vulnerabilities*, World Development Vo.23(9), p 1615-1632.

[23] Considering a justice dimension of climate change entails a call for rebalancing the social inequalities exacerbated by the effects of climate change. For more see: Potter, L., Rickards L., et al (2020) *Climate Justice in*

change but suffered disproportionately from its consequences, experiencing higher losses from climate-related disasters, including sea level rise.[24] Finally, these countries have demonstrated the ability and the willingness to unify their voices in international platforms.[25] Shared perspectives, along with similar challenges, facilitates conducting research focused on populations inhabiting these States. In light of the above, the focus of the research will fall on individuals and communities inhabiting SIDS. Importantly, the choice to adopt a broader approach which considers both individuals and communities ensures a more comprehensive and nuanced analysis.[26]

Secondly, the concept of protection employed throughout the research will be broadly interpreted. A definition of the term protection can entail ensuring safety from harm or injury,[27] with the specific context here being the adverse effects of extreme sea level rise. By adopting this definition, the primary instrument for protection involves the eradication of the harm itself.[28] Furthermore, the concept of protection will be employed with a *post facto* dimension, exploring accountability and redress as a way no more to ensure safety, but to cope with the harm already materialized.[29]

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a Climate Changed World, Planning Theory, Vol. 21(2), p 293-321. Also see: Miranda, M.L., Douglas A., et al (2011), *The Environmental Justice Dimensions of Climate Change*, Environmental Justice, Vol.4(1), p 17-25.

[24] Mycoo, M., Wairiu, M., et al (2022) Small Islands. In: Climate Change 2022: I*mpacts, Adaptation and Vulnerability*. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p 2048-2073.

United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (2015), Small Islands Developing States in Numbers.

Intergovernmental Panel on Climate Change (2023), Summary for Policymakers. In: Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, para A.2.

[25] A clear example is the unified negotiating position that they adopted as a coalition in the climate change regime. Fore more see: Betzold, C., Castro P., et al (2012), *AOSIS in the UNFCC negotiations: from Unity to Fragmentation?*, Climate Policy, Vol. 12(5), p 591-613.

[26] For the more nuanced and comprehensive nature of the analysis as a result of the focus on both individuals and communities, see the analysis carried out in the chapter 3.1 and 3.2, in particular the difference in the protection arising from an individual right and the from a collective right.

[27] Protection. Definition taken from the Cambridge Dictionary (online), Available at: https://dictionary.cambridge.org/dictionary/english/protection (Accessed: 15 March 2024).

[28] See chapter 2, where the meaning of protection as eradication of the harm will be employed, by exploring mitigation and adaptation obligations that States have under the climate change regime.

[29] See chapter 2.2 and 3, where the *post facto* meaning of protection will be employed.

Third, the concept of legal tools offered by international law needs to be defined. A tool can be defined as something that helps in a particular activity,[30] with the activity in the context at issue being the protection of individuals and communities inhabiting SIDS. In light of the above definition of the concept of protection, the meaning of the term tool entails something that helps towards the achievement of protection of individuals and communities affected by sea level rise. The notion of legal tools will broadly encompass what international law offers in order to achieve the protection of these populations.

However, given this broad definition of legal tool, it its relevant to outline and delimit the specific boundaries within which this research will operate, in light of the choice to solely investigate legal tools arising from the international legal regimes regulating climate change and human rights. Although the phenomenon of extreme sea level rise and in particular displacement of the population might call for the recourse to international migration and refugee law, this research will not further develop on potential protection tools available under these regimes. The choice is mainly due to the research focus on the interpretation and the potential applicability of *lex lata*.[31] International law concerning refugees does not adopt a definition of refugee broad enough to cover persons victims of natural disasters or affected by the rising level of the sea.[32] In this light, an analysis in this regard might result in an exercise of *de lege ferenda*,[33] which will fall outside of the scope of this research. With a different rationale, this explorative journey will additionally not touch upon international law concerning disasters. Despite, the relevance in this context, the applicable instruments lack legal binding strength and the recent codification result in the lack of practice to assess.[34] Thirdly, despite the relevance

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[30] Tool. Definition taken from Cambridge Dictionary (online), Available at: https://dictionary.cambridge.org/dictionary/english/tool (Accessed: 15 March 2024).

[31] See chapter 1.3.

The term lex lata can be defined as: " Ratified law. The positive law currently in force, without modification to account for any rules subjectively preferred by the interpreter" Definition taken from: Fellmeth, A. and Horwitz, M. (2011), *Guide to Latin in International Law*, Oxford University Press.

[32] ILC Second Issues Paper, p 64- 71.

[33] See chapter 1.3.

The term de lege ferenda can be defined as: "The Law that is to come into force. A phrase used to indicate that a proposition related to what the law ought to be or may in the future be". Definition take from: Fellmeth, A. and Horwitz, M. (2011), *Guide to Latin in International Law*, Oxford University Press.

[34] See: ILC (2016), Draft Articles on the Protection of Persons in the event of Disasters.

of the legal regime governing the law of the sea and the obligation it imposes on States to protect and preserve the marine environment along with their impact on the duty to curb emissions,[35] the regime itself will not be analysed in detail. Instead, the focus will solely fall on examining the possibility of presenting claims under the dispute settlement mechanisms established by this regime, analysed as a tool to protect individuals and communities by holding major emitters accountable.[36]

1.3 Methodology and Sources

This research will mainly rely on the examination of legal materials, by using a dogmatic legal approach. Indeed, the research will generally entail a critical descriptive assessment grounded in *lex lata.*[37] The primary focus of the research will fall on the current state of international law, using interpretation to determine the potential application of already existing legal principles and obligations in the specific context in which the research operates; namely, the protection of individuals and communities inhabiting SIDS affected by sea level rise. Therefore, an exercise of *de lege ferenda*,[38] which would involve the consideration of potential legal reforms, will not be performed.

International legal obligations binding States[39] will be analysed through a human-centred perspective. The debate concerning the binary distinction between subjects and objects of international law and the role of individuals in the international legal system has stimulated the work of many scholars, leading to nuanced and diverse conclusions.[40] The notion of international legal subjectivity revolves around the capacity to act within international law,

[35] See chapter 2.2.2

[36] Ibdiem

[37] See supra note 31.

[38] See supra note 33.

[39] Since the research will mainly analyse legal obligations stemming from international treaties, it is relevant to recall Art.11 of the Vienna Convention on the Law of the Treaties which regulates how States can express the consent to be bound by a treaty.

[40] For more on the role of individuals in International law see: Higgins, R. (1978), *Conceptual Thinking about the Individual in International Law*, British Journal of International Studies, Vol. 4(1). Also see: Orakhelashvili, A. (2001), *The Position of the Individual*, California Western International Law Journal, Vol. 31(2).

thereby deriving rights and duties from it.[41] This notion is hard to reconcile with the role assigned to individuals in international law, particularly in line with the lack of independence that characterize their role.[42] More pertinent is the definition of individuals within the international legal system as passive recipients of rights.[43] Indeed, individuals can indirectly benefit from the obligations that States have undertaken under public international law, a clear example of this passive role is international human rights obligations.[44] In light of the above, this research will adopt the approach that, despite the passive role that characterizes individuals within the international legal system, international legal instruments can nevertheless serve as avenues for protecting them.

Drawing from the catalogue of sources of international law included in the Statute of the International Court of Justice,[45] the research will use as a starting point the obligations stemming from international treaties and conventions.[46] By signing and ratifying international conventions, States bound themselves to perform in good faith according to the obligations they consented to therein.[47] For interpretational purposes, the general rules on treaties interpretation will be followed, by considering the ordinary meaning of the terms, the context and the overall object and purpose of the legal instruments analysed.[48]

Since the research aims at mapping and evaluating the protection that international law entrusts to individuals and communities inhabiting SIDS, the sources that will be employed will

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[41] Droesse, G. (2019), *Subjects of International Law and International Legal Personality*. In: Membership in International Organizations, T.M.C Asser Press, p 205- 274.

[42] A clear example is the lack of judicial standing for individuals under the International Court of Justice, in line with art. 34.1 of the Statute of the International Court of Justice. Another examples lies in the fact that solely States are assigned the capacity of concluding international treaties, in line with art.6 of the Vienna Convention on the Law of the Treaties.

[43] Parlett, K.(eds) (2011), *Reflections on the Structures of the International Legal System*. In: The Individual in the International Legal System, Cambridge University Press, p 353.

[44] Peters, A. (eds) (2016), *The Doctrine of International Legal Personality of Human Being*. In: Beyond human rights, Cambridge University Press, p 35- 59.

[45] Art. 38.1 of the Statute of the International Court of Justice is generally considered as a catalogue of the sources of international law. Specifically, the provision lists the sources that will be employed by the court in rendering judgment on disputes presented before it.

[46] Art. 38.1 (a) of the Statute of the International Court of Justice.

[47] Art. 26 of the Vienna Convention on the Law of the Treaties.

[48] Art.31.1 of the Vienna Convention on the Law of the Treaties.

primarily explore the concept of protection as ensuring safety from a harm. In this light, the Paris Agreement will be the key legal instrument taken into account, given its primary goal of stabilizing and controlling global emissions.[49] Additionally, given the almost universal ratification of the treaty,[50] the adoption of Paris obligations as the starting point of the research enables conducting a more general analysis, which does not focus on country-specific obligations. Indeed, while the focus on SIDS motivated by their vulnerabilities, as explained above, the research intends to focus on obligations that are binding on the vast majority of the international community. Adhering to the same approach, in analysing the possible avenues for protection under international human rights law, the research will adopt as a starting point the obligations included within the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic and Social Rights (ICESR).[51] Almost universal applicability of the treaties that will be analysed in the research allows for a systemic interpretation,[52] which requires the consideration of relevant rules of international law generally applicable between the parties to a given an agreement.[53]

[49] See chapter 2.1.

[50] The Paris Agreement has been ratified by 195 States. For more on the ratification status of the Paris Agreement, see: United Nations, UN Treaties, Paris Agreement, Available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en (Accessed: 20 March 2024).

[51] The International Covenant on Civil and Political Rights has been ratified by 197 States. For more on the ratification status of the International Covenant on Civil and Political Rights, see: United Nations Human Rights Treaty Bodies, Ratification Status for the International Covenant on Civil and Political Rights, Available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en (Accessed: 20 March 2024).

The International Covenant on Economic, Social and Cultural Rights has been ratified by 197 States. For more on the ratification status of the International Covenant on Economic, Social and Cultural Rights, see: United Nations Human Rights Treaty Bodies, Ratification Status for the International Covenant on Economic, Social and Cultural Rights, Available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en (Accessed 20 March 2024).

[52] ILC (2006), Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law, UN Doc A/CN.4/L.682, p 84- 87.

[53] Art.31.3 (c) of the Vienna Convention on the Law of the Treaties.

Primary sources will be complemented by subsidiary means. In particular, human rights obligations will be interpreted in lights of General Comments[54] and Views[55] adopted by Human Rights Committee. Despite the lack of legally binding strength, both instruments can represent subsequent practice in the application of the ICCPR[56] and be relevant for interpretation purposes.[57] Within the same understanding, also ICJ decisions, despite formally binding only for the parties involved in the dispute, will provide guidance on the interpretation and the application of the obligations presented.[58] In a nutshell, international decisions rendered by international judicial bodies, General Comments and Views adopted by the Human Rights Committee and other human rights compliance bodies and scholarly contributions will be pivotal in guiding the interpretation of treaty obligations.

[54] Keller, H., Grover L. (2012), *General Comments of the Human Rights Committee and their legitimacy*. In: Keller, H., Ulfstein, G. (eds), UN Human Rights Treaty Bodies: Law and Legitimacy, Cambridge University Press

[55] Ulfstein, G. (2012*), Individual Complaints*. In: Keller, H., Ulfstein, G. (eds), UN Human Rights Treaty Bodies: Law and Legitimacy, Cambridge University Press.

[56] See supra note 54 and 55.

[57] In light of Art. 31.3 (b) of the Vienna Convention on the Law of the Treaties.

[58] Art.38.1 (d) of the Statute of the International Court of Justice read in conjunction with art. 59 of the Statute of the International Court of Justice.

2 International Climate Change regime as an avenue for protection against sea level rise

This chapter will provide an analysis of the legal tools available or potentially applicable to protect individuals and communities from the adverse impacts of sea level rise within the international climate change framework. Conducted as an exploratory journey that will expand in the subsequent chapter, the analysis is aimed at both mapping out and shedding light on the limitations of existing frameworks, their applicability and the entities entitled to invoke protection. The exploration starts with an examination of States' obligations under the climate regime. For the sake of clarity and simplicity, the focus will particularly fall on the examination of States' obligations under the Paris Agreement, leaving aside other international legal instruments relevant for climate change regulation.[59] After having highlighted what the limitations of the climate regime are, particularly with regards to scarce avenues for individuals protection, the second part of the chapter will explore to what extent the climate litigation trend can address the limitations outlined.

2.1 The Paris Agreement

The Paris Agreement, as explained in this section, only ensures an indirect level of protection to individuals and communities affected by sea level rise. Indeed, the Agreement does not address either individuals or communities, but establishes obligations on signatory States. Nevertheless, it is relevant to explore the potential indirect protection that individuals and communities might be awarded in light of the compliance with the Agreement's obligations, in particular the potential protection for individuals and communities inhabiting SIDS.

It has been well documented that high levels of greenhouse gases concentration in the atmosphere are associated with an increase in global temperature and the rising of sea levels.[60] The anthropogenic nature of the extreme sea level rise problem,[61] additionally, needs to be

[59] For an overview over the evolution of international climate change law see: Kuyper, J., Schroeder, H., et al (2018), *The Evolution of the UNFCCC*, Annual Review of Environment and Resources, Vol. 43, p 343-368.

[60] Intergovernmental Panel on Climate Change (2023), Summary for Policymakers. In: Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.

[61] Ibid, para A.1.

highlighted. The human influence clearly is the main driver of the phenomenon, which consequently means that a drastic decrease in greenhouse gas (GHG) concentration has the potential to limit the magnitude of extreme sea level rise. Although scientists have expressed high confidence with regard to the inevitability of sea level rise, different emissions scenarios clearly show a change in the amount of rise.[62] Despite the lack of mention to sea level rise in the text of the Agreement, its relevance in regulating and potentially controlling the problem is straightforward. Indeed, the Agreement aims at strengthening the global response to the threats of climate change,[63] with extreme sea level rise clearly being one of them. Addressing sea level rise in isolation, would not have permitted to construct a comprehensive approach focused on addressing the problem from its root by controlling and limiting the increase in the global temperature level and by focusing on adapting to the impacts of climate change. In this light, the international climate change regime holistically includes reference to mitigation and adaption efforts.[64] While mitigation focuses on the elimination of the problem at the source by reducing GHG emissions or enhancing sinks, adaptation measures are aimed at enhancing the responsiveness to extreme climate events.[65]

Relevant within the context of the research is to address the peculiar treatment that SIDS have been assigned under the Paris Agreement, in light of their vulnerabilities. The Preamble includes several refences to this peculiar treatment. It highlights the need to take into account the pressing necessities of developing countries particularly vulnerable to the effects of climate change.[66] Additionally, by defining climate change as a common concern of mankind,[67] the signatory States acknowledged the whole international community to have a legitimate interest in striving towards the eradication of the problem and the equitable sharing of responsibilities

[62] Ibid , para B.3.1.

[63] Art. 2.1 of the Paris Agreement.

[64] Art. 2.1 (a) and (b) of the Paris Agreement.

[65] Klein, R.J.T, Huq, S., et al (2007*), Inter-relationships between adaptation and mitigation*. In: Parry, M.L., Canziani O.F., et al (eds), Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press, p 745-777.

[66] Preamble of the Paris Agreement para 5.

[67] Preamble of the Paris Agreement para 11.

based on each country capabilities and resources.[68] Furthermore, the Agreement provides a framework for financial support,[69] technology transfer[70] and capacity building[71] from developed to developing countries, particularly those most vulnerable to climate impacts like SIDS.

Before delving into the States' obligations analysis with a community oriented impact lens, the following section will present States obligations concerning mitigation, adaptation and loss and damage. Scholars have intensely deliberated on the legal character of the obligations included in the Paris Agreement and their intended recipients.[72] Within these debates, distinction have been drawn between descriptive provisions,[73] individual and collection obligations[74] and legally binding obligations.[75] Importantly, the categorization of obligations significantly influences what a State party is required to perform in order to act in compliance of its obligations under the Agreement. Clarifying whether a given obligation is to be fulfilled individually or collectively or whether it mandates certain outcomes to be achieved is essential

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[68] Bellinkx, V., Casalin, D, et al (2021), *Addressing Climate Change through International Human Rights Law: From (Extra)Territoriality to Common Concern of Mankind*, Transnational Environmental Law, Vol.11(1), p 85.

[69] Art.9 of the Paris Agreement.

[70] Art.10 of the Paris Agreement.

[71] Art.11 of the Paris Agreement.

[72] Some authors have stressed the purely procedural nature of the obligations under the Agreement. See: Voigt, C. (2016), *The Compliance and Implementation Mechanism of the Paris Agreement*, Review of European, Comparative and International Environmental Law, Vol. 25(2), p 161-173. Other scholars have focused on the mix of soft and binding obligation that is at the core of the agreement. See: Rajamani, L. (2016), *The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations*, Journal of Environmental Law, Vol. 28(2), p 337-358. Other authors focused on the different approaches adopted by the Kyoto Protocol and the Paris Agreement and the shift from the imposition of obligations of result under the Kyoto regime to obligations of conduct under the Paris ones. See: Huggins, A., (2018), *The Evolution of Different Treatment in International Climate Change Law: Innovation, Experimentation and Hot Law*, Climate Law, Vol. 8 (3-4), p 195-206.

[73] Examples of descriptive provisions can be found in art. 7.2, art. 8.1 and art. 11.1 of the Paris Agreement.

[74] Individual obligations have as their addressee individual States, the subject of the obligation is usually "each party". Provisions addressed to individual States can either create obligations, for example art. 4.2, art. 4.9, art. 7.9 and art. 13.7.; or can have a recommendatory nature, for example art. 7.10 and art. 13.8.

Collective obligations can be addressed to "All Parties" imposing on them collective obligations as in art.12 or having a collective recommendatory nature as in art. 7.7 and art. 8.3.

Collective obligations can also be addressed to specific groups. Developed countries are the addressee of both binding provisions, for example art. 9.1, art. 9.5 and art. 13.9, and provisions with recommendatory nature, as in art. 4.4, art. 9.3 and art. 11.3.

[75] Provisions in which the verb shall usually intended to create legally binding obligation. On the other hand, the use of verbs like should or are encouraged to denotate a less legal straight to the provision under analysis.

for understanding the precise nature and scope of States parties' responsibilities and for addressing whether obligations are fulfilled or not.

At the heart of the Agreement, it lies its collective binding[76] objectives, which includes a long-term temperature goal,[77] increasing adaptation capacities[78] and the facilitation of financial flows.[79] These collective objectives are subsequently operationalized throughout the text of the Agreement.

2.1.1 Mitigation

Firstly, with regard to the operationalization of the long-term temperature goal to hold the increase in global average temperature to well below 2 degrees above pre-industrial levels and to pursue efforts to limit the increase to 1,5 degrees,[80] State parties are bound by the obligation to prepare and submit Nationally Determined Contributions (NDC) which outline the mitigation measures that the individual State is pledging to implement with the aim of achieving the objectives of the Agreement.[81] Focusing on the language used in the text of the Agreement, the subject of obligation being "each party" and the use of the verb "shall" underscore that the provision establishes an individual binding obligation on States parties. It is imperative to investigate the nature of this obligation, in order to consider what exactly States are bound to do, and whether they are bound to achieve specific outcomes or not. States parties are bound to submit, prepare and maintain an inventory of their commitments and efforts in mitigating GHG emissions. The provision is constructed as an obligation of conduct.[82] Differently from an

[76] On the binding nature of the collective objectives included in the Agreement there are disputed views. On the one hand, see: Zahar, A. (2020*), Collective Obligation and Individual Ambition in the Paris Agreement,* Transnational Environmental Law, Vol. 9(1), p 165-188, for an explanation on how the Agreement is based on a collective binding obligation, textually derived from the process of mutual collaboration to be established in setting each States ambitions. On the other hand, see: Rajamani, L., Werksman, J. (2018), *The Legal Character and operational relevance of Paris Agreement's temperature goal*, Philosophical Transactions, Vol. 376(2119), which assigned a merely symbolical and aspirational nature to the goals of the Agreement. This analysis will be conducted supporting the view of Zahar, therefore assigning a mandatory nature to the aim of the agreement.

[77] Art. 2.1 (a) of the Paris Agreement.

[78] Art. 2.1 (b) of the Paris Agreement.

[79] Art. 2.1 (c) of the Paris Agreement.

[80] Art. 2.1 (a) of the Paris Agreement.

[81] Art. 4.2 of the Paris Agreement.

[82] Use of "with the view of achieving" in art. 3 and art.4.2 of the Paris Agreement.

obligation of result, which requires the achievement of a predefined goal, an obligation of conduct merely bounds States in endeavouring towards the achievement of the goal established.[83] A due diligence standard of conduct applies with regard to the achievement of parties' NDC.[84] In this light, State parties are required to exercise best possible efforts[85] in striving towards the achievement of the targets outlined in their NDC and ultimately towards the achievement of the long term temperature goal. Additionally, in line with the general rules regulating international treaties, State parties have to perform their international obligations exercising good faith.[86] Generally, the performance of an international treaty obligation in line with the principle of good faith requires the treaty to be executed with due regard to the intentions of the signatory parties.[87] In this context, striving to achieve the long-term temperature goal, underscores the importance of fulfilling obligations in good faith.

The indirect beneficial effects for populations inhabiting SIDS stemming from mitigation actions by the international community, as envisioned in the Paris Agreement, are twofold. Firstly, by integrating the imperative to address climate change and reduce emissions into the individual agenda of every country, long-term benefits for SIDS' inhabitants can be realized. Since the primary driver of extreme sea level rise can be traced back to the excessive levels of anthropogenic emissions,[88] a reduction in GHG concentration will indirectly benefit populations by addressing the root cause of their vulnerability. Secondly, the collective compliance of all States parties with the obligations outlined in the Agreement, coupled with subsequent policy changes implemented by the vast majority of the international community, is likely to establish a framework for coordinated action against the challenges posed by sea

[83] Mayer, B. (2018*), Obligations of Conduct in the International Law on Climate Change: A Defens*e, Review of European, Comparative and International Environmental Law, Vol.27(2), p 130-140

[84] Voigt, C. (2016), *The Paris Agreement: What is the Standard of Conduct for Parties?*, Questions of International Law, Zoom-in, Vol. 26, p 17-28.

[85] Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Case N. 21, Advisory Opinion, ITLOS Reports 2015, para 125- 139.

Pulp Mills on the River Uruguay, Argentina v Uruguay, Judgement, ICJ Reports 2010, para 197.

Responsibilities and obligations of States with respect to activities in the Area, Case N. 17, Advisory Opinion, ITLOS Reports 2011, para 110- 120.

[86]Art. 26 of the Vienna Convention on the Law of the Treaties.

[87] Reinhold, S. (2013), *Good Faith in International Law*, UCL Journal of Law and Jurisprudence, Vol.2, p 40-63.

[88] See supra note 60.

level rise. This collective approach is essential for indirectly protecting individuals and communities in SIDS, particularly in light of the fact that extreme rise in sea level, which has exacerbated the vulnerabilities of these communities, is not to be attributed to emissions emitted within these islands.[89] Given that the vulnerabilities of individuals and communities affected by sea level rise, for which this research is seeking to find protection tools, are caused by a global source, the universal commitment of the intentional community provide a solid starting point to address the problem.

2.1.2 Adaptation

The second objective of the Agreement concerns adaptive capacities. The performance of adaptation obligations by State parties has an even more tangible and immediate indirect effect on individuals and communities affected by sea level rise, if compared with the performance of mitigation measures. Indeed, operationalizing the binding aim of enhancing adaptive capacities requires State parties to invest in infrastructure and community resilience measures, which will directly benefit individuals and communities by reducing the risk of displacement and property damage.[90] As outlined by scientific research, even a drastic decrease in the GHG concentration level in the atmosphere would not prevent the effects associated with the rising temperature from happening, this holds particularly true with regards to the rising trend in the sea level.[91] In this light, enhancing adaptation capacities is crucial, especially for those populations potentially more vulnerable to the effects of climate change.

Despite the urgency of enhancing adaptive capacities, the provision regulating adaptation efforts under the Paris Agreement is not characterized by imposing on States parties strong legally binding obligations. Indeed, most of the provisions within the article are entrusted with a descriptive aim, by emphasizing the importance of adaptation in addressing climate change,

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[89] Small Island Developing States in Numbers, p 6.

[90] Examples of adaptive strategies against the effect of sea level rise includes: the construction of protective barriers and seawalls, raising house elevation, changes in land use to cope with the salinity intrusion. For more see: Oppenheimer, M., Glavovic, B.C., et al (2019*) Responding to Sea Level Rise*. In: H.-O. Pörtner, D.C. Roberts, et al (eds.), IPCC Special Report on the Ocean and Cryosphere in a Changing Climate, Cambridge University Press, p 385-410.

[91] Vousdoukas, M.I., Athanasiou, P. et al (2023), *Small Island Developing States under threat by rising seas even in a 1.5 °C warming world*, Nature Sustainability, Vol.6, p 1552-1564.

underscoring the imperative of protecting people[92] and addressing the specific vulnerabilities of countries, particularly those in the developing world, to its impacts.[93] The quest of developing countries and SIDS to include more stringent provisions regulating adaptation did not achieve successful outcomes.[94] Despite their endeavours, the predominantly contextual and descriptive approach adopted did not effectively pressure towards the adoption of strong legally binding obligations. The language used in the provisions lacked the necessary force to impose strong legally binding procedural obligations on States to communicate their implemented adaptation efforts.[95] The primary reason for the lack of appeal in including strong collective adaptation commitments in the Agreement stems from the perception that adaptation costs primarily benefit local areas.[96]

2.1.3 Loss and damage

Nevertheless, as warned by scientists, the capacity to adapt to climate change is not unlimited.[97] In the face of extreme sea level rise, which poses threats of submerging coastal communities and even States entirely, the hard limits of adaptation become evident.[98] Particularly, for population inhabiting low-lying areas, first and foremost SIDS, both the economic and non-economic damages attributable to sea level rise can clearly serve as an indicator of the limits to adaptation.[99] With adaptation limits and the vulnerability of individuals and communities affected by sea level rise in mind, the inclusion in the Paris Agreement of a stand-alone provision addressing loss and damage was a high priority for SIDS during the negotiation

[92] Art.7.2 of the Paris Agreement.

[93] Art.7.6 of the Paris Agreement.

[94] Bodansky, D., Brunnée, J., Rajamani, L.(eds) (2017*), Paris Agreement*. In : International Climate Change law, Oxford Public International Law, p 237.

[95] Art. 7.10 of the Paris Agreement. The use of should rather than shall denotes less legal binding strength.

[96] See supra note 94.

[97] United Nations Climate Change (2022), At COP27 Scientists Warn against Limits of Adaptation. Available at: https://unfccc.int/news/at-cop27-scientists-warn-against-limits-of-adaptation (Accessed: 30 March 2024).

[98] See supra note 24.

[99] See Martyr-Koller, R., Thomas, A., et al (2021*), Loss and damage Implications of Sea-Level Rise on Small Island Developing States,* Current Opinion in Environmental Sustainability, Vol.50, p 245-259. The research lists as economic losses: certain percentage in house loss, impact on GDP, projected losses in fisheries and tourism. Non-economic losses includes: forced relocation, death and loss of burial sites.

process.[100] The notion of loss and damage, which remains surrounded by uncertainties,[101] is to be referred to the irreversible harms to be associated with climate change impacts. The uncertainties around the notion are exacerbated by the vague language employed in the Agreement, which fails to impose strong obligations on State parties.[102] However, despite these drawbacks, the notion of loss and damage is pivotal for a community oriented analysis. Indeed, the operationalization of the loss and damage mechanism would require an evaluation of both tangible and intangible losses. On the one hand, it requires consideration of physical and financial losses to which a monetary value can be assigned. On the other hand, it would also require consideration of non-tradable goods impacted by the consequences of climate change. Although this second category of goods are not assigned a market value they have an immense importance to communities, examples can include sense of identity, place and cultural heritage.[103] It is evident, therefore, how the notion of loss and damage and its incorporation in the Paris Agreement, can potentially enhance a community-oriented understanding of climate change's impacts.

However, what still remains controversial is how and to what extent this framework will provide a form of protection to individuals and communities affected by climate change impacts. Research concerning actions needed to address loss and damage has highlighted the relevance of enhancing information and data-based approaches, investing to safeguard cultural heritage, ensuring the maintenance of cultural identities and social ties and performing a culturally sensitive and people-centred relocation in those situations in which populations are forced to move from their homeland. [104] Although it has been clarified that the

[100] Calliari, E. (2018), *Loss and Damage: Acritical Discourse Analysis of Parties' Positions in Climate Change Negotiations*, Journal of Risks Research, Vol.21(6), p 725-747.

[101] Vulturius, G., Davis, M, (2016), *Defining loss and damage: the Science and politics around one of the most contested issues within the UNFCCC*, Stockholm Environment Institute.

[102] Art. 8 of the Paris Agreement. The provision does not establish on the State Parties any strong obligation, as witnessed from the use of the verb "should" in the third paragraph. It vaguely recognize the importance of loss and damage and the establishment of the Warsaw Mechanism for Loss and Damage.

[103] McNamara, E.K., Westoby, R., Chandra, A. (2021*), Exploring climate-driven non-economic loss and damage in the Pacific Islands*, Current Opinion in Environmental Sustainability, Vol.50, p 1-11.

[104] United Nations Environment Programme (2023), Adaptation Gap Report 2023 : Undefined, Unprepared, p 69-70 and Annex 5.

operationalization of loss and damage would not provide a basis for liability and compensation,[105] the community-oriented understanding it brings should not be undermined. In particular, recent decisions adopted by the Conference of the Parties (COP) to the Paris Agreement have begun to give substance to what might have initially been perceived as a symbolic provision. The first steps towards the establishment of Loss and Damage Fund has been taken,[106] but there is a risk that the pledged allocated money is far from be close to the amount needed to address the losses caused by impacts of climate change.[107] Despite the recent nature of the decision and the scarcity in the funds pledged, the Fund might represent a potential avenue to safeguard individuals and communities affected by climate change impacts, first and foremost sea level rise.

2.1.4 Paris Agreement role in protecting individuals and communities affected by sea level rise

Building on the obligations presented above, the last part of this section will delve into a community oriented analysis of States obligations under the Paris Agreement in order to question whether they create safeguard mechanism entrusted with the protection of individuals and communities affected by sea level rise. As outlined above, the indirect impact on individuals and communities affected by sea level rise of enhancing mitigation and adaptation efforts should not be underestimated. Indeed, requiring States to include climate mitigation and adaptation efforts in their governmental agenda and creating a framework for collective action

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[105] UNFCCC (2016), Decision 1/CP.21, Adoption of the Paris Agreement, UN Doc FCCC/CP/2015/10/Add.1, para. 51. Also see: Amini, A., Abedi, M., et al (2023), *The Paris Agreement's Approach Towards Climate Change Loss and Damage*, World Affairs, Vol.186(1), 46-80, for an analysis of what other forms of reparations can potentially be invoked, like the obligation for States to eliminate the source of the damage or the adoption of precautionary measures.

[106] UNFCCC (2022), Decision 2/CMA.4, Funding arrangements for responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage, UN Doc. FCCC/PA/CMA/2022/10/Add.1.

Individual Countries have already pledged funds on Loss and Damage. Japan has pledged 10 million USD, United Arab States 100 million USD, the United Kingdom 60 million GBP. For more on that consult the COP28 Announcements website. Available at: https://climateaction.unfccc.int/Events/COP28?_gl=1*1yr50av*_ga*ODMwMDQ2ODUuMTY5NzQ0ODcyMA..*_ga_7ZZWT14N79*MTcwODM1NDUxMy4xNi4wLjE3MDgzNTQ1MTcuMC4wLjA (Accessed: 02 April 2024).

[107] For more see: Lakhani, N.(2023), $700m pledged to loss and damage fund at Cop28 covers less than 0.2% needed, The Guardian. Available at https://www.theguardian.com/environment/2023/dec/06/700m-pledged-to-loss-and-damage-fund-cop28-covers-less-than-02-percent-needed (Accessed: 02 April 2024).

towards the achievement of a common goal can potentially protect populations affected by sea level rise. Firstly, lowering the level of GHG concentration is the most straightforward way to eradicate the problem from the root.[108] Secondly, requiring States to include in their policy agenda adaptation measures has the potential to foster resilience of communities affected by sea level rise and place the spotlight on vulnerabilities caused by it.

Nevertheless, actions actually implemented by States and efforts pledged are far from being aligned with what is required to be performed in order to achieve the collective objective included in the Agreement.[109] From this misalignment emerges the question whether there exist means by which individuals and communities affected by sea level rise can more directly be protected against the effects of climate change. This inquiry is indeed related to the fact that the indirect protection described throughout the chapter is the result of an equation where all the elements are respected. The first implied element is the scientific nexus existing between GHG level in the atmosphere, the rise in temperature and the rise of the sea level.[110] The second element of the equation is international collective action[111] targeting mitigation and adaptation measures. And the last element and result of the equation would be the indirect benefit and protection that individuals would be awarded. However, the inadequacy and insufficiency of the second element in the equation hinder its effectiveness. Therefore, the ineffective action of States, would not produce the indirect beneficial effect on population envisaged. Consequently, it is necessary to explore if there are available tools for protecting individuals and communities affected by sea level rise against the inaction (or the non-ambitious[112] enough action) States.

[108] See supra note 60.

[109] UNFCCC (2023), Technical dialogue of the first global stocktake, Synthesis report by the co-facilitators on the technical dialogue, FCCC/SB/2023/9, p 5- 10.

[110] See supra note 60.

[111] Important to focus on the international character of the collective action, indeed climate change is not a problem caused by a single State and consequently a single State cannot solve the problem. Additionally, emissions generated in a certain point of the globe have effects very far from the point where they are generated.

[112] For the notion of ambition within the Paris Agreement see: Rehbinader, E. (2022), *Ambition as Legal Concept in the Paris Agreement and Climate Litigation: Some Reflections*, Environmental Policy and Law, Vol. 52(5-6), p 377-388.

Given the inability of the obligations under the Paris Agreement to indirectly represent a tool for protection of individuals and communities inhabiting SIDS by ensuring safety through the eradication of the root of the harm affecting them, it is relevant to question whether the climate regime can nevertheless serve as a residual avenue for protection, in line with the second meaning assigned to the word.[113] In this light, the next section will explore, both within and outside the Paris Agreement, the existing possibilities for protecting individuals and communities inhabiting SIDS by the establishment of accountability and redress mechanisms as a way to cope with and compensate them for the harm suffered or likely to be suffered. The notion of accountability that will be employed will mainly relate to legal accountability, despite the acknowledgement that other forms of accountabilities can potentially play a decisive role in holding States accountable for their actions.[114] Legal accountability requires a scrutiny in light of formally established rules and principles in front of courts and quasi-judicial bodies.[115]

2.2 Legal accountability as an avenue of protection: prospects of climate litigation

With the objective of securing broad participation to the Paris Agreement, negotiators prioritized more flexible and faciliatory compliance over the establishment of judicial or quasi-judicial mechanisms with the power to impose strict enforcement measures.[116] Indeed, the Agreement establishes a facilitative, non-adversarial and non-judicial mechanism entrusted with the function of fostering compliance with the obligations of the Agreement. Given the current misalignment among States' climate actions and their commitments under the Agreement,[117] it is imperative to investigate alternative tools to achieve protection of

[113] See chapter 1.2.

[114] For more see: Grant, W.R., Keohane, R.O. (2005), *Accountability and Abuses of Power in World Politics*, The American Political Science Review, Vol. 99 (1), p 29- 43.

[115] Ibid, p 36.

[116] The so called effectiveness trilemma: foster broad participation, high ambition and sufficient compliance. For more see: Torstad, V.H. (2020), *Participation, Ambition and Compliance: Can the Paris Agreement solve the Effectiveness Trilemma?,* Environmental Politics, Vol. 29(5), p 761-780. Also see: Dimitrov, R., Hvoi, J., et al (2019), *Institutional and Environmental Effectiveness: Will the Paris Agreement work?,* Wire's Climate Change, Vol.10(4).

[117] See supra note 109.

individuals and communities affected by the consequences of climate change, in particular extreme sea level rise.

The growing trend of climate litigation has proven successful in filling the gap in the accountability vacuum that the facilitative architecture of the compliance mechanism established under the Paris Agreement has created.[118] In particular, by holding States and private companies accountable for their inadequate response to lowering GHG emissions level and for their consequent contributions to environmental degradation,[119] climate litigation can serve as tool for protecting individuals and communities from the adverse impacts of climate change. The protection that climate litigation can affords to individuals and communities affected by the impacts of climate change is layered and multifaced. Firstly, it enables them to present their claims and seek redress for the harm they have suffered.[120] Secondly, the trend of climate litigation spurs and asks for the active involvement of individuals and communities in the shaping of the climate agenda.[121] Litigation, indeed, enables individuals and communities to advocate their interests especially in those cases in which participation in decision-making processes had been flawed.[122] Thirdly, in addition to represent an avenue for holding

[118] Alabi, S.A. (2012), *Using Litigation to Enforce Climate Obligations under Domestic and International Laws*, Carbon & Climate Law Review, Vol.6 (3), p 209-220

[119] Peel, J., Osofsky, H.M. (2020) *Climate Change Litigation*, Annual Review of Law and Social Science, Vol.16, p 23- 28

[120] Toussaint, P. (2021), *Loss and Damage and Climate Litigation: the Case for Greater Interlinkage*, Review of European, Comparative & International Environmental Law, Vol.30 (1), p 20- 22.

[121] United Nations Environment Programme (2023), Global Climate Litigation Report, p 42-44.

[122] An example can be found in the Communication submitted to the Aarhus Convention Compliance Committee against the alleged failure of the Italian government to carry out public constitutions in the preparation of the climate agenda. For more see: Aarhus Compliance Committee (2023), Determination of inadmissibility of communication to the Aarhus Convention Compliance Committee concerning compliance by Italy in connection with Italy's draft updated national energy and climate plan, ACCC/C/2023/205.

governments[123] and companies[124] accountable for their insufficient efforts in curbing their contribution to the climate crisis and compelling them to correct their course of action,[125] climate litigation can also enable individuals to be awarded compensatory claims, providing a means for affected parties to seek restitution for the harm suffered.[126]

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[123] For examples see: Romania Court of Appeal CLUJ Administrative and Tax Litigation Section III (2023), Declic et al v The Romanian Government, civil sentence n. 312/2023. For more on the case visit: Climate Change Litigation Databases, Declic et al v The Romanian Government, Available at: https://climatecasechart.com/non-us-case/declic-et-al-v-the-romanian-government/ (Accessed: 25 April 2024).

National Green Tribunal Principal Bench (2015), Gaurav Kumar Bansal V Union of India & Ors, Item n.17. For more on the case visit: Climate Change Litigation Databases, Gaurav Bansal v. Union of India, Available at: https://climatecasechart.com/non-us-case/gaurav-bansal-v-union-of-india/ (Accessed: 25 April 2024).

Spanish Supreme Court (2023), Greenpeace v Spain, 1079/2023. For more on the case visit: Climate Change Litigation Database, Greenpeace v Spain I, Available at: https://climatecasechart.com/non-us-case/greenpeace-v-spain/ (Accessed: 25 April 2024).

[124] Regional Court of Munich Landgericht Munchen (2021), Deutsche Umwelthilfe (DUH) v. Bayerische Motoren Werke AG (BMW). For more on the case visit: Climate Change Litigation Databases, Deutsche Umwelthilfe (DUH) v. Bayerische Motoren Werke AG (BMW), Available at: https://climatecasechart.com/non-us-case/deutsche-umwelthilfe-duh-v-bmw/ (Accesses: 25 April 2024).

Regional Court of Munish Landgericht Munchen (2021), Deutsche Umwelthilfe (DUH) v. Merxedes-Benz AG. For more on the case visit: Climate Change Litigation Databases, Deutsche Umwelthilfe (DUH) v. Mercedes-Benz AG, Availibale at: https://climatecasechart.com/non-us-case/deutsche-umwelthilfe-duh-v-mercedes-benz-ag/ (Accessed: 25 April 2024).

The Hague District Court (2021), Milieudefensie et al. v. Royal Dutch Shell plc., C/09/571932/HA ZA 19-379. For more on the case visit: Climate Change Litigation Databases, Milieudefensie et al. v. Royal Dutch Shell plc., Available at: https://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/ (Accessed: 25 April 2024).

Court of Appel of Versailles (2022), Notre Affaire à Tous and Others v. Total. For more on the case visit: Climate Change Litigation Databases, Notre Affaire à Tous and Others v. Total, Accessible at: https://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-total/#:~:text=The%20plaintiffs%20allege%20that%20Total,brought%20before%20the%20commercial%20court. (Accessed: 25 April 2024).

Saint-Étienne Judicial Court (2021), Envol Vert et al. v. Casino. For more on the case visit: Climate Change Litigation Databases, Envol Vert et al. v. Casino, Accessible at: https://climatecasechart.com/non-us-case/envol-vert-et-al-v-casino/ (Accessed: 25 April 2024).

[125] Dutch Supreme Court (2019), Urgenda Foundation v The Netherlands, 19/00135. For more on the case visit: Climate Change Litigation Database, Urgenda Foundation v. State of the Netherlands, Available at: https://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/ (Accessed: 25 April 2024).

Administrative Court of Paris (2021), Notre Affaire à Tous and Others v. France, n.1901967, 1904968, 1904972, 1904976/4-1. For more on the case visit: Climate Change Litigation Database, Notre Affaire à Tous and Others v. France, Available at: https://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-france/ (Accessed: 25 April 2024).

[126] For example see: Constitutional Court of Colombia (2017), Decision SU- 698/17.

High Court of Uganda at Mbale (2020), Tsama William and Others v. Uganda's Attorney General and Others, Miscellaneous Cause No. 024 of 2020. For more on the case visit: Climate Change Litigation Database, Tsama

2.2.1 Approaches under domestic climate litigation

In the context in which this research operates, it is imperative to question whether climate litigation can represent a tool for protecting individuals and communities inhabiting SIDS against the threats posed by extreme sea level rise. To address this inquiry two distinct line of arguments can be pursued. The first line of argument requires the consideration of the straightforward possibility for individuals and communities of SIDS to seek protection against their own governments. The adjective straightforward is employed here due to the prevailing scenario in climate litigation, which typically entails claims submitted by citizens challenging governmental action adopted by their State with the aim of tackling climate change.[127] The second line of argument that will be explored entails the possibility for individuals and community of SIDS to seek protection against third States, notably major emitters countries.

Given the marginal contribution of SIDS to the total global GHG emission level,[128] individuals and communities inhabiting these countries will be most likely be inclined to focus on legal claims concerning the implementation of adaptation practices. This approach aligns with the reasoning put forth by the High Court of Pakistan in deciding a claim present by a Pakistani farmer alleging the failure of the government in pursing mitigation and adaptation efforts.[129] The claimant alleges a breach of its fundamental rights as a result of the governmental inaction in the implementation of adequate adaptation measures.[130] In addressing the case, the Court highlights the marginal contribution that Pakistan has in the total global GHG emissions level and the highly vulnerability of the country to climate change impacts,[131] both characteristics

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William and Others v. Uganda's Attorney General and Others, Available at: https://climatecasechart.com/non-us-case/tsama-william-and-others-v-ugandas-attorney-general-and-others/ (Accessed: 25 April 2024).

[127] Setzer, J., Higham, C. (2023), *Global Trends in Climate Change Litigation: 2023 Snapshot*, Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science,p 22 and 32-35.

[128] See supra note 89.

[129] Lahore High Court (2015), Leghari v. Federation of Pakistan, W.P. No. 25501/201. For more on the case visit: Climate Change Litigation Database, Leghari v. Federation of Pakistan, Accessible at: https://climatecasechart.com/non-us-case/ashgar-leghari-v-federation-of-pakistan/ (Accessed: 25 April 2024).

Ohdedar, B. (2021), *Climate Change Litigation in India and Pakistan: Analyzing Opportunities and Challenges*. In: Alogna, I., Bakker, C., Gauci, J.P. (eds.), Climate Change Litigation: Global Perspectives, Brill Nijhoff, p 112-114.

[130] Leghari v. Federation of Pakistan, para 10.

[131] Ibid, para 7.

common to SIDS. These peculiarities require the prioritization of adaptation efforts.[132] The case resulted with the establishment of institutions entrusted with the function of ensuring a climate resilient development of the country.[133]

Another avenue of domestic litigation that is likely to be associated with the quest of protection for individuals and communities of SIDS involves claims against the governmental utilization of climate financial resources.[134] A lawsuit brought before the Supreme Court of Brazil highlights the potential for climate litigation cases to arise concerning the allocation and utilization of international climate funds, closely interrelated with citizens participation claims.[135] In particular, the claimants argue against the unconstitutionality of the governmental failure in adopting administrative measures to effectively operate the Amazon Fund,[136] which resulted in the paralysation of the latter and the lack of approval of afforestation projects.[137] The Court in its preliminary ruling emphasizes the governmental obligation to effectively operationalize and allocate financial resources derived from international climate funds.[138] As climate funding becomes a pivotal reality in SIDS,[139] ensuring the effective and equitable utilization of financial resources becomes an imperative. Therefore, the envisioned emergence of climate litigation in this domain underscores the potential role of the judiciary in protecting individuals and communities through securing their possibility to effectively and equitably benefit from resources generated from international climate funds.

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[132] Ibid, para 21.

[133] Ibid, para 19.

[134] United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (2022), Accessing Climate Finance: Challenges and Opportunities for Small Islands Developing States.

[135] Brazil Federal Supreme Court (2023), Partido Socialista Brasileiro (PSB) et al v. Brazil, ADO 59/DF. For more on the case visit: Climate Change Litigation Database, PSB et al. v. Brazil (on Amazon Fund), Available at: https://climatecasechart.com/non-us-case/psb-et-al-v-brazil/ (Accessed: 27 April 2024).

[136] For more on the Amazon Fund see: Amazon Fund, What is the Amazon Fund, Available at: https://www.amazonfund.gov.br/en/library/amazon-fund/ (Accessed: 27 April 2024).

[137] See supra note 135. Due to the lack of English transition of the judgement the information was derived from the website cited above.

[138] Ibidem.

[139] See supra note 106 and 134.

A second line of argument can be explored, which requires the possibility for individuals and communities inhabiting SIDS to seek protection against third States, notably major emitter countries. To enable them to seek protection against major emitter States it is necessary the recognition and enforcement of "*diagonal responsibility*" of third countries towards individuals and communities of SIDS.[140] The peculiarity of diagonal claims rests in the fact that it challenges the traditional notion of territorial jurisdiction, seeking the establishment of transnational responsibility for climate change impacts, providing thus a pathway for individuals and communities inhabiting SIDS to hold major emitter States accountable for their contributions to climate change and for the consequent harms suffered. Although the additional level of complexity that diagonal claims bring with them, they have the potential of addressing the justice paradox associated with climate change impacts.[141] Indeed, diagonal claims can potentially entail the possibility of representing a remedy avenue for those most vulnerable to and least responsible for the impacts of climate change against those that economically benefitted from GHG emissions.[142]

One illustrative example of such claims emerged before the German Federal Constitutional Court, from a petition presented by individuals living in Bangladesh and Nepal alleging the failure of the German government in sufficiently contributing towards the achievement of the long term temperature goal referred in article 2.1 of the Paris Agreement.[143] Central in the claim presented before the Court lies the question of historical responsibilities, the obligations of developed countries to take the lead in tackling the climate crisis and the equitable distribution of GHG associated costs and benefits.[144] The Court, in addressing the case, does not exclude

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[140] Knox, J. (2008), *Diagonal Environmental Rights.* In: Gibney, M., Skogly, S.(eds.), Universal Human Rights and Extraterritorial Obligations, University of Pennsylvania Press.

[141] Burkett, M. (2013), *A Justice Paradox: On Climate Change, Small Island Developing States and the Quest for Effective Legal Remedy*, University of Hawaii Law Review, Vol. 35 (2), p 633- 670.

[142] Ibid, 634.

[143] German Constitutional Court (2021), Neubauer, et al. v. Germany, 1 BvR 2656/18

[144] In application of the principle of common but differentiated responsibilities as enshrined in Art. 2.2 and Art. 4.3 of the Paris Agreement and Art. 3.1 of the UNFCCC.

For more see: Jahn, J. (2023), *Domestic courts as guarantors of international climate cooperation: Insights from the German Constitutional Court's climate decision*, International Journal of Constitutional Law, Vol. 21(3), p 859-883.

the existence of a duty to protect individuals living in third countries against fundamental rights violations associated with the impacts of climate change.[145] Importantly, the Court also recognizes that a factor relevant in the establishment of a duty to protect individuals residing in third countries is the German participation, albeit minor, in the total GHG emission level that contributes to the present and future impairment of the applicants fundamental rights.[146] However, it differentiates between the content that the protection duty entails towards German citizens, in the benefit of which the State is obliged to adopt mitigation and adaptation measures, and towards individuals of third countries, which will solely benefit from the adoption of mitigation measures by the German government.[147] The reasoning of the German Federal Constitutional Court can potentially influence domestic courts in playing a decisive role in ensuring cooperation in international climate law, through the protection of individuals and communities residing in third countries.[148]

2.2.2 Extraterritorial jurisdiction

Diagonal claims have also been presented before human rights judicial and non-judicial bodies, particularly alleging the protection of another vulnerable category against the impacts of climate change. Two cases have been recently reported by young applicants alleging the extraterritorial obligations of third States to protect them against the impacts of climate change. Youth and inhabitants of SIDS are two categories of potential applicants in climate litigation that share two striking similarities, they are equally highly vulnerable to the impacts of climate change but also marginally contributed to it.[149] Nevertheless, the different reasoning and argumentations presented by the European Court of Human Rights and the Committee on the

[145]Neubauer, et al. v. Germany, para 175.

Krämer-Hoppe, R. (2021), *The Climate Protection Order of the Federal Constitutional Court of Germany and the North-South Divide*, German Law Journal, Vol.22(8), p 1393-1408.

[146] Ibidem.

[147] Neubauer, et al. v. Germany, para 176-178.

[148] However, it is relevant to remind that the Court points out that the there is no need to judge on the claims submitted by third states nationals, therefore the reasoning of the Court has the value of orbiter dicta.

Neubauer, et al. v. Germany, para 174.

[149] See supra note 24.

Rights of the Child, in deciding two very similar claims, underscores the legal uncertainty surrounding the notion of extraterritorial responsibility for climate change impacts.[150]

The extraterritorial nature of youth protection against the impacts of climate change has been analysed by the Committee on the Rights of the Child, in addressing a communication submitted by sixteen children against Argentina, Brazil, France, Germany and Turkey.[151] In considering the issue of extraterritorial jurisdiction, the Committee recalls the Advisory Opinion on the Environment and Human Rights delivered by the Inter-American Court of Human Right.[152] By relying on the effective control that States have over the activities contributing to the enhancement of global GHG emissions level causing transboundary harm to individuals living outside the national boarders, the Committee does not exclude the possibility of establishing extraterritorial jurisdiction for climate change related harms.[153] Additionally, the Committee bases the foreseeability of the harm element in the ratification by the States of the United Nation Framework Convention on Climate Change (UNFCCC) and the Paris Agreement.[154] Finally, in application of the customary obligation to prevent transboundary environmental harm[155] and the common but different responsibilities principle as enshrined in the Paris Agreement,[156] the Committee grounds the possibility[157] to hold States

[150] Important to note that the legal regimes under the European Convention on Human Rights and the Convention on the Rights of the Child are distinct. In particular, the concept of jurisdiction as interpreted by the European Court of Human Rights (ECtHR) differs from that adopted by the Committee on the Rights of the Child. As expressed by the European Court of Justice in: European Court of Human Rights (2024), Duarte Agostinho and Others v Portugal and 32 Others, no 39371/20, para 210-212.

[151] United Nation Committee on the Rights of the Child (2019), Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child, Chiara Sacchi, et al. v Argentina, Brazil, France, Germany and Turkey, Communications 104/2019 (Argentina), 105/2019 (Brazil), 106/2019 (France), 107/2019 (Germany), 108/2019 (Turkey), para 1.1 and 2.4-5.

[152] Inter-American Court of Human Rights (2017), Advisory Opinion OC-23/17.

[153] Chiara Sacchi, et al. v Argentina, Brasil, France Germany and Turkey, para 9.5.

Inter-American Court of Human Rights, Advisory Opinion, para 104.

[154] Chiara Sacchi, et al. v Argentina, Brasil, France Germany and Turkey, para 9.11.

[155] *Inter alia*: Pulp Mills, para 101.

Legality Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, para 27.

[156] Chiara Sacchi, et al. v Argentina, Brasil, France Germany and Turkey, para 9.10.

See supra note 144.

[157] Important to highlight the word possibility, since the Committee did not decided on the merit of the case. The communication was indeed considered inadmissible due to the lack of exhaustion of domestic remedies.

Chiara Sacchi, et al. v Argentina, Brasil, France Germany and Turkey, para 9.15

responsible for damages caused by emissions within their territory but harming individuals outside their national borders.[158]

On the other hand, the European Court of Justice in deciding a case submitted by six young Portuguese national alleging that the failure of European Countries to reduce GHG emissions levels resulted in a violation of their fundamental rights, was reluctant in expanding the notion of exterritorial jurisdiction.[159] Although the Court did not deny the global effects of climate change and the unique interlinked and multilayered challenge it creates,[160] it did not extend the notion of control by third States over the Portuguese applicants.[161] Consequently, the Court denied any positive obligation to protect young applicants residing in third States from transboundary harm originated within their national borders.[162] The interpretation of the notion of extraterritorial jurisdiction in the context of vulnerable applicants protection against the harmful effects of climate change deviated from the more progressive approach adopted by the Inter-American Court and the Committee on the Rights of the Child, and represented a missed opportunities to transnationally hold States accountable for their emissions and related global environmental and human rights impacts.[163]

For more on the case see: Suedi, Y. (2022), Litigating Climate Change before the Committee on the Rights of the Child in Sacchi v Argentina et al.: Breaking New Ground?, Nordic Journal of Human Rights, Vol.40(4), p 549-567. Also see: Theil, S. (2022*), A cause worthy of more effort; The Committee on the Rights of the Child and the Climate Change decision*, The Cambridge Law Journal, Vol. 81(1), p 1-4.

[158] Chiara Sacchi, et al. v Argentina, Brasil, France Germany and Turkey, para 9.5.

[159] Duarte Agostinho and Others v Portugal and 32 Others, para 181- 214.

For more on the notion of extraterritorial jurisdiction see: Stojnic, P. (2021), *Gentlemen at home, hoodlums elsewhere: The Extraterritorial Application of the European Convention on Human Rights on the extraterritorial jurisdiction*, The Oxford University Undergraduate Law Journal, Vol.10, 138-170. Also see: European Court of Human Rights (2018), Extra-territorial jurisdiction of States Parties to the European Convention on Human Rights.

[160] Duarte Agostinho and Others v Portugal and 32 Others, para 189-194.

[161] Duarte Agostinho and Others v Portugal and 32 Others, para 208.

[162] Duarte Agostinho and Others v Portugal and 32 Others, para 210-212.

[163] Savaresi, A., Nordlander, L., and Wewerinke-Sight, M. (2024), Climate Change Litigation before the European Court of Human Rights: A New Dawn, GNHRE, Available at: https://gnhre.org/?p=17984 (Accessed: 01 May 2024).

2.2.3 International Courts role in protecting individuals and communities affected by sea level rise

Returning to the core focus of this research, namely international law tools available to protect individuals and communities of SIDS affected by extreme sea level rise, it is imperative to scrutinize the potential application of principles outlined by domestic and regional courts and compliance bodies towards the establishment of accountability of those responsible for the impacts of climate change and sea level rise in SIDS. Central in this regard, is exploring the possibility for affected SIDS to present claims before the two of the main international law adjudicating bodies, namely the International Court of Justice (ICJ) and the International Tribunal for the Law of the Sea (ITLOS). Despite individuals and communities are not generally granted the power under international law to directly present claims before international adjudicating bodies,[164] the opportunity for them to exercise pressure on their government to file international claims against the alleged the wrongful conduct of third States should not be underestimated.

The relevance of both international adjudicating bodies in ruling upon climate accountability claims is underscored by the respective engagement in providing advisory opinions on States' obligations concerning the reduction of GHG emissions level, as well as the legal ramifications of non-compliance with these obligations.[165] Additionally, the legal question at the scrutiny before the International Court of Justice requires the consideration of legal consequences of harm resulting from climate change impacts on peoples and future generation,[166] as a clear example harm inflicted on individuals and communities inhabiting SIDS as a consequence of extreme sea level rise and other impacts of climate change. Despite the relevance of advisory opinions in clarifying the substantial obligations that States have to comply with under

[164] See supra note 42 and 43.

[165] Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Case N..31, Advisory Opinion, ITLOS Reports 2022.

Request for Advisory Opinion on the Obligations of States in respect of Climate Change, Advisory Opinion, ICJ Reports 2021.

[166] Request for Advisory Opinion on the Obligations of States in respect of Climate Change, question (b) (ii).

international law and potentially shape and influence States conduct,[167] they lack the power of granting relief to affected States and their inhabitants.[168]

The possibility for the ICJ to exercise its adjudicative power in a dispute on the application of climate obligations was already contemplated more than twenty years ago. Indeed, the Small Island Developing State of Tuvalu threatened to bring a lawsuit before the Court against the inaction of the United States and Australia in curbing their emissions levels, triggered from the lack of ratification of the Kyoto Protocol by both countries.[169] Despite Tuvalu did not bring forward this claim, the future appeal to the ICJ to rule on the protection of vulnerable States against major emitters cannot be disregarded.

The ICJ has the power to adjudicate disputes among States concerning the application of international obligations and, if relevant, reparation duties,[170] in application of international conventions, international customs and general principles of international law.[171] Drawing upon the obligations outlined above, stemming from the Paris Agreement, the customary no harm principle[172] can potentially inform and shape the conduct that major emitter States are required to perform concerning their GHG emissions level reduction.[173] As already recognized by the ICJ, States are bound by the general obligation to not cause and prevent transboundary harm in the territory of other States. [174] This customary law obligation prosses two primary characteristics relevant for this analysis. Firstly, it is not an absolute prohibition, rather it solely

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[167] Lando, M. (2023) , *Three goals of States as they seek Advisory Opinions from Itlos*, AJIL Unbound, Vol. 117, p 282-286.

Sthoeger, E. (2023*), How do States React to Advisory Opinions? Rejection, Implementation and what lies in between,* AJIL Unbound, Vol.117, p 292-297.

[168]Jacobs, R. E. (2005*), Treading Deep Weading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice,* Washington International Law Journa,l Vol.14(1), p 118.

[169] Ibidem.

[170] Art. 36.2 (c) and (d) of the Statute of the International Court of Justice.

[171] Art. 38.1 of the Statute of the International Court of Justice.

[172] Pulp Mills case, para 101.

Legality Threat or Use of Nuclear Weapons, para 29.

Gabcikovo-Nagymaros Project (Hungary v. Slovakia), Judgement, ICJ Reports 1997, para 53.

[173] Maljean-Dubois, S. (2021), *The No-Harm Principle as the Foundation of International Climate Law*,. In: Mayer, B., Zahar, A. (eds), Debating Climate Law, Cambridge University Press, p 15-28.

[174] See supra note 172.

applies if the level of transboundary harm can be considered as significant.[175] Secondly, the obligation entails a due diligence standard of conduct,[176] requiring States to take reasonable and necessary steps to prevent the transboundary harm from occurring.[177]

The application of the no harm principle in the context in which this research operates could potentially lead to the establishment of States responsibilities resulting from the failure to adopt within national borders adequate measures to reduce emissions levels, which then resulted in environmental damages in SIDS.[178] Nevertheless, establishing State responsibility[179] for transboundary environmental damages based on the application of the no harm principle does not come without its challenges. In particular, the complex nature of climate change and its implications on the rising sea level makes it difficult to attribute to a specific action performed by a specific State a consequent environmental damage.[180] Additionally, alleging the establishment of some form of attribution, the joint global responsibility for climate change impacts complicates quantifying individual shares of liability for determining any form of consequent compensation to SIDS.[181]

The approach that the ICJ will adopt in addressing the Advisory Opinion is crucial for understanding its perspective on the matter. Furthermore, it will also influence how future (if any) adversarial claims, centred on protecting vulnerable States and seeking compensation for damage caused by major emitters, will be adjudicated.

Another dispute resolution avenue available under international law, feasible for delivering a binding judgement concerning the protection of SIDS, and indirectly their inhabitants, against

[175] Legal Response Initiative (2012), No harm rule and Climate Change, p 3.

[176] See supra note 85.

[177] Pulp mills, para 197.

[178] See supra note 173.

[179] International Law Commission (2001), Draft Articles on Responsibility of States for Internationally Wrongful Acts, A/56/10.

[180] Art.2 of the Draft Articles on Responsibility States for Internationally Wrongful Acts.

[181] Brunée, J. (eds) (2020), *Harm Prevention Beyond the "Neighbourhood".* In: Procedure and Substance in International Environmental Law, Brill, p 129.

the effects of sea level rise is the one established under the United Nations Convention on the Law of the Sea (UNCLOS).

The mutually supportive nature of climate change emissions reduction obligations and provisions regulating the protection and preservation of the marine environment included in the UNCLOS has already been extensively analysed by legal scholars.[182] Despite climate change not being an international concern at that time of the adoption of the Convention, it proved to be flexible enough to accommodate and potentially regulate the new challenges that defines the contemporary world.[183] Furthermore, the willingness of the ITLOS in addressing the legal question concerning States responsibility to protect and preserve the marine environment in the context of GHG emissions and climate change underscores the interconnectedness of the two regimes.[184] However, the specific way in which the Tribunal will approach the advisory opinion referred above will crucially clarify the interactions between the two legal regimes: the one regulating climate change and the law of the sea.

The broad definition that the UNCLOS adopts for the term pollution of the marine environment[185] enables to reasonably consider GHG emission to fall within the regulatory power of the Convention. Indeed, in line with the definition of marine pollution, anthropogenic GHG emissions can be classified as substances or energy deemed to have deleterious effects on the marine environment, manifested through phenomena such as sea level rise and ocean acidification.[186]

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[182] Boyle, A. (2012*), Law of the Sea Perspectives on Climate Change*, International Journal of Marine and Coastal Law, Vol. 27(4), p 831-838.

Natalie, K. (2020), *Adapting UNCLOS Dispute Settlement to Adress Climate Change*. In: McDonald, J., et al (eds) Research Handbook on Climate Change, Oceans and Coasts, Edward Elgar Publishing Limited.

[183] Barret, J., Barnes, R. (eds) (2016), *The UN Convention on the Law of the Sea: A "Living Treaty"?.* In: Law of the Sae: UNCLOS as a Living Treaty, British Institute of International and Comparative Law, p 3-37.

[184] Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law.

[185] Art. 1.1 (4) of the United Nations Convention on the Law of the Sea.

[186] Potts, T. (2018), Climate change, ocean acidification and the marine environment: Challenges for the international legal regime. In Hassan, D., Karim, S. (eds), International Marine and Environmental Law and Policy, Routledge, p 92-93.

The Convention imposes on signatory parties the general obligation to protect and preserve the marine environment,[187] which has been interpreted to be a due diligence[188] duty to adopt both positive measures to protect the marine environment but also negative duty to no degrade the current state of affairs.[189] The content of this general obligation is informed by the other provisions of Part XII of the Convention.[190] Other applicable rules of international law additionally play a role in informing the duty to protect and preserve the marine environment,[191] in particular obligations under the Paris Agreement can be considered to set a standard against which necessary measures to be taken to curb emissions levels degrading the marine environment can be judged.[192]

To strengthen the argumentation that States are bound by the duty to reduce their GHG emissions as a part of the obligation to protect and preserve the marine environment, they are also mandated to prevent, reduce and control pollution of the marine environment from any source.[193] Given the above explained reasons for classifying GHG emissions as a source of pollution of the marine environment, it can be reasonably argued that implementing actions and policies to mitigate climate change falls within the performance of States obligations under Part XII of the Convention.[194] Additionally, the obligation to control and reduce pollution of the marine environment stemming from GHG emissions can be reasonably interpreted as having

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Xue, G. (2013), Climate Change Challenges and the Law of the Sea Responses. In: Rupper, O., et al (eds), Climate Change: International Law and Global Governance: Volume I: Legal Reponses and Global Responsibility, Nomos Verlagsgesellschaft mbH, p 573-575.

[187] Art. 192 of UNCLOS.

[188] See supra note 85.

[189] South China Sea Arbitration (The Republic of The Philippines v The People's Republic of China), Award, PCA Case N.2013-19, para 941 and 944.

[190] South China Sea Arbitration, para 942.

[191] South China Sea Arbitration, para 941.

Art. 237 of UNCLOS.

[192] Findlay, H.S., Turley, C. (2021), *Ocean acidification and climate change*. In: Letcher, T. (eds), Climate Change: Observed Impacts on Planet Earth, Elsevier, p 466-467.

[193] Art. 194.1 of UNCLOS.

[194] Boyle, A. (2016), *Climate change, ocean governance and UNCLOS.* In: Barrett, J. and Barnes, R. (eds), Law of the Sea: UNCLOS as a Living Treaty, British Institute of International and Comparative Law, p 217- 220.

an extraterritorial nature, since the Convention provides that activities within the jurisdiction of a State should not result in polluting other States.[195]

In light of the above, it can be argued that a State's failure in adopting the necessary measures to mitigate climate change, resulting in the damage to the marine environment of third States can amount to a violation of their obligations under the UNCLOS. Interpreting the Convention as imposing climate mitigation duties on States could serve as a means to give teeth to the regulatory regime established under the Paris Agreement.[196] Firstly, the Convention expressly provides that a failure in protecting and preserving the marine environment, resulting from inadequate climate mitigation actions, entitles affected States to be awarded prompt and adequate compensation for the damage suffered.[197] Secondly, the Convention remarkably includes a compulsory dispute settlement mechanism,[198] which has the potential of filling the jurisdictional gap that may characterize an extraterritorial climate litigation presented before the ICJ. Indeed, differently from claims submitted before the ICJ, where States must explicitly consent to the Court's jurisdiction,[199] dispute settlement under the UNCLOS has the advantage of operating under compulsory jurisdiction.[200]

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[195] Art. 194.2 of UNCLOS.

In application of the no harm principle as explained above, see supra note 172.

Johnstone, R.L. (eds) (2014), *The Right to Resource and the No-Harm Principle*. In: Offshore Oil and Gas Development in the Arctic under International Law : Risk and Responsibility, British Institute of International and Comparative Law, p 50-52.

[196] See supra note 116.

Wam, R. (2024) , Climate Change Loss and Damage: A Case for Mandatory Cooperation and Contribution under the United Nations Convention of the Law of the Sea, UCLA Journal of Environmental Law and Policy, Vol.42(1).

[197] Art. 235 of UNCLOS.

[198] Part XV of UNCLOS regulating the settlement of disputes.

Art. 286 and 287 to be read in conjunction with art. 297.1 (c) UNCLOS.

For more see: Karaman, I.V (eds) (2011), *Dispute Settlement under the Law of the Sea Convention: A General Overview*. In: Dispute Resolution in the Law of the Sea, Martinius Nijhoff Publishers, p 1-15.

[199] According to Art. 36.2 of the Statute of the International Court of Justice, States can declare compulsory jurisdiction to the Court.

[200] This advantage, however, must be carefully balanced considering the USA's lack of ratification of the UNCLOS. As a result, there is no compulsory jurisdiction for cases brought against one of the major polluting states. While the USA is not bound by UNCLOS obligations, some are recognized as having customary international law status. Additionally, the ICJ does not have compulsory jurisdiction over the USA.

Burkett, M. (2013), p 655.

2.2.4 Limits of litigation

However, while litigation remains a cornerstone of legal accountability, its role in protecting individuals and communities of SIDS from extreme sea level rise is subject to significant limitations.

Firstly, the costs associated with litigation, especially innovative extraterritorial international legal claims, are likely to be high.[201] Considering the financial constraints that characterize SIDS it is imperative, for an effective protection of their inhabitants, to allocate the limited resources judiciously. Rather than directing funds towards litigation, which can lead to uncertain and unwanted outcomes, focusing on enhancing adaptation capacities or tackling sea level rise related loss and damage promise for more concrete positive results.

The above is strictly related to a second constraint inherent to climate litigation: the expenditure of funds, time, and expertise does not guarantee a favourable judgment holding major emitters accountable for the environmental harms suffered by SIDS, nor does it ensure the willingness of international courts and tribunal to order remedies in the benefit of affected States and their inhabitants.

Thirdly, even in case of a positive judicial outcome, international litigation is particularly constrained by the lack of enforcement power. In other words, even if major emitters will be held accountable before international courts and ordered to remedy for the damage inflicted to SIDS, the enforcement of the judgement will solely rely on the good faith obligation that States have to comply with it.[202] As a clear example of this limitation, both United States and China have already refused in the past to comply with the orders of remedies given by international court and arbitral tribunal for environmental damages.[203]

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[201] Horn, L. (2009), *Is Litigation an Effective Weapon for Pacific Island Nations in the War against Climate Change*, Asia Pacific Journal of Environmental Law, Vol. 12, p 193- 198.

[202] Tanzi, A. (1995), *Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations*, European Journal of International Law, Vol.4, p 539- 572.

[203] See: Wam, R. (2024), p 54-64, concerning the compliance by United States with the judgement in the Nicaragua Case and China with the award in the South China Sea Arbitration.

Lastly, the *ex post* nature of litigation, which tends to prioritize reparation for breaches of international law rather than preventing environmental harm proactively, renders the reliance on judicial institutions not desirable.[204] Additionally to the above mentioned constraints, appeal to international judicial institutions can be limited by procedural barriers for accessing courts or conservatism of the judges. Therefore, it becomes evident that sole reliance on litigation cannot represent a sufficient tool for protecting individuals and communities of SIDS, in light of these inherent limitations.[205]

[204] Alabi, S.A. (2012), p 211.
[205] Peel, J., Osofsky, H.M. (2020), p 34.

3 International Human Rights regime as an avenue for protection against sea level rise

The codification of entitlements assigned to individuals and communities in international human rights treaties has represented a shift in the traditional dynamics of international law. Indeed, by stepping outside from a State centric understanding of international law, modern international law is characterized by the inclusion of human-centred norms, aimed at awarding individuals minimum safeguards of protection.[206]

The detrimental effects of climate change, and specifically the adverse impacts of sea level rise, on the enjoyment of human rights is already widely acknowledged.[207] The adoption of a right-based approach allows individuals and communities prone to be disproportionately affected by the effects of climate change, to have an avenue where to address their concerns and potentially be awarded redress.[208]

The link between climate change and human rights is strengthened by the inclusion of a reference to human rights obligations within the Preamble to the Paris Agreement.[209] Although some scholars have not considered this timid preambular reference to human rights as a

[206] Mazzeschi, R.P., (eds) (2021), *The Impact of Human Rights on International Law*. In: International Human Rights Law, G. Giappichelli Editore, p 17-18.

[207] Human Rights Council (2009), Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary General, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, A/HRC/10/61.

Human Rights Council (2009), Human rights and climate change, A/HRC/RES/10/4.

Human Rights Council (2011), Human rights and climate change, A/HRC/RES/18/22.

Human Rights Council (2015), Human rights and climate change, A/HRC/RES/29/15.

Human Rights Council (2017), Human rights and climate change, A/HRC/RES/35/20.

Human Rights Council (2019), Human rights and climate change, A/HRC/RES/41/21.

Human Rights Council (2021), Human rights and the environment, A/HRC/RES/46/7.

Human Rights Council (2021), The human rights to a clean, healthy and sustainable environment, A/HRC/RES/48/13.

United Nations General Assembly (2022), The human rights to a clean, healthy and sustainable environment, A/RES/76/30.

[208] Shelton, D. (2006), *Human Rights, Individual Communications/Complaints*, Max Planck Encyclopaedia of International Law.

[209] Preamble of the Paris Agreement para 11.

triumph,[210] its relevance should not be underestimated. Firstly, while the Paris Agreement does not impose any new human rights obligations on States, it is relevant recalling that signatory parties to the Agreement are already bound by international and regional human rights treaties together with customary human rights law.[211] Rendering, therefore, redundant the repetition of already existing legally binding human rights obligations. Secondly, although preambles do not carry legally binding force, they are usually the crucial depositary of the object and purpose of agreements.[212] In this context, inclusion of human rights considerations signifies that the protection and enjoyment of human rights are integral to the overarching goals of the Paris Agreement. Any interpretation of the treaty that undermines this objective would be inherently flawed.[213]

This section will explore the relation between the extreme sea level rise and the enjoyment of human rights, by briefly presenting how the enjoyment of some human rights can be hindered by rising sea level. The main aim of this section is questioning how particular rights can afford an avenue for protection to individuals and communities affected by sea level rise. In particular, the research will build on the collective right of self-determination and the individual right to life in order to investigate their potential applicability within this context. This section aims to take a proactive approach, rather than listing the negative consequences of sea level rise on the enjoyment of human rights.[214] Instead, the focus will be on how human rights can actively serve as a form of protection for individuals and communities against the challenges posed by sea level rise.

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[210] Boyle, A. (2018), *Climate Change, the Paris Agreement and Human Rights*, International and Comparative Law Quarterly, Vol. 67(4), p 759-777.

Mayer, B. (2016), *Human Rights in the Paris Agreement*, Climate Law, Vol.6(1-2), p 109-117.

[211] Paust, J.J. (1995), *The Complex Nature, Sources and Evidences of Customary Human Rights*, Georgia Journal of International and Comparative, Vol. 25(2), p 147-164.

[212] See chapter 1.3.

Klabbers, J. (2018), *Treaties and Their Preambles*. In: Bowman, M..J., Kritsiotis, D. (eds), Conceptual and Contextual Perspectives on the Modern Law of Treaties, Cambridge University Press, p 172- 20.

[213] Art. 31.1-2 of the Vienna Convention on the Law of the Sea.

[214] For more on this see: ILC second report, p 61- 64.

3.1 Right to life

The right to life is a cornerstone of international human rights law. It is the most basic human right all individuals should be entitled to, because it represents a prerequisite for the enjoyment of all other rights assigned to humans.[215] The protection of this right is, inter alia,[216] included in the International Covenant on Civil and Political Rights (ICCPR).[217] The protection that States have to afford to individuals regarding the enjoyment of their right to life is non-derogable.[218] This entails, that even in situations in which the life of the nation is threatened, States are not justified in failing to ensure enjoyment of this fundamental right. This holds true in the case of extreme rise in the level of the sea, particularly with regard to SIDS. Indeed, despite sea level rise can be considered as constituting a public emergency likely to threatening the life of the nation, this situation cannot justify a derogation from the obligation to protect the right to life. On the non-derogable nature of the right to life, the Inter-American Court of Human Right[219] has built further, by establishing that the protection of this right is to be considered as a *ius cogens* norm. This classification implies that the norm represents a peremptory rule of international law, namely a norm that due to its recognition given by the international community as a whole does not allow for derogations nor modification.[220] The peremptory character of a norm additionally influence a discourse on State responsibility. Indeed, a

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[215] Human Rights Committee (2019), General Comment n. 36, Article 6 (Right to Life), CCPR/C/GC/35, para 2.

[216] *Inter alia*: Art.3 of the Universal Declaration of Human Rights.

Art.4 of the American Convention on Human Rights.

Art.2 of the European Convention on Human Rights.

Art.5 of the Arab Charter on Human Rights.

Art. 6 of the Convention on the Rights of the Child.

[217] Art. 6 of the International Covenant on Civil and Political Rights.

[218] Art.4.2 of the International Covenant on Civil and Political Rights.

[219] Inter-American Commission on Human Rights (1996), Victims of the Tugboat 13 de Marzo v Cuba, report n. 47/96 case 11.436.

Disputable how a regional body can have the final word with regard to the nature of an obligation with international application. However some scholars have agreed on this point: Wwerinke-Singh, M. (eds) (2018), *Establishing Violations of Human Rights Affected by Climate Change*. In: State Responsibility, Climate Change and Human Rights Under International Law, Oxford Hart Publishing, p 107. Gormley, W.P. (1995), *The Right to Life and the Rule of Non-Derogability : Peremptory Norms of Jus Cogens.* In: Ramcharan, B.G. (eds), The Right to Life in International Law, Martinus Nijhoff .

[220] International Law Commission (2022), Draft Conclusion on Identification and Legal Consequences of Peremptory Norms of General International Law, conclusion 2 and 3.

peremptory norm give rise to an *erga omnes* obligation, which is owed to the internationally community as a whole.[221] Consequently every State has an interest in the adherence to the norm, which gives every State the possibility to invoke responsibility for the breach of an *erga omnes* obligation.

A second peculiarity connected with the enjoyment of the right to life is its intrinsic connection to other human rights. Through an interpretation of the provision protecting the right to life, which is constructed on the overarching objective and purpose of the ICCPR,[222] the enjoyment of the right to life encompasses more than safeguarding the mere existence of individuals. Indeed, States are bound to guarantee to the individuals living under their jurisdiction or within their territory[223] a life with dignity.[224] This understanding, consequently, requires the fulfilment of essential needs that enable individuals to enjoy a life with dignity, such as the access to clean water, adequate food and housing.[225]

The obligations of States regarding the enjoyment of the right to life encompass a positive duty to protect individuals against actions committed by private and entities that could impede the enjoyment of ICCPR rights.[226] Violations occur when a State fails to take appropriate measures to prevent, punish, investigate or redress harm suffered by individuals within its power or effective control.[227] From a very broad understanding of the notion of effective control, it might be argued that major emitters have an effective control[228] over the enjoyment of the right to life of population inhabiting SIDS threatened by the consequences of sea level rise, imposing

[221] Draft Conclusion on Identification and Legal Consequences of Peremptory Norms of General International Law, conclusion 17.

[222] Art. 31.1 of the Vienna Convention on the Law of the Treaties.

View supported by: Human Rights Committee (2022), Views adopted by the Committee under art. 5.4 of the Optional Protocol, concerning communication n. 3624/2019 (Torres Strait Islanders Petition), CCPR/C/135/D/3624/2019, para 8.4.

[223] Art.2.1 of the International Covenant on the Civil and Political Rights.

[224] In light of General Comment n. 36, 3 and Preamble of the International Covenant on the Civil and Political Rights para 2.

[225] General Comment n. 36, para 26.

[226] General Comment n.36, para 22.

[227] General Comment n.36, para 66.

[228] The effective control is linked to the power they have to lower emission within their jurisdiction.

therefore positive duties to prevent, punish, investigate, or rectify harm suffered by individuals. However, based on the circumstances in which the notion of effective control has proved to be exercised by States, which includes cases of arrest or detention of a person or occupied territories,[229] an interpretation of the notion of effective control which encompasses major emitters duty towards those more vulnerable to the effects of sea level rise is arguably too creative.[230] Nevertheless, an extraterritorial application of the duty to protect individuals right to life should not be completely excluded, particularly in light of the obligation of international cooperation[231] and customary duty to prevent transboundary harm.[232]

3.1.1 Right to life role in protecting individuals and communities affected by sea level rise

As clarified, by the Human Rights Committee, environmental degradation and the adverse effects of climate change can constitute a basis for a violation of the right to life under the ICCPR.[233] In particular, in instances where sea level rise threatens the whole existence of a State, the connection between the enjoyment of this right and the surrounding environmental situation gets even more clear, since the decision to keep living on a sinking territory will definitely led to the death of its inhabitants. This holds true with regards to a variety of interlinked factors: the reduction of resources and potable water availabilities,[234] scarcity of

[229] General Comment n.36, para 66.

Human Rights Committee (2004), General Comment n.31, The Nature of the General Legal Obligation imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Ass.13, para 10.

For more see: Human Rights Committee (1981), Views of the Committee under art. 5.4 of the Optional Protocol, concerning communication n.52/1979 (Saldias de Lopez v Uruguay), para 12.1-13.

Human Rights Committee (1981), Views of the Committee under art. 5.4 of the Optional Protocol, concerning communication n.R.13/56 (Celiberti de Casariego v. Uruguay), para 10.1-11.

Human Rights Committee (1998), Views of the Committee under art. 5.4 of the Optional Protocol, concerning communication n. 623/1995 (Domukovsky v. Georgia), para 18.2.

[230] Burger, M., Wentz, J.A (2015), Climate Change and Human Rights, United Nations Environmental Programme and Columbia Law School Sabin Center for Climate Change, p 26.

[231] Art.3. 5 of the UNFCCC.

Human Rights and Climate Change 26/27, para 4 and 5.

[232] See supra note 172.

[233] General Comment n.36, para 32.

[234] National Collaborating Center for Environmental Health (2022), Health risks associated with sea level rise

land which may exacerbate already existing land conflict and create new violence[235] and the destruction of fields which will led to higher socio-economic vulnerabilities.[236]

The Human Rights Committee has already ruled on how individuals affected by sea level rise can potentially suffer from violation of their right to life. In the Teitiota v. New Zealand case,[237] the Committee found that the risk of submergence that SIDS are facing, cannot be reconcilable with the enjoyment of the right to life with dignity, even before the actual manifestation of the risk.[238] The Committee additionally stressed that the effects of climate change, first and foremost sea level rise, have the potential to lead to violation of the right to life and prohibition of degrading treatment if not backed by a robust national and international response. Taking into account that pledges that States made in their NDCs and national efforts implementing them are not close to be enough to reach the Paris temperature goal, the robustness of national and international response against climate change and sea level rise can easily be questioned.[239] The Committee failed to consider this point.

Despite the Teitiota ruling being acclaimed as a landmark decision,[240] it does not come without its limitations, particularly with regard to the application of the right to live in situations in which sea level rise poses a threat to individuals. The case holds significant relevance within the scope of this research. The applicants contents that extraditing individuals from New

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[235] Swedish International Development Cooperation Agency (2017), The Relationship Between Climate Change and Violent Conflict.

[236] Leatherman, S.P. (2001), *Social and economic Costs of Sea Level Rise*. In: Douglas, B.C. et al, International Geophysics, Academic Press, p 181-223.

[237] Human Rights Committee (2019), Views adopted by the Committee under art.5.4 of the Optional Protocol, concerning communication n. 2728/2016 (Teitiota v New Zealand), CCPR/C/127/D2728/2016

[238] Teitiota v New Zealand, para 9.11.

[239] This is a question that the Committee does not ask itself, on the other hand they can claim that submersion of the territory is going to happen in a time span of 10-15 years, there is time for the state to implement a robust response. Disputable view, since climate change has not been solved despite being in the international agenda for more than 30 years now, since the adoption in 1992 of the UNFCCC.

[240] Amnesty International (2020), UN landmark case for people displaced by climate change, Available at: https://www.amnesty.org/en/latest/news/2020/01/un-landmark-case-for-people-displaced-by-climate-change/ (Accessed: 15 May 2024).

Lyons, K. (2020), Climate refugees can't be returned home, says landmark UN human rights ruling, The Guardians, Available at: https://www.theguardian.com/world/2020/jan/20/climate-refugees-cant-be-returned-home-says-landmark-un-human-rights-ruling (Accessed: 15 May 2024).

Zealand back to Kiribati would constitute an act in devoid of justice.[241] Specifically, they asserted that such action would breach the principle of non-refoulement,[242] as it would place the individual's life at risk upon return to their country of origin. The application of the principle of non-refoulement, alongside the broader obligation to protect the right to life of refugees, including climate refugees, can be viewed as avenues for protection that individuals and communities affected by sea level rise can be awarded. However, for two primary reasons it can be argued that the Committee fails to uphold the envisaged level of protection.

Firstly, as highlighted above, the Committee remains silent on the robustness of national and international actions addressing extreme sea level rise. On the other hand, the reasoning of the Committee rests on the assumption that the time span intercurrent between the communication and the possible materialization of the uninhabitableness of the State would be too distant to result in a possible violation of the right to life. The time span intercurrent between the communication and the predicted inundation of the State, on the one hand would render the risk to life not imminent and on the other hand would award the necessary time for the State to adopt interim measures.[243]

Secondly, while the Committee acknowledged that the material conditions in Kiribati are rapidly deteriorating, it rests on the opinion that the family submitting the communication failed in proving how their situation was significantly worse than the general conditions of other citizens of the State.[244] This reasoning is strictly linked to the application of the principle of non-refoulment, which imposes on States an obligation to not extradite refugees that claim a risk of violation of their right to life in their country of origin.[245] The application of the principle

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[241] Teitiota v New Zealand, para 2.10 and 3.

[242] Teitiota v New Zealand, para 3 read in conjunction with 2.1-10.

Gil-Bazo, M. T. (2015*), Refugee Protection under International Human Rights Law*: *From Non-Refoulement to Residence and Citizensh*ip, Refugee Survey Quarterly, Vol.34(1), p 11-42.

Baeza, J. V. (2023), *Climate Refugees, Human Rights and the Principle of Non-Refoulement*, Peace & Security-Paix et Sécurité Internationales, Euromediterranean Journal of International Law and International Relations, Vol.11(3).

[243] Teitiota v New Zealand, para 9.12.

[244] Teitiota v New Zealand, para 9.3.

[245] Coleman, N. (2003), *Non-Refoulement Revised - Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law*, European Journal of Migration and Law, Vol.5(1), p 23-68.

of non-refoulment calls for the risk of life to personally and specifically represent a danger for the individual risking extradition.[246] Only in situations in which a real risk to irreparable harm to the life of individuals exists due to the extreme circumstances, general conditions can be accepted for triggering the application of the principle of non-refoulement.[247] Despite the Committee highlights the need for the risk to be personal in the case at issue, dissenting opinion to the ruling[248] and scholarly contributions[249] have argued against this view. The effects of extreme sea level rise and the related risk to the effective enjoyment of the right to life can hardly coexist with the fulfilment of a personal risk requirement. Indeed, the reduction of available drinking water and food, the violent land disputes and the destruction of crops and homes, are all elements that represent a danger to the proper enjoyment of the right to life with dignity on a broader community scale. If the risk of the whole country to sink does not represent an extreme circumstance which will certainly led to irreparable harm to the life of individuals, it is difficult to imagine what kind of criteria are not satisfied in order for this situation to be considered as extremely harmful. By using the words of a dissenting Committee member: the result of the decision to allow the non-application of the principle of non-refoulment amounts to "forcing a drowning person back into a sinking vessel, with the "justification" that after all there are other voyagers on board"[250].

In conclusion, as highlighted above it is clear that extreme sea level rise has the potential to represent an impairment to the enjoyment of the right to life of inhabitants of SIDS. However, merely acknowledge the potential of impairment is insufficient for truly protect individuals and communities. If the threshold for establishing the need for protection arising from the alleged violation of the right to life is set too high, then asserting a risk to the enjoyment of that right becomes meaningless without corresponding safeguards. This concept is exemplified by the

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[246] General Comment n.36, para 30.

[247]Teitiota v New Zealand, para 9.3, read in conjunction with General Comment n.36, para 31.

[248] Teitiola v New Zealand, Individual opinion of Committee member Ducan Laki Muhumuza (dissenting), para 6.

[249] Behrman, S., Kent, A. (2020), *The Teitiota Case and the limitations of the human rights framework*, Questions of International Law, Vo.75, p 25-39.

[250] Teitiola v New Zealand, Individual opinion of Committee member Ducan Laki Muhumuza (dissenting), para 6.

stringent and rigorous criteria associated with the application of principle of non-refoulement, which can be interpreted as a way to protect individuals whose right to life is threatened in their country of origin. Setting the bar excessively high can be compared to promising a child a candy as a reward for good behaviour, but then placing the candy on a shelf far too high for the child to reach.

3.2 Right of self determination

The right of self determination, which is a well-established rule of customary international law,[251] has also been codified under a variety of international conventions.[252] In particular the focus of this section will fall on the codification in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Both Covenants contain a twin provision that enshrines the right of self determination.[253] The inclusion of a provision recognizing the protection of the right of self determination in both Covenants highlights the pivotal role that self determination plays in realizing not only civil and political rights but also economic, social, and cultural ones.

Despite in the negotiating process of the ICCPR and the ICESCR the primary concern was to establish the right with regard to the protection of colonial people, minorities, people oppressed by despotic governments and military occupations;[254] the content of the right as laid down in the Covenants lacks to define specific categories of right holders. Indeed, the provision generally defines as the right holders of the right of self determination "*all people*". This broad language opens up the possibility for applications in contexts not initially envisioned during the

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[251] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 277, Advisory Opinion, ICJ Reports 1971, para 53.

Western Sahara, Advisory Opinion, ICJ Reports 1975, para 54- 59.

East Timor (Portugal v Australia), Judgement, ICJ Reports 1995, para 29.

Legal Consequences of the Construction of Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, para 117- 118.

[252] Art.1.2 of the Charter of the United Nations.

Art.21 of the Universal Declaration of Human Rights.

[253] Art .1 of the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social and Cultural Rights.

[254] Cassese, A. (eds) (1995), Treaty Law. In: Self- Determination of Peoples: A Legal Reappraisal, Cambridge University Press, Grotius Publication, p 48- 52.

drafting of the Covenants. The ordinary meaning of the term "*all people*"[255] encourages a universal applicability of the right. In application of the rules on treaty interpretation included in the Vienna Convention on the Law of the Treaties,[256] the recourse to discussions carried out in the negotiating process, which are assigned the value of supplementary means of interpretation, needs to be employed in those cases in which an interpretation in light of the ordinary meaning assigned to the text of treaty[257] would lead to ambiguous or unreasonable conclusions.[258] However, a universal application of the right of self determination in light of the ordinary meaning assigned to the term "*all people*" does not lead to obscure interpretation, which might call for the recourse of supplementary means of interpretation to clarify the willingness of the negotiators.[259] It is therefore legitimate to explore what level of protection the entitlements stemming from the enjoyment of the right of self determination can afford to communities inhabiting SIDS affected by extreme sea level rise. In this light, this section will first outline the content of the right and the entitlements it provides, and then assess whether it is applicable in the context at issue.

Article 1.1 of the ICCPR and the ICESCR recognizes that all peoples have the right to "*freely determine their political status and freely pursue their economic, social and cultural development*." Scholars have interpreted in a twofold way the word "*freely*," giving rise to an internal and an external dimension of the right.[260] The first meaning that has been assigned to the word "*freely*" entails the absence of influence or manipulation from domestic authorities. The internal dimension of the right of self determination can be realized through the national recognition and implementation of other individual rights included in the Covenants, in

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[255] All. Definition taken from Cambridge Dictionary (online), Available at: https://dictionary.cambridge.org/dictionary/english/all (Accessed: 05 May 2024).

People. Definition taken from Cambridge Dictionary (online), Available at: https://dictionary.cambridge.org/dictionary/english/people (Accesses: 05 May 2024).

[256] See chapter 1.3.

[257] Art. 31.1 of the Vienna Convention on the Law of the Treaties.

[258] Art.32 of the Vienna Convention on the Law of the Treaties.

[259] This view is support by: Cassese (1995), p 48-58 and Quane, H. (1998), *The United Nations and the Evolving Right to Self-Determinatio*n, International &Comparative Law Quarterly, Vol. 47(3), p 559-560.

Legal Consequences of the Separation of the Chagos Archipelago From Mauritius in 1965, Advisory Opinion, ICJ Reports 2019, para 144.

[260] Cassese (1995), p 52- 55.

particular the freedom of thought and expression and the right to take part and influence public affairs.[261] This aspect underscores that the internal dimension of self determination does not mandate a specific outcome but its exercise aligns with the "*freely*" expressed will of the people.[262]

Secondly, the word "*freely*" has been interpreted in an external dimension, which entitles all people to the be free from external forms of oppression[263]. This external dimension has usually been equated with the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State,[264] the principle has found practical application in cases of foreign invasion, illegal use of force and decolonization processes.[265]

Additionally, the right of self determination, as enshrined in both Covenants, entitles communities to freely dispose of their natural resources and wealth.[266] As argued above, the twofold meaning assigned to the word "*freely*", entails in its internal dimension that small fractions of the population cannot solely benefit of natural resources and wealth at the detriment of the majority of the population.[267] In its external dimension, people of a territory cannot be deprived of natural resources and wealth simply because a foreign private corporation or another State have been granted entitlement to benefit from them or are forcibly benefiting from

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[261] Ibidem, read in conjunction with art 18, 19, 21, 22 and 25 of the International Covenant on Civil and Political Rights.

[262] Western Sahara, para 55 and 71.

[263] Cassese, A.(1995), The Emergence of Customary rules: Internal Self-Determination. In: In: Self- Determination of Peoples: A Legal Reappraisal, Cambridge University Press, Grotius Publication, p 101- 108 and 124- 140.

[264] United Nations General Assembly (1971), Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, A_RES_2625(XXV).

Despite the general lack of legal bindingness of Resolutions adopted by the United Nations General Assembly, the International Court of Justice has recognized the customary nature of the principles included in the Declaration referred above. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgement, ICJ Reports 1984, para 191-193.

[265] Saul, M. (2011), *The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?*, Human Rights Law Review, p 609- 644.

[266] Art. 1.2 of the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social and Cultural Rights.

[267] Cassese (1995), p 56.

them.[268] The right to freely dispose of natural wealth and resources, which has been outlined as the economic side of the right of self determination,[269] should not conflict with international agreements aimed at promoting international economic cooperation and customary rules on foreign investments.[270] On the other hand, it is arguable that the right of people to not be deprived of its means of subsistence,[271] is a permanent and non-derogable entitlement, in light of the inclusion of the expression "*in no case*".[272]

A relevant attribute of the right of self determination is its well-established *ius cogens* character.[273] Authoritative identification of the *ius cogens* character of the right of self determination is provided by the International Law Commission. In the report drafted by the Commission on identification and legal consequences of the peremptory norms of general international law, the right of self determination is included in the non exhaustive list of norms having this character.[274] Additionally, the right of self-determination has been distinctly defined as an obligation owed to the entire international community.[275] In light of this, all States have an interest in the protection of this right, particularly this entitles third States of the possibility of providing assistance in the enforcing the respect of the right to self determination.[276]

While highlighting the intrinsic benefit of the well-established *ius cogens* and *erga omnes* nature of the right to self determination, the inherent limitations of relying on a collective right should be acknowledged. Unlike the individual right to life whose violation can be directly

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[268] Ibidem.

[269] Human Rights Committee (1984), General Comment n.12, The Right to Self-determination of Peoples, para 5.

[270] Farmer, A. (2007*), Towards a Meaningful Rebirth of Economic Self-Determination: Human Rights Realization in Resource-Rich Countries,* New York university Journal of International Law and Politics, Vol.39 (2), p 417-473.

[271] Art.1.2 of the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social and Cultural Rights.

[272] In no case. Definition taken from the Collins Dictionary (online), Available at: https://www.collinsdictionary.com/dictionary/english/in-no-case#google_vignette (Accesses: 18 May 2024).

[273] See supra note 220 and 221.

[274] Draft Conclusion on Identification and Legal Consequences of Peremptory Norms of General International Law, Annex h.

[275] Legal Consequences of the Separation of the Chagos Archipelago, para 180.

East Timor, para 29.

[276] This entails the power to apply countermeasures currently authorized under international law. For more see: Cassese (1995), p 155-158.

claimed by victims before the Human Rights Committee, the reliance on a collective right violation does not entitle for this possibility. As provided in the Optional Protocol to the International Covenant on Civil and Political Rights, individuals have the power to submit to the Human Rights Committee communications if they claim to be victims of violations of any right established in the Covenant.[277] However, the notion of victim and the collective right of self determination have proved difficult to be reconciled together. Indeed, the Committee has consistently pointed out, while reviewing the admissibility of individuals communications, that an individual cannot claim to be a victim of a collective right; making it impossible for individuals to submit communications claiming violations of the right of self determination.[278]

Despite the inability to present communications before the Human Rights Committee may represent a missed avenue of protection, particularly as it is one of the few direct avenues available for individuals to present international claims,[279] it is important to not overestimate this downside. Firstly, the impossibility to submit communications to the Human Rights Committee does not affect the possibility to recourse to other compliance bodies or courts both under international and domestic legal systems. In particular, communications can be lodged only with regard to State parties to the Optional Protocol and that have jurisdiction over the individual that alleges victim status. The inability to present communications before the Human Rights Committee does not exclude the possibility for other State to bring contentious proceedings or ask for advisory proceedings in front of the International Court of Justice, which proved to be willingly to address the right of self-determination in other contexts. Secondly, particularly with regard to the context in which this research is operating, namely the legal protection of individuals and communities inhabiting SIDS affected by extreme sea level rise, it has been difficult to prove the personalization of the harm even with regard of alleged

[277] Art.1 of the Optional Protocol to the International Covenant on Civil and Political Rights.

[278] Human Rights Committee (1987), Views adopted by the Committee under art. 5.4 of the Optional Protocol, concerning communication n. 197/1985 (Ivan Kitok v. Sweden), CCPR/C/33/D/197/1985, para 6.3.

Human Rights Committee (1990), Views adopted by the Committee under art. 5.4 of the Optional Protocol, concerning communication n. 167/1984 (Lubicon Lake Band v. Canada), CCPR/C/38/D/167/1984, para 32.1.

Cassese (1995), p 62- 65.

[279] Diamond, N.J., Duggal, K. (2022), *Inter-regime conversations: What barriers persist for individuals in international law?*, Leiden Journal of International Law, Vol. 35(1).

violations of individual rights, since the overall situation causing harm is not specific to certain individuals. Therefore, even the reliance on an individual right violation proves problematic, primarily because the harm caused by extreme sea level rise hardly ever solely affects the victim personally, as explained above with regards to the application of the non-refoulment principle.[280] Thirdly, individuals can still submit communications concerning alleged violations of other rights that are closely linked to the enjoyment of self determination, especially in its internal dimension. This becomes especially clear when considering fundamental rights such as the right to vote, participate in public affairs, and exercise freedoms of thought, expression, and peaceful assembly.

3.2.1 Right of self determination role in protecting individuals and communities affected by sea level rise

In order to debate about the applicability of right of self determination to the context in which this research operates, it is first relevant to question whether the subject of the research can be defined as people, for the purpose of the application of article 1 of both Covenants. Human Rights Treaty bodies have not provided any guidance on how the notion of people is to be interpreted for the application of the right of self determination.[281] However, scholars have contributed to shed light on the vague nature of this right by attributing three distinct meanings to the notion of people, which are as follows.[282] The definition of the term people encompasses the entirety of the population inhabiting a sovereign and independent State, those not yet independent and those living under foreign military occupation.[283] Communities[284] inhabiting SIDS fall within the first definition of people. Indeed, SIDS are sovereign and independent entities, and as inhabitants of these territories, communities are entitled to enjoy their right of self determination.

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[280] See chapter 3.1.1.

[281] General comment n.12 does not define the notion of people. Additionally, no general comment guiding the application of the right of self determination has been adopted by the Committee on Economic, Social and Cultural Rights.

[282] Cassese (1995), p 59.

[283] Ibidem.

[284] The subject focus in this section will be shifted solely to community in light of the collective nature of the right of self determination.

The second element to analyse in order to debate about the applicability of the right in the context at issue is questioning whether extreme sea level rise can represent a hindrance to the exercise of self determination. The following criteria must be fulfilled in order for a given situation to qualify as a threat to a people's enjoyment of the right of self determination: something must represent a significant, foreseeable and external threat over which a people has little control, directly impacting their autonomy or destiny.[285] Based on this definition outlined in the literature analysed, the assessment will be made regarding whether extreme sea level rise poses such a threat.

Exploring the first criterion requires questioning whether extreme sea level rise and its impacts on SIDS amounts to a significant, foreseeable and external threat. The significance of the threat is underscored by the increasing attention that the scientific community and more broadly the international community have devoted to study the consequences of extreme sea level rise on low-laying areas and in particular SIDS.[286] Researches have showed a clear correlation between extreme levels of sea rise and the prospect of territories becoming uninhabitable.[287] Additionally, to further emphasize the significance of the threat, the projections for the level of sea rise can potentially result in inundations, threatening the very existence of low-lying regions and SIDS.[288] The scientific attention devoted to the issue has demonstrated the foreseeability of extreme sea level rise and its correlated impacts.[289] Finally, as the threat origins from forces beyond the affected communities control,[290] the criterion of being an external threat is met.

The second criterion focuses on the limited extent to which affected people have control over the threat. In the case of extreme sea level rise and its impact on SIDS it is undeniable the little impact that these communities have on the phenomenon, and consequently the little power they have to control it. The main contributors to extreme sea level rise, in particular the effects of

[285] Willcox, S. (2015*), Climate Change Inundation and Atoll Islands States: Implications for Human Rights, Self-Determination and Statehood*, The London School of Economic and Political Science, p 126-130.
[286] See supra note 7 and 24.
[287] See supra note 24.
[288] Ibidem.
[289] Ibidem.
[290] See supra note 89.

climate change on the global temperature and melting ice caps, are predominantly driven by the increasing level of GHG emissions in the atmosphere.[291] The negligible contribution of SIDS to global GHG emissions level[292] significantly constraints the ability of communities inhabiting these territories to exercise any form of control over the threat.

Thirdly, the direct impact of extreme sea level rise on the autonomy or destiny of communities inhabiting SIDS needs to be questioned. As highlighted in the literature, there is an intrinsic relation between the territory and the enjoyment of the right of self determination.[293] Indeed, the territory is the physical space in which a people exercise its self determination, where the population is entitled to collectively exercise their control through institutions of collective government and which provides the population natural wealth and resources to dispose of.[294] Additionally, as clearly argued in a dissenting opinion by a judge of the International Court of Justice, it is the people who should determine the destiny of the territory, not the territory dictating the destiny of the people.[295] This assumption does not seem to hold true if the current situation faced by communities inhabiting SIDS is take in analysis. It is challenging to envision how communities forced to relocate, due to their country becoming inhabitable, or even worst submerged, can maintain their ability to freely determine their political and economic status, and therefore exercise some level of autonomy . The phenomenon of extreme sea level rise and the prospect of forced displacement threatens the existence of autonomous and independent communities that share a collective identity.[296] In conclusion, it is evident how extreme sea level rise can directly impact the autonomy and the destiny of the communities inhabiting SIDS.

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[291] See supra note 60.

[292] See supra not 89.

[293] Dietrich, F., Wundisch, J. (2015), *Territory Lost- Climate Change and the Violation of Self-Determination Rights*, Moral Philosophy and Politics, Vol.2(1), p 83-105.

[294]Dietrich, F., Wundisch, J. (2015).

Moore, M. (eds) (2003), *The Territorial Dimension of Self-Determination*. In: National Self-Determination and Succession, Oxford University Press, p 134-157.

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[295] Western Sahara, Separate Opinion of Judge Dillard, p 122.

[296] Willcox, S. (2015), p 111.

Having ascertained that extreme sea level rise represents a threat to the enjoyment of the right of self determination of communities inhabiting SIDS, this research now turns to explore the potential role of self determination as a tool in protecting these communities against challenges arising from extreme sea level rise.

The exercise of communities' self determination has been equated with the free and genuine expression of their will.[297] Therefore, the protection that the enjoyment of the right of self determination can award to communities inhabiting SIDS does not involve a focus on the eradication of the harm, but it entails equipping communities with the tools and resilience to cope with the inevitable challenges posed by rising sea levels. In particular, the protection that can be awarded to communities in light of their self determination requires the enhancement of people's capacity for autonomy and independence.[298] In order to achieve this level of protection it is necessary to empower communities to express their will through a collective decision-making framework. In this light, protecting communities in alignment with their self determination demand the freely and genuine expression of their will regarding matters that will have impact on their identification as a people. A clear example can be found in the involvement of community participation in decision making concerning the inevitable relocation process that inhabitants of SIDS are going to face,[299] with a focal point on ensuring that relocation efforts are responsive to the needs of the people.

Secondly, as highlighted in the introductory chapter, both the International Law Commission (ILC) and the International Law Association (ILA) have devoted efforts in analysing the consequences of territorial and population loss on the legal notion of statehood. The reports issued by both organisations led to the presumption that continuity of statehood, even in cases of total loss of territorial land assigned to a State, does not conflict with what international law

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[297] Legal Consequences of the Separation of the Chagos Archipelago, para 157-158.
Western Sahara, para 55 and 72.

[298] Willcox, S. (2016), *Climate Change Inundation, Self-Determination, and Atoll Island States*, Human Rights Quarterly, Vol. 38(4), p 1022-1037.

[299] Pill, M. (2020), *Planned Relocation from the Impacts of Climate Change in Small Island Developing States: The Intersection Between Adaptation and Loss and Damage*. In: Leal Filho, W. (eds), Managing Climate Change Adaptation in the Pacific Region. Climate Change Management, Springer, p 129-149.

postulates.[300] Additionally, it is relevant to highlight that statehood, independence, cultural identity, all notions threatened by the loss of territory and relocation induced by extreme sea level rise, are intrinsic elements of self determination.[301] Consequently, in order to enable community to retain their right of self determination, even in the extreme scenario in which their country is inundated as a result of extreme sea level rise, is it peremptory to allow them to express their right through continued statehood.[302] In this light, it is arguable that the continuity of statehood can be considered as a tool that international law offers to protect communities affected by extreme sea level rise.

To better elucidate this concept, the possibility to still have a sense of belonging tied to a sovereign entity is crucial for those communities that will and yet are experiencing inundation of their territories. Despite the ongoing debate concerning the practical implementation of the continuity of statehood in situations of extreme sea level rise, it is undeniable the protection level that this legal recognition can offer to communities inhabiting SIDS. In particular, the continuity of statehood can provide a framework through which displaced communities can still be enabled to navigate the complexities of international relation and international law as a unified and recognized entity. By retaining a collective and internationally recognized status, these communities maintain avenues for representation at the international level. This allows them, through their institutional representatives, to engage in diplomatic discourse, advocate their interests and participate in international lawmaking processes. Removing this level of protection would not only imperil legal ties that bind these communities together but also prevent them from having a collective voice in international platforms.

[300] ILA Report, p 22-38.

ILC Second Issues Paper, p 21-55.

[301] Jones, N. (2022), *Prospects for invoking the law of self-determination in international climate litigation*, Review of European, Comparative & International Environmental Law, Vol. 32(2), p 250-258

[302] International Law Commission (2021), Submission by the Principality of Liechtenstein to the International Law Commission on the topic "Sea Level Rise in relation to International Law"

Thirdly, the alleged level of protection that communities can be awarded from the economic dimension of the right of self determination requires investigation.[303] As argued above,[304] the enjoyment of the right of self determination entails the people's power to dispose of the natural resources and wealth and the non-derogable entitlement to not be deprived of its own means of subsistence.[305] Human Rights Treaty Bodies have not performed any efforts in clarifying the meaning of the means of subsistence notion,[306] but according to the ordinary meaning generally assigned it, the notion refers to the minimum necessities required to sustain life, which includes food and shelter.[307] Considering the vital role that fishery plays for SIDS subsistence,[308] it is reasonable to assume that fishery can be regarded as a fundamental means of substance for communities inhabiting these States. This is underscored by the fact that fishery significantly contribute to the economy of these States and represent a substantial portion of the dietary intake of these communities.[309]

As outlined in the introductory chapter,[310] both the ILC and the ILA have analysed the international consensus and State practice concerning the freezing of the current status of baselines and maritime delimitations.[311] This approach would prevent the unjust deprivation of entitlements over marine resources of communities inhabiting SIDS, despite the coastal recession and land inundation attributed to the extreme level of sea rise. The freezing of maritime baseline legal fiction enables communities to access, exploit, and manage marine

[303] See supra note 269 and 270.

[304] See chapter 3.2.

[305] Art.1.2 of the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social and Cultural Rights.

[306] [306] General comment n.12 does not define the notion of means of subsitance. Additionally, no general comment guiding the application of the right of self determination has been adopted by the Committee on Economic, Social and Cultural Rights.

[307] Substance. Definition taken from the Merriam-Webster Dictionary (online), Available at: https://www.merriam-webster.com/dictionary/subsistence (Accessed: 20 May 2024).

[308] Food and Agriculture Organization of the United Nations (2014), Global Blue Growth Initiative and Small Island Developing States (SIDS), p 4.

[309] Ibidem.

[310] See chapter 1.

[311] ILA Report, p 19-21.

ILC First Issues Paper, p 80.

resources. This can be viewed as a protection tool afforded to these communities, in line with the right to resources inherent in the broader right of self determination.

4 Conclusion

This research sought to map and evaluate based on their limitations the tools that international law, in particular the regimes governing international climate change and international human rights, offers to protect individuals and communities of Small Islands Developing States against the threats posed by sea level rise. Despite the two regimes having been analysed in isolation, it is pivotal to acknowledge the need to perform a systematic interpretation[312] that highlights the mutually supportive nature of the obligations under both regimes to potentially achieve a broader and more holistic level of protection towards individuals and communities against the threats of sea level rise. A clear example of the above can be found in the climate litigation cases presented in this research,[313] which often carefully balance together States obligations to curb their contributions to the global total GHG emission level and their duty to protect and recognize fundamental rights to individuals under their jurisdiction and allegedly outside their jurisdiction.

Two different meaning have been assigned to the word "protection" in this research. Firstly, protection requires acting on the source of the harm, therefore eradicating the origin of the vulnerability of SIDS individuals and communities by lowering and controlling the total global GHG emission level. From the obligations that States have under the Paris Agreement it can be argued that international law provides a guidance and a cooperating framework to achieve this level of protection. However, the insufficient and reluctant attitude that has been witnessed towards the implementation of their obligations under the Paris Agreement coupled with the vague language used in some provisions, can lead to the conclusion that the current state of international law is not well equipped for protecting individuals and communities of SIDS against extreme sea level rise, according to the first meaning assigned to the word protection. Additionally, both the possibility to hold States accountable for their failure to sufficiently curb GHG emissions level and the tools explored under international human rights law, may offer potential for seeking redress for and cope with the harm caused by extreme sea level rise. While

[312] See chapter 1.3.
[313] See chapter 2.2.

valuable for seeking justice and not exacerbating vulnerabilities, these tools do not inherently ensure the safety of individuals and communities through the eradication of the harm affecting them. From this perspective, despite their potential for still representing a way to protect them, in light of the second meaning assigned to the word, both tools do not allow for the eradication of the harm represented by extreme sea level rise, which can be considered to be the most immediate and successful way to ensure safety for SIDS individuals and communities. Therefore, it can be concluded that from the exploratory journey performed in this research, which does not claim to be a comprehensive analysis of the applicable international law governing the issue,[314] international law does not provide adequate tools to ensure safety from the harm caused by extreme sea level rise for the individuals and communities most affected by its impacts.

Despite not addressed within this research, one of the possible reasons behind the insufficiency of international law in representing an effective avenue for protecting individuals and communities of SIDS against the threats posed by sea level rise, can be found in the historical prioritization of economic interests over legal rights performed by the international community.[315] Consequently, for achieving the aim of protecting individuals and communities of SIDS through ensuring safety from the harm associated to extreme sea level rise, novel approaches in international law are needed.

Considering international law tools for the protection of individuals and communities, understood as an exploration of accountability, redress and other mechanisms to cope with the harm that has already materialized; it can be concluded that a more robust legal protection can be found under the second connotation given to the word.

Firstly, the growing trend of climate litigation can potentially be a tool for protection of individuals and communities of SIDS affected by extreme sea level rise. The protection that this tool has the potential to award them is twofold. On the one hand, through the application

[314] See chapter 1.2.

[315] Badrinarayana, D (2010), *Global Warming: A Second Coming for International Law?*, Washington Law Review, Vol.85(2), p 253-292.

of international climate and human rights obligations, domestic court have the power to protect individuals and communities against their own government. In light of the peculiar situation of SIDS, the protection that courts might be asked to judge upon is likely to concern inadequate adaptation efforts and inefficient utilization of international climate funds. In both types of claims the protection level that individuals and communities are likely to be afforded entails the legal accountability of their governments in inadequately use the means at their disposal at the benefit of the community. Additionally, contingent upon the specificity of the juridical system and the peculiarity of the claims at issue, plaintiffs might be awarded compensatory measures to redress the harm suffered. Finally, on a broader basis, in those cases in which domestic courts mandates a rectification of governmental action, the whole population will benefit from the governmental transition to a more efficient and community-focused course of action.

On the other hand, international climate litigation has the potential to shed light on the responsibility to protect individuals and communities of SIDS in its transboundary connotation. Indeed, seeking protection of SIDS individuals and communities before international courts and tribunals[316] is essential, especially against major emitter States, whose actions contribute significantly to their vulnerability to extreme sea level rise. The most crucial avenue for the protection of individuals and communities lies in the possibility that international courts and tribunal have in mandating the cessation of wrongful conduct by major emitter States, compelling them to curb their GHG emissions level.

Nevertheless, the inherent limitations that characterize climate litigation, which are even more exacerbated in an international perspective,[317] hinder the reliance on this tool as an effective way to protect individuals and communities against the threats posed by sea level rise. Considering the time and monetary costs associated with litigation, its *ex post* nature, the lack of enforcement power by international courts and tribunals and procedural barriers in accessing judicial institutions, it becomes clear that climate litigation can serve as a valuable tool for

[316] See chapter 2.2.3.
[317] See chapter 2.3.3

protecting individuals and communities of SIDS against sea level rise, however it cannot be considered as the sole tool to rely on.

Secondly, the recourse to protection tools rooted in international human rights law represents another valuable avenue for individuals and communities to cope with the harm already materialized. The challenge of guaranteeing the enjoyment of the individual right of life with dignity on at territory at the risk of submersion due to extreme sea level rise highlights the possibility to award protection to individuals facing potential displacement through the application of the non-refoulement principle. However, the criteria for applying this principle appear to extensively limit the level of protection afforded, thereby impeding its effective application in this context.[318]

The reliance on the collective right of self determination is better suited for protecting communities, as it emphasizes the shared fate of individuals facing the threat of submergence. The level of protection that the collective right of self determination awards to communities inhabiting SIDS is threefold.[319] Firstly, the enjoyment of the right of self determination, equated with entitling communities to the free and genuine expression of their will, awards a level of protection which is rooted in participatory claims. Indeed, a protection level in light of above can be practically translated in ensuring the participation of communities of SIDS in decision making concerning all those matter that are likely to have an impact on their identification as people, first and foremost the inevitable relocation process. Secondly, the enjoyment of the right of self determination, through the continuity of statehood status for SIDS, can represent a further avenue for protection of communities since retaining their collective and internationally recognized status can enable them to not be deprived of the possibility to act as a unified entity under international law. Thirdly, the entitlement of permanent sovereignty over natural resources read in light of the enjoyment of the right to self determination entails the possibility to protect SIDS communities by not inequitably depriving them of maritime entitlements they have always been entitled to.

[318] See chapter 3.1.1.
[319] See chapter 3.2.1.

In conclusion, it can be argued that international law does not offer adequate tools for protecting SIDS individuals and communities against the threats posed by sea level rise, if the protection is understood as ensuring safety by eradicating the harm at the root of their vulnerability. On the other hand, a more robust and variegated tools for protection can be found under international law, with the aim of enabling SIDS individuals and communities to cope with the harm associated by extreme sea level rise and be potentially awarded some forms of redress.

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